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Addendum #1 to Report

Patient: William Simao

Date of service: Oct. 1, 2009

Date of Injury: April 15, 2005

I was asked to provide an updated report with new medical records that I was given to review.

Updated Timeline:

05/06/08 Nevada Spine Clinic

Dr. Jaswinder Grover

Office note

HPI

- Ongoing symptoms neck pain
- Interscapular pain
- UE paresthesias
- Symptoms in Paracervical areas
- Symptoms which are ongoing and significant
- At times intractable
- Severe and intolerable

PE

- Axial compression positive for reproduction of interscapular and suboccipital pain
- Discomfort with ROM of cervical spine
- Some subtle weakness to grip strength in UE
- Does not demonstrate new focal myotome or dermatomal deficits

Radiographs

- MRI
- Do not reveal significant neural encroachment
- Some potential facet tropism and degeneration of proximal cervical segments C3-4, C4-5
- EMG UE still pending

Impression

- Persistent neck pain
- Interscapular pain

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- Spurling sign positive on left
- Left parascapular spasm
- Localized tenderness

Radiographs

- Flexion-extension xrays no gross instability
- Some possible subtle subluxation at C4-5

Impression

- Ongoing neck pain
- Left parascapular pain
- Suboccipital headache
- Potentially related to disc disruption vs facet mediated pathology at C3-4, C4-5

Recommendations

- At wit's end with symptoms
- Discography with CT scan cervical spine

07/09/08 Nevada Spine Clinic

Dr. Jorg Rosler

Office note

HPI

- Underwent left sided C4-5 nerve root blocks 05/10/08
- No significant improvement cervical symptomatology
- Ongoing neck pain and interscapular pain
- Radiating into left arm
- Dr. Grover recommended cervical discography

PE

- Positive Spurling sign to left
- Tenderness interscapular and left parascapular area

Impression

- Ongoing neck pain
- Interscapular pain
- Left parascapular pain
- Disc compromise C3-4, C4-5

Recommendations

- Cervical CT discography

08/08/08 Center for Spine & Special Surgery

Operative report

Dr. Jorg Rosler

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Preoperative diagnosis

- Ongoing neck pain
- Interscapular pain
- Left parascapular pain
- Disc compromise C3-4, C4-5

Postoperative diagnosis

- Positive provocation discography C3-4
- 0.3cc nonionic contrast material injected
- Concordant pain reported
- Pain was 10/10
- Evidence of disc disruption
- Positive provocation discography at C4-5
- 0.3cc nonionic contrast material injected
- Morphologically abnormal disc
- Concordant pain reproduction
- Pain 10/10
- Negative provocation discography at C5-6
- No pain reported
- 0.3 cc nonionic contrast material injected
- Morphologically slightly abnormal disc

Procedures

- Provocation discography with disc stimulation C3-4, C4-5, C5-6
- Discography interpretation C3-4, C4-5, C5-6
- Fluoroscopy
- AP and lateral xrays of cervical spine

Diagnostic conclusion

- Positive provocation discography C3-4, C4-5 with negative C5-6 discography finding

08/08/08 Las Vegas Radiology

Radiology Report

Dr. Bhuvana Kittusamy

CT discogram

Findings

- C3-4 grade 4 annular fissure at 4 o'clock position
- C4-5 contrast noted in ventral subarachnoid space probably secondary to grade 5 fissure at 5-6 o'clock position

Impression

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- S/p discogram with findings described above

08/28/08 Nevada Spine Clinic

Dr. Jorg Rosler

Office note

HPI

- ongoing severe intractable neck pain
- interscapular pain
- periscapular pain
- underwent cervical discography
- positive provocation at C3-4, C4-5
- negative control C5-6

PE

- no new focal dermatomal or myotomal deficit

Impression

- neck pain
- interscapular pain
- left periscapular pain
- positive provocation discography C3-4, C4-5

Recommendations

- follow up with Dr. Grover

09/02/08 Nevada Spine Clinic

Dr. Jaswinder Grover

Office note

HPI

- Persistent neck pain
- Left parascapular pain
- Suboccipital headaches
- Symptoms increasingly intolerable and severe

PE

- Tenderness Paracervical area, left suboccipital area
- Spurling sign positive on left
- Axial compression positive for reproduction of left suboccipital and parascapular pain
- Otherwise neurologically intact

Impression

- C3-4, C4-5 disruption of disc with left sided facet arthrosis and foraminal stenosis

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- Persistent left parascapular and left suboccipital symptoms despite multitude of conservative nonsurgical modalities of care and treatment

Recommendations

- Reasonable candidate for interbody fusion, reconstruction, decompression C3-4, C4-5
- Consideration of left C4, C5 neural foraminotomy
- Return 4-6 weeks

11/04/08 Nevada Orthopedic & Spine Center

Dr. Patrick McNulty

Orthopedic evaluation

HPI

- Pain increased
- Posterior neck pain
- Trapezial radiation, mainly left sided

Plan

- Need to get updated studies to see if there is significant structural changes to alter plan of previous C3-5 reconstruction

11/25/08 Nevada Orthopedic & Spine Center

Dr. Patrick McNulty

Follow up

HPI

- Here with MRI cervical spine

Diagnostic testing

- MRI shows no significant abnormalities
- Mild issue of potential left C3-4 foraminal narrowing
- It appears pt has been seen by Dr. Grover and Dr. Rosler
- Discogram shows annular tears at C3-4, C4-5, C5-6

Assessment

- Further clarify issue of ongoing pain generator

Plan

- Get Dr. Rosler's and Dr. Grover's notes

01/06/09 Nevada Orthopedic & Spine Center

Dr. Patrick McNulty

Follow up

HPI

- Pain has changed

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- Posterior cervicothoracic pain
- Left sided component

Plan

- Will get confirmatory pain generator status
- Bilateral C3-5 transforaminal epidural injections confirming pain status C3-4, C4-5
- Did have provocative discograms which were painful and concordant with C3-4, C4-5 but had extravasation of dye at C5-6 but nonpainful
- This is further reason to confirm with analgesic response of C3-4, C4-5

02/12/09 Nevada Orthopedic & Spine Center

Dr. Patrick McNulty

Follow up

HPI

- Final procedure consideration visit for bilateral C3-4, C4-5 transforaminal epidural injections
- H & P dictated for hospital

02/13/09 UMC

Dr. Patrick McNulty

Preoperative H&P

Chief complaint

- Neck pain

HPI

- 45 year old male
- Persistent neck pain failing conservative measures

Current meds

- Lovastatin
- Fiorinal
- Enalapril

Social history

- Smokes ½ PPD
- Rare alcohol
- Works in flooring sales

PE

- No significant weakness or numbness C5-T1 dermatomes and myotomes

Diagnostic studies

- MRI suggests abnormalities C3-4
- Positive discogram C3-4, C4-5

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Assessment

- Ongoing complaints cervical pain
- Status potential of pain relief at C3-4, C4-5

Plan

- Bilateral C3-4, C4-5 transforaminal epidural injections

Operative Report

Dr. Patrick McNulty

Preoperative diagnosis

- Painful motion segments C3-4, C4-5

Postoperative diagnosis

- Painful motion segments C3-4, C4-5

Procedure

- Bilateral C3-4, C4-5 transforaminal epidural injections

02/24/09 Nevada Orthopedic & Spine Center

Dr. Patrick McNulty

Follow up

HPI

- Some difficulty sorting out immediate post procedure pain relief
- Some pain associated with needle placement in anterolateral neck
- Pain with removing of adhesive sterile barriers
- Typical chronic pain relieved by approx 65-70%
- This conflicts with previous discograms which were positive C3-4, C4-5 as well as pain relief with previous injections
- Pt appears to have ongoing painful motion segments at C3-4, C4-5 primarily discogenic

Plan

- Anterior cervical decompression, fusion, instrumentation C3-5
- Return for final procedure consideration visit

03/24/09 Nevada Orthopedic & Spine Center

Dr. Patrick McNulty

Office visit

- For anterior cervical reconstruction C3-5
- H&P dictated

03/25/09 UMC

Dr. Patrick McNulty

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Preoperative H&PChief complaint

- Neck pain

HPI

- 45 year old male
- Ongoing pain failing conservative measures

Current meds

- Lovastatin
- Fiorinal
- Enalapril

Social history

- Quit smoking 2 weeks ago
- Was smoking ½ PPD
- Rare alcohol
- Works in flooring sales

PE

- No significant tingling or numbness at C2, ? in dermatomes and myotomes

Assessment

- Symptomatic level C3-5 failing conservative measures

Plan

- Anterior cervical decompression and fusion of station C3-5

Operative Report

Dr. Patrick McNulty

Preoperative diagnosis

- Symptomatic level stenosis disc herniation C3-4, C4-5

Postoperative diagnosis

- Same

Procedure

- Anterior cervical discectomy two level C3-4, C4-5
- Placement of biomechanical intervertebral structural cage device with two level anterior arthrodesis C3-4, C4-5
- Three level anterior instrumentation

04/14/09 Nevada Orthopedic and Spine Center

Dr. Patrick McNulty

Follow up

HPI

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- 2 weeks s/p anterior reconstruction C3-5
- Doing well
- Already notices significant improvement in pain compared to preop

Diagnostics

- X-ray shows excellent maintenance of reconstruction

Plan

- Follow up six weeks
- Symptoms benign

5/26/09 Nevada Orthopedic & Spine Center

Patrick McNulty, M.D.

Orthopedic Evaluation

Complaints:

- 2 months s/p C3-5 reconstruction
- Doing well
- X-ray done
 - Good maintenance

Plan:

- D/C collar
- Start PT
- Resume Work as Tolerated
- F/U 4 weeks

Prescription for PT

- Evaluate and Treat
- Stabilization and strengthening

7/14/09 Nevada Orthopedic & Spine Center

Patrick McNulty, M.D.

Orthopedic Evaluation

Complaints:

- 3.5 months s/p C3-5 reconstruction
- Left upper extremity Paresthesias
 - Pain down to hand for 1 week
- Please note that prior to surgery, his upper extremity symptoms did not go distal to the elbow.

Exam:

- Neurologic exam

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- No significant weakness or numbness to C5-T1 dermatomes or myotomes
 - X-ray done
 - Good maintenance
- Assessment:
1. Concern for potential C6 radiculopathy
 2. New Problem – Cervical Radiculopathy
- Plan:
- MRI of cervical spine
 - CT of Cervical Spine

Assessment / Opinions / Future Care:

All of my opinions below are based on my training, clinical teaching practice and the medical literature. I am currently a Professor of Orthopaedic Surgery and Neurosurgery at the UCLA Medical Center. My opinions are also based on a reasonable medical probability. There is no doctor-patient relationship.

Mr. William Simao was involved in a motor vehicle accident. He reported experiencing neck pain and left shoulder pain soon after the collision. The post accident radiographs did not demonstrate any acute traumatic changes, but findings consistent with mild chronic degenerative changes. He may have sustained a soft-tissue "whiplash" injury to his cervical spine and exacerbated his long history of headaches. However, it appears from the records, that he did not require specific medical treatment for his spine over the subsequent 7-8 months. According to the medical records, it was not until 9 months following the MVA that Mr. Simao began some physical therapy for his cervical symptoms. He also began complaining of left sided radicular symptoms at about that time. These were not reported until January of 2006, which was well after the MVA. Workup following this included an MRI, about one year after the MVA (3/2006), which was again consistent with chronic degenerative changes without any significant nerve compression or traumatic structural changes.

He ultimately had discography which showed the C3-4 and C4-5 levels to be positive, and it appears that his surgeon, Dr. McNulty, based his surgery on the discography. Dr. McNulty's first note on 11/25/08 noted that the MRI did not show any significant abnormalities. It is rarely recommended to operate on the spine where the MRI does not show any significant abnormalities. These surgeries typically have poor outcomes. Dr. McNulty is probably aware of this, which is why he asked for further confirmatory anesthetic injections, following these studies in order to try to clarify the pain generator. What this implies, however, is that the source of the pain, given conflicting studies, a relatively normal MRI, and discography showing discogenic changes at multiple cervical levels, was not clearly identified.

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I still maintain as in my earlier report, that this type of surgery for axial neck pain is a controversial procedure. Therefore, in my opinion the low success rate does not typically warrant the need to undergo the procedure and I recommend treating these patients without surgery. From the notes, although it is still within the post-operative period, it appears that the patient is still having pain and some radicular symptoms. This may imply that the surgery did not help and the patient may have continued symptoms.

In summary, it is still my opinion that Mr. Simao may have sustained a soft tissue "whiplash" type injury as a result of the MVA of April 2005. This injury did not require any specific treatment until nine months following the MVA. His imaging studies reveal chronic degenerative changes which most likely pre-existed the MVA. His current symptoms are consistent with his chronic degenerative changes which appear by report to have worsened slightly from the MRI of the cervical spine in 2006 to the most current MRI of 2008. The MVA did not result in any acute traumatic structural injuries, but may have contributed to his symptoms immediately following the MVA. The fact that he is a smoker probably contributes to neck pain and degeneration. This is consistent with his current symptoms which are most probably caused by his pre-existing degeneration in his neck. The post-discogram CT demonstrates annular fissures which are commonly associated with arthritic changes. As far as apportionment I relate the initial treatment done from the time of the MVA through 5/26/05 to the MVA. His treatment for his symptoms of neck pain after this I apportion no more than 25% to the MVA of 2005. Although spine surgery was an option, it was not necessary in this case. Regarding his headache complaints, his initial headaches may have been part of a whiplash syndrome but his current migraines seem compatible to his pre-MVA headaches which were not causally related to the MVA. At this time it is too early to comment on future care needs based on the notes I have reviewed to date. I look forward to reviewing these records after his 6-8 month post-operative evaluation.

Sincerely,

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EXHIBIT “5”



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Records and Films Review Addendum #2

Patient: William Simao

Date of service: July 4, 2010

Date of Injury: April 15, 2005

I was asked to provide an updated report with new medical records that I was given to review.

Records Reviewed:

11/01/07 Southwest Medicine Associates
 Britt Hill PA-C

History / Complaints:

- 44 yo
- History of cervical disc disease
- Migraines
- Had pre-operative clearance for epidural of neck
- Had brief episode of left arm radiating pain; 15 min then completely resolved
- Denies chest pain
- Came today because wife forced him to come.

Exam

- normal

Medications:

- Lyrica 75 mg
- Enalapril 20 mg
- Lovastatin 20 mg
- Zomig 10mg
- Promethazine HCL 12.5 mg

Assessment

1. Cervicalgia
2. Migraines

Plan:

- Continue current meds
- Pain management epidural
- Smoking cessation



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1/14/08 Southwest Medicine Associates
 Britt Hill PA-C

History / Complaints:

- 44 yo
- Family dentist requests that he see an oral surgeon
- Suspicious growth on gum line / jaw

Medications:

- Lyrica 75 mg
- Enalapril 20 mg
- Lovastatin 20 mg
- Zomig 10mg
- Promethazine HCL 12. 5 mg

Plan:

- Continue current meds
- Referral to Oral surgery

2/06/08 Southwest Medicine Associates
 Britt Hill PA-C

History / Complaints:

- 44 yo
- Blood in throat when he awakens in AM

Exam

- Neck supple
- Nasal Turbinates injected with bleeding in right nares

Medications:

- Lyrica 75 mg
- Enalapril 20 mg
- Lovastatin 20 mg
- Zomig 10mg
- Promethazine HCL 12. 5 mg

Assessment

1. Epistaxis
2. Hyperlipidemia
3. Hypertension

Plan:

- Continue current meds

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- Lab work
- Gel in nose

4/15/08 Southwest medical Associates

CT Mandible

Impression:

1. Extraction deformity in right mandible

12/24/08 Southwest Medicine Associates

Britt Hill PA-C

History / Complaints:

- 44 yo
- Migraines
- Would like referral to smoking cessation

Exam

- Neck supple without lymphadenopathy
- Neuro intact

Medications:

- Enalapril 20 mg
- Lovastatin 20 mg
- Zomig 5mg
- Butalbital APAP caff Cod

Assessment

1. HTN
2. Hyperlipidemia
3. Nicotine dependance
4. Migraines

Plan:

- Continue current meds
- Routine labs
- Smoking cessation

2/25/09 Southwest Medicine Associates

J. Hernandez, M.D.

Neurologist

History / Complaints:

- 44 yo
- Neck pain

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- Migraines
 - Was sent to neurology
 - Without aura
 - Had for 12 years
 - 2x/ week over last 6 months

Exam

- Normal
- Neck supple
- Neuro intact
- Upper extremity motor and sensory and DTR intact and equal

Medications:

- Enalapril 20 mg
- Lovastatin 20 mg
- Zomig 10mg
- Chanix 0.5 mg

Assessment :

1. Migraines
2. Possible intracranial etiology

Plan:

- CT of brain
- Change Zomig dose
- Refer to Alicia Felicia
- Re-start amitryptaline
- D/C Butalbital

3/016/09 Southwest Medicine Associates
 Britt Hill PA-C

History / Complaints:

- 44 yo
- Refill on smoking cessation medications

Plan:

- Refill Chantix

3/20/2009 Southwest Medicine Associates

Chest x-ray 2 views

Impression:

1. 9 mm faint nodular density in left lower lobe on PA



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05/22/09 Southwest Medicine Associates
Britt Hill PA-C

History / Complaints:

- 45 yo
- Seen in neurology clinic today
- Underwent cervical fusion on March 24th
- Has still not had Brain CT
- In last 2 months migraine frequency decreased to 1/wk
- Zomig 5mg successful

Exam

- normal

Medications:

- Enalapril 20 mg
- Lovastatin 20 mg
- Zomig 10mg
- Amitryptaline 25mg

Assessment

1. Migraine no aura
2. Improved

Plan:

- Change Zomig
- Increase Amitryptaline to 50gm at bedtime

5/26/09 Nevada Orthopedic & Spine Center
Patrick McNulty, M.D.

Orthopedic Evaluation

Complaints:

- 2 months s/p C3-5 reconstruction
- Doing well
- X-ray done
 - Good maintenance

Plan:

- D/C collar
- Start PT
- Resume Work as Tolerated
- F/U 4 weeks

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Prescription for PT

- Evaluate and Treat
- Stabilization and strengthening

06/02/09 Southwest Medicine Associates
 Britt Hill PA-C

History / Complaints:

- 46 yo
- Allergy

Exam

- normal

Medications:

- Enalapril 20 mg
- Lovastatin 20 mg
- Zomig 10mg
- Amitryptaline 25mg

Assessment

1. Allergic Rhinitis

Plan:

- Singulair

6/09/09 Desert Valley Therapy

Intake

Janelle Lauchman, PT

Anatomic Diagram:

- Pain in frontal head
- Pain in posterior neck
- Pain para scapular
- No pain marked on arms

Revised Oswestry Disability Index for low back pain and dysfunction:

- 20%

History/ Complaints:

- Uneventful post-op course
- No complications
- Brace was d/c'd on 5/26/09
- Head is in more forward position
- Pain with sleeping



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- Denies radicular symptoms
- Owns a cleaning company; polishes tile and cleans carpets.
- Was scheduled to return to work next week but is thinking about pushing it back
- Doing 30% of household tasks
- Looking up and turning head; side to side, causes pain.

Medications:

- Occasional migraine pill
- Now less frequent than before surgery

Exam:

- Very tall
- Increased tightness of bilateral SCM and Rhomboids
- Incision well healed
- Cervical ROM
 - Flex/Ext: 50/20 degrees
 - Side to side: 20/20 degrees
 - Rotation Left / Right: 25 / 50% of normal
- Motor
 - Upper extremities 5/5
 - Deep neck flex 2/5
 - Scapular stabilization 3/5
- Neg Spurling's
- Light touch in all extremities intact

Assessment / Plan:

- 20% dysfunction
- Decreased ROM and flexibility
- Decreased posture awareness
- 1-2 x/week
- Exercise
- HEP

6/16/09 Southwest Medical Associates

CT of Head

Impression:

1. NO acute findings.

6/23/09 Desert Valley Therapy

- Decrease in various ADL's
- May return to work today

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- Pain wakes him 5-6 x night
- Progressing well

6/30/09 Desert Valley Therapy

- Increased neck pain
- Continue treatment 1-2x/week

7/07/09 Desert Valley Therapy

Disability Index:

- 32%
- Neck Pain continues
 - 1/10 at rest
 - 6/10 after 9 hrs of work
- Patient met strengths goals after 5 visits
- Met ROM goals
- However increased disability
- Good posture
- Met 75% of goals
- Discharge to HEP

7/14/09 Nevada Orthopedic & Spine Center

Patrick McNulty, M.D.

Orthopedic Evaluation

Complaints:

- 3.5 months s/p C3-5 reconstruction
- Left upper extremity Paresthesias
 - Pain down to hand for 1 week
- Please note that prior to surgery, his upper extremity symptoms did not go distal to the elbow..

Exam:

- Neuro exam
 - No significant weakness or numbness to C5-T1 dermatomes or myotomes
- X-ray done
 - Good maintenance

Assessment:

1. Concern for potential C6 radiculopathy
2. New Problem – Cervical Radiculopathy

Plan:

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- MRI of cervical spine
- CT of Cervical Spine

07/15/09 Southwest Medicine Associates
 Britt Hill PA-C

History/ Complaints:

- 46 yo
- Left side neck pain
- Left shoulder pain
- Radiating pain down left arm
- Numb sensation in fingers
- S/P cervical fusion
- Surgeon ordered an MRI of neck yesterday

Exam

- Neck ROM normal
- Tightness in traps

Medications:

- Enalapril 20 mg
- Fexofenadine 180mg
- Fluticasone propionate 50mcg
- Lovastatin 20 mg
- Zomig 5mg
- Amitryptaline 50mg

Assessment

1. Cervicalgia
2. Cervical Radiculopathy

Plan:

- F/U after cervical MRI

8/11/2009 MRI Cervical Spine
 CT of Cervical Spine

08/18/09 Southwest Medicine Associates
 Britt Hill PA-C

History/ Complaints:

- 46 yo
- Was seen in neurology clinic today
 - Migraines significantly diminished to 1x/month

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o CT of brain normal

- Left side neck pain
- Left shoulder pain
- Radiating pain down left arm into digits 3 and 4
- Numb sensation in fingers
- S/P cervical fusion
- Surgeon ordered an MRI of neck yesterday
- Undergoing evaluation by surgeon

Exam

- Normal

Medications:

- Enalapril 20 mg
- Fexofenadine 180mg
- Fluticasone propionate 50mcg
- Lovastatin 20 mg
- Zomig 5mg
- Amitriptyline 50mg

Assessment

1. Migraines
2. Cervical Radiculopathy

Plan:

- Amitriptyline 50 mg at bed
- Somig 5 mg at onset of migraine
- Continue with ortho
- F/U 4 months

9/14/09 Southwest Medical Associates

Neurology Note

Referred by : Patrick McNulty, M.D.

EMG Left upper extremity

Impression:

1. Normal

12/07/09 Southwest Medicine Associates

Neurology Clinic

J. Hernandez, M.D.

History / Complaints:

- 46 yo

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- Self d/c'd amitriptyline
- Now with migraines 2-3x/week
- Zomig no longer working
- Neck and shoulder pain may trigger HA
- Left side neck pain
- Left shoulder pain
- Radiating pain down left arm
- Neck pain may trigger HA
- SP upper extremity EMG

Exam

- Left sided cervical tenderness

Medications:

- Enalapril 20 mg
- Fexofenadine 180mg
- Fluticasone propionate 50mcg
- Lovastatin 20 mg
- Zomig 5mg
- Amitriptyline 50mg
- Butalbital-APAP-Caff-COD
- Naproxen 500 TID

Assessment

1. Neck pain secondary to DDD
2. Restart Amitriptyline

Plan:

- Continue Zomig
- Referral to Pain management for neck
- Naproxen 500mg TID for neck
- Follow up in 3 weeks with Alicia Felicia

1/13/10 Southwest Medical Associates

Cervical X-ray (5 views)

Impression:

1. Fusion C3-C6
2. No other abnormalities

1/28/10 Southwest Medical Associates

Alicia Felicia, APN

Complaints / History:

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- 46 y/o
- 9 year history of migraines
- Neck pain; left side
- Pain sometimes triggers migraines
- Cervical fusion 3/2009
- Was followed by Dr. J. Hernandez
- Now here for re-evaluation for Amitriptyline and Zomig
- 2 HA / week
- Claims that Surgery completely resolved his neck pain
- He underwent 6 weeks of PT without help
- Agrees to try PT again
- Exercises
 - Walks or runs daily
- Sleep
 - 9-10 hrs
- Stress level
 - Moderate

Exam:

- normal

Medications :

- Zomig 5mg prn migraine
- Fluticasone propionate 50 mcg/ACT spray
- Enalapril Maleate 20 gm
- Naproxen 500 mg TID
- Amitriptyline 50mg
- Singulair 10 mg
- Lovasatin 40 mg

Impression:

1. Migraine HA without Aura
2. S/P anterior cervical Fusion

Plan:

- Increase amitryptaline to 50 mg up to 100mg BID
- Zomig for breakthrough pain
- PT
- HEP
- Stress Management
- F/u

003092

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2/17/10 Desert Valley Therapy

Intake

Anatomic Diagram:

- Posterior head
- Posterior neck; L > R
- Pain radiating down entire left shoulder and arm; anterior and posterior.
- Down to second and third fingers

Medications:

- Naproxen
- Lortab
- Lovastatin
- Analipril

Complaints /History:

- Neck pain
- Headaches
- Numbness and tingling
- Hypertension
- Pain limits job function

Exam:

- Forward head posture
- Tenderness over left upper trap
- ROM
 - Side decreased by 50%
- Motor of upper extremities
 - Left upper = 4/5
- Hand grip
 - L/R = 44 / 143 lbs

Assessment / Plan:

- HEP
- Modalities
- Ther Fx
- Increase ROM
- Increase strength
- Good candidate for PT

2/24/10 Desert Valley Therapy



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- Doing good
- treatment

3/02/10 Desert Valley Therapy
 • Stiff and hurting
 • treatment

3/05/10 South West Medical Associates
 Ron Seibel, M.D.

Referred by Jesus Hernandez, M.D. (neurology)

Primary care physician: J. Metcalf, DO

Reason for Evaluation:

- Neck Pain

History / Complaints:

- 46 yo
- Seen by pain management Dr. Arita dating back to 2007
 - Insidious onset of neck pain and migraines
- MRI Cervical Spine (3/06)
 - C3-4 facet hypertrophy
 - Mild narrowing of neural foramen
 - Possible Left ascending L4 root compression
 - C4-5 bulge
 - Remainder of cervical spine unremarkable
- Dr. Arita performed the following injections:
 - C3-4 SNRB
 - Left C4 facet block
 - Had several weeks of relief with each procedure
- Reinitiated care at end of 2008
- Seen by Drs. Rosler and Grover
- Discogram C3-C6 with annular tears at all levels
- Underwent several C3-C5 transforaminal epidurals
- C3-C5 ACDF by McNulty on 9/2009
- Patient has persistent left trapezial pain radiating to left upper extremity
- EMG shows possible median and ulnar neuropathy
- Patient tells me that he does not want upper extremity surgery and that he is doing well
- 90% of his symptoms are in posterior cervical spine with radiating symptoms to left traps.



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Exam

- Slight decrease in cervical ROM
- Multiple Trigger points
- Sensory intact
- Motor intact
- DTR's intact and equal

Assessment

4. Similar complaints as he had pre-operatively, several years ago.
5. Axial neck pain radiating to left trapezial region

Plan:

- Pain may still be in C4 distribution
- May be secondary to left sided foraminal stenosis
- Trigger points
- Possible re-surgical evaluation

Procedure

- 8 Trigger point injections
- Cervical paraspinous region

3/09/10	Desert Valley Therapy <ul style="list-style-type: none"> • Doing good • treatment
3/12/10	Desert Valley Therapy <ul style="list-style-type: none"> • Sore in upper right back • treatment
3/16/10	Desert Valley Therapy <ul style="list-style-type: none"> • Still hurting • Treatment
3/19/10	Desert Valley Therapy <ul style="list-style-type: none"> • No new complaints • Refer to PM
3/23/10	Nevada Orthopedic and Spine Center History / Complaints:



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- Left sided neck pain
- Trapezial parascapular radiation
- Was seen by pain management and has some C3-4 foraminal stenosis
- Again this would affect C4 nerve root
- This was noted before surgery
- He does not have C4 dermatomal pattern of pain
- Please note that there is a correction to the chart note of 8/25/09 in which should read:
 - "C4 nerve root dermatomal pattern of pain is typical for the anterior chest"
- Was seen by Dr. Taylor for upper extremity paresthesias
- Considering Carpal Tunnel release back in 2009
- Patient did not follow up with this

Diagnostic studies

- X-ray cervical spine (2 views)
 - Excellent interbody fusion at C3-C5

Assessment

6. May have Facet mediated pain below his fusion (ie. C5-6 and C6-7 which could be giving him left sided neck pain, trap and periscapular pain.
7. Would not attribute this to residual C3-4 foraminal stenosis.
8. I think this mild and typically just simple restoration of disc height and formal anterior decompression would address any residual symptoms
9. In general I would not recommend PT so I will refer back to pain management with intention of trying left sided C5-6 and C6-7 facet / medial branch blocks / ablation.
10. I do NOT think that there is any significant symptomatic problem with any potential residual left C3-4 foraminal stenosis because symptoms are not in a C4 dermatome

Plan:

- F/U
- Refer to pain management for facet blocks C5-C7

3/26/10

Desert Valley Therapy

- Going to pain management for shots son
- Treatment

3/30/10

Desert Valley Therapy

- No new complaints
- Doing fairly well

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- Probably d/c after next treatment

4/02/10

Desert Valley Therapy

- OK but still having pain
- Home HEP
- D/C

4/06/10

Southwest Medical Associates

Terry Robichaud, PA-C

History / Complaints:

- Left sided neck pain
- Upper trap pain
- Dr. Seibel feels secondary to foraminal stenosis at C4
- Dr. McNulty believes possible facet mediated pain and referred for facet, medial branch blocks/ RF procedures
- He does not feel that patient's symptoms are coming from C4 dermatome; because would have more anterior chest pain than his upper trap and neck pain
- Patient wishes to schedule procedure

Exam:

- Unchanged

Assessment / Plan:

1. Schedule Left C3-C6 medial branch blocks.

4/20/10

Southwest Medical Associates

Surgery Center

Surgeon:

- Ross Seibel, M.D.

Procedure Note:

1. Left C3-C6 Medial branch blocks.

4/20/10

Southwest Medical Associates

Terry Robichaud, PA-C

History / Complaints:

- S/P C3-C6 medial branch blocks
- Only appreciated 30% reduction in pain

Plan:

- Scheduled Left C3-4 transforaminal epidural

Active Problem list:



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1. Allergic Rhinitis
2. Bulging C4-5 disc
3. Cervical postlaminectomy syndrome
4. Cervical Radiculopathy
5. C4 nerve root compression secondary to facet hypertrophy
6. Migraines
7. Tension HA
8. Epistaxis
9. Hyperlipidemia
10. Hypertension
11. Myalgia
12. Nicotine Dependence

Medications:

- Singulair
- Lovastatin
- Amitriptyline 50 mg
- Naproxen 500 tid
- Fluticasone Propionate 50 mg nasal
- Zomig 5mg
- Enalapril 20 mg

Radiographic Studies Viewed:

4/15/05 Radiographs of cervical spine

Findings:

- Essentially normal radiographs of cervical spine

5/23/05 MRI of brain

Findings:

- Unremarkable

10/18/05 Radiographs of cervical spine

Findings:

- Normal for age.
- Essentially normal films

3/22/06 MRI of cervical spine

- Decreased signal at C2-3.



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- Small central disc bulge that I would regard as insignificant at C4-5.
- No neural compression.

9/24/07

MRI of cervical spine

- Decreased signal at C2-3.
- Small central bulge at C4-5.
- No neural compression.

6/17/08

Radiographs of cervical spine

- Flexion/extension lateral radiographs of cervical spine.
- No instability noted.

4/30/08

MRI of cervical spine

- Mild signal loss at C2-3 on sagittal cuts.
- No significant disc bulging or any neuro compression noted.
- Discs at C3-4 and C4-5 have normal signal intensity.
- Minimal central bulge at these levels with no neurological compression.

8/8/08

CT scan of cervical spine

- Appears to be a post-discogram CT scan of the cervical spine.
- There is contrast noted at several levels.

11/6/08

MRI of cervical spine

- Decreased signal at C2-3.
- Small central bulge at C4-5.
- No neural compression.

8/11/09

MRI of cervical spine

- Evidence of cervical plate with prior fusion at C3-4 and C4-5.
- Sagittal views without any central stenosis.
- No other significant problems with stenosis or disc herniations at other levels.
- Adjacent levels to fusion look fine.

8/11/09

CT scan of cervical spine

- Evidence of bone formation within the cages at C3-4 and C4-5.
- No obvious loosening of the screw/bone interface.
- No loosening of the screws or displacement of the cages.



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- Appears to be fused.

1/11/10 Radiographs of cervical spine

- Radiographs of cervical spine demonstrate ACDF at C3-4 and C4-5.
- No loosening of the plate and there appears to be bone graft within the cervical spacers.
- Perhaps some mild early degeneration at the C5-6 level compared to earlier radiographs.

Assessment / Opinions / Future Care:

All of my opinions below are based on my training, clinical teaching practice and the medical literature. I am currently a Professor of Orthopaedic Surgery and Neurosurgery at the UCLA Medical Center. My opinions are also based on a reasonable medical probability however, are preliminary and subject to change based on future records/documents supplemented and reviewed. I am reviewing these records for evaluation purposes only. There is no doctor-patient relationship.

Mr. William Simao was involved in a motor vehicle accident. He reported experiencing neck pain and left shoulder pain soon after the collision. The post accident radiographs did not demonstrate any acute traumatic changes, but findings consistent with mild chronic degenerative changes. He may have sustained a soft-tissue "whiplash" injury to his cervical spine and exacerbated his long history of headaches. However, it appears from the records, that he did not require specific medical treatment for his spine over the subsequent 7-8 months. According to the medical records, it was not until 9 months following the MVA that Mr. Simao began some physical therapy for his cervical symptoms. He also began complaining of left sided radicular symptoms at about that time. These were not reported until January of 2006, which was well after the MVA. Workup following this included an MRI, about one year after the MVA (3/2006), which was again consistent with chronic degenerative changes without any significant nerve compression or traumatic structural changes.

I have had a chance to review the extensive radiographs, MRI studies, and post surgery imaging studies and these serve to reinforce my opinions. I do not see any traumatic structural changes in any of the radiographic studies that would lead me to believe that there was any structural damage to the cervical spine caused by the MVA. The essentially normal imaging studies reinforce my opinions that this patient, at most, sustained a soft tissue strain. His surgeon appeared to base his surgical recommendations on the discograms which showed the C3-4 and C4-5 levels to be positive. His surgeon's first note on 11/25/08 noted that the MRI did not show any significant abnormalities. I agree with this assessment. I do not perform elective surgeries on normal imaging studies and it is very rare, if at all, that surgery is recommended on a spine where the MRI does not show any significant abnormalities.

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I still maintain as in my earlier report, that this type of surgery for axial neck pain is a controversial procedure. Therefore, in my opinion the low success rate does not typically warrant the need to undergo the procedure and I recommend treating these patients without surgery, especially those without any radiographic abnormalities, and essentially normal discs.

In summary, it is still my opinion that Mr. Simao may have sustained a soft tissue "whiplash" type injury as a result of the MVA of April 2005. This injury did not require any specific treatment until nine months following the MVA. His imaging studies reveal mild chronic degenerative changes which most likely pre-existed the MVA. Patients that undergo this type of surgery for appropriate pathology typically do quite well and this surgery typically has an enormously high success rate. The imaging studies do not reveal any definitive non-union and the fusion appears to have healed successfully. If the patient is currently still experiencing pain, I would not think that this surgery, after successfully healing, would cause significant pain. As far as apportionment I relate the initial treatment done from the time of the MVA through 5/26/05 to the MVA. His treatment for his symptoms of neck pain after this I apportion no more than 25% to the MVA of 2005, and this is based on subjective reported symptoms only. I reserve the right to alter my opinions if any further information is given to me.

It appears that there is ongoing pain and some controversy as to the source of the pain. There appears to be disagreement between the surgeon and the pain management physicians as to whether it is the facet joints at C3-4 or some C4 mediated nerve pain from foraminal stenosis. I do not find that this should be an issue. This is a fused level which would typically eliminate any facet mediated pain and any issues with nerve root symptoms. I do not see any significant compression at this level on the imaging studies nor do I feel that there is any compression on the nerve leading to any symptoms.

Sincerely,

Jeffrey C. Wang, MD
 Professor of Orthopaedic and Neurosurgery
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EXHIBIT “6”

JEFFREY C. WANG, M.D. - 2/15, 2011

Page 1

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually)
and CHERYL ANN SIMAO,)
individually, and as)
husband and wife,)

Plaintiffs,)

vs.)

Case No. A539455

JENNY RISH; JAMES RISH;)
LINDA RISH; DOES 1 through V;)
and ROE CORPORATIONS)
1 through V, inclusive,)

Defendants.)

DEPOSITION OF JEFFREY C. WANG, M.D.

Santa Monica, California

Tuesday, February 15, 2011

Reported by: Dianne G. Slockbower, CSR No. 10676

LST JOB NO.: 134323

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DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually)
and CHERYL ANN SIMAO,)
individually, and as)
husband and wife,)

)
Plaintiffs,)

vs.) Case No. A539455

JENNY RISH; JAMES RISH;)
LINDA RISH; DOES 1 through V;)
and ROE CORPORATIONS)
1 through V, inclusive,)

)
Defendants.)

Deposition of JEFFREY C. WANG,
M.D., taken on behalf of Plaintiffs, at
1250 16th Street, Suite 745,
Santa Monica, California, beginning
2:43 p.m. and ending at 4:47 p.m. on
Tuesday, February 15, 2011, before
Dianne G. Stockbower, Certified
Shorthand Reporter No. 10676.

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EXHIBITS

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Exhibit 7 Report dated 7/4/10	20	77	
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Current bills to date
and whether they've
been paid or not
(Retained by Dr. Wang)

Page 4

APPEARANCES:

For Plaintiffs:
(Appearing telephonically and through Skype)

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Page 3

Santa Monica, California, Tuesday, February 15, 2011
2:43 p.m. - 4:47 p.m.

JEFFREY C. WANG, M.D.,
called as a witness by and on behalf of the Plaintiffs,
having been first duly sworn, was examined and testified
as follows:

EXAMINATION

BY MR. WALL:

Q Doctor, could you state your name and spell it
for the record, please.

A First name is Jeffrey, J-E-F-F-R-E-Y, middle
name is Chun, C-H-U-N, last name is Wang, W-A-N-G.

Q And how are you employed?

A Are you asking who am I employed by?

Q How are you employed? What do you do?

A I'm an orthopaedic spine surgeon.

Q All right. Dr. Wang, my name is David Wall,
Steve Rogers is also present. I'm an attorney on behalf
of William Simao, you understand that that's the nature
of today's deposition?

A Yes.

Q Because we are doing this telephonically, but I
can see you through Skype as well, if there's any problem

Page 5

<p>1 with any question that I ask that it doesn't come through 2 clearly, go ahead and ask me to restate it; is that all 3 right? 4 A Yes. 5 Q If you don't, I'm just going to sort of assume, 6 I guess, from the transcript that you understood my 7 question; fair enough? 8 A Yes. 9 Q You have had your deposition taken on a number 10 of occasions; is that right? 11 A Yes. 12 Q Would you waive the standard admonitions that we 13 normally give during a deposition? 14 A Yes. 15 Q All right. I have -- strike that. 16 Do you have a copy of a current CV? 17 A Yes. 18 Q All right. I'm going to ask that that be marked 19 as Exhibit 1. How current is it? 20 A I mean, it's current within the last year. 21 Q All right. The copy I have, just by way of 22 reference, shows that your children are 8 and 10. How 23 current is mine? 24 A They're now 17 and 14 going to be 15. 25 Q All right. Not so current. Are you board</p> <p style="text-align: right;">Page 6</p>	<p>1 Q How about lumbar? 2 A Yes. 3 Q Thoracic? 4 A It's pretty rare, I'm not sure if I've done so 5 in the past. 6 Q Okay. Do you believe that discography is a 7 reliable diagnostic tool? 8 A No. 9 Q Why not? 10 A Well, there are many studies showing that it can 11 be quite variable. The results are not definitive. It's 12 just another piece of information. 13 Q When you say it's just another piece of 14 information, you order them on occasion; approximately 15 how many times a year do you order a discogram? 16 A Boy, if I had to estimate my best guess would be 17 fifteen. 18 Q Do you use them as part of a range of tools for 19 diagnostic purposes? 20 A Yeah, I mean, it's just another test, it gives 21 me some information. 22 Q All right. Now, are you with the UCLA School of 23 Medicine; is that right? 24 A Yes. 25 Q I need to ask you a couple questions about your</p> <p style="text-align: right;">Page 8</p>
<p>1 certified in any area? 2 A I'm board certified in orthopaedic surgery. 3 Q And how long have you been so board certified? 4 A About 12 years. 5 Q Are you a member of NASS? 6 A Yes. 7 Q Are you a member of ISIS, I-S-I-S? 8 A No. 9 Q Is there a reason why you're not a member? 10 A I'm not sure what ISIS is. 11 Q You have not heard of it? 12 A I've heard of the abbreviation. I'm not sure 13 what the official name of that organization is. 14 Q Do you routinely perform discography or 15 discograms? 16 A I've never performed a discogram. 17 Q Do you rely on them in the course of your 18 practice? 19 A Well, I do order them and I gain some useful 20 information from them. 21 Q On cervical, thoracic and/or lumbar cases? 22 A I'm sorry, I think the beginning of the question 23 got cut off a little bit. Could you repeat the question? 24 Q Do you order discograms on cervical cases? 25 A I have in the past, yes.</p> <p style="text-align: right;">Page 7</p>	<p>1 position with UCLA. Were you formerly the Executive 2 Co-Director of the UCLA Spine Center? 3 A Yes. 4 Q Were you removed from that position? 5 A No. 6 Q Are you still an Executive Co-Director of the 7 UCLA Spine Center? 8 A No, several years ago we gave up those titles. 9 Q What do you mean we? 10 A Well, the physicians in the spine center decided 11 that we would not have Executive or Co-Director titles, 12 and that we would all be sort of equal when it comes to 13 the directorship of the spine center. 14 Q Were you removed from any position at the UCLA 15 Spine Center after news broke of the Senate 16 investigation? 17 A No. In the news article they stated that I was 18 no longer the Executive Co-Director of the UCLA Spine 19 Center, which I believe implies that I was removed, but 20 in actuality I had given that title up several years 21 prior to that. 22 Q Were there any sanctions at all taken as a 23 result of that Senate investigation? 24 A Are you asking whether the Senate or whether my 25 department?</p> <p style="text-align: right;">Page 9</p>

1 Q Your department. Thank you for clarifying.
2 A No.
3 Q Have you ever testified that you thought it was
4 UCLA's reaction to the article that was the reason that
5 you were asked to step down as Executive Co-Director of
6 the UCLA Spine Center?

7 A I'm sorry, could you repeat that question.

8 Q Have you ever previously testified that it was
9 UCLA officials reaction to the article regarding the
10 Senate investigation that was the reason you were asked
11 to give up the title of Executive Co-Director of the UCLA
12 Spine Center?

13 A I can't recall.

14 Q Is it true that the university's reaction to the
15 article was to remove you as Executive Co-Director of the
16 UCLA Spine Center?

17 A As - I believe as a reaction to the article,
18 they - they asked that I no longer use that title, but
19 as I stated previously, I had given up that title several
20 years prior to that time. So obviously I was happy to
21 abide by that.

22 Q What did you understand the focus of the Senate
23 investigation, to the extent that it focused on you, what
24 did you understand it was about?

25 A I guess I'd have to ask you to clarify the

Page 10

1 stop the question there. Is that what you understood the
2 allegations to be?

3 A I don't recall that Senator Grassley alleged
4 that. I do recall reading that in an article written by
5 a reporter.

6 Q And was that true or not true?

7 A Well, yes. I received consulting money from
8 spine companies, and in accordance with our department
9 policies at the time, we were not required to report that
10 to our department.

11 Q Did you check no on the forms when asked whether
12 you had received income of \$500 or more from those
13 companies that were funding the clinical research?

14 A Which form are you referring to?

15 Q Any form. Any form that you would be required
16 to disclose that information.

17 A Well, there are many forms that we have to fill
18 out as a result of research. I guess I'd have to ask you
19 to specify which form you're talking about.

20 Q Did you report on any form that you had not
21 collected in excess of \$500 when in fact you had?

22 A Again, there are many forms that we have to fill
23 out during the course of research. I can't recall
24 specifically every single form that I had to fill out.

25 Q Doctor, do you understand my question?

Page 12

1 question.

2 Q Did you understand that it was alleged within
3 the Senate investigation or the article surrounding the
4 Senate investigation that you had collected in excess of
5 \$450,000 from companies for which you were doing clinical
6 research?

7 A Yeah, I'm not sure I understand the question.

8 Q What did you understand the focus of the Senate
9 investigation to be as it related to you?

10 A Well, from my point of view, I believe the
11 Senate asked UCLA for some records, and that's the last
12 I've heard from any type of Senate investigation.

13 Q Do you understand that Mr. Grassley alleged that
14 you had collected in excess of \$450,000 from companies
15 for whom you were providing clinical research services?

16 A I'm not sure I understand the first part of the
17 question. I have collected consulting money. Many of
18 these companies I have performed research with, and I
19 believe the amounts were the amounts that I gave to them.

20 Q Who did you understand Mr. Grassley to be? Was
21 he a Senator from the state of Iowa?

22 A I believe that's correct.

23 Q Did you understand that he alleged that you had
24 failed to inform UCLA of an excess of \$450,000 that you
25 were paid by companies from 2004 through 2007 - let me

Page 11

1 A I do.

2 Q So is it your testimony that there was no
3 substance or truth to the allegation in the Senate
4 investigation that you had received in excess of \$450,000
5 between 2004 and 2007 by medical device and drug
6 companies for whom you were doing clinical research that
7 you failed to report?

8 A I think I've already testified that I received
9 moneys from my consulting with spinal device companies,
10 and that I did not report those to UCLA as per our
11 department policies at the time.

12 Q What if any action did UCLA take after that
13 investigation became public?

14 A Well, it's my understanding that they asked me
15 to not use the title of Executive Co-Director of the UCLA
16 Spine Center.

17 Q All right. Do you have with you a list of cases
18 on which you testified either in deposition or in trial
19 over the last four years?

20 A I have a list dating back to about 2006.

21 Q 2006 you say?

22 A Yes.

23 Q I'm going to ask that that be marked as
24 Exhibit 2.

25 Are any of those cases also with Mr. Rogers'

Page 13

1 firm?
 2 A I believe so.
 3 Q Tell me how many.
 4 A Well, on this list I don't have all the law
 5 firms listed. I do see one case from 2010. But there
 6 are several cases listed where I did not list a law firm.
 7 Q How many cases are there approximately total
 8 from 2006 to 2010 that are on your list? 'Cause I don't
 9 have your list.
 10 A Thirty-nine.
 11 Q All right. Do you have them itemized by whether
 12 they're for plaintiff or defendant?
 13 A Yes.
 14 Q What's the approximate breakdown?
 15 A Thirteen are plaintiff.
 16 Q So the other 26 are defendant? Did you say 39
 17 total?
 18 A Yes.
 19 Q All right. Do you know how many of those are
 20 Nevada cases? Would it say on the report?
 21 A I'm sorry, I don't understand your question.
 22 Q Does Exhibit 2 reflect whether they are Nevada
 23 cases, California cases?
 24 A I'm counting. Well, five of the cases say
 25 Nevada, but I would believe that there are actually more

Page 14

Page 16

1 that are Nevada cases. I have listed the location for
 2 many of these as where the deposition was given. And so
 3 many of the depositions were given here in Santa Monica,
 4 California.
 5 Q I'm going to have marked and made as Exhibit 3 a
 6 disc which I -- I will forward to Ms. Court Reporter
 7 which includes eight prior depositions of Dr. Wang.
 8 Doctor, when were you first contacted in this
 9 case and by whom?
 10 A I can't recall the date, and I don't recall who
 11 contacted me. I imagine as per the routine it would be
 12 the law firm.
 13 Q Do you have any documents in your file that
 14 would reflect when you were first contacted and by whom?
 15 A No.
 16 Q No?
 17 A No.
 18 Q Were you contacted by telephone?
 19 A I'm sorry, I did not hear your question.
 20 Q Are you normally contacted by telephone?
 21 A Sure, people contact my office by telephone and
 22 they get a message to me.
 23 Q Well, in this case would you have been contacted
 24 originally by letter or by telephone?
 25 A As we -- as I stated before, I don't recall how

Page 15

1 or who contacted me on this particular case.
 2 Q You don't have any document which would reflect
 3 when you were retained as an expert on this case; is that
 4 correct or no?
 5 A That is correct.
 6 Q Do you have a copy of your current fee schedule?
 7 A Yes.
 8 Q I'd like to have that marked as Exhibit 4. I
 9 have one that shows 7500 for an IME; for a court
 10 appearance in Los Angeles and Santa Monica it's \$10,000
 11 for half a day, \$14,000 for a full day and if it requires
 12 travel it would be \$15,000 for one day plus travel
 13 expenses. Is the one I have current?
 14 A I don't believe so.
 15 Q What changes are there? And let me just
 16 restrict it to a court appearance requiring travel. What
 17 does that cost now?
 18 A I put -- it says here 12,000 for one day plus
 19 travel expenses.
 20 Q Have you reduced your fee?
 21 A I guess according to the difference between what
 22 you're holding and what you just read to me and what I'm
 23 holding in my hand, I believe so.
 24 Q Do you recall reducing your fee by 20 percent
 25 for a court appearance out of state?

1 A Not specifically, as far as the date and time of
 2 when I did it. But what I hold in my hand is my current
 3 fee schedule.
 4 Q What's your IME cost on that -- Exhibit 4?
 5 A 7500.
 6 Q How about your court appearance in Los Angeles
 7 and Santa Monica?
 8 A I have 7,000 for a half day and 12,000 for one
 9 day.
 10 Q And you don't specifically recall directing
 11 anyone to reduce your fees?
 12 A No.
 13 Q What have you charged in this case to date?
 14 A I'm sorry, can you repeat the question?
 15 Q How much have you charged in this case so far?
 16 A I -- I apologize, I don't have those records
 17 with me, but I can obtain those.
 18 Q I will leave a space in the deposition. Will
 19 you make that information available and provide it to us
 20 in the deposition?
 21 A Yes.
 22 Well, I'm sorry, did you say in the deposition,
 23 so does that mean during this time?
 24 Q Well, you meant it could be produced?
 25 A I'm sorry?

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1 Q Do you have a document that reflects how much
2 you've been paid so far or how much you've billed so far?

3 A I may, I can certainly check in my office as
4 soon as we conclude this deposition.

5 Q All right. Assuming that you're able to do
6 that, I would ask that that be -- well, let me hold off
7 on that for one moment.

8 Actually, I'm going to ask that -- do you have
9 your entire work file?

10 A I have all the records that I've reviewed.

11 Q Are those on disc or are those -- or are they
12 hard copied?

13 A They're on disc.

14 Q All right. I'm going to ask that that disc be
15 marked as Exhibit 8. I'm going to ask that you include
16 with Exhibit 8 at the end of your deposition your current
17 bills to date and whether they've been paid; is that
18 fair?

19 A Well, are you saying at the conclusion -- you're
20 saying today or is there a period of time?

21 Q Today or tomorrow because we're going to want to
22 expedite the transcript.

23 A I can definitely, at the conclusion of this
24 deposition today, I can search my records and see if I
25 have the invoices which I believe I will be able to do.

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1 Number 1, dated October 1st, 2009, which I would ask be
2 marked as Exhibit 6. And I have Addendum Number 2, it is
3 July 4th, 2010, which I'll ask be marked as Exhibit 7.

4 Are those the three reports you prepared in this case?

5 A Yes.

6 Q Since the date of your last report which was
7 July 4, 2010, have you reviewed additional documents
8 before today's deposition?

9 A Yes.

10 Q What documents did you review?

11 A I don't have a list in front of me. Since my
12 last addendum from July 4, 2010, I've reviewed some of
13 the records which I believe are mostly physical therapy,
14 there are some records from Southwest Medical or -- I'm
15 not sure of the full official name -- and I've read the
16 report of a Mark Winkler.

17 Q Is that the extent of the additional documents?

18 A That's what I have listed here.

19 Q Did any of those documents change any of your
20 opinions in the case?

21 A I apologize. Since that time I've also reviewed
22 some surveillance videos.

23 Q Did the physical therapy records, the records
24 from Southwest Medical, or the report of Dr. Winkler
25 change any of your opinions in this case?

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1 As far as whether or not they've been paid or not, I will
2 have to check with my wife.

3 Q All right.

4 THE COURT REPORTER: Did you say Exhibit 8 on
5 those discs?

6 MR. WALL: Yeah, 'cause his report is already,
7 for my own purposes, marked as 5, 6, and 7.

8 Q What did you do to prepare for your deposition
9 today, Doctor?

10 A I read my reports.

11 Q Anything else?

12 A I spoke to Mr. Rogers.

13 Q When was that conversation?

14 A Probably about maybe an hour ago.

15 Q What was the nature of that conversation?

16 A I had asked him whether or not this trial was
17 going forward.

18 Q Did you discuss with him your -- the conclusions
19 in your report?

20 A No.

21 Q I have three reports that you've prepared in
22 this case, does that sound right?

23 A Yes.

24 Q I have an original report dated February 10,
25 2009, which I have marked as Exhibit 5; I have Addendum

Page 19

1 A I'm sorry, did you include the surveillance
2 video or did you specifically not include the
3 surveillance video?

4 Q Not yet, that will be my next question.

5 A I'm sorry, you do not want me to talk about the
6 surveillance video?

7 Q That will be my next question, Doctor.

8 Based on the physical therapy records, the
9 Southwest Medical records, and the records of Dr. Winkler
10 that you reviewed since your last report, has that
11 changed your conclusions in any way?

12 A Well, it's hard to answer that question because
13 I've reviewed these records along with the surveillance
14 video. So are you asking me to hypothesize sort of a
15 theoretical situation where I just totally forget about
16 the surveillance video and then look only at these
17 records and see whether that changes my opinion?

18 Q Correct.

19 A So without the surveillance video, in my prior
20 reports I apportioned no more than 25 percent of the
21 patient's symptomatology to the motor vehicle accident in
22 question on April 15th, 2005. Looking at these new
23 records and discounting the surveillance video, I think
24 it's reinforced my opinions that there really were not
25 many radiographic changes following the motor vehicle

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1 accident.

2 And the fact that I initially had apportioned
3 25 percent of his ongoing pain was because giving the
4 patient the benefit of the doubt, assuming he's reliable,
5 that I would trust his reports of his pain, and I believe
6 he had a soft tissue injury. The problem with that is
7 that these soft tissue injuries typically resolve with
8 time. And the fact that this patient has gone on to have
9 continued pain without a specific pain generator, or at
10 least in my opinion, I probably would apportion much less
11 than 25 percent.

12 Q Is that based on the physical therapy records?

13 A I think it's based on the fact that the records
14 of the physical therapy and the doctor visits show that
15 he continues to have pain throughout 2010.

16 MR. WALL: Let me go off the record for a
17 moment.

18 (Brief pause in proceedings.)

19 MR. WALL: All right. Back on the record.

20 Q Doctor, the physical therapy records established
21 for you some reason to change your conclusion after the
22 July 4, 2010 report; is that correct?

23 A As I stated before, I think it's a combination
24 of the records that I reviewed since my last report,
25 which include the physical therapy records.

Page 22

1 see me - I think we've lost the video on this end. I
2 don't know if you need to turn it on again.

3 Q How about that?

4 A There you go, yeah, good.

5 Q Do you recall my question?

6 A Could you please repeat it?

7 Q When did you understand the surveillance video
8 to have been taken?

9 A June and July of 2008.

10 Q When was that in relation to the surgery that
11 was performed?

12 A I believe the surgery was performed around
13 March of 2009.

14 Q Did you see in the surveillance video any
15 evidence of left shoulder or neck pain?

16 A Yeah, you know, during the majority of the video
17 this patient was doing a lot of heavy lifting without any
18 signs of any pain in his shoulder or his neck. There was
19 a time, I believe it was June 18th, around 8:45 a.m.,
20 where he was lifting a very heavy - it looked like an
21 industrial vacuum cleaner, which required him to extend
22 his left arm and lift it out of a truck bed. He
23 unsuccessfully placed it on the ground, and then I saw him
24 rotate his shoulder and cock his neck to the side, which
25 made me think that he may have strained his neck during

Page 24

1 Q How about the Southwest Medical records, did
2 they change your opinion?

3 A Well, I think, like I stated, it's the -- sort
4 of the culmination of these records show that this
5 patient continued to have pain.

6 Q The patient had continued to have pain even
7 before your July 2010 addendum; is that correct?

8 A Yes.

9 Q But as of that date you hadn't changed your
10 opinion, would that be correct?

11 A Yes.

12 Q What was it about the surveillance video that
13 led you to change some of your opinion?

14 A Well, I watched the surveillance video and it
15 clearly showed him throughout his, I guess, routine job
16 of performing significant physical activities on a daily
17 basis, at least during the days that he was filmed, which
18 I believe reflects the nature of the work that he -- that
19 he currently performs. He was very physical, he was
20 doing a lot of heavy lifting, a lot of heavy bending and
21 it just did not seem like a patient who was injured.

22 Q And do you recall whether those surveillance
23 videos -- do you recall when those surveillance videos
24 were taken?

25 A I'm sorry, can we go off the record? You can

Page 23

1 that heavy lifting.

2 And then I believe, minutes later, he was back
3 performing his typical work and he seemed to have no ill
4 effects from that lifting.

5 Q So your testimony is that that changed your
6 opinion in this case?

7 A Yes.

8 Q And tell me exactly how it changed it.

9 A Well, here's a gentleman that had had a motor
10 vehicle accident, I believe in 2005, and in 2008, about
11 three years later, he's -- I see him doing some very
12 heavy manual labor; I see him changing a tire; I see him
13 bending his neck forward and performing some pretty
14 strenuous activities. And this is not someone who
15 behaves like he has an injured neck.

16 Q Have you been asked to do any additional reports
17 in this case?

18 A No.

19 Q When did you receive the surveillance video?

20 A I can't recall the exact date.

21 Q Do you have any letters or correspondence which
22 would reflect when that was received?

23 A I do not.

24 Q Where did you receive it from?

25 A I assume it came in the mail.

Page 25

1 Q From whom?
 2 A I would assume it's from Mr. Rogers law firm.
 3 I'm sorry, could you repeat that?
 4 Q Did you request that it be provided to you?
 5 A No.
 6 Q It wasn't sent with a letter which would have a
 7 date on it?
 8 A It may have been, but by the time it arrived on
 9 my desk it was just the CD.
 10 Q Would that letter be in your file?
 11 A No, I brought my file with me, with the
 12 exception of the billing forms, and I do not see this
 13 letter.
 14 Q Do you presume that you received it after the
 15 preparation of your last report?
 16 A Yes.
 17 Q So your reports do not contain a complete
 18 statement of all your opinions that you'd express in
 19 this case, does that sound correct, based on what you
 20 told me today?
 21 A That's correct.
 22 Q And they don't state a complete statement of the
 23 basis or reasons for your opinions, is that correct based
 24 on what you've told me today?
 25 A You're asking in my reports?

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1 heading under - or listing of records reviewed; is that
 2 right?
 3 A That's correct.
 4 Q Can I assume the same with your October 1st,
 5 2009 Addendum Number 1, that the additional records you
 6 reviewed are records from all of the dates listed in the
 7 medical history in that report?
 8 A Yes.
 9 Q And the same would be true for the July 4th,
 10 2010 Addendum Number 2?
 11 A Yes.
 12 Q Have you been given anything to review other
 13 than what you told me you reviewed after you prepared
 14 your last report that's not listed in those three
 15 reports?
 16 A Yes, I've reviewed all of the depositions which
 17 are on the CD ROMs.
 18 Q What depositions are those?
 19 A I don't have a list of them. If you'd like I
 20 can open them.
 21 Q Okay. You'd agree with me that none of your
 22 three reports reference any depositions, would that be
 23 correct?
 24 A That's correct.
 25 Q When did you receive these depositions?

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1 Q Correct.
 2 A That's correct.
 3 Q But you were never requested to prepare an
 4 additional report with your new conclusion; is that
 5 correct or incorrect?
 6 A That's correct.
 7 Q Had you informed defense counsel of your new
 8 conclusion?
 9 A No.
 10 Q So today is the first time you told anyone about
 11 your new conclusion; is that correct?
 12 A Yes.
 13 Q I'm sorry?
 14 A Yes, that's correct.
 15 Q When did you form those conclusions?
 16 A I believe over the past week.
 17 Q Did you receive that video within the last week?
 18 A Yes.
 19 Q Your first report, Exhibit 5, lists on the
 20 second page - and by the way, I don't think mine has
 21 page numbers on it - lists on the second page a list of
 22 fourteen items that are under the category, Records
 23 Reviewed; is that right?
 24 A Yes.
 25 Q Your other two reports don't have a similar

Page 27

1 A Again, I can't recall the exact date, probably
 2 within the last month.
 3 Q Did it come with the surveillance video that you
 4 received within the last week?
 5 A I don't recall whether it was in the same
 6 mailing or not.
 7 Q Did you request these depositions or were they
 8 just sent to you?
 9 A They were sent to me.
 10 Q Do you have the list?
 11 A As I stated I don't have a list. I can try to
 12 put this in a computer and try to open it.
 13 Can you hear me?
 14 Q Yes, I can.
 15 A I see Adam Arita, Britt - Hans-Jorg Rusler;
 16 Patrick McNulty, looks like there's two of them;
 17 Mr. Simao, and there might be two of them; a
 18 Trooper Shawn Haggstrom; a Jenny Rish, Dr. Grover, a
 19 Cheryl Ann Simao.
 20 Q Is that it?
 21 A There's a listing here of a Britt Hill, but I'm
 22 not sure if that's a deposition or not. I'm opening the
 23 file. Oh, yeah, Britt Hill, B-R-I-T-T.
 24 Q So you reviewed all those depositions within the
 25 last month?

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1 A Again, I don't know the exact time when it was
2 given to me, I don't open my own mail, but I've read
3 through them all.

4 Q Did you request all those depositions or were
5 they just sent to you out of the blue?

6 A I don't believe I've requested any records on
7 this case. The records are just sent to me.

8 Q Did those depositions change your opinions in
9 this case?

10 A No.

11 Q Your original report is dated February 10th,
12 2009; is that right?

13 A Yes.

14 Q What's the date that you saw Mr. Simao?

15 A I'm sorry, did you ask me if that's the date I
16 saw him?

17 Q Correct.

18 A I believe so.

19 Q So you prepared your report on the same day that
20 you saw him?

21 A Well, on my report it says, Date of service. I
22 listed the date that I saw him as the date of service.

23 Q Okay. How long did you see him?

24 A I can't recall.

25 Q What's the normal length of time for an

Page 30

1 A I typically dictate it.

2 Q So when you prepared this report that lists on
3 the second page of records reviewed, it is all the
4 documents that you had available to you at that time; is
5 that correct?

6 A I believe so.

7 Q You describe on the third page of that report at
8 the top, vehicle damage as moderate for both vehicles.
9 Do you see that?

10 A Yes.

11 Q Is that fact significant to you?

12 THE COURT REPORTER: I did not hear that
13 objection.

14 MR. ROGERS: Objection, mischaracterization.
15 Moderate, in other words, is a vague term and that
16 characterizes --

17 THE COURT REPORTER: I'm sorry, could you repeat
18 that objection.

19 MR. ROGERS: Mischaracterizes and it's vague.
20 BY MR. WALL:

21 Q Doctor, you may answer the question.

22 A I'm sorry, could you please repeat the question.

23 Q The listing of the vehicle damage as moderate
24 for both vehicles, is that fact significant to you in
25 your analysis?

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1 independent medical examination?

2 A It can range anywhere from 15 to 45 minutes to
3 an hour.

4 Q Do you have any records which would suggest how
5 long you met with Mr. Simao?

6 A No.

7 I'm sorry, could you repeat that?

8 Q Did you meet with him at the same time that
9 Dr. Fish met with him?

10 A I can't recall.

11 Q Do you have any record which would indicate
12 whether you and Dr. Fish saw my client at the same time?

13 A I don't.

14 Q Do you have an independent recollection of the
15 examination?

16 A No.

17 Q Did you discuss your reports in this case with
18 Dr. Fish at any time from February of 2009 'til today's
19 date?

20 A No.

21 Q Who prepares the medical history that is about
22 pages 2 through about 24 of your report?

23 A I did.

24 Q Do you dictate and then it's transcribed or did
25 you prepare it yourself?

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1 MR. ROGERS: Same objections.

2 THE WITNESS: Yeah, I guess I'm not sure what
3 you mean by significant.

4 BY MR. WALL:

5 Q Well, did you use it as a basis for any of your
6 opinions?

7 A It's part of the medical records, I read it, and
8 I took that into account along with the other facts that
9 were involved in the medical records to form my opinion,
10 but I did not base my opinion entirely on just that one
11 fact.

12 Q Well, actually, it's not part of the medical
13 records, it's a Traffic Accident Report; is that right?

14 A When I use the term medical records, I guess I
15 was referring to the records I received and reviewed.
16 This Traffic Accident Report came in the batch of records
17 that I received.

18 Q Do you plan to state an opinion at trial on
19 whether the impact was severe enough to cause injury?

20 A If you're asking me whether or not I'm going to
21 talk about force factors and whether or not I have a
22 Ph.D. in physics and can understand the science of impact
23 and collisions, then no, I'm not going to claim to be an
24 expert in that regard.

25 Q Okay. On that same page you reviewed records of

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1 when Mr. Simao presented at urgent care on the day of the
2 motor vehicle accident; do you see that?

3 A Yes.

4 Q There were complaints of neck and shoulder pain
5 that day; is that correct?

6 A Yeah, I see neck pain, headache, left elbow
7 pain. I'm not sure I see anything about shoulder pain.

8 Q What's the -- what would be the purpose of
9 placing his left arm in a sling?

10 A I assume that the doctor who was treating him
11 wanted to immobilize his arm.

12 Q Okay. It says, hyperextended neck and bit cage;
13 also hyperflexed, what's the difference?

14 A Well, if you look at the words, hyperextended is
15 when you extend your neck and hyperflex is when you flex
16 your neck. So it's a different motion of the neck.

17 Q So they're opposite directions; is that right?

18 A Typically, the way those terms are used, that is
19 correct.

20 Q It also notes tenderness in the cervical spine;
21 is that correct?

22 A It says, C-Spine tender, C6 with full range of
23 motion.

24 Q It looks as though a cervical spine X-ray was
25 done on that day; is that correct?

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1 Q And then by May 23rd, of 2005 -- strike that.

2 On May 26, 2005, moving on to the next page of
3 your report that is Exhibit 5, it looks like the medical
4 provider at Southwest Medical explained to Mr. Simao that
5 the imaging studies were normal; is that right?

6 A Yes.

7 Q What was the instructions that he received at
8 that time?

9 A Well, I only have what's documented in the note,
10 I'm not sure if they gave him other instructions, but it
11 says, Patient does not seek further treatment, routine
12 follow-up over next six months.

13 Q Do you believe that he was told on that day that
14 whatever problems he was suffering from would resolve on
15 their own?

16 A I see no documentation of that.

17 Q Is that what routine follow-up over next six
18 months would indicate to you?

19 A I'm not sure that I can get that from what you
20 just said. Routine follow-up over the next six months,
21 the way I typically use that, means that over the next
22 six months if there's any problems come to see me, but
23 I'd like to see you in six months for a routine
24 follow-up.

25 Q Mr. Simao returned to Southwest Medical in a

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1 A Yes.

2 Q Were you able to determine from the records what
3 they were looking for when they ordered an X-ray of the
4 cervical spine?

5 A Well, the impression was no fractures. I would
6 assume they were looking for fractures.

7 Q On the next page of your report, the records
8 from May 4th of 2005 that you reviewed note the history
9 of migraine headaches; is that correct?

10 A Yes.

11 Q And that the patient also reported that the
12 headaches he was suffering on that day felt different; is
13 that correct?

14 A Yes.

15 Q It says there's a follow-up on May 12th of 2005
16 with a referral for an MRI; is that correct?

17 A Yes.

18 Q What did you understand the purpose of that MRI
19 to be?

20 A Well, it says here MRI to rule out intracranial
21 lesion. So I think they wanted to rule out an
22 intracranial lesion.

23 Q It was not an MRI on the cervical spine; is that
24 correct?

25 A That is correct.

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1 little over four months; is that right?

2 A Yes.

3 Q And what were his complaints on that day?

4 A Well, I have documented headaches, nausea and
5 vomiting, tightness in left shoulder radiates into neck
6 and then becomes migraine headache.

7 Q And his headaches were worsening over the last
8 few months; is that correct?

9 A That's what it says.

10 Q By October 12th of 2005 was there a referral for
11 neck and left shoulder X-ray?

12 A Yes.

13 Q And what did you understand the purpose of a
14 neck and left shoulder X-ray to be at that point based on
15 your review of the record?

16 A Well, it's a little hard to say because it looks
17 like the main problem was feet swelling, and I don't see
18 any orders for any feet X-rays. And then under the
19 Assessment and Plan, it says, Nicotine dependence,
20 possible vascular insufficiency, stop smoking, tension
21 headache associated with left shoulder discomfort, and
22 then they talk about ordering the study. So I think they
23 were ordering it in relationship to the tension headache.

24 Q Why would you do a left shoulder X-ray for a
25 tension headache, what would you expect to find or rule

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1 out?

2 A Well, in this note it says, tension headache
3 associated with left shoulder discomfort. So they
4 probably ordered the shoulder X-ray because he had left
5 shoulder discomfort.

6 Q On page -- well, the second to last page which I
7 have as the 26th page of Exhibit 5, the report says that
8 Mr. Simao didn't begin complaining of neck and
9 shoulder pain until nine months after the accident. Is
10 that right?

11 Strike that. Let me rephrase.

12 Well, yeah, you state that, According to the
13 medical records, it was not until nine months following
14 the motor vehicle accident that Mr. Simao began some
15 physical therapy for his cervical symptoms. He also
16 began complaining of left sided radicular symptoms at
17 about that time. Is that right?

18 A That's a direct quote from any report.

19 Q But he obviously complained of neck pain on the
20 day of the accident; is that right?

21 A Yes.

22 Q Is it your testimony that the medical records
23 reflect no evidence of any ongoing neck pain from April
24 through October of 2005?

25 A Well, I do see on the day of the accident which

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1 myofascial pain creating radicular symptoms down left
2 upper extremity. What would be the source of that
3 myofascial pain, do you know?

4 A Yeah, one of the problems is the physical
5 therapist used a completely different set of terminology
6 than a spine surgeon. So I'm not sure exactly what
7 they're referring to. It's probably some terminology
8 that's used within the realm of physical therapy.

9 Q How do you define myofascial pain?

10 A For me there's a very general statement. There
11 is fascia over the muscles, myo implies that there's
12 muscular pain, and so that's a combination of words that
13 are used to describe patients with pain. But for me that
14 really doesn't -- I don't use that term as a specific
15 diagnosis.

16 Q What would be the purpose of cervical traction
17 at that point?

18 A Well, it's one of the modalities that many
19 physical therapists use.

20 Q For what?

21 A Are you asking for a specific diagnoses or are
22 you asking more in general?

23 Q Well, what would be the purpose of placing
24 someone in cervical traction at that point in time?

25 A Well, in the literal sense when you place

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1 was April 15, 2005, he's complaining of neck pain. And
2 then we've kind of covered the subsequent medical visits
3 where he's talking about a lot of his complaints and at
4 no point do I see that he's complaining of neck pain
5 until October 6, 2005.

6 Q So is it your -- is it your opinion that the
7 medical record established no consistent neck pain from
8 May through October of 2005?

9 A I certainly do not see any documentation of any
10 neck pain during that time period.

11 Q In January of 2006, physical therapy was
12 ordered, is that -- or he was referred to physical
13 therapy; is that right?

14 A It appears that on December 21, 2005 when he was
15 at Southwest Medical Associates, under their Assessment
16 and Plan it seems they have under number four PT for neck
17 and traps, and I believe that's when they were thinking
18 of the referral.

19 Q And on January 16, 2006, the physical therapy
20 records reflect that the date of onset neck and upper
21 trap problems was approximately six months ago; is that
22 correct?

23 A Yes.

24 Q In the exam portion of the physical therapy
25 record it says, Presence of -- what I'm going to call --

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1 someone in traction you're stretching their neck. I
2 guess taken very literally, that's what the literal
3 purpose is. As far as treating specific diagnoses, you
4 know, sometimes the therapists use it to treat patients
5 with radicular pain, sometimes therapists just use it as
6 a modality.

7 Q In your examination of Mr. Simao in February of
8 2009 -- on the 25th page of what I believe is a 27-page
9 exhibit -- under cervical spine you noted minor
10 tenderness at the base of his neck on palpation; is that
11 right?

12 A Yes.

13 Q And he also complains of tenderness with a
14 Spurlings; what's a Spurlings?

15 A It's a test that we perform where we tilt their
16 head to the side, extend the neck, and rotate it towards
17 the side.

18 Q What would tenderness with a Spurlings indicate
19 to you?

20 A It's a subjective reporting of some tenderness
21 when we put their neck into sort of an extreme position.

22 Q What's the significance of the tenderness with a
23 Spurlings being to his left side and radiating to his
24 left shoulder?

25 A It may indicate some nerve irritation.

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1 Q What did you note during the medical examination
2 with respect to his left shoulder?

3 A I can read from my report, we found that there
4 were some tenderness when we palpated it, and that his
5 left shoulder was positive to Hawkins and Neer's test in
6 supraspinatus testing. That's just some positions of the
7 shoulder and the arm that we place the arm and the head
8 in.

9 Q You said we, who's we?

10 A Well, you asked me in general. When I examine
11 patients in my practice I'm typically there with
12 residence and fellows.

13 Q What's Hawkins or is it -- or is Hawkins and
14 Neer's one test?

15 A They're different tests. Basically Hawkins is
16 when you extend the shoulder and bring the arm over the
17 front of the body and internally rotate it; and Neer's
18 Test is when you put the thumbs down, extend the arms at
19 about 15, 20 degrees outward and give it some resistance.

20 Q And what was the significance to you of the test
21 you performed on Mr. Simao's left shoulder?

22 A It may indicate some rotator cuff inflammation.

23 Q Had you seen a medical record anywhere that
24 referenced rotator cuff inflammation?

25 A I don't recall that, but if you point it out to

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1 the time of my second report.

2 Q On the 19th page of Exhibit 7, with -- well,
3 it's 18 and 19 pages of Exhibit 7 -- with respect to the
4 March 22, 2006 MRI, you wrote, Decreased signal at C2-3.
5 So that's based on your viewing of the films rather than
6 just the report; is that correct?

7 A Yes.

8 Q And what does that mean, Decreased signal at
9 C2-3?

10 A It meant that there was some mild degeneration
11 at that level.

12 Q Define what you mean by mild degeneration.

13 A I typically use that term to -- generation,
14 meaning, arthritis.

15 Q Okay. You also noted a, Small central disc
16 bulge that I would regard as insignificant at C4-5; is
17 that correct?

18 A Yes.

19 Q Obviously that's from your view of the films and
20 not from the report; is that right?

21 A That's correct.

22 Q That's somewhat different than the report from
23 Steinberg Diagnostic date of that MRI; is that right?

24 A I guess I'd have to ask you to define the
25 question. It just seems too general.

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1 me, I'll be happy to take a look at it.

2 Q I'm asking you if you've ever seen a medical
3 record that references rotator cuff inflammation for
4 Mr. Simao?

5 A I don't recall.

6 Q Did you review the various MRIs and other
7 radiographic studies in this case?

8 A Yes.

9 Q Your Addendum Number 2, which is Exhibit 7, your
10 final report, seems to reflect that the -- in fact you
11 reviewed all --

12 THE COURT REPORTER: Could you repeat that?
13 BY MR. WALL:

14 Q Hold on. In Exhibit 7, beginning on what I
15 believe to be the 19th of -- strike that.

16 The 18th of 21 pages you reference the
17 radiographic studies that you viewed in this case; is
18 that right?

19 A Yes.

20 Q Is that -- I assume you didn't have the actual
21 films when you prepared the first two reports?

22 A Yeah, I can't recall if I did or didn't, but
23 when I actually view the studies I typically put that in
24 my report. So I -- this implies that I did not put this
25 in my first two reports, so I probably was seeing this at

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1 Q On the 7th page of your first report, Exhibit 5,
2 you noted that the impression under March 22, 2006 MRI
3 cervical spine was as follows: One, C3-4 facet
4 hypertrophy on the left mildly narrowing left neural
5 foramen; may be contact with left exiting C4 nerve root.
6 Do you see that?

7 A Yes.

8 Q Also, C4-5 central broad based two to
9 three-millimeter disc protrusion without stenosis. Do
10 you see that?

11 A Yes.

12 Q When you made your conclusion after reviewing
13 the films, you didn't say anything about C3-4; is that
14 right?

15 A That's correct.

16 Q You disagree with the report from Steinberg
17 Diagnostic, 2006 MRI?

18 A I'm not sure the term is disagree. When I
19 reviewed the reports -- or I'm sorry -- when I reviewed
20 the MRI personally, I did see that the facets were at a
21 different angle on the right to the left side at, I
22 believe, the C3-4 level. That's more of a congenital
23 finding. Meaning, the patient was born that way. I can
24 certainly see how someone may think that that represents
25 an arthritic change because we can see that in patients

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1 with arthritis. But I thought that that was just the way
2 the facets were oriented.

3 Q So you would disagree with the impression as it
4 relates to C3-4 from the Steinberg Diagnostic report; is
5 that right?

6 A I don't think you can make a blanket statement
7 like that. They're saying that there's facet
8 hypertrophy. I think there's a facet difference. And
9 that's, I think, a matter of opinion.

10 Q But you didn't note it at all in your report; is
11 that right?

12 A That's correct.

13 Q The September 2007 MRI, our last report, Exhibit
14 7, on the 19th page, you write, Decreased signal at C2-3,
15 small central bulge at C4-5, and no neural compression;
16 do you see that?

17 A Yes.

18 Q Did you think that the September 2007 MRI was
19 the same as the March 2006 MRI?

20 A Yes.

21 Q Did it show degenerative changes in Mr. Simao's
22 cervical spine? I don't mean from one MRI to the next, I
23 mean overall.

24 MR. ROGERS: Object, it may be vague.

25 Go ahead, Doctor.

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1 A No.

2 Q Do you believe that the injections -- let's go
3 all the way from 2006 up 'til the time of the surgery,
4 but not including the surgery -- the injections that
5 were -- that he underwent were reasonable and necessary?
6 Setting aside for now the issue of causation.

7 A Well, I think they were reasonable in the sense
8 that I believe the doctors ordered them in order to try
9 and alleviate his pain to try to help him and try to
10 identify the pain generator. As far as necessary, I
11 guess I'd have to ask you to define what you mean by
12 necessary.

13 Q Well, setting aside the issue of causation, do
14 you believe any of the injections that he received were
15 unnecessary?

16 A Well, as I stated, I think that they were --
17 there was a reasonable thought given to why they gave him
18 the injections but -- and I believe the doctors felt like
19 they were trying to help him. Looking back at the
20 multitude of injections, many of them didn't really help
21 him or have any long lasting effect. So I'm not sure
22 that they were all necessary, but I think that they were
23 reasonable.

24 Q Did you review the medical bills in this case?

25 A I recall seeing them.

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1 THE WITNESS: Well, I -- I listed in the
2 September 24, 2007, Decreased signal at C2-3, which I
3 noted on the prior report. And as I stated, that is more
4 of an arthritic or degenerative change.

5 BY MR. WALL:

6 Q Was the film essentially the same as the
7 March 2006 MRI?

8 A I believe so.

9 Q There was another in April of 2008; what is mild
10 signal loss at C2-3 on sagittal cuts mean?

11 A I think for all intents and purposes it means
12 the same as decreased signal at C2-3. I was just a
13 little bit more specific that I saw it primarily on the
14 sagittal cut, which is different from the axial cut.

15 Q Did you find that the April 2008 MRI was
16 significantly different or different in any way from the
17 September 2007 MRI?

18 A I believe it was essentially the same.

19 Q You have reviewed the medical records and so
20 you're aware that Mr. Simao has had a multitude of
21 injections for either diagnostic or therapeutic purposes
22 from 2006 to 2010; is that correct?

23 A Yes.

24 Q Do you believe that at any time the pain
25 generator in Mr. Simao's neck has been isolated?

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1 Q But do you intend to offer testimony at trial as
2 to whether the charges for his treatment were reasonable
3 and customary in Las Vegas?

4 A No.

5 Q All right. The discogram in August of 2008,
6 it's not referenced in your first report of February of
7 2009, is it because you didn't have the records
8 surrounding that at the time of your independent medical
9 examination?

10 A I'm sorry, could you please repeat that.

11 Q The discogram in August of 2008, it's not
12 referenced in your February 2009 report, which is
13 Exhibit 5, is that because you didn't have those records
14 at that time?

15 A Yeah, looking at my first report, it looks like
16 the records went up 'til May 10th, 2008.

17 Q You referenced it in Exhibit 6, which is your
18 Addendum Number 1 and the discography to have revealed --

19 A I'm sorry, we didn't hear that.

20 Q You reference the discography in Exhibit 6,
21 which is your Addendum Number 1 from October of 2009,
22 what do you understand the discography to have revealed?

23 A Well, from the records dated 8/8/08 from
24 Dr. Roser, it says that there was positive provocation
25 discography C3-4, C4-5 with negative C5-6 discography.

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1 Q What does that mean, positive provocation
2 discography C3-4?

3 A It means that when he injected the material and
4 tried to provoke pain, that it caused pain at C3-4 and
5 C4-5 but not at C5-6.

6 Q What would cause that pain?

7 A Well, you're injecting contrast with a needle
8 into the disc, and when you pressurize it, it can cause
9 pain in the disc.

10 Q Which would be an indication of what to a spine
11 surgeon?

12 A Well, it would mean that the discography was
13 positive at those two levels and negative at the other
14 level.

15 Q What does morphologically abnormal disc mean?

16 A I believe it would be the injectionist, which
17 was Dr. Rosler, when he injected the contrast he felt
18 like there was some abnormality in the disc when he
19 injected the contrast.

20 Q What type of abnormality?

21 A I don't believe that it says.

22 Q What type of abnormality would result in a
23 description of a morphologically abnormal disc?

24 A Well, again, I'm not Dr. Rosler, I'm not sure
25 how he uses those terms.

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1 Q Do you have any reason to believe that the
2 procedure was done incorrectly?

3 A It doesn't state that it was done incorrectly.

4 Q Do you have any reason to believe that it was
5 done incorrectly?

6 A No.

7 Q Do you have any reason to believe that this
8 would constitute a false positive?

9 A Well, I guess -- I guess in reviewing Dr. Mark
10 Winkler's report, I believe he had some issues on whether
11 or not the discogram was administered appropriately.

12 Q I'm asking you.

13 A Yeah, and I've already stated my opinion on
14 that.

15 Q And what did you understand Dr. Winkler's
16 criticism to be?

17 A I believe that he felt that the injection was
18 given in the annulus and not in the nucleus, which is the
19 wrong anatomic region to give the injection.

20 Q And what was his basis for that belief?

21 A I believe it was upon him examining the CT scan
22 and the records that he had available to him regarding
23 the injection.

24 Q You have the same records and CT scan; is that
25 right?

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1 Q Was there a radiology report that was prepared
2 in conjunction with the discography?

3 A I believe they did a CT scan following the
4 discogram.

5 Q And what was the result of the CT scan? That
6 was the same day, right?

7 A Yes. I have here in my records that at C3-4
8 there was a grade 4 annular fissure and at C4-5 contrast
9 was noted in the ventral subarachnoid space probably
10 secondary to grade 5 fissure.

11 Q What's the difference between a grade 4 and a
12 grade 5 fissure?

13 A I believe grade 5 is a more extensive tear.

14 Q Would those tears constitute morphologically
15 abnormal discs?

16 A Again, it depends on how they use the
17 terminology, but I suspect that's what they were
18 discussing.

19 Q After your review of the records from
20 August 8th, 2008 as well as the CT scan, do you agree
21 with the description of the results?

22 A I'm not sure I can answer that question. I
23 mean, these are the results of a person administering a
24 test. I'm not sure I can agree or disagree with it. I
25 wasn't present at the time.

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1 A Yes.

2 Q Do you agree with Dr. Winkler's criticism?

3 A I certainly don't dispute it. I believe he's a
4 neuroradiologist. I typically do not order a CT scan
5 following a discography.

6 Q I'm asking for your independent review. What is
7 the result of your independent review of the records and
8 the CT scan?

9 A When I looked at the post discogram CT scan,
10 again, I don't do these injections, so I'm not here to
11 criticize the methodology. I do see where the injection
12 was given in the annulus; but again, I don't rely on the
13 CT scans in my practice when I do discography or when I
14 order discography.

15 Q So do you discount the results of the discogram
16 as it relates to Mr. Simco?

17 A I believe there's a lot of reasons to question
18 whether or not these discograms are reliable.

19 Q Are annular fissures, such as those noted in the
20 report of the CT scan, commonly associated with arthritic
21 changes?

22 A They're typically associated with arthritic
23 changes.

24 Q In fact, you note that in your report that in
25 Addendum 1, which is Exhibit 6, it says, The

Page 53

1 post-discogram CT demonstrates annular fissures, which
2 are commonly associated with arthritic changes. Do you
3 see that?

4 A I'm sorry, could you tell me what -- is it on
5 the last page.

6 Q Yeah, about the middle of the second paragraph.

7 A That's correct, I see it.

8 Q Where in this report do you state any
9 disagreement or discrepancy with the discogram?

10 A I'm not sure I understand the question.

11 Q You reviewed the films, you reviewed the reports
12 surrounding that discography procedure in August of 2008,
13 and where in any of your reports is there any criticism
14 of the procedure or the results?

15 A I don't see where I'm specifically criticizing
16 the discography. I am taking the entire picture into
17 account when I talk about the clarification of the pain
18 generator, and the fact that the discography really
19 contradicts the MRI which is relatively normal, and the
20 discography showed discogenic changes at multiple
21 cervical levels. And I did not believe that it clearly
22 identified the pain generator.

23 Q Are annular fissures such as those seen or
24 reported in August of 2008 ever the result of trauma, can
25 they be the result of trauma?

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1 Q Are they always symptomatic?

2 A No.

3 Q Can trauma cause a previously asymptomatic
4 degenerative cervical change to become symptomatic?

5 MR. ROGERS: Same objection as before.

6 Go ahead, Doctor.

7 THE WITNESS: Yeah, I don't -- I'm not sure.

8 What is clear is that patients who have pre-existing
9 degenerative changes can get into an accident and have
10 pain. I believe that many people who cannot identify a
11 pain generator will attribute that to the pre-existing
12 degenerative changes. I'm not so sure that those
13 previously asymptomatic changes can become definitively
14 symptomatic. Although, I do agree that patients can
15 experience pain following a traumatic incident.

16 Q Pain as a result of those degenerative changes
17 or something else?

18 A I don't think that science has conclusively been
19 able to relate that to the degenerative changes.

20 Q The surgery of March of 2009 in your Addendum
21 Number 1, you describe it as, "an option" but "not
22 necessary." Do you recall that?

23 A Can you tell me what -- is it on the next to the
24 last page or the last page?

25 Q It's on the last page.

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1 A It's certainly possible.

2 Q Even if they are pre-existing arthritic changes,
3 if they're previously asymptomatic can they become
4 symptomatic or aggravated by trauma?

5 MR. ROGERS: Objection, foundation.

6 Go ahead, Doctor.

7 THE WITNESS: Yeah, I guess I'd have to ask you
8 to define the question a little bit. Are you asking if
9 the fissures are they pre-existing, can they be further
10 torn by trauma, and that's what you mean by aggravating?
11 Or are you asking whether or not the patient is
12 experiencing pain from these fissures?

13 BY MR. WALL:

14 Q Fair enough. Let me break it down.

15 On the MRIs you testified that you saw
16 degenerative changes in Mr. Simao's spine; is that right?

17 A Yes.

18 Q Is it your belief that those predated the
19 accident of April of 2005?

20 A Yes.

21 Q Do you have any record or information suggesting
22 that they were -- strike that.

23 Can those -- are those age-related degenerative
24 changes uncommon in someone Mr. Simao's age?

25 A No, they're common.

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1 A I see it, that's correct.

2 Q What did you mean by, not necessary?

3 A Well, I did not believe that this patient at
4 that time that the pain generator was identified nor that
5 this was a reliable surgery that would give reliable
6 results with relief of his pain. And that I would not
7 have recommended the surgery. And that's why I did not
8 feel that it was necessary.

9 Q Do you believe surgery was indicated by all the
10 diagnostic procedures that had been used?

11 A In my opinion, I don't believe the surgery was
12 indicated because of what I just stated.

13 Q Do you believe that it was -- that Dr. McNulty
14 acted below the standard of care in performing the
15 surgery?

16 A No, I do not believe he was below the standard
17 of care.

18 Q But he performed a surgery that was not
19 necessary, is that your testimony?

20 A In my opinion, I would not have recommended the
21 surgery nor would I have performed the surgery nor do I
22 teach my residents and fellows at the UCLA Spine Center
23 to perform this type of surgery for this indication.

24 Q Do you recall that Dr. Grover described
25 Mr. Simao as a reasonable candidate for a fusion as of

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September of 2008?

A I'd be happy to confirm that with the records or I guess I could take your word for it.

Q On the 6th page of your October 1st, 2009 Addendum Number 1, at the top, it starts on the bottom of the 5th page, Grover found that Mr. Simao was a reasonable candidate for interbody fusion, reconstruction, decompression at C3-4 and C4-5?

A Yes, I see it.

Q Do you disagree with that conclusion?

A As I stated, I would not have recommended this surgery nor would I have performed this surgery.

Q Why was it an option?

A Well, some people operate on discography.

Q Do you believe that the decision to perform a surgery was solely based on discography?

A I think that was a very important factor in leading to the reasoning behind this surgery.

Q And you feel that the discography resulted in a false positive?

A No, I did not state that.

Q Do you believe that the result of the discography was erroneous?

A I believe that the result of this discography is the result. How you choose to use those results in

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A You can get adjacent segment breakdown.

Q Do you agree or disagree with that assessment number six on that 16th page?

A Well, I disagree with parts of it. Number one, this patient, if he should develop adjacent segment breakdown, you would typically see it on X-rays or an MRI scan. Number two, it's very early after his surgery, which was done probably just a year before, to develop adjacent segment breakdown. The current literature shows that it develops about three percent per year and it's additive. And that's actually pretty low for this type of patient. I wouldn't expect it to come on so soon. So whereas adjacent segment breakdown can occur, it's been well documented in literature, I'm not sure that in this whole clinical scenario that I can attribute this pain to adjacent segment breakdown.

Q But you would agree that his current pain is not a result of the surgery, is that right or wrong?

A I'm not sure what you mean by that question. Are you saying that is it his post-surgical pain result from the pain from the procedure?

Q Let me rephrase. On the last page of your final report you state that, if the patient is currently still experiencing pain, I would not think that this surgery, after successfully healing, would cause significant pain.

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treating your patient is a separate issue.

Q What do you understand the result of the surgery to have been?

A Well, it appears he had the surgery around March of 2009, and unfortunately when I review the records subsequent to that, I see that he still has pain.

Q So do you form a conclusion or opinion as to the result of the surgery, whether the surgery had any success?

A Well, there's many ways to measure success, but I think in this situation, the goal of the surgery was probably trying to alleviate his neck pain. And unfortunately it appears that he continues to have neck pain and continues 'til the last records that I reviewed to continue to experience neck pain.

Q You mention in Exhibit 7, which is Addendum Number 2, on the 15th page of 21, which is a note from March 23, 2010, from Nevada Orthopedic and Spine Center, that Dr. McNulty, in his assessment, noted that Mr. Simao's current pain may possibly be mediated pain below the fusion; do you see that?

A Yes.

Q Is it common with, say, a two-level fusion to encounter problems at the level either immediately above or immediately below the area of the fusion?

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What did you mean by that?

A Oh, I see it. What I mean by that is, is when this surgery is done for the proper indications, for the proper pain generator, this surgery is highly successful. The literature quotes a very high success rate. This is probably one of the most successful surgeries that we do as spine surgeons today. And that's documented throughout the medical literature. So what I was trying to say is that I would not think that this surgery, after successfully healing, would cause pain in and of itself. It probably relates more to the fact that the surgery probably wasn't necessary. Because he's still having pain. And you would think that this highly successful surgery, when done for the appropriate reasons, typically alleviates patient's pain.

Q To what do you attribute his current pain?

A It's a little unclear in this situation, because many of the injections have failed to give him complete relief or even complete long lasting relief. Some of the injections are a bit contradictory. And even Dr. McNulty felt in some of his notes, I believe either prior or immediately post-surgery, but I believe it was prior to the surgery, that some of the injections just were not consistent. And I believe prior to the surgery Dr. McNulty really tried to order more tests because I

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1 think he was maybe trying to really define the pain
2 generator because this is not a clear cut case.
3 Q So to what do you attribute his current pain?
4 A I'm not sure that the pain generator has been
5 isolated.
6 Q If the surgery was not necessary or
7 contraindicated, what steps would you have taken at that
8 point, March of 2009, if not surgery?
9 A Well, that's not the way I approach these types
10 of things. I would have recommended surgery had I
11 thought that we had isolated the pain generator, whether
12 I thought that this patient would have gotten better.
13 And so, at that time, I did not think he was a surgical
14 candidate and I would not have recommended the surgery.
15 Q What would you have recommended?
16 A Not to have the surgery.
17 Q Other than surgery, what would you have
18 recommended? If you criticize Dr. McNulty for
19 performing -- making the decision to perform the surgery,
20 what should he have done instead?
21 A Well, first of all, there's a couple things.
22 I'm not sure I'm criticizing Dr. McNulty. What I am
23 saying is that I would not have done the surgery, that's
24 not what I teach here at UCLA. Number two, not having
25 other options is still not an indication for surgery.

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1 whiplash injury to his cervical spine and exacerbated his
2 long history of headaches.
3 Well, let me back up. Make sure that -- let me
4 just go in order.
5 Your original report says on the second to last
6 page, He may have sustained a soft tissue whiplash injury
7 to his cervical spine and exacerbated his long history of
8 headaches.
9 Do you see that?
10 A Yes.
11 Q Yes?
12 A Yes, I see that.
13 Q On the last page of Exhibit 6, Addendum Number
14 1, you state, In summary, it is still my opinion that
15 Mr. Simao may have sustained a soft tissue whiplash-type
16 injury as a result of the motor vehicle accident.
17 Do you see that?
18 A Yes.
19 Q And on Exhibit 7, on the last page, In summary,
20 it is still my opinion that Mr. Simao may have sustained
21 a soft tissue whiplash-type injury as a result of the
22 motor vehicle accident in April 2005.
23 Do you see that?
24 A I do.
25 Q Do you believe, as reflected in all three

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1 And number three, my recommendation would have been not
2 to have surgery and continue with conservative care.
3 Q So just -- when you say conservative care, what
4 would you have recommended? What would you have taught
5 your residents to do?
6 A I would have told him to stop smoking; I would
7 have told him to get into a good rehab program; I would
8 have sent him to pain management to try and adjust his
9 meds and try and get him off any medications and get him
10 into an exercise program.
11 Q Do you believe that those things were done
12 before the surgery?
13 A I believe he had attempted at trying many of
14 these modalities.
15 Q And had they proved successful?
16 A By his reports, no. He's still reporting that
17 he's experiencing pain.
18 Q All three of your reports conclude that
19 Mr. Simao may have sustained a soft tissue whiplash-type
20 injury as a result of the motor vehicle accident in
21 April 2005; is that correct?
22 A I believe my reports refer to I felt like he may
23 have at most sustained a soft tissue injury.
24 Q Each of your reports has the sentence that I'll
25 quote as follows: He may have sustained a soft tissue

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1 reports, that Mr. Simao continued to experience pain in
2 his neck from the end of 2005 at least, forward to the
3 present; is that correct?
4 A Yes, based on the records.
5 Q I'm sorry?
6 A Based on the medical records, yes.
7 Q And your evaluation of him in 2009?
8 A Yes.
9 Q And that's beyond migraine headaches; is that
10 correct?
11 A Yes.
12 Q Now, in all three reports you relate the initial
13 treatment from the date of the motor vehicle accident
14 until May 26th, 2005 to the motor vehicle -- to the motor
15 vehicle accident; is that right?
16 A Yes.
17 Q And in all three reports you state that
18 treatment for symptoms of neck pain after May 26, 2005, I
19 apportion no more than 25 percent to the motor vehicle
20 accident. Is that what you wrote in all three of your
21 reports?
22 A I believe so.
23 Q How did you arrive at 25 percent when you
24 prepared those three reports?
25 A Well, at the time that I was preparing the

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1 reports, I had no evidence that this patient sustained
2 any structural injury based on the imaging studies. I
3 also took into account that the patient had a motor
4 vehicle accident and immediately complained of neck pain,
5 but after one or two visits he did no longer complain of
6 any neck pain, despite seeing his medical providers. So
7 it appeared that his neck pain was no longer an issue at
8 that time. It appeared that there was a pretty long gap
9 in care where there was no reports of neck pain until
10 maybe, I believe it was October of that same year.
11 That's just not typical for any type of major spinal
12 injury. The timing is not consistent with that. When
13 you have a true injury from the time of the accident it's
14 injured, it's damaged, you typically see structural
15 damage and it typically - the symptoms come on and they
16 progress from that time. The fact that his symptoms seem
17 to disappear quite soon after the motor vehicle accident,
18 about less than a month afterwards, and then they
19 suddenly reappeared, is just - I just can't attribute
20 any major structural injury. At the time I was preparing
21 my reports, I wanted to give him the benefit of the doubt
22 and say, okay, I can't identify any injury, the timing is
23 completely inconsistent with any injury occurring from
24 the motor vehicle accident to the pain beginning around
25 October of 2005, but I'm going to give this patient the

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1 benefit of the doubt. And if he says that he's
2 experiencing pain, that's something I cannot be a hundred
3 percent reliable about. I'm going to give him the
4 benefit of the doubt. And that was my thinking at the
5 time I was preparing those three reports.

6 Q Would your conclusion had been different if you
7 understood that Mr. Simao reported neck pain between May
8 and October of 2005?

9 A If he had reported pain during that period of
10 time, that would be more consistent with a true injury
11 from the motor vehicle accident.

12 Q And if he had suffered neck pain from May to
13 October of 2005, in addition to what's in the medical
14 records from 2005 forward, would that change your opinion
15 in this case?

16 A Would it - are you asking would it change my
17 opinions put forth on my first three reports?

18 Q Yes.

19 A I think it would.

20 Q And how so? Would it change the percentage that
21 you have attributed to - of his neck pain that you
22 attribute to the accident?

23 A At the time that I prepared my reports, then
24 yeah, I probably would have attributed more to that.

25 Q At the time you prepared your reports when you

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1 attributed 25 percent of his neck pain after May of 2005
2 to the accident, what would the other 75 percent be
3 attributed to?

4 A Well, as I stated before, I can't find any
5 evidence of any structural injury on this patient in all
6 the imaging studies. The only thing I attributed the
7 25 percent to was his - based on his reliability and his
8 reports of his subjective complaints.

9 Q The question is what would the other 75 percent
10 be?

11 A Well, I'm not sure that it has anything to do
12 with the accident.

13 Q But would it be a facet injury? Would it be
14 degenerative changes? What would you attribute the other
15 75 percent of his neck pain to?

16 A I'm not sure that his pain generator has been
17 identified. I certainly don't think there's any evidence
18 of any structural injury such as a facet injury.

19 Q Well, would the other 75 percent just be
20 degenerative age-related changes in the cervical spine?

21 A I'm not - I'm not really sure.

22 Q Are you aware of any evidence that - any
23 complaints of neck pain prior to the date of the
24 accident?

25 A I don't believe I've seen any medical records

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1 prior to the accident.

2 Q Are you aware of any medical records after the
3 accident referencing any neck or left shoulder pain prior
4 to the accident?

5 A The only thing I have is that he did tell me he
6 had a motorcycle accident about one year prior to the
7 motor vehicle accident and that he had a history of
8 headaches for ten years.

9 Q So, did you see in any post-accident medical
10 records any reference to neck or left shoulder pain prior
11 to the accident?

12 A No.

13 Q Your conclusion - well, your conclusion is that
14 he suffered a whiplash injury for which treatment was
15 appropriate after the accident for about five weeks; is
16 that about right?

17 A Yes.

18 Q And when he suffered the accident he reported
19 neck pain and left upper extremity pain; is that right?

20 A I believe the day of the accident he had a
21 neck - neck pain, headache and left elbow pain.

22 Q All right. Let's just go with the neck pain
23 because that's the whiplash injury, right?

24 A I'm sorry, can we go off the record for one
25 second?

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MR WALL Sure
(Brief discussion held off the record.)

BY MR WALL.

Q The whiplash injury, that's the soft tissue injury in the area of his neck; is that right?

A Yes.

Q And you believe -- well, let me ask you today, because we have your opinions on that 25 percent in terms of what you wrote in your reports. What is your opinion today as to the injuries suffered by Mr. Simao as a result of the April 15th, 2005 motor vehicle accident?

A Well, I think at most he probably had a soft tissue injury, as I stated before. I cannot identify any structural imaging problem that I see would be related to any trauma. I believe that he had neck pain for about -- about a month, according to the medical records, and then when he saw his medical care providers he stopped complaining of any neck pain whatsoever. And then the neck pain seemed to reappear in October of that year. It's hard for me to relate the onset of that neck pain, what, five or six months after the accident to be related to the accident. Since that time I've seen that he's had many injections that are actually quite confusing. I don't think the pain generator's been identified. And I've seen the surveillance video where he just seems like

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the information I have, I'm not sure I can -- I can related any of his current pain to the motor vehicle accident.

Q So when you stated as recently as July of 2010, that his treatment for his symptoms of neck pain after this, being after May 26, 2005, I apportion no more than 25 percent to the motor vehicle accident; you have changed that opinion and that is 0 percent today, is that right?

A Yeah, I'm sorry, are you referring to my last report?

Q Yeah, but your statement is the same in all three.

A Yeah, I believe my statement was I would -- this was from my last report, from July 4, 2010, I would at most apportion at this time of reappearance of the symptoms 25 percent of the reported subjective symptoms.

Q What page are you on?

A I'm sorry, I think it's the last page.

Q That sentence that says, His treatment for his symptoms of neck pain after this I apportion no more than 25 percent to the motor vehicle accident. That? Right?

A Yeah, I'm sorry, I was at a different point. Right. Apportion no more than 25 percent and this is based on subjective reporting symptoms only.

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he's pretty normal and doing pretty strenuous activities. I do think that the soft tissue injuries when you look at the literature are typically self-limiting and typically resolve with time. And after a reasonable amount of time, I would not expect the soft tissue injury to become a chronic problem that would go on for years, and we're now almost six years after this accident.

Q So in your three reports you attributed up to or no more than 25 percent of his post May 26th, 2005 symptoms of neck pain to the motor vehicle accident. Is that still your opinion today?

A No, as I think I stated earlier, I think the apportionment probably would be much less given all the facts that I now have.

Q How much less?

A It's hard for me to imagine that a soft tissue injury would go on for six years.

Q And do you believe that that's all he had currently is a soft tissue injury?

A I believe that's all that I can relate to the accident.

Q So is it 0 percent now from 25 percent or what is your opinion?

A Yeah, it's hard for me to relate any of his current pain six years following the accident, given all

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And what I mean by that is I gave him no more than 25 percent based on the fact that he is truthful and reliable in his reports of his symptomatology. And since the time of this report, I've been able to review the ongoing pain that has been progressive -- or maybe not progressive, but existing up until the present time, also the surveillance videos, and I guess I would have to question his reliability.

Q So my question was now it's 0 percent as opposed to 25 percent, is that your testimony?

A Yes.

Q So to your knowledge, he -- with respect to his neck, he is asymptomatic prior to the motor vehicle accident; is that right?

A I think we established I have not seen any records or any reference to any pain in his neck prior to the motor vehicle accident.

Q And on April 15, 2005, he's in a motor vehicle accident and reports neck pain; is that right?

A Yes.

Q And your opinion is that that neck pain was a soft tissue injury that resolved in five or six weeks; is that correct?

A Yes.

Q And then he was symptom-free until October 2005,

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1 is that your impression?

2 A Well, he was symptom-free in regards to his neck
3 until, I believe, October. In his medical visits,
4 although he's detailing many other complaints, I see no
5 complaints of neck pain.

6 Q And then as of October of 2005, that five plus
7 years, he is symptomatic in the same area where he was
8 symptomatic on the day of the accident?

9 THE COURT REPORTER: Could you repeat that
10 please, Counsel.

11 BY MR. WALL:

12 Q So then in October of 2005 he becomes
13 symptomatic in his cervical spine in the same area, with
14 the same complaint that he had on the day of the
15 accident?

16 MR. ROGERS: I'm going to object, that
17 mischaracterizes the medical records.

18 Go ahead, Doctor.

19 THE WITNESS: Yeah, I wouldn't say it's the same
20 complaints. I mean, he's got complaints that have gone
21 all over the place, you know, back in -- even after his
22 surgery he started complaining of pain that went to his
23 hand, and even Dr. McNully's notes on July 14, '09 said
24 that prior to the surgery it didn't go past his elbow and
25 now he's talking about problems at C-6. I mean, this

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1 2010 report, where he notes the neck and shoulder pain
2 may trigger headache?

3 A What's the date on that note?

4 Q December 7th, 2009.

5 A Well, as I stated before, there are many things
6 that can trigger headaches. I'm not disputing that
7 statement that this doctor is making.

8 Q Do you understand that Dr. Hernandez is a
9 neurologist?

10 A Yes.

11 Q In that same note under Assessments, what's neck
12 pain secondary to DDD?

13 A DDD is typically Degenerative Disc Disease, it's
14 an abbreviation.

15 I'm sorry, can we go off the record please for a
16 second?

17 MR. WALL: Sure, we'll go off.

18 (Brief discussion held off the record.)

19 MR. WALL: We can go back on the record.

20 Doctor, in light of the fact that you just
21 indicated to us off the record that you have a surgery to
22 perform, an emergency surgery to perform, I don't have
23 any other questions.

EXAMINATION

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1 guy's symptoms have been all over the place.

2 So I guess I -- I'm not sure that I can say it's
3 in the same place. But I think that what you said
4 earlier was pretty reasonable in my testimony, the guy
5 had an accident, reported neck pain the day of the
6 accident, a few weeks later he sees his providers and
7 there's no neck pain. And there's a gap of, what, four
8 to five months where there is no reports of neck pain and
9 then he starts getting neck pain. It's hard for me to
10 attribute it to an accident that occurred five or six
11 months prior, especially when this guy has been working
12 and seeing the type of work that he does.

13 Q Do you believe that -- do you agree with
14 Dr. Hernandez that neck and shoulder pain can trigger
15 headaches or migraine headaches?

16 A Well, I'm not an expert in migraines, but I know
17 that there are many things that can trigger headaches;
18 lights, when my son play video games there's a little
19 warning that comes on that says, You may get headaches
20 when you play this video game.

21 Q Did you understand my question, Doctor?

22 A Maybe I didn't. Could you repeat it.

23 Q Do you agree with the note from Dr. Hernandez --

24 A I'm sorry, could -- well, okay.

25 Q -- on the 10th and 11th page of your July 4th,

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1 BY MR. ROGERS:

2 Q Doctor, I have one question before you go. And
3 that is what is your current position at UCLA?

4 A Well, I'm the chief of the spine service, and
5 I'm the acting chairman of our department when the
6 chairman is out of town or wants me to cover for him.

7 Q Okay. So, no sanctions by UCLA with regard to
8 this Senate investigation that counsel opened the
9 deposition with, your position not only continues but has
10 been promoted?

11 A That's correct.

12 MR. ROGERS: Okay, I'll let you do your surgery.
13 We'll reconvene the deposition if we need to.

14 MR. WALL: Off the record, Madam Reporter.

15 Expedited transcript, can you do it by Friday?

16 THE COURT REPORTER: Absolutely.

17 MR. ROGERS: Make that two of them.

18 (Whereupon, Plaintiff's Exhibits 1 through 8
19 were marked for identification by the Certified Shorthand
20 Reporter, copies of which are attached hereto.)

21 (THE DEPOSITION ENDED AT 4:47 P.M. DECLARATION
22 UNDER PENALTY OF PERJURY ON THE FOLLOWING PAGE HEREOF.)

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JEFFREY C. WANG, M.D. - 2/15/2011

21 (Pages 78 to 79)

1	CERTIFICATE OF DEPONENT		
2	PAGE LINE	CHANGE	REASON
3			
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14	* * * * *		
15	I, JEFFREY C. WANG, M.D., deponent herein,		
16	do hereby certify and declare the within and foregoing		
17	transcription to be my deposition in said action;		
18	that I have read, corrected, and do hereby affix my		
19	signature, under penalty of perjury, to said		
20	deposition.		
21			
22			
23			
24			
25			
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1	CERTIFICATION		
2	OF		
3	CERTIFIED SHORTHAND REPORTER		
4			
5			
6	I, the undersigned, a Certified Shorthand		
7	Reporter of the State of California do hereby certify:		
8	That the foregoing proceedings were taken		
9	before me at the time and place herein set forth;		
10	that any witnesses in the foregoing proceedings, prior		
11	to testifying, were placed under oath; that a verbatim		
12	record of the proceedings was made by me using machine		
13	shorthand which was thereafter transcribed under my		
14	direction; further, that the foregoing is an accurate		
15	transcription thereof.		
16	I further certify that I am neither		
17	financially interested in the action nor a relative or		
18	employee of any attorney of any of the parties.		
19	IN WITNESS WHEREOF, I have this date		
20			
21	subscribed my name _____		
22	Dianne G. Stockbower, CSR No. 10676		
23	Dated: _____		
24			
25			
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EXHIBIT “7”

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7 **DISTRICT COURT OF NEVADA**

8 **COUNTY OF CLARK**

9	WILLIAM JAY SIMAO, individually and)	Case No.: A 539455
10	CHERYL ANN SIMAO, individually, and as)	
11	husband and wife,)	Department X
12)	
13	Plaintiffs,)	
14)	
15	vs.)	
16)	
17	JENNY RISH; JAMES RISH; LINDA RISH;)	
18	DOES I through V; and ROE CORPORATIONS)	
19	I through V, inclusive,)	
20)	
21	Defendants.)	

17 **DEFENDANT JENNY RISH'S FIRST SUPPLEMENT TO THE 16.1 EARLY CASE**
 18 **CONFERENCE PRODUCTION OF DOCUMENTS AND/OR WITNESSES**

19 COME NOW, Defendant Jenny Rish, by and through her counsel of record, Stephen H.
 20 Rogers, Esq., of Rogers, Mastrangelo, Carvalho & Mitchell, hereby submits this supplement to the
 21 16.1 Early Case Conference Production of Documents and Witnesses:

22 **LIST OF DOCUMENTS**

- 23 1. Two (2) dvd's containing surveillance footage of Plaintiff William Samao..
- 24 ///
- 25 ///
- 26 ///
- 27 ///
- 28 ///

002983

002983

EXHIBIT “1”

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO,)
individually, and CHERYL ANN)
SIMAO, individually, and as)
husband and wife,)

Plaintiffs,)

v.)

CASE NO. A539455

DEPT. NO. X

JENNY RISH; JAMES RISH; LINDA)
RISH; DOES I through V; and)
ROE CORPORATIONS I through V,)
inclusive,)

Defendants.)

2.67 CONFERENCE

LAS VEGAS, NEVADA

THURSDAY, MARCH 10, 2011

Reported By Kele R. Smith, NV CCR No. 672, CA CSR No.
13405

LST Job No. 1-135828

2.67 CONFERENCE,
taken at 400 South Fourth Street, Suite 600, Las
Vegas, Nevada, on Thursday, March 10, 2011, at 10:55
a.m., before Kele R. Smith, Certified Court Reporter,
in and for the State of Nevada.

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10:55 A.M.

-oOo-

MR. ADAMS: You said which supplement?

MR. ROGERS: It was -- I don't recall if you
had a computation attached to the latest one, but it
was like 23 or higher that amounted to 194.

Somewhere in that neighborhood.

This may be Ingrassia.

(Interruption in proceedings.)

(Discussion off the record.)

MR. ADAMS: Back on for the 2.67. We just
started discussing Plaintiff's Exhibit No. 1, which
is a medical special summary, and we just had a
discussion with counsel where I agreed to check the
amounts that I have listed in Exhibit 1 and compare
them with our last computation of damages. So I did
that. If I need to revise it, I'll get back -- I'll
let you know sometime today so you have that.

(Interruption in proceedings.)

(Discussion off the record.)

MR. ROGERS: I don't know if we need to go
through -- all I'm interested in the meds is it's the
same stuff that's been produced.

MR. ADAMS: I'm going to do them in groups.

I N D E X

EXHIBITS

NUMBER	MARKED
1 Plaintiff's Exhibit List	4
2 Defendants' Pre-Trial Disclosures	24

Like 2 through 17 is the billing. We separate out
our billing, typically, from the records themselves.
And, again, the billing's been redacted for the
treatment not related to this. Like for his symptoms
at Southwest or other conditions that he was treated
for not related to this accident.

MR. ROGERS: You know, that's another
curious wrinkle, though, in the amount in your
summary is that I expected it to be less than 194
after removing all the colonoscopy things. There was
probably 15 grand in that.

MR. ADAMS: I'll look. I know there was an
upper GI and there was a colonoscopy as well. I'll
look and make sure that I have the medical bills
redacted. So you -- once you have somebody look at
it, they can point something out. I'm going to have
my people look at it as soon as we're done here and
just confirm that that bill is for something on that
day related to this accident.

MR. ROGERS: Because, in the end, I don't
think the defense experts are disputing the charges.

MR. ADAMS: Right.

MR. ROGERS: It's just the reasonableness --
pardon me -- the necessity of treatment.

MR. ADAMS: The necessity. Right.

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1 MR. ROGERS: But they would naturally
2 dispute the other stuff.
3 MR. ADAMS: Right. Exactly. That's why I
4 want to make sure we're on the same page.
5 MR. ROGERS: With that we might be able to
6 stipulate it.
7 MR. ADAMS: Okay. Perfect and I'll go back
8 over that again and be sure.
9 But as far as foundation, authenticity, 2
10 through 17 you don't have a problem with?
11 MR. ROGERS: No, as long as we're on the
12 same page.
13 MR. ADAMS: I actually took the liberty of
14 using some of the COR affidavits from the records you
15 provided and using your records because we didn't
16 have a couple of them. I ended up using some of your
17 records.
18 MR. ROGERS: Have somebody bring in your
19 latest -- you guys were pretty good about doing
20 computations on -- have someone work on 23, 24, and
21 you'll have it right there.
22 MR. ADAMS: Okay. All right.
23 So, now, 18 through 32 are the medical
24 records. Again, you don't object to the authenticity
25 or foundation of those. Right?

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1 MR. ROGERS: Just the necessity, cause and
2 necessity and all that.
3 MR. ADAMS: Right. Okay. I don't see a
4 disk. Brice, will you step out and see if they have
5 the CD for 33 through -- for the record, 33 through
6 57 are diagnostic films, X rays, MRIs, etcetera.
7 MR. CRAFTON: What about 58?
8 MR. ADAMS: Well, 58 is his own exhibit.
9 MR. CRAFTON: Already have --
10 MR. ADAMS: So 33 through 57 I typically
11 provide to defense counsel on the disk because we
12 have them already digitized, and see if they have
13 that. Thanks.
14 MR. ROGERS: There's -- we keep coming back
15 to where we started.
16 MR. ADAMS: All right. What do we have?
17 MR. ROGERS: The surgery center and all
18 those things.
19 MR. ADAMS: What number?
20 MR. ROGERS: 23. This would go to Desert --
21 or pardon me -- Nevada Orthopedic too, No. 22. Are
22 there going to be any records after this latest
23 production, which I think was an MRI?
24 MR. ADAMS: No. We produced some follow-up
25 records they just had recently with Dr. Lee, but

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1 we're not producing anything from now until the time
2 of trial.
3 MR. ROGERS: Okay. So we should be the
4 same --
5 MR. ADAMS: Yeah.
6 MR. ROGERS: I haven't gone page by page
7 through Exhibits 22 and --
8 MR. WALL: 23 is primarily 2006.
9 MR. ROGERS: Okay. It would be 22. That's
10 where Dr. Lee is?
11 MR. ADAMS: Yeah. He's with the same group
12 where -- actually, no. 26 probably. Spine Clinic.
13 Isn't it? He's with McNulty. I don't know. I
14 always get those groups mixed up.
15 MR. ROGERS: Regardless, it's one of those,
16 but I'll look these over closer, and you know, as
17 long as it's the stuff that's been produced, we're
18 not going to argue about it, other than cause and
19 necessity.
20 MR. ADAMS: Right.
21 MR. WALL: Right.
22 MR. ADAMS: So I've got my paralegal burning
23 a CD for you of the films from 33 through --
24 MR. WALL: 57.
25 MR. ADAMS: -- through 57.

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1 MR. CRAFTON: He's going to put 58 on there.
2 MR. ADAMS: He's going to put 58 on the same
3 disk, but 58 should actually be in a book as its own
4 exhibit, so I want to make sure we get that right.
5 They didn't. We've got to fix that. 58 is a CD
6 that --
7 MR. ROGERS: I saw this one.
8 MR. ADAMS: In other words, it wouldn't come
9 on a film. They didn't provide it to us on a film.
10 They provide it to us on a CD. So tell him 58 needs
11 to be its own exhibit.
12 MR. ROGERS: So you guys know, I just, when
13 I received it, sent it on out to the defense experts.
14 I haven't heard back from them yet.
15 MR. ADAMS: So in other words, available for
16 you at trial we are actually going to mark all the
17 way through -- 33 through 57 will have the film
18 jackets there, and they'll be marked, and you can
19 have them with you if you want to show it that way.
20 But 58 is actually just going to be on a disk because
21 there is no film for it, because that is the way it
22 was produced. So any objection to the films?
23 MR. ROGERS: None. As long as it's all been
24 produced, none.
25 MR. ADAMS: 59, life expectancy table. I

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1 think we had a motion on that. Right?

2 MR. WALL: I can't remember if we did it as

3 part of the stipulation or whether there was -- I

4 don't think there was a specific motion on it, but if

5 there wasn't, it was because we agreed in the stip.

6 MR. ROGERS: I don't know. We had our

7 disagreements about the experts, who might use them.

8 MR. WALL: But not the table itself.

9 MR. ROGERS: Right. So I don't recall how

10 we -- or even if we addressed that.

11 (Interruption in proceedings.)

12 (Discussion off the record.)

13 MR. ROGERS: Where did we leave off?

14 MR. ADAMS: On No. 59, I'm looking at the

15 stipulation, and I don't see the life expectancy

16 table in the stipulation. We're checking our orders

17 right now and we'll see if we filed a motion on it.

18 MR. ROGERS: Whose table is it? Do you

19 know?

20 MR. ADAMS: It would be the table that Smith

21 relied on. It says Smith Reports. We were given

22 judicial notice on it so...

23 MR. ROGERS: Let's hold off on this one for

24 a minute just so that I can get a look at it because

25 I haven't sat down and studied this.

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1 MR. ADAMS: Okay.

2 MR. CRAFTON: It's not on here. Ashley's

3 pulling the minutes right now.

4 MR. ADAMS: All right. Then No. 60 and 61

5 are your clients' responses to interrogatories and

6 requests to admit.

7 MR. ROGERS: Okay.

8 MR. ADAMS: Any objection to those?

9 MR. ROGERS: Well, you don't admit those

10 back to the jury?

11 MR. ADAMS: No, but we're going to be using

12 them, so I list them here. I don't want to admit

13 them.

14 MR. ROGERS: Right. We'd have to redact

15 them like crazy.

16 MR. ADAMS: Well, they are redacted.

17 MR. ROGERS: Okay. I'm doing the same

18 thing, but I don't have any intention of giving them

19 to the jury.

20 MR. ADAMS: All right. The only reason we

21 put them in here is because we don't really know your

22 position on liability, so that's one of the primary

23 reasons.

24 MR. ROGERS: No. No. You guys do. We've

25 admitted it. I just -- I thought we handled that.

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1 MR. WALL: It was handled in Gallion, I

2 believe, but it wasn't ever really handled in this

3 one. I think there's correspondence from Dan in

4 Gallion, maybe even a stip that's been sent over, but

5 not in Simao.

6 MR. ROGERS: Yeah. I know that I saw

7 something recently from Ashley about Gallion, but I

8 thought we handled this on Rish a long time ago,

9 maybe in front of the judge.

10 MR. WALL: Not that I'm aware of.

11 MR. ADAMS: Not that I'm aware of either.

12 MR. ROGERS: So she's not disputing

13 liability.

14 MR. ADAMS: You're not going to dispute

15 liability?

16 MR. ROGERS: No.

17 MR. ADAMS: So can we send a stip over or

18 you send a stip over?

19 MR. WALL: Why don't we just have her

20 prepare one right now?

21 MR. ADAMS: Will you go do that?

22 MR. ROGERS: There was something in the

23 language of the Gallion stip that I didn't see it,

24 but I was told that it was too expansive when all

25 we're doing is admitting breach of duty for a

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1 negligence action, so again, if you would, tell her

2 to keep the language confined to that.

3 MR. ADAMS: Did we come to agreement on the

4 Gallion one? Did you actually sign one?

5 MR. ROGERS: I haven't been involved enough

6 in that.

7 MR. ADAMS: All right. See if we have an

8 agreement on that one and let's look at that one as a

9 sample.

10 62 and 63 is the complaint and answer.

11 Again, we're not planning on admitting them at trial,

12 but at trial they may come up, so...

13 MR. ROGERS: All right.

14 MR. WALL: So we want to hold off on 60 and

15 61?

16 MR. ADAMS: Yeah. Well -- yeah.

17 MR. ROGERS: Yeah. If you guys -- at her

18 depo, I recall that she said, I rear-ended him and I

19 don't have any reason to think he did any wrong, and

20 ever since then -- that was a long time ago -- I've

21 never really pushed liability on this thing.

22 MR. ADAMS: Right. It pretty much says that

23 in her interrogatories as well. That's why I listed

24 the interrogatories.

25 Okay. So we've got an issue with the life

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1 expectancy table we're going to follow up on. Right?
 2 MR. ROGERS: I'll call you. Now that I
 3 don't have the settlement conference this afternoon,
 4 I can get right on this.

5 MR. ADAMS: All right. Then we just list
 6 all of our demonstratives. I got some over there if
 7 you want to see the spine and that type of stuff.

8 MR. ROGERS: I saw that, but, you know, I
 9 just, a couple months ago, tried a case in front of
 10 Bell, and she had one curious thing, she admitted the
 11 written discovery responses into evidence, and I'm
 12 sitting in there thinking, "Hold up. I don't have
 13 authority to prove to you that that shouldn't go to
 14 the jury, but I'm pretty sure it shouldn't go,"
 15 because it was just on the fly kind of thing she
 16 allowed it in.

17 But another thing that came up was the
 18 opposing party -- and they were right to object to
 19 this -- opposed stuff that I was showing on
 20 PowerPoint that I hadn't yet cleared with them or
 21 gotten admitted into evidence, and if we're -- if
 22 we're going to, you know, show some stuff in the
 23 PowerPoint in the opening, I just want to make sure
 24 that we're doing this clean. I'm not going to do
 25 anything that's going to show anything that's

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1 unpublished or that you guys don't agree with.

2 My thought is to do what I always do, and
 3 that's just to show medical records, show party depo
 4 comment, and that's about it here. I won't be able
 5 to show photos in the opening or property damage.

6 MR. ADAMS: We're going to do the same thing
 7 except for we're going to have some medical and
 8 animations, like cartoons, like we normally do.

9 MR. ROGERS: I may pull up one of those too.

10 MR. ADAMS: You know, that describe what
 11 procedure it was and that kind of stuff.

12 MR. ROGERS: Nice.

13 MR. ADAMS: Got a list? Looks like you got
 14 a list.

15 MR. ROGERS: I do, but it's in a borrowed
 16 binder. Okay. Off for a second.

17 (Discussion off the record.)

18 MR. ADAMS: One thing. If you look at all
 19 our demonstrative exhibits, we're going to show
 20 through Google Earth the general area where the
 21 accident was, so I don't want you to be thrown off by
 22 that. And we're going to make a timeline. I'm sure
 23 you will too in your PowerPoint.

24 MR. ROGERS: Now, while we're waiting on my
 25 exhibits, then, let's go through these witnesses. Do

Page 16

1 you have a witness list here, or is this just the
 2 documents?

3 MR. ADAMS: That's just the documents.

4 MR. ROGERS: See, what I want to do is when
 5 we're done here, I want to be able to tell the
 6 witnesses -- my out-of-state witnesses, when they can
 7 come.

8 MR. ADAMS: You're not going to be able to
 9 do that.

10 MR. WALL: Except for Wang the 21st.

11 MR. ROGERS: Right. But the other guys, I'd
 12 at least like to say, Look, you know, set aside --
 13 pencil this block of a day or two to get here.

14 MR. ADAMS: Yeah. Our problem is we're
 15 dealing with two orthopedic surgeons and two pain
 16 management guys who we're trying to juggle their
 17 schedules right now. You're not going to have that
 18 detail by today. I can tell you that.

19 MR. ROGERS: Okay.

20 MR. ADAMS: McNulty and Grover right now
 21 we're just trying to figure out because some are
 22 clinic days versus a procedure day. They do not want
 23 to come on a procedure day. That's what we're having
 24 to deal with right now.

25 MR. ROGERS: Do you know whether you're

Page 17

1 going to be able to put them on consecutively, or are
 2 we going to bounce them out of order just like we've
 3 done Dr. Wang, or you're not that far yet?

4 MR. ADAMS: Not even that far.

5 MR. ROGERS: Okay. Because I could tell
 6 them, "Look, it won't be until the end of the second
 7 week."

8 Do you guys think your case is going to go
 9 further than that? Like a full two weeks?

10 MR. WALL: You know, three and a half hours
 11 a day, it's going to take a long time.

12 MR. ROGERS: Is there any way -- you know
 13 how Sturman offered to move this to Villani if he had
 14 full days? Is there a judge we can go full days with
 15 and not do half days?

16 MR. WALL: I don't think you can.

17 MR. ROGERS: This is going to be painfully
 18 long.

19 MR. ADAMS: This is going to be long, but
 20 we're getting affected by all of our other trials
 21 too. Most of our other trials. Let's put it that
 22 way.

23 MR. ROGERS: I'm not suggesting move the
 24 trial date. I'm just wondering is there anybody out
 25 there who can us give a full day?

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1 MR. WALL: I don't think any of them do
2 anymore. They either have calendars or courtroom
3 sharing. If they don't have a morning calendar, then
4 one of the seven new judges is using that courtroom
5 for their morning calendar.

6 MR. ROGERS: Tell my people it won't be any
7 sooner than the end of the second week.

8 MR. ADAMS: I wouldn't think so. Other than
9 Wang, you said -- is it Wang or Wang (pronouncing)?

10 MR. ROGERS: It's a short vowel.

11 MR. ADAMS: I was told he had to be on the
12 21st. We're playing around that too.

13 MR. ROGERS: Right. See, I have three
14 others -- two others who are out of town. Fish and
15 Skoog. Skoog, you know, is a bit up in the air.

16 Your treaters are certainly getting on. Smith, you
17 know, that's a little bit -- jury's out on that one
18 or the judge, I guess, is a little bit. I imagine
19 Skoog will need to come in at some point.

20 MR. ADAMS: Winkler you have local. Right?

21 MR. ROGERS: He's the only local expert.

22 MR. ADAMS: We're counting on basically nine
23 witnesses right now. That's right now. We've got
24 McNulty, Seibel, Hartman, our plaintiff and the wife.

25 MR. WALL: We may not need the defendant.

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1 MR. ADAMS: True. We have Rish. We
2 actually have her subpoenaed, I think. Then we've
3 got Rosler and Grover and Smith.

4 MR. ROGERS: She's coming, so you guys don't
5 worry about that.

6 MR. ADAMS: Depends on how trial develops.
7 Lee.

8 MR. ROGERS: Lee?

9 MR. ADAMS: Yeah.

10 MR. ROGERS: So you know exactly who I got,
11 I was going to call Seibel, but now that you guys
12 will, I won't. But it's going to be Wang first.

13 MR. WALL: Yeah.

14 MR. ROGERS: And then I'm going to have to
15 do this schedule dance you're doing, so --

16 MR. WALL: Understood.

17 MR. ROGERS: -- but I'll let you guys know
18 ahead of time. Fish, Winkler. I'm going to want to
19 call in Arita. We'll do this Britt Hill depo at some
20 point. Evidently he's moved out of the country.

21 MR. ADAMS: Oh, really?

22 MR. WALL: Do you want to designate -- let
23 us know what part of that you want, and then we'll
24 cross it and figure it out and take it from there.

25 MR. ROGERS: Sure.

Page 20

1 Who else was I getting ready to say? Sood,
2 I'll probably -- I've got to figure out his schedule
3 too. I think that's everybody we intend to call.
4 Jenny and Linda Rish. Jenny will be there, so she'll
5 be available. Linda was just there at the accident,
6 so she'll --

7 MR. WALL: What would be -- if we're going
8 to stipulate to liability, what would be --

9 MR. ROGERS: That may change that.
10 Circumstances have changed a little bit because she
11 was a party.

12 MR. WALL: Right.

13 MR. ROGERS: And that was the main thing.
14 It wasn't liability.

15 MR. WALL: Right.

16 MR. ROGERS: Let me go back and talk to --
17 I've never met Linda. I don't know the first thing
18 about her, but I will talk to --

19 MR. WALL: Bryan Lewis sent over a
20 stipulation to dismiss them out, and so I don't know
21 what would be the necessity of her testimony if we're
22 not going to get into that whole thing that it's her
23 car and all the 41,440 stuff.

24 MR. ROGERS: Okay. And you guys didn't
25 dismiss her?

Page 21

1 MR. WALL: The stipulation he sent over is
2 sitting on my desk. I've got to review it.

3 MR. ROGERS: Okay. Well, good. That's
4 everybody then. I know we both have --

5 MR. ADAMS: So we have 18 total -- 18
6 probable, I guess. I was wrong? She's duplicated.
7 17 probable.

8 All right, Brice. What did we figure out?

9 MR. CRAFTON: She's making changes to the
10 Gallion stip. I guess we sent over the Gallion stip
11 back over to you and asked you what the changes
12 were -- or Dan, not you -- and we're still waiting on
13 those. I'm having them modify it and change it over,
14 and then we'll bring it in.

15 MR. ADAMS: Did you find anything on the
16 life expectancy table?

17 MR. CRAFTON: It wasn't filed.

18 MR. WALL: It wasn't?

19 MR. ADAMS: Okay.

20 MR. ROGERS: It's not going to be that big
21 of a deal. I'll take a look at it and get back to
22 you guys.

23 MR. ADAMS: Okay.

24 MR. ROGERS: She brought me the right
25 binder. But not a duplicate, so let me find out if

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1 it's all here. Everything is the same, it looks
 2 like, but --
 3 MR. ADAMS: Everything in your exhibits are
 4 the same?
 5 MR. ROGERS: Yeah. And there's a little bit
 6 more but it's covered -- like there's an Exhibit O,
 7 but there's -- I don't see any exhibits attached, and
 8 Exhibit O is your medical records, so it's
 9 probably -- I'll look through those records.
 10 MR. ADAMS: Will you go across and look at
 11 them and copy --
 12 MR. ROGERS: Things are shuffled around a
 13 bit because of the order excluding photos and stuff
 14 like that.
 15 MR. ADAMS: Have you had an opportunity to
 16 look at the questionnaires yet?
 17 MR. ROGERS: No, but I did hear that someone
 18 from your office sent an Email saying that someone
 19 was dismissed already, and then Kade Baird -- he's a
 20 new guy just transferred over from Hall Jaffe &
 21 Clayton -- he said that one of those jurors -- how
 22 Hall Jaffe & Clayton found out, I don't know, because
 23 I don't talk to those guys really socially or
 24 anything, but one of those jurors is related to Hall
 25 Jaffe & Clayton, and they called Kade and said this

Page 23

1 person called us and, you know, you're over there.
 2 That may be a conflict. So there may be another
 3 dismissal coming.
 4 Aside from that, though, I haven't looked at
 5 them to do like Gloria was suggesting, people we can
 6 agree to exclude.
 7 MR. ADAMS: Right. Typically they like to
 8 have like somebody we can agree to exclude.
 9 Typically for hardship. They like to have that the
 10 day before they have to call those people in. These
 11 are kind of our notes. This is not everybody, but if
 12 we send you over a list later today, can you send us
 13 one and we can talk maybe tomorrow and agree upon a
 14 list and send it to the court? Because they call
 15 them in, and there's no need to call them in on
 16 Monday.
 17 MR. ROGERS: What are the reasons, in the
 18 day that you were doing it? At this early stage what
 19 kind of reasons would you find?
 20 MR. WALL: Travel, child care issues,
 21 transportation issues, taking care of -- you know,
 22 pretty much what Gloria said. Taking care of sick
 23 relatives, things like that. Basically for the
 24 questionnaires, anybody that the two sides agreed to
 25 we exclude. I didn't even get involved in it.

Page 24

1 Pretty much the same things that you would do once
 2 you're in there. If somebody came in and said, I
 3 have to pick up my kids at 3:30 and there's no one
 4 else to do it and I'm a single parent and there's
 5 nobody to watch them, I basically let them go. I let
 6 them go.
 7 MR. ROGERS: I wonder if we should get extra
 8 alternates too. I mean, if we're going to go into
 9 three weeks.
 10 MR. WALL: Yeah. I have no problem getting
 11 8 and 4.
 12 MR. ADAMS: Probably. 8 and 4.
 13 (Exhibit 2 was marked.)
 14 MR. ADAMS: Your list, Page 4.
 15 MR. ROGERS: All right.
 16 MR. ADAMS: A looks like a CV of Fish; B, CV
 17 of Wang; C, CV of Winkler; and D, CV of Skoog.
 18 You're not planning on admitting those. Right?
 19 MR. ROGERS: Probably not. Just go through
 20 it with them. I doubt I'll even show it, but I don't
 21 want to fore swear it. I never have. Let me put it
 22 that way.
 23 MR. ADAMS: Right, right. Okay.
 24 Surveillance footage of Simao. You're talking about
 25 the sub rosa?

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1 MR. ROGERS: Yeah. Right. And I'll be
 2 mindful of that discussion we had with the judge
 3 where -- what did she want again?
 4 MR. WALL: Well, she wanted you to send it
 5 to her.
 6 MR. ROGERS: I did, but I haven't heard from
 7 her.
 8 MR. WALL: But she -- her order was that
 9 it's not to be mentioned, at least until the end of
 10 Direct of the plaintiff, at which time she would
 11 entertain arguing on whether and how it impeached his
 12 testimony.
 13 MR. ROGERS: Okay.
 14 MR. ADAMS: So I guess we'd object.
 15 MR. ROGERS: Hold up just one second. I
 16 thought she was going to look at it and give me an
 17 answer as to whether we needed to go that far.
 18 MR. ADAMS: Well, that -- that's -- no.
 19 Because she said it wasn't to be mentioned. Because
 20 I mentioned opening statement and things like that,
 21 and she said it wasn't -- it's not to be mentioned
 22 until after Direct, and then it's because it's for
 23 impeachment purposes only, and so she would take up
 24 the issue of whether it impeaches his testimony in
 25 any way after his Direct, but she did want to see it.

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1 MR. ROGERS: Okay. Here's what I'll do. I
2 won't show it without talking to her. I -- see, the
3 way I thought it turned out was that I'd said, Look,
4 you have everything in front of you to determine its
5 relevance. It's these surrounding medical records.
6 Is there an inconsistency between what the doctors
7 are reporting about his condition or his complaints
8 and what's depicted in the video, so I'll give you
9 the video. You make that decision.

10 And then I haven't heard from her, and --
11 but I'm not going to spring anything on you. I'll
12 wait until I hear from her.

13 MR. WALL: Okay.

14 MR. ADAMS: All right. Then Exhibit F, you
15 have four subparts. Are they listed in your book
16 there? Are they indicated there? Are you planning
17 on admitting those?

18 MR. ROGERS: I don't know if I'll admit
19 them. I'll use them for impeachment, but whether
20 they go back, I'm not sure. I never have.

21 MR. ADAMS: All right. Because I'd object
22 to the admission of them also. I understand you're
23 going to use them for trial, but probably for the
24 same purpose I had listed the interrogatories and
25 requests for admit on ours.

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1 MR. ROGERS: Okay.

2 MR. ADAMS: G.

3 MR. ROGERS: You know, Daniel Lee doesn't
4 belong. I haven't deposed him. I don't have
5 testimony history.

6 MR. WALL: Right. So F-4, I'm not sure that
7 there is such a document.

8 MR. ROGERS: Right. Unless I've just --
9 I'll elicit it from him on the stand.

10 MR. ADAMS: G. All documents attached and
11 referred to as exhibits... I guess if they're medical
12 records and they're redacted properly, we don't
13 object to that, but if they are reports of the
14 experts, then they're hearsay and we object to that.

15 MR. ROGERS: I'm looking at G, and I don't
16 see anything attached here. Yeah. That would be
17 more in the nature of how we would use, for example,
18 the testimony history.

19 MR. ADAMS: Okay.

20 MR. ROGERS: I don't see anything like --
21 that would fit that description going back to the
22 jury.

23 MR. ADAMS: Okay. H is all documents
24 produced by plaintiffs, including all pleadings and
25 those attached to the deposition transcript. So same

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1 principle with that?

2 MR. ROGERS: Right.

3 MR. ADAMS: And then exhibits defendants may
4 offer if the need arises is I. Do you have an I in
5 your book?

6 MR. ROGERS: Yep.

7 MR. ADAMS: Okay.

8 MR. ROGERS: Oh, the reports.

9 MR. ADAMS: Yeah. So I guess I would object
10 to I, J, K, L because they're hearsay. Expert
11 reports are hearsay.

12 M, rejection slip from the Internal Revenue
13 Service and attached authorization.

14 N, Plaintiff's William Simao's tax returns
15 and O -- well, let's just go M and N. I guess we'd
16 object as it's not relevant. We're not making a wage
17 loss claim.

18 MR. ROGERS: Okay.

19 MR. ADAMS: All right. Do you have an M and
20 N in your book, any documents in there?

21 MR. ROGERS: Yeah. But as we discussed
22 earlier, that may not -- they may not be relevant if
23 you guys are dropping that claim. I'll get back to
24 you on that one as well. Just like the life-care
25 plan, we may just withdraw.

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1 MR. ADAMS: The life expectancy table?

2 MR. ROGERS: That's what I meant.

3 MR. ADAMS: Okay. And then O looks like all
4 the medical records.

5 MR. ROGERS: Yeah.

6 MR. ADAMS: You don't have anything under O.
7 Right? That's pretty much what we provided you.

8 P, Plaintiff's written discovery responses.
9 I guess similar principle as why we listed ours.
10 You're not going to --

11 MR. ROGERS: Admit them.

12 MR. ADAMS: -- admit it, but may use it.

13 Q, we objected because it was excluded.

14 R, also object to as excluded, as well as S
15 we object to as excluded.

16 MR. ROGERS: Right. Okay. So the homework
17 then is I'll go through M and N and the life table.

18 MR. ADAMS: I'm going to go through the
19 medical summary, special summary which is our Exhibit
20 No. 1, and make sure that we got the correct amounts
21 in there.

22 MR. ROGERS: Yeah, and then give me a call
23 about the witnesses so I can tell mine when to go.

24 MR. ADAMS: How is our stip coming?

25 MR. WALL: Right there.

1 MR. ADAMS: Cool.
 2 MR. ROGERS: Here's my proposal.
 3 MR. CRAFTON: Did you need to see your
 4 answer to verify that that was correct?
 5 MR. ROGERS: Here's what I propose to do
 6 with it: Just for the fear of agreeing to something
 7 that's more expansive than just liability, which is
 8 (inaudible) and the plaintiff is not in Paragraphs 1
 9 and 2, nor 3.
 10 MR. WALL: What about 4?
 11 MR. ROGERS: It just concerns me in that
 12 when you're disputing necessity, that affirmative
 13 defense could go beyond --
 14 MR. WALL: There's another one on Page 3.
 15 Acts and omissions of a third party.
 16 MR. ROGERS: I didn't see that. I don't --
 17 we're not claiming that a third party caused the
 18 accident. Let me see that. Let me see Page 3. No,
 19 I wouldn't agree to the third one, because that goes
 20 beyond the car accident itself.
 21 For example, when you're making a necessity
 22 defense and you're arguing that some treatment was
 23 unnecessary, well, the plaintiff can say, Well, look.
 24 You're just arguing malpractice, and I don't want to
 25 waive any claims that might be related to the

1 necessity of care, whether they be the plaintiff's or
 2 mine by contribution. So the easiest way to do this
 3 is just to say, Look, Jenny Rish caused the accident.
 4 The plaintiff didn't. It's that simple a
 5 stipulation.
 6 MR. WALL: Let me see that.
 7 MR. ROGERS: If you look at those two
 8 paragraphs, it seems to cover everything that -- the
 9 plaintiff, in other words, gets what he wants.
 10 MR. WALL: That third affirmative defense,
 11 who would be the third party?
 12 MR. ROGERS: Well, what I'm discussing --
 13 MR. ADAMS: A medical provider.
 14 MR. ROGERS: Yeah. What's going to happen
 15 here is we're disputing the necessity of care. You
 16 guys will say, That's fine. That's malpractice.
 17 We'll say, No, it's not, and if it is, it's
 18 of a variety that's not compensable.
 19 We'll have that argument. You can see how
 20 that third affirmative defense can spill into third
 21 parties. Has nothing to do with the car accident
 22 anymore, and I wouldn't want -- if there were a right
 23 for contribution or indemnity down the road, to
 24 interfere with that. Might have nothing to do with
 25 this action, but it could have something to do with

1 it down the road.
 2 MR. ADAMS: I'm having Brice pull another
 3 stip that we've used.
 4 MR. WALL: So even the paragraphs that you
 5 left in here, would that negate the necessity for
 6 Jenny or Linda Rish's testimony?
 7 MR. ROGERS: Well, no. I want Jenny to
 8 testify. I mean, she's a party to this case.
 9 MR. WALL: To what though?
 10 MR. ROGERS: She's going to be able to
 11 describe the accident. This is what happened, and I
 12 mean, how else -- the jury's got to know something
 13 about this. I know the judge took the photos away,
 14 but the jury is still going to hear about the
 15 accident.
 16 MR. WALL: She won't be able to testify to
 17 it being a minor impact or anything like that.
 18 MR. ROGERS: She might not be able to use
 19 that term, but she's going to be able to say "this is
 20 the accident. This is what happened."
 21 Did you guys take what the judge said to
 22 mean that the jury can't hear a thing about this
 23 accident?
 24 MR. WALL: Well, there can't be a defense
 25 presented saying that this was a minor impact. She

1 granted that motion, I believe, in its entirety.
 2 MR. ROGERS: But the motion was that the
 3 defense is precluded from arguing that a minor impact
 4 can't cause injury. It's not that the jury can't
 5 hear the nature of this accident. I mean, the way I
 6 look at that, if she said that or if there were an
 7 order interpreting things that way, there'd be no way
 8 around trying this thing twice. How can the jury not
 9 know anything about the accident?
 10 MR. WALL: Because there's no correlation
 11 between the type of impact and damages. I mean, if
 12 you don't have an expert to correlate this impact was
 13 too minor to cause this injury, then the testimony of
 14 the defendant or a passenger in her vehicle about
 15 what the impact -- how minor the impact was has no
 16 relevance to any fact in issue because it's --
 17 MR. ROGERS: I hope she didn't say that. I
 18 didn't take it to be that. I took it that the
 19 defense can't argue that a minor impact cannot cause
 20 injury, but not that the evidence of the accident
 21 being minor is excluded. That goes way too far. I
 22 mean, how on earth is a jury supposed to --
 23 MR. WALL: Well, they're not supposed to
 24 weigh whether this impact was significant enough to
 25 cause this injury, is what I understood.

MR. ADAMS: We can go off.

MR. WALL: Let's go off.

(Discussion off the record.)

MR. WALL: It's clearer because it takes the same type of affirmative defenses and makes them into the subject motor vehicle accident. Look at the language on their one --

MR. ROGERS: Yeah. As long as those affirmative defense waivers are related and limited to the accident, that's okay.

MR. WALL: See if she can take those and turn it into that.

MR. CRAFTON: Yeah.

MR. WALL: On the other issue, I guess my understanding of her order on minor impact, it's the same reason that the photos do not come in or the damage estimates do not come in, because just bringing in the photos and then saying this impact was not severe enough to cause these injuries is no longer an issue, and so that's why the photos are no longer relevant and the damage estimates are no longer relevant, so even the testimony that "Gee, we just barely bumped him" is the same thing as the damage estimates and the photos.

MR. ROGERS: See, I took her ruling to be

So my understanding of her ruling would essentially be that -- especially with a stipulation for responsibility for the accident, the testimony would be that he was rear-ended on April 15th, 2005, and then everything else is whether based on medicine this is causally related to the accident. And so I would definitely object to either the defendant or -- I suppose they're both technically still defendants -- to either Linda or Jenny Rish testifying about it being a minor impact because I believe that that's being precluded by her order.

MR. ROGERS: Well --

MR. WALL: Maybe that's an issue we should raise before opening, because what relevance is it if you can't argue this impact was too minor to cause this injury. If you're not allowed to argue that based on her order, then what would be the relevance of Linda coming in saying, "Geez, this was just a minor accident. We barely even bumped him."

MR. ROGERS: Remember she said that in her opinion the photos are relevant but that you needed a bio mech to admit them. Those were her concluding comments. What she meant, as I understood it, was that without a bio mech, a jury couldn't understand what those photos and that property damage evidence

that she excluded property damage and the photos on the basis that it would call for speculation in that, for example, a juror might not understand what forces are involved that would result in that property damage.

My argument, of course without that evidence the jury can do nothing but speculate, but that didn't mean that the parties were prohibited from describing the accident. That, to me, would be a crazy extension of that idea because now the jury is more or less being called on to assume injury because there is going to be no testimony about cause.

MR. WALL: Well, there's a -- it would be a stipulation that the defendant caused the accident, essentially rear-ended Mr. Simao. There is not a question that he was injured to the point of going to Urgent Care and treating for some period of time. There's -- at one end of the spectrum that's four weeks, and at the other end of the spectrum, that's six years. That's what we're trying, whether it's four weeks or six years, and whether it -- it doesn't matter whether the person in the defendant's car thinks the impact was only enough to make it four weeks. That would be reasonable. That's not -- that's not an opinion that has any relevance.

meant.

That doesn't mean that a jury can't understand an accident as described by the people involved. They need some understanding of what happened here because that is the root of the plaintiff's entire claim, and I didn't take at all from that that she meant the jury is not going to learn one thing about this accident.

MR. WALL: The substance of the motion was to exclude evidence of minor impact, including an argument that -- the argument and the testimony that a minor impact -- that this was a minor impact that couldn't cause these injuries, and additionally, to exclude the photos and the damage estimates. So if you can't argue that it was a minor impact and therefore couldn't cause these injuries, then I don't know what the relevance is of Linda Rish, for example, testifying that this was minor. In fairness, that needs to be clarified before --

MR. ROGERS: Yeah. So we will. We'll talk to her.

MR. ADAMS: She's drafting the stipulation?

MR. CRAFTON: Yeah.

MR. WALL: Were we all the way through the list?

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1 MR. ADAMS: Yeah. We're done with the
2 exhibits. We're going to send over a list of people
3 that we believe should be released for hardship
4 today. I forgot.

5 MR. ROGERS: Okay.

6 MR. ADAMS: Do you want to do that?

7 MR. ROGERS: Let's go off for a second.
(Discussion off the record.)

8 MR. ROGERS: Okay. Looks good to me. Let
9 me just take it back. I'm just spinning right now
10 from this discussion so I'm going to -- let me take
11 this with me and mull it over.

12 MR. ADAMS: When am I going to have it back?
13 Because this is truly selfish from me. Okay? I am
14 finishing our opening statement. Okay? And I want
15 to go to a basketball game tomorrow because I got
16 those tickets. My partner is at the BYU game right
17 now because I'm at this.

18 So what I'm telling you is: I don't have to
19 do a third of my PowerPoint if you sign that stip.
20 But if not, I'm going to crucify your girl in Opening
21 by saying "This is what we claim in the accident and
22 they say it's some third party."

23 I'm going to do that and I'm going to have
24 25 slides. Okay? Which can be alleviated by that

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1 stip, and your girl doesn't have to look that bad.

2 MR. ROGERS: She won't. She's a kindly old
3 grandma.

4 MR. ADAMS: I'm just telling you selfishly.
(The proceedings concluded at 12:04 p.m.)

1 CERTIFICATE OF REPORTER

2 STATE OF NEVADA)

SS:

3 COUNTY OF CLARK)

4 I, KELE R. SMITH, Certified Shorthand
5 Reporter, do hereby certify that I took down in
6 shorthand (Stenotype) all of the proceedings had in
7 the before-entitled matter at the time and place
8 indicated; and that thereafter said shorthand notes
9 were transcribed into typewriting at and under my
10 direction and supervision and the foregoing
11 transcript constitutes a full, true, and accurate
12 record of the proceedings had.

13 IN WITNESS WHEREOF, I have hereunto affixed
14 my hand this 10th day of March, 2011.

18 KELE R. SMITH, CCR NO. 672

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EXHIBIT “2”

Page 1	Page 3
1 DISTRICT COURT	1 (Thereupon, Rule 30(b)(4) was waived
2 CLARK COUNTY, NEVADA	2 prior to the commencement of the
3 *****	3 deposition proceedings.)
4 WILLIAM JAY SIMAO,)	4 Thereupon --
5 individually, and CHERYL)	5 WILLIAM SIMAO
6 ANN SIMAO, individually,) Case No. AS39455	6 was called as a witness by the Defendants, and
7 and as husband and wife,) Dept. No. X	7 having been first duly sworn, testified as follows:
8)	8 EXAMINATION
9 Plaintiffs,)	9 BY MR. ROGERS:
10 vs.)	10 Q. Would you state your name, please.
11)	11 A. William J. Simao.
12 JENNY RISH; JAMES RISH;)	12 Q. Now, you were present for your wife's
13 LINDA RISH; DOES I through)	13 deposition yesterday; right?
14 V; and ROE CORPORATIONS I)	14 A. Yes.
15 through V, inclusive,)	15 Q. And you heard the ground rules that I
16 Defendants.)	16 gave her before the deposition began. I will repeat
17	17 the most important one, and that is that the oath
18	18 that you just took carries the obligation to tell
19	19 the truth and the penalties if you do not. Do you
20	20 understand that?
21	21 A. Yes.
22	22 Q. Is there any reason that you would be
23	23 unable to testify truthfully?
24	24 A. No.
25	25 Q. Well, did you review any documents in
DEPOSITION OF WILLIAM SIMAO	
Taken on Thursday, October 23, 2008	
At 1:50 P.M.	
At Rogers, Mastrangelo, Carvalho & Mitchell	
300 South Fourth Street	
Suite 710	
Las Vegas, Nevada	
Reported by: CAMEO KAYSER, RPR, CCR No. 569	
Page 2	Page 4
1 APPEARANCES:	1 preparation for your deposition?
2 For the Plaintiffs:	2 A. Just the one -- I guess it was some
3 JOHN E. PALERMO, ESQ.	3 deposition that I gave a while back.
4 Aaron & Paternoster, Ltd.	4 MR. PALERMO: Interrogatories?
5 2300 West Sahara Avenue	5 THE WITNESS: Yes.
6 Suite 650	6 BY MR. ROGERS:
7 Las Vegas, Nevada 89102	7 Q. Let me show them to you and tell me if
8 For the Defendants:	8 this is it. Was it this document?
9 STEPHEN H. ROGERS, ESQ.	9 A. Yes, I believe it was.
10 Rogers, Mastrangelo, Carvalho & Mitchell	10 Q. And you just looked at your answers to
11 300 South Fourth Street	11 interrogatories. We will attach a copy of these as
12 Suite 710	12 Exhibit A.
13 Las Vegas, Nevada 89101	13 (Defendants' Exhibit A was
14	14 marked for identification.)
15	15 BY MR. ROGERS:
16	16 Q. Did you review any other documents?
17	17 A. I did not.
18	18 Q. Do you have any changes that you would
19	19 make to your answers to interrogatories?
20	20 A. I would have to read through it. I don't
21	21 believe so, no.
22	22 Q. Did you read through all of your answers
23	23 to interrogatories today?
24	24 A. I did not.
25	25 Q. When did you?
EXHIBITS	
Exh. No. A Plaintiff William Jay Simao's	
Answers to Defendant Jenny Rish's	
Interrogatories	

1 (Pages 1 to 4)

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<p style="text-align: right;">Page 5</p> <p>1 A. A couple of days ago.</p> <p>2 Q. And when you read through all of them,</p> <p>3 did you see anything that you thought was wrong?</p> <p>4 A. I did not notice anything, no.</p> <p>5 Q. Just as we did in your wife's deposition</p> <p>6 yesterday, I will go through some of your background</p> <p>7 to begin with.</p> <p>8 Where do you live now?</p> <p>9 A. Henderson, 121 Bear Coat Court.</p> <p>10 Q. How long have you lived at the Bear Coat</p> <p>11 Court address?</p> <p>12 A. Almost two years.</p> <p>13 Q. Where did you move there from?</p> <p>14 A. I moved there from Las Vegas -- I cannot</p> <p>15 remember the address I was at.</p> <p>16 Q. You cannot remember?</p> <p>17 A. No. I know it is Jewel Canyon or</p> <p>18 something.</p> <p>19 Q. How long did you live in the Jewel Canyon</p> <p>20 address?</p> <p>21 A. Like four years; somewhere around there.</p> <p>22 Q. And is that Jewel Canyon address the</p> <p>23 first place you lived in the Las Vegas area?</p> <p>24 A. Yes.</p> <p>25 Q. And you moved there from Modesto?</p>	<p style="text-align: right;">Page 7</p> <p>1 A. He will be 25.</p> <p>2 Q. Where does Justin live?</p> <p>3 A. I believe Santa Rosa right now.</p> <p>4 Q. Was Justin born before you married</p> <p>5 Cheryl?</p> <p>6 A. Yes.</p> <p>7 Q. And when did you marry Cheryl, again?</p> <p>8 A. 1984, November 2nd.</p> <p>9 Q. What is your highest level of education?</p> <p>10 A. Proficiency.</p> <p>11 Q. Does that mean a GED?</p> <p>12 A. It is kind of like it, yes.</p> <p>13 Q. How far did you get in high school?</p> <p>14 A. Part of the 11th grade.</p> <p>15 Q. And did you go to work right after</p> <p>16 leaving high school?</p> <p>17 A. I did.</p> <p>18 Q. What kind of work?</p> <p>19 A. Flooring related. Different things like</p> <p>20 installation, helper, sales, all different aspects</p> <p>21 of it.</p> <p>22 Q. Have you worked in some capacity in the</p> <p>23 flooring industry since leaving high school?</p> <p>24 A. I have.</p> <p>25 Q. Have you gone to any kind of trade</p>
<p style="text-align: right;">Page 6</p> <p>1 A. Yes.</p> <p>2 Q. How long did you live in Modesto?</p> <p>3 A. Probably maybe 15 years; somewhere around</p> <p>4 there.</p> <p>5 Q. And did you move to Modesto from</p> <p>6 San Francisco?</p> <p>7 A. San Francisco.</p> <p>8 Q. Is that where you were born?</p> <p>9 A. Yes.</p> <p>10 Q. What is your date of birth?</p> <p>11 A. May 8th, 1963.</p> <p>12 Q. Have you been married to anyone other</p> <p>13 than to Cheryl?</p> <p>14 A. I have not.</p> <p>15 Q. Your children are William and Amanda,</p> <p>16 ages 22 and 19?</p> <p>17 A. Yes.</p> <p>18 Q. Do you have any other children?</p> <p>19 A. I actually do.</p> <p>20 Q. What is your other child's name?</p> <p>21 A. It would be Justin. His last name is</p> <p>22 Eklederger.</p> <p>23 Q. How do you spell that?</p> <p>24 A. I guess it would be E-k-l-e-d-e-r-g-e-r.</p> <p>25 Q. How old is Justin?</p>	<p style="text-align: right;">Page 8</p> <p>1 schools?</p> <p>2 A. I have been to different classes for</p> <p>3 different things. I have a contractor's license, so</p> <p>4 I went to school for that and different things with</p> <p>5 the flooring trade.</p> <p>6 Q. Do you have a contractor's license here</p> <p>7 in Nevada?</p> <p>8 A. I do not.</p> <p>9 Q. Where did you have the license?</p> <p>10 A. California.</p> <p>11 Q. When did you get it?</p> <p>12 A. I do not recall.</p> <p>13 Q. And what trade did you have the license</p> <p>14 in?</p> <p>15 A. Flooring.</p> <p>16 Q. Have you ever been convicted of a felony?</p> <p>17 A. I have not.</p> <p>18 Q. You're a licensed driver here in Nevada?</p> <p>19 A. Yes.</p> <p>20 Q. Has your driver's license ever been</p> <p>21 suspended or revoked?</p> <p>22 A. It has not.</p> <p>23 Q. Have you ever served in the military?</p> <p>24 A. I have not.</p> <p>25 Q. Now, I saw from your answers to</p>

2 (Pages 5 to 8)

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<p style="text-align: right;">Page 9</p> <p>1 Interrogatories that on the date of the April 2005 2 incident you were employed in a company that you 3 owned called Americlean? 4 A. Uh-huh. 5 Q. Is that a yes? 6 A. Yes. 7 Q. And your answers to Interrogatories read 8 that you were a silent partner at Americlean from 9 March of 2005 to September 2007 when you became an 10 owner? 11 A. Yes. 12 Q. What is the difference between an owner 13 and a silent partner? 14 A. I did not own it at that time. 15 Q. So this was not the kind of partnership 16 that had equity? 17 A. I do not understand the question. 18 Q. Well, in many businesses when you're a 19 partner in a business you own a piece of it. You 20 have an equity interest in it. So up until 21 September 2007 you did not own a piece of 22 Americlean? 23 A. I did not. 24 Q. What were your job duties as a silent 25 partner?</p>	<p style="text-align: right;">Page 11</p> <p>1 Q. Who was the owner when you were the 2 silent partner? 3 A. That would be Steve Chesin, C-h-e-s-i-n. 4 Q. Is Mr. Chesin still an owner of 5 Americlean? 6 A. No. 7 Q. You're the sole owner? 8 A. Yes. 9 Q. Was Mr. Chesin the sole owner before you? 10 A. I believe so. 11 Q. And then you bought the company from him? 12 A. Yes. 13 Q. And you said that you make more as an 14 owner than you did as a silent partner. How much do 15 you make as an owner? 16 A. Now, my salary is \$1,250 a week. 17 Q. Do you make more than just a salary since 18 you're an owner? 19 A. No. 20 Q. Is this a franchise? 21 A. No. 22 Q. What happens if Americlean has more 23 income than it pays you? What happens to that 24 money, say in December at the end of the year? 25 A. If and when it happens, I will find out.</p>
<p style="text-align: right;">Page 10</p> <p>1 A. To run the company. 2 Q. Does that mean something like a 3 management position? 4 A. Yes. 5 Q. Was that your job title there? Were you 6 the manager at Americlean? 7 A. I guess, yes. 8 Q. Was that a salaried position? 9 A. Yes. 10 Q. Did you earn commissions also? 11 A. No. 12 Q. What was your salary as a manager or 13 silent partner? 14 A. I believe at the time it was \$1,000 a 15 week. 16 Q. And was that your rate of pay from 17 March 2005 through September 2007? 18 A. Through September 2007? 19 Q. When you became the owner. 20 A. Honestly, I'm not sure when it changed, 21 but I do make a little bit more now, yes. 22 Q. Well, did your income change before you 23 became an owner or did it remain the same until that 24 point? 25 A. I believe it changed before.</p>	<p style="text-align: right;">Page 12</p> <p>1 I would imagine -- I would imagine it would be taken 2 out in dividends or however it works. I'm not sure. 3 I have somebody who helps me with it. Put it at 4 this point, with the economy -- 5 Q. It is sort of academic right now? 6 A. Yes. Absolutely. 7 Q. Have you noticed a downturn in business 8 lately? 9 A. Yes, a little bit. 10 Q. Are you making less in salary today than 11 you did say a year ago? 12 A. No. 13 Q. Is this person who handles the finances 14 there an office manager or is it someone who is 15 independent of the company? 16 A. No. My daughter puts everything in. 17 Whatever program she uses, takes care of all of 18 that, and then I take it in at the end of the year. 19 Sometimes I have someone come in and look at it, so 20 I bought the company so I'm not really sure. 21 Q. You have not even had a full tax year 22 with that company, right? 23 A. Right. 24 Q. How many people do you employ? 25 A. Right now, two -- well, three.</p>

3 (Pages 9 to 12)

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<p style="text-align: right;">Page 13</p> <p>1 Q. Full time?</p> <p>2 A. Yes.</p> <p>3 Q. What are their names?</p> <p>4 A. That would be myself, my son,</p> <p>5 William, Jr., and Amanda.</p> <p>6 Q. Your daughter?</p> <p>7 A. Yes.</p> <p>8 Q. And all three of you work full time?</p> <p>9 A. Yes.</p> <p>10 Q. How much did you buy the company for?</p> <p>11 A. I don't recall.</p> <p>12 Q. But that information would be in the</p> <p>13 corporate records?</p> <p>14 A. Absolutely. Yes.</p> <p>15 MR. PALERMO: Is there a lot of relevance</p> <p>16 to this?</p> <p>17 MR. ROGERS: Only later I will get into</p> <p>18 whether there is a lost income or lost opportunity</p> <p>19 claim, and I don't know yet whether there will be.</p> <p>20 BY MR. ROGERS:</p> <p>21 Q. Did you employ more than you and your son</p> <p>22 and your daughter at the time of the April 2005</p> <p>23 accident?</p> <p>24 A. Yes.</p> <p>25 Q. Who did you employ at that time?</p>	<p style="text-align: right;">Page 15</p> <p>1 A. I guess. I have records of everything.</p> <p>2 Q. Is Americlean a corporation?</p> <p>3 A. Yes.</p> <p>4 Q. What kind of a corporation?</p> <p>5 A. I believe it is an S-corporation.</p> <p>6 Q. And you're the sole owner of it?</p> <p>7 A. At that time, yes.</p> <p>8 Q. Are you seeing a change in that in the</p> <p>9 near future?</p> <p>10 A. No.</p> <p>11 Q. Where did you work before March 2000?</p> <p>12 A. At Carpets and More.</p> <p>13 Q. What did you do there?</p> <p>14 A. Salesman.</p> <p>15 Q. What were your dates of employment there?</p> <p>16 A. From when we moved here in 2002 until we</p> <p>17 went over to take over Americlean.</p> <p>18 Q. Why did you leave Carpets and More?</p> <p>19 A. Opportunity of the cleaning business.</p> <p>20 Q. Do you make more with Americlean than you</p> <p>21 did with Carpets and More?</p> <p>22 A. I probably do, yes. Carpets and More was</p> <p>23 commission so --</p> <p>24 Q. At Carpets and More did your job duties</p> <p>25 include labor?</p>
<p style="text-align: right;">Page 14</p> <p>1 A. Michael Duncan would be one, I believe at</p> <p>2 that time, but I'm not sure, Eduardo Gonzalez. I'm</p> <p>3 not sure about that, though.</p> <p>4 Q. And why doesn't Mr. Duncan work for you</p> <p>5 anymore?</p> <p>6 A. Because I do not need him, probably.</p> <p>7 Q. Did your son or daughter replace either</p> <p>8 of those two former employees?</p> <p>9 A. No. Actually he was working there when</p> <p>10 both of them were still working there.</p> <p>11 Q. Was Amanda?</p> <p>12 A. I'm not sure. Because I did have someone</p> <p>13 else in the office before Amanda.</p> <p>14 Q. So Amanda replaced someone who was doing</p> <p>15 basically the same job?</p> <p>16 A. Yes.</p> <p>17 Q. When did William start working for</p> <p>18 Americlean?</p> <p>19 A. I'm not sure.</p> <p>20 Q. But you do know it was before the car</p> <p>21 accident?</p> <p>22 A. No, I'm not sure about that.</p> <p>23 Q. All the dates of employment and all of</p> <p>24 your employees' records will be in the corporate</p> <p>25 records?</p>	<p style="text-align: right;">Page 16</p> <p>1 A. No.</p> <p>2 Q. I will shift gears now and get into some</p> <p>3 other stuff. We may talk more about employment in a</p> <p>4 little bit. Have you ever had an on-the-job injury?</p> <p>5 A. I have.</p> <p>6 Q. When and where?</p> <p>7 A. When -- It would be 23 or 24 years ago,</p> <p>8 and it was a company called California Beverage</p> <p>9 Company.</p> <p>10 Q. What kind of injury did you sustain?</p> <p>11 A. I think I pulled like a muscle in my</p> <p>12 lower back.</p> <p>13 Q. So your wife mentioned this yesterday.</p> <p>14 How did you sustain that injury?</p> <p>15 A. Trying to move a keg, a keg of beer.</p> <p>16 Q. Did you have any medical treatment?</p> <p>17 A. I believe -- I know they sent me to a</p> <p>18 chiropractor, and I was off work for a couple of</p> <p>19 weeks. I'm not sure how long.</p> <p>20 Q. How long did you treat with the</p> <p>21 chiropractor?</p> <p>22 A. I'm not sure, honestly. It was a long</p> <p>23 time ago. I would say, if I had to guess, I would</p> <p>24 say at least a couple of months, two or</p> <p>25 three months. I'm not sure.</p>

4 (Pages 13 to 16)

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1 Q. Did you treat with any medical providers
2 other than a chiropractor?

3 A. I do not remember.

4 Q. Did you make any workers' compensation
5 claim?

6 A. I don't understand the question. The
7 workers' compensation claim would be -- did I get
8 paid while I was off the job?

9 Q. That would be part of it, yes. There are
10 all sorts of claims that can be made in the guise of
11 workers' compensation that can be simple
12 reimbursement of medical expenses. It could be
13 payment for time off. It could be a disability
14 rating like a permanent partial disability or a
15 total disability. It could be all sorts of things
16 like that.

17 A. So would it be the weekly check that I
18 would not get while I was working?

19 Q. Well, if you did not get reimbursed for
20 it, that probably suggests that you did not make a
21 claim?

22 A. I still do not understand. Now, what I'm
23 asking is while I was off work, I do believe that I
24 received a check. I don't know who it was from.
25 I'm not sure. I don't think this was from the

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1 it settle?

2 A. I believe they settled.

3 Q. Was the settlement a repair of your home
4 or was it a cash settlement?

5 A. It was a cash settlement which did not
6 cover the repairs that were needed for the home.

7 Q. Have you settled with a company for a
8 claim of any kind other than this construction
9 defect claim?

10 MR. PALERMO: Objection; vague and
11 ambiguous as to form.

12 You can answer.

13 THE WITNESS: No.

14 BY MR. ROGERS:

15 Q. Now, I want to talk about other car
16 accidents you have been involved in. Your answers
17 to interrogatories mention a motorcycle accident in
18 2003. We will get to that in a moment.

19 Have you been in any motor vehicle
20 accidents other than the April 2005 accident and the
21 2003 motorcycle accident?

22 A. I have.

23 MR. PALERMO: I was going to say the time
24 frame before or after?

25 MR. ROGERS: Just any.

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1 company. It could have been from workmen's comp or
2 disability. I do not know. So, no. Did I make a
3 claim, no. Other than the time I was off, I
4 received like a portion of what I used to get paid,
5 yes.

6 Q. Have you ever made a workers'
7 compensation claim?

8 A. I have no idea.

9 Q. Have you ever been involved in a personal
10 injury claim?

11 A. I have not.

12 Q. Have you ever been involved in a lawsuit
13 other than this one?

14 A. Personal injury?

15 Q. Any kind.

16 A. I have.

17 Q. For what?

18 A. For my home.

19 Q. What happened?

20 A. There was a class action defect.

21 Q. What was the defect?

22 A. There were a lot of them.

23 Q. Was this in this Jewel Canyon home?

24 A. It was.

25 Q. And did that lawsuit go to trial or did

Page 20

1 MR. PALERMO: Then I will issue an
2 objection. Overbroad, vague and ambiguous as to
3 form.

4 But you can answer.

5 THE WITNESS: Yes, I have.

6 BY MR. ROGERS:

7 Q. Okay. When?

8 A. I will guess, but I'm probably pretty
9 close. May 22nd of this year.

10 Q. What happened?

11 A. I was driving down the freeway. There
12 was a car in front of me, a car in front of the car
13 in front of me, and a truck pulling a trailer, and
14 the tire popped off of the trailer and flew across
15 the road and then the three of us went to stop
16 and -- I do not believe that the car in front of me
17 hit anyone, but I stopped and barely touched it to
18 the back of their car.

19 Q. So you rear-ended the vehicle in front of
20 you?

21 A. I did.

22 Q. Has anybody made an injury claim from
23 that accident?

24 A. No.

25 Q. Did you sustain any property damage?

5 (Pages 17 to 20)

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<p style="text-align: right;">Page 21</p> <p>1 A. No, none at all whatsoever. Not a dent. 2 Not a ding, no. 3 Q. Any other car accidents? 4 A. No. 5 Q. Let's discuss the 2003 motorcycle 6 accident. Your wife said it happened there on 7 Sunset and Sunset. Describe what happened? 8 A. Sunset and Sunset, it is where -- going 9 east on Sunset -- I believe it is Sunset Way and 10 Sunset, but anyway, it turns to the right to go 11 down the hill towards the mall and continued to be 12 Sunset, and there is -- as you turn to the right 13 there is a curb. On your left-hand side, there is 14 like a turn lane; it is kind of hard to explain, but 15 when I went to go around the turn, there was a 16 little white pickup and it started coming over to my 17 lane, and I was -- I was not going too fast, I do 18 not think, but I popped up onto the curb, and got 19 the bike almost to a stop and then laid it down. 20 So it is still on that curb right there 21 where the turn lane is. 22 Q. Did you lay it down on the sidewalk or on 23 the street? 24 A. Yes. On the sidewalk. I did not let it 25 get to the street, no. There is like an island in</p>	<p style="text-align: right;">Page 23</p> <p>1 island? 2 A. Yes. 3 Q. What kind of right elbow injury did you 4 have? 5 A. When I laid it down, it was still sliding 6 forward and like a rock, piece of gravel went into 7 my arm. 8 Q. It was just embedded up there? 9 A. Yes. I mean, it was not real deep. You 10 can only go so deep, because the elbow -- it kind of 11 ripped it open. 12 Q. Any other injuries? 13 A. I might have had a scrape or two on my 14 arm. I probably did, but no, that was it. 15 Q. And your wife mentioned someone on the 16 bike with you? 17 A. My daughter, Amanda. 18 Q. Was she injured? 19 A. Her elbow. 20 Q. Right elbow? 21 A. Right elbow, yes. 22 Q. What injury did she have? 23 A. It is about the same as mine, because 24 when we went down onto the ground, we slid a little 25 bit, probably half a foot or a foot, so I think she</p>
<p style="text-align: right;">Page 22</p> <p>1 the center. 2 Q. Right. Like a designated right turn lane 3 with an island on the left side of it? 4 A. Yes. 5 Q. Did your bike end up on the island or on 6 the sidewalk? 7 A. It was on the island, because I was in 8 the left turn lane. There are two lanes there, and 9 I was on the left lane, so I popped up onto the curb 10 and then just kind of laid it down. 11 Q. Your wife mentioned some kind of injury. 12 What was it? 13 A. My elbow. 14 Q. Which elbow? 15 A. My right elbow. 16 Q. So you were turning right in the left of 17 two right turn lanes? 18 A. Yes. 19 Q. And a vehicle in the right of the two 20 right turn lanes merged into your right-of-way? 21 A. Yes. 22 Q. And to avoid that vehicle you went up on 23 the island to your left? 24 A. Yes. 25 Q. And you laid your bike down on the</p>	<p style="text-align: right;">Page 24</p> <p>1 picked up a rock or a little bit of gravel that, you 2 know, kind of gravel and a cut. 3 Q. And you underwent some treatment for it? 4 A. I went to -- just went to the 5 Urgent Care, and they cleaned my arm and Amanda's 6 arm, and that was it, I believe. 7 Q. How did you get to the Urgent Care? 8 A. I think Cheryl took us. 9 Q. Did you drive your bike to your house? 10 A. I did not. I do remember -- we were 11 right there on Sunset and the Harley-Davidson 12 dealer. It was about a block and a half down from 13 where it happened, so we did get back on the 14 motorcycle and ride it, and I believe I left it 15 there for them to look at it, because the front 16 fender was -- the front fender had scraped the 17 ground when it went down, and Cheryl picked us up 18 from there. 19 Q. So far as far as motor vehicle accidents 20 are concerned, I know of three, the 2003 motorcycle 21 accident, the accident with my client on April 15th, 22 2005, and then the May 2008 incident on the freeway. 23 Are there any other motor vehicle accidents? 24 A. In my whole life? 25 Q. Yes.</p>

6 (Pages 21 to 24)

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1 A. There is one where I was pulling my boat.
2 I had a pickup truck pulling my boat. This was
3 probably 25 years ago, and as I was going across the
4 street, a car -- I cannot remember if they pulled
5 out of the gas station, I believe, and as I was
6 going down the street, they hit the boat and knocked
7 it off of the trailer. It did not hit the vehicle
8 or anything. I think that is the only other
9 accident I have been in.

10 Q. Have you been involved in any other kinds
11 of accidents, meaning nonmotor vehicle accidents in
12 which you sustained injury? And by that I mean, you
13 know, a fall or a sports incident, anything like
14 that where you had medical treatment afterwards?

15 MR. PALERMO: Object. Vague and
16 ambiguous as to form.

17 You can answer. Compound.

18 THE WITNESS: I have not.

19 BY MR. ROGERS:

20 Q. Who was your family doctor on the date of
21 this car accident with my client?

22 A. I believe it was Britt Hill.

23 Q. I want to discuss conditions that you had
24 prior to the car accident. Your wife mentioned
25 migraines. We depose Mr. Hill the other day, and

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1 he did as well. Did you have any other prior
2 conditions for which you were undergoing medical
3 care?

4 MR. PALERMO: Objection. Vague and
5 ambiguous as to form.

6 You can answer.

7 THE WITNESS: High blood pressure and
8 high cholesterol.

9 BY MR. ROGERS:

10 Q. After moving to Las Vegas in 2002, did
11 you treat with medical providers for any reason
12 other than migraines, high cholesterol, and high
13 blood pressure?

14 A. I do not believe so.

15 MR. PALERMO: Pursuant to; prior to the
16 accident; right?

17 MR. ROGERS: No. Any time since 2002.

18 MR. PALERMO: Including the treatment for
19 the accident?

20 MR. ROGERS: You're right then. It would
21 be between the accident and moving here.

22 BY MR. ROGERS:

23 Q. The answer is still the same?

24 A. Yes, I do believe so.

25 Q. And have you ever undergone surgery?

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1 A. Before the accident or --

2 Q. Let's start with before the accident?

3 A. I don't believe I have.

4 Q. And since the accident?

5 A. I have been to like injections and stuff,
6 if those are -- I think they considered those like
7 minor surgeries.

8 Q. Did you treat with a chiropractor at any
9 time before the accident other than that two or
10 three months for low back pain?

11 A. I did not.

12 Q. What were your injuries from the
13 accident?

14 A. The back of my head, my neck, and my
15 shoulder, my left shoulder.

16 Q. Now, as you were saying left shoulder,
17 you were pointing to this muscle that runs between
18 your neck and your shoulder. Is that the trapezius?
19 Have you ever heard that word before, the
20 "trapezius"?

21 A. I have not. No. Not that I recall, no.

22 Q. Is that the location of the pain, is
23 right there between the neck and the shoulder?

24 A. Actually, no. Actually, it starts down
25 in my shoulder down here and goes up to like the

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1 back of my head.

2 Q. So right on the back of your left
3 shoulder and then goes up to about the base of your
4 skull on the left side?

5 A. Yes. It was kind of more on the side
6 almost on the top than on the back, because it was
7 like the side of my neck and to -- like the back of
8 my head here.

9 Q. I'm trying to clarify for the record
10 where you're pointing to, and tell me if I'm getting
11 it right. You're pointing primarily to the -- the
12 area I would say, basically, from the back of your
13 shoulder, the shoulder blade, up to the base of your
14 skull on the back left side?

15 A. Right. And that is the shoulder pain.

16 Q. Have you ever injured the back of your
17 head, your neck, or your left shoulder before the
18 car accident?

19 A. No.

20 Q. Did you ever have pain in the back of
21 your head before the car accident?

22 A. Not that I recall, no.

23 Q. When you had migraines, where did you
24 feel them?

25 A. Migraines were up under like the front

7 (Pages 25 to 28)

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1 part of your face, your eye, your forehead. Mostly
 2 on the left side, on one side. I had had them on
 3 the right before.
 4 Q. Pardon me?
 5 A. I have had them on the right side before,
 6 migraines.
 7 Q. Had you ever had neck pain before the car
 8 accident?
 9 A. I have not.
 10 Q. Had you ever had pain in the left
 11 shoulder area before the car accident?
 12 A. I have not, no.
 13 Q. Let's talk about the car accident. As I
 14 understand it again, it happened on April 15th,
 15 2005, somewhere right around 3:00 o'clock?
 16 A. Yes.
 17 Q. Where were you driving from and to?
 18 A. I was driving from up north. I had just
 19 stopped by -- one of the guys that worked for me,
 20 just stopped on a job to see how he was doing, and
 21 he was actually just finishing up, and then I was on
 22 my way home. That would be Michael.
 23 Q. And your answers to interrogatories,
 24 describe the traffic as stop and go. When you said
 25 stop and go, did you mean literally stopping or did

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1 some time it is stop and go traffic, and then the
 2 accident happens; right?
 3 A. I do not remember. I do not recall.
 4 Q. You do not remember how long a time it
 5 was stop and go?
 6 A. Stop and go; right.
 7 Q. It sounded like you wanted to jump in and
 8 say something.
 9 A. I do not remember if I had just stopped
 10 or it was stop and go. I do not even have an idea.
 11 I would just be guessing.
 12 Q. Were you stopped when the accident
 13 happened?
 14 A. Yes.
 15 Q. How long were you stopped? Was it a
 16 split second or was it something longer than that?
 17 A. No. It was a little bit longer than
 18 that.
 19 Q. A few seconds?
 20 A. I do not know. I would say yes. It
 21 would have been a few seconds.
 22 Q. And did you have to come to a quick stop
 23 because of traffic in front of you or was it all
 24 going slow that nobody was moving quickly to begin
 25 with?

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1 you mean simply slow traffic?
 2 A. No, it was stopping.
 3 Q. And this happened around the Sahara
 4 off-ramp; right?
 5 A. I do not believe so. I think it was
 6 Cheyenne.
 7 Q. You're right. So which lane were you in?
 8 A. I guess it is a number one lane.
 9 Q. Is it the fast lane?
 10 A. The fast lane, yes.
 11 Q. So you're going in this stop and go
 12 traffic. How long was traffic stopping and going
 13 before the accident happened from the time you got
 14 on the freeway?
 15 A. I believe I had just got on the freeway
 16 maybe a couple of exits before. I'm not sure.
 17 Basically that is where it had congested at the area
 18 where I was stopped.
 19 Q. But was it stop and go traffic from the
 20 moment you got on the freeway.
 21 A. I do not recall, honestly. I don't
 22 remember.
 23 Q. But you get on the freeway roughly a
 24 couple of exits before the area where the accident
 25 happens. You get over to the fast lane and then for

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1 A. It was going pretty slow.
 2 Q. So it was not as if you just drove up on
 3 a line of stopped cars and stopped and then got
 4 rear-ended? Traffic was already --
 5 A. I believe it was.
 6 MR. PALERMO: Let him finish his
 7 question.
 8 THE WITNESS: I'm sorry.
 9 BY MR. ROGERS:
 10 Q. The end of it was simply that traffic was
 11 already slow, and you were in the slow part of it
 12 before the accident happened?
 13 MR. PALERMO: Objection as to form.
 14 Vague and ambiguous.
 15 You can answer.
 16 THE WITNESS: I believe when I got on --
 17 and I'm not even positive. You can see that it
 18 slows down ahead of you, so I slowed and I slowed to
 19 a stop, and I did -- I sat there a couple of
 20 seconds, and then the car hit me.
 21 BY MR. ROGERS:
 22 Q. Were you aware that you were going to be
 23 hit before it happened?
 24 A. No.
 25 Q. You did not hear any brakes or anything

8 (Pages 29 to 32)

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<p style="text-align: right;">Page 33</p> <p>1 like that?</p> <p>2 A. No.</p> <p>3 Q. Did you have your radio on?</p> <p>4 A. I do not remember. But no, I don't</p> <p>5 listen to loud music. I listen to news radio.</p> <p>6 Q. So do you know if your windows were down?</p> <p>7 A. I don't remember.</p> <p>8 Q. But you do not think there was loud noise</p> <p>9 inside of your van just because you don't listen</p> <p>10 to --</p> <p>11 A. I don't believe so, no.</p> <p>12 Q. Was your van pushed forward as a result</p> <p>13 of the accident?</p> <p>14 A. I believe it was, yes.</p> <p>15 Q. Did your van hit the car in front of you?</p> <p>16 A. It did not.</p> <p>17 Q. You do not know how far forward your van</p> <p>18 was you pushed in?</p> <p>19 A. I have no idea.</p> <p>20 Q. Was there anymore than just the one</p> <p>21 impact?</p> <p>22 MR. PALERMO: Objection. Vague as to</p> <p>23 form.</p> <p>24 You can answer.</p> <p>25 BY MR. ROGERS:</p>	<p style="text-align: right;">Page 35</p> <p>1 Q. What was it?</p> <p>2 A. I imagine it would have been like the</p> <p>3 clipboards or -- normal stuff that I carry, soda</p> <p>4 spilled. Different papers or whatever was laying on</p> <p>5 the seat that leaked fluid all over.</p> <p>6 Q. Did you have a soda in -- like a cup</p> <p>7 holder in there?</p> <p>8 A. Yes.</p> <p>9 Q. Was it like this, like a cup you would</p> <p>10 buy at a convenience store and fill up at a fountain</p> <p>11 or was it like a can of Coke?</p> <p>12 A. No. It was a cup.</p> <p>13 Q. It did not have a top on it then?</p> <p>14 A. No, it did not.</p> <p>15 Q. And it spilled?</p> <p>16 A. It flew out of the cup holder, yes.</p> <p>17 Q. Did your body hit anything inside of the</p> <p>18 car?</p> <p>19 A. Yes.</p> <p>20 Q. What?</p> <p>21 A. There is a cage -- or I call it a cage.</p> <p>22 There is a cage behind the driver's seat that is</p> <p>23 steel.</p> <p>24 Q. Actually, I want to get into that. What</p> <p>25 I meant was any part of your body other than your</p>
<p style="text-align: right;">Page 34</p> <p>1 Q. In other words, did your vehicle hit</p> <p>2 anything other than -- well, did it hit anything at</p> <p>3 all?</p> <p>4 A. No.</p> <p>5 Q. So there was the rear-end impact and no</p> <p>6 other impacts?</p> <p>7 A. And no other impact.</p> <p>8 Q. Did your seat break upon impact?</p> <p>9 A. The vehicle seat?</p> <p>10 Q. Yes.</p> <p>11 A. No.</p> <p>12 Q. Were you seat-belted?</p> <p>13 A. Yes.</p> <p>14 Q. Was the van equipped with air bags?</p> <p>15 A. No. It did not come out. That is why I</p> <p>16 am saying no. So I don't think so. I do not</p> <p>17 believe it was.</p> <p>18 Q. Do you wear glasses?</p> <p>19 A. No.</p> <p>20 Q. Were you wearing a hat when this</p> <p>21 happened? Anything on your face or your head?</p> <p>22 A. No.</p> <p>23 Q. Now, when the accident happened, did</p> <p>24 anything fly off the seat?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 36</p> <p>1 head hit anything in the car?</p> <p>2 A. I think I hit my arm on the steering</p> <p>3 wheel. I do not remember.</p> <p>4 Q. Which arm?</p> <p>5 A. I believe my left hand and I hit my right</p> <p>6 elbow on the cage, but it was not bad when I hit my</p> <p>7 elbow, really.</p> <p>8 Q. Any other part of your body hit anything</p> <p>9 in the car?</p> <p>10 A. I do not believe so.</p> <p>11 Q. You were talking about your head. You</p> <p>12 said that you hit the cage behind your seat; right?</p> <p>13 A. Yes.</p> <p>14 Q. How tall are you?</p> <p>15 A. Six-six.</p> <p>16 Q. And is the seat in that van equipped with</p> <p>17 an adjustable headrest?</p> <p>18 A. No.</p> <p>19 Q. That headrest does not go up higher than</p> <p>20 your head?</p> <p>21 A. I don't believe it does. I believe it</p> <p>22 probably comes right about here.</p> <p>23 Q. So below the base of your skull, right</p> <p>24 about the middle of your neck?</p> <p>25 A. Probably.</p>

9 (Pages 33 to 36)

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<p style="text-align: right;">Page 37</p> <p>1 Q. How far behind the headrest is the cage?</p> <p>2 A. It is directly -- the seats are -- the</p> <p>3 seats are almost up against them by just a fraction</p> <p>4 of an inch.</p> <p>5 Q. And I think your wife said that there was</p> <p>6 something like a plastic sheet or a Plexiglass sheet</p> <p>7 across the cage. Was she right?</p> <p>8 A. Sort of. There is -- are you familiar</p> <p>9 with the cages?</p> <p>10 Q. No.</p> <p>11 A. Or do you want me to start from the</p> <p>12 beginning?</p> <p>13 Q. Go ahead.</p> <p>14 A. It goes from the floor to the ceiling</p> <p>15 from side to side of the van. It covers the whole</p> <p>16 thing. I'm not sure on that. There is -- sometimes</p> <p>17 there is a door in the middle. I'm not sure if that</p> <p>18 one has one or not, because all of the vans I have</p> <p>19 had those. But there are holes in part of it and</p> <p>20 parts of it are solid.</p> <p>21 And by holes, I mean, so you can actually</p> <p>22 see through. So if I look in my rearview mirror in</p> <p>23 the center there are holes about the size of 50 cent</p> <p>24 pieces, probably two and a half feet by two and a</p> <p>25 half feet, three foot, so if you look in your</p>	<p style="text-align: right;">Page 39</p> <p>1 A. No.</p> <p>2 Q. Were you knocked unconscious in this</p> <p>3 accident?</p> <p>4 A. Not unconscious, no.</p> <p>5 Q. Were you dazed or stunned?</p> <p>6 A. I was.</p> <p>7 Q. Were you able to get out of your van</p> <p>8 without assistance?</p> <p>9 A. I sat there for probably -- I don't know,</p> <p>10 three or four or five minutes before I got out.</p> <p>11 Q. Were you bleeding?</p> <p>12 A. I don't remember. Not from the head.</p> <p>13 I'm not sure if my elbow was or not.</p> <p>14 Q. Well, did you sustain any cuts?</p> <p>15 A. I do not remember.</p> <p>16 Q. Any bruises?</p> <p>17 A. I believe I had bruises on my right arm.</p> <p>18 Q. Where?</p> <p>19 A. Up above where the elbow is right here.</p> <p>20 Q. Were you seated in some position other</p> <p>21 than just looking straight forward when this</p> <p>22 accident happened? Do you know how you are sitting</p> <p>23 in your car and your back is to the seat back, and</p> <p>24 you have your hands on the steering wheel, is that</p> <p>25 how you were sitting when this accident happened?</p>
<p style="text-align: right;">Page 38</p> <p>1 rearview mirror you can actually see all through the</p> <p>2 holes.</p> <p>3 The air conditioning does not work so</p> <p>4 good with those holes and a big van like that, so</p> <p>5 you put Plexiglass on it, so there is Plexiglass</p> <p>6 anywhere where those holes there.</p> <p>7 Q. Are there holes in that portion of the</p> <p>8 cage that your head struck?</p> <p>9 A. I don't know.</p> <p>10 Q. Well, where your head struck, is there a</p> <p>11 plastic surface or a steel surface?</p> <p>12 A. I believe it would be steel. I would</p> <p>13 have to see it, though. I believe it would be</p> <p>14 steel, but it would be where the plastic is. It is</p> <p>15 bolted to the steel.</p> <p>16 Q. And is the steel a solid sheet or is it</p> <p>17 like woven threads of steel?</p> <p>18 MR. PALERMO: Objection. Vague and</p> <p>19 ambiguous as to form.</p> <p>20 You can answer.</p> <p>21 THE WITNESS: It is a solid sheet of</p> <p>22 steel.</p> <p>23 BY MR. ROGERS</p> <p>24 Q. So it does not look like a steel fence</p> <p>25 around a construction area?</p>	<p style="text-align: right;">Page 40</p> <p>1 MR. PALERMO: Objection. Compound as to</p> <p>2 form. Vague and ambiguous.</p> <p>3 You can answer.</p> <p>4 THE WITNESS: I do not remember.</p> <p>5 BY MR. ROGERS:</p> <p>6 Q. I am just trying to figure out how your</p> <p>7 right elbow got behind the seat to the cage?</p> <p>8 A. No. I mean, I understand exactly what</p> <p>9 you are saying. Well, the seats are only as wide as</p> <p>10 I am. The cage is three inches behind the seat. So</p> <p>11 it is just sitting on the seat, if you put my elbow</p> <p>12 back, it would hit it just sitting on the seat.</p> <p>13 Q. You mean like if your forearm was rested</p> <p>14 on the armrest, your elbow would be close to that</p> <p>15 cage?</p> <p>16 A. Yes.</p> <p>17 Q. Is there an armrest on that driver's</p> <p>18 seat?</p> <p>19 A. I'm not sure.</p> <p>20 Q. Well, I was wondering if maybe at the</p> <p>21 time the accident happened you were turned in your</p> <p>22 seat and maybe doing something with paperwork or</p> <p>23 getting the drink from the cup holder or turning the</p> <p>24 radio dial, something that would have moved your</p> <p>25 right elbow away from the seat?</p>

10 (Pages 37 to 40)

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1 A. I do not believe so.
 2 Q. You believe you were just looking
 3 straight forward?
 4 A. I believe I was. I will try to elaborate
 5 on that. I know I do not answer a lot of questions,
 6 because I cannot even think. If I had an armrest, I
 7 could have been stopped and sitting there and like
 8 leaning my chin on my arm or something like that.
 9 And I honestly do not recall.
 10 Q. Well, it is fine. If you do not recall,
 11 that is an appropriate answer. But if at any time
 12 you feel like, hold up, maybe -- there is this thing
 13 that I did not tell you, just jump in and say so.
 14 Okay?
 15 A. I just did. Absolutely.
 16 Q. Now, did you move your van from the area
 17 of the accident before the police arrived?
 18 A. I do not remember.
 19 Q. And tell me if this might jog your
 20 memory. You said you were in stop and go traffic,
 21 you were in the fast lane. Was there a shoulder to
 22 your left, a space there in which you could pull
 23 your car and get out of traffic?
 24 A. I do not remember. I honestly do not
 25 remember. I don't know.

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1 Q. I will tell you what the police officer
 2 wrote. Maybe this will jog your memory. It says
 3 that vehicle 2, and that is you, slowed down to a
 4 complete stop due to congested traffic. Vehicle 1
 5 failed to decrease the speed and struck vehicle 2's
 6 rear. And then it says both vehicles were moved
 7 prior to NHP, Nevada Highway Patrol, arrival.
 8 Do you remember now moving your vehicle
 9 before the highway patrolmen appeared?
 10 A. I do not.
 11 Q. Now, before the deposition began, I asked
 12 if you had any photos of this van that was involved
 13 in the accident. I believe you said you did not,
 14 but that you still have the van; is that right?
 15 A. Yes.
 16 Q. However, that van has been repaired?
 17 A. Yes.
 18 Q. Has it been involved in any accidents
 19 other than the April 2005 accident?
 20 A. The one that I told you about, yes.
 21 Q. In May 2008?
 22 A. Yes.
 23 Q. But that the damage from the May 2008
 24 accident was to the front of the van; right?
 25 A. There was no damage.

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1 Q. That is right. But the impact was at the
 2 front?
 3 A. Yes.
 4 Q. And the damage to the van as a result of
 5 the April 2005 accident was to the rear?
 6 A. Yes.
 7 Q. And your counsel has produced an invoice
 8 for repair of your van from Frank's Auto Body. Is
 9 that where it was repaired?
 10 A. Yes, I believe so.
 11 Q. And the invoice was for \$577.64. Is that
 12 what it cost to repair the van?
 13 A. I have no idea.
 14 Q. The repair was paid for by an insurance
 15 company, Liberty Mutual?
 16 A. Yes.
 17 Q. Did you pay for it?
 18 A. No.
 19 Q. The Liberty Mutual check was paid to you,
 20 which made me wonder if you had paid for it and then
 21 got reimbursed?
 22 A. No. I believe I just gave them a check
 23 from the insurance company?
 24 Q. And the check is dated June 28th of 2005,
 25 and the invoice is June 27th. So was the van

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1 repaired on the 27th or 28th of June?
 2 A. I do not remember.
 3 Q. Roughly a couple of months after the
 4 accident?
 5 A. I honestly do not remember.
 6 Q. Were you able to drive the van before
 7 having it repaired?
 8 A. Yes.
 9 Q. Was the damage to the van, did it affect
 10 the mechanics of it or was it a cosmetic damage like
 11 to the bumper?
 12 MR. PALERMO: Objection. Vague as to
 13 form and compound.
 14 You can answer.
 15 THE WITNESS: It was to the bumper and
 16 the back door.
 17 BY MR. ROGERS:
 18 Q. Did the repairs fix all of the problems
 19 or were there problems that were not repaired?
 20 A. At first there was a problem that was not
 21 repaired when I went to pick up the vehicle. They
 22 had not fixed the back door. I guess they just
 23 replaced the bumper. They did not do any work to
 24 the back door, so they actually kept it an extra day
 25 or two and it did not work.

11 (Pages 41 to 44)

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<p style="text-align: right;">Page 45</p> <p>1 Q. And then after they did that follow-up</p> <p>2 work, was all of the damage repaired?</p> <p>3 A. Yes. I believe it was, yes.</p> <p>4 Q. So let me get back to that earlier</p> <p>5 question. The van was drivable between the date of</p> <p>6 the accident and the date that it was repaired?</p> <p>7 A. Yes.</p> <p>8 Q. Who referred you to Frank's Auto Body?</p> <p>9 A. I do not know.</p> <p>10 Q. Did you know the folks over there?</p> <p>11 A. No.</p> <p>12 Q. So it was like an insurance company?</p> <p>13 A. It was probably Liberty Mutual.</p> <p>14 MR. PALERMO: Is this a good time for a</p> <p>15 break.</p> <p>16 (Off the record.)</p> <p>17 BY MR. ROGERS:</p> <p>18 Q. Let's go back to the car accident scene.</p> <p>19 You said that you stayed in your car for a few</p> <p>20 minutes and then you got out. What did you do when</p> <p>21 you got out?</p> <p>22 A. I went back to see if the other people</p> <p>23 were okay.</p> <p>24 Q. And what did you find out when you went</p> <p>25 back there?</p>	<p style="text-align: right;">Page 47</p> <p>1 A. I don't know how long it took. It did</p> <p>2 not seem like a long time. I guess it always does.</p> <p>3 I'm not sure how long it took, though.</p> <p>4 Q. What kind of a vehicle was the policeman</p> <p>5 driving? Was it a motorcycle or a car?</p> <p>6 A. I don't recall. I don't remember.</p> <p>7 Q. Do you remember talking to the police</p> <p>8 officer?</p> <p>9 A. Absolutely.</p> <p>10 Q. What did you discuss?</p> <p>11 A. Actually, I was sitting in my van, and he</p> <p>12 came up to the window and I think he asked if I</p> <p>13 needed to make a report, and I think he actually</p> <p>14 said, No, not really, and I guess he had gotten the</p> <p>15 report from him. I am not sure. That is kind of</p> <p>16 what I remember, but I'm not sure. I'm not</p> <p>17 positive.</p> <p>18 Q. Did the policemen ask if you were</p> <p>19 injured?</p> <p>20 A. They did. There was an ambulance there</p> <p>21 too. They asked me if I wanted to go in the</p> <p>22 ambulance, and I told them no.</p> <p>23 Q. Who got there first, the paramedics or</p> <p>24 the police?</p> <p>25 A. I'm not sure. It could have been the</p>
<p style="text-align: right;">Page 46</p> <p>1 A. That they were okay.</p> <p>2 Q. Who did you talk to?</p> <p>3 A. The driver of the vehicle.</p> <p>4 Q. Anybody else in the vehicle?</p> <p>5 A. Yes. There were a few people in the</p> <p>6 vehicle.</p> <p>7 Q. Right. I mean I know there were. There</p> <p>8 were I think a total of six people in there, but did</p> <p>9 you talk to anybody else in there?</p> <p>10 A. I don't believe so.</p> <p>11 Q. What all did you discuss with the driver?</p> <p>12 A. I think I just asked them if they were</p> <p>13 all right. That was it.</p> <p>14 Q. Did they say anything to you like to</p> <p>15 apologize? Anything? Did you discuss anything</p> <p>16 else?</p> <p>17 A. I do not remember.</p> <p>18 Q. And then after talking with the driver,</p> <p>19 what did you do?</p> <p>20 A. I think I went back to my vehicle.</p> <p>21 Q. And did you get back in it or just stand</p> <p>22 there and wait?</p> <p>23 A. I'm not sure. I'm not sure.</p> <p>24 Q. Well, did it take a long time for the</p> <p>25 police to get there?</p>	<p style="text-align: right;">Page 48</p> <p>1 paramedics.</p> <p>2 Q. And did the paramedics tend to anybody in</p> <p>3 the car?</p> <p>4 A. I don't believe so.</p> <p>5 Q. Did you discuss anything with the police</p> <p>6 officer that you have not told me about?</p> <p>7 A. I do not remember.</p> <p>8 Q. And did you have any discussions with the</p> <p>9 folks in the car that was behind you other than what</p> <p>10 you have told me?</p> <p>11 A. I do not remember.</p> <p>12 Q. Did anybody in that other vehicle get out</p> <p>13 or did they all remain inside?</p> <p>14 A. I'm not sure. I know they were not out</p> <p>15 when I walked back to see if they were okay. They</p> <p>16 were all inside. I believe so.</p> <p>17 Q. Well, did you experience pain while you</p> <p>18 were there at the accident scene?</p> <p>19 A. Yes. I had just hit my head, yes.</p> <p>20 Q. Anywhere other than to your head?</p> <p>21 A. I believe my elbow.</p> <p>22 Q. And what did you do after the policeman</p> <p>23 was done with his work?</p> <p>24 A. What do you mean?</p> <p>25 Q. Well, you did not take an ambulance, so</p>

12 (Pages 45 to 48)

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1 you drove from the scene?
 2 A. Yes.
 3 Q. Where did you go?
 4 A. I'm not sure if I went home or if I met
 5 my wife at the Urgent Care. I'm not sure.
 6 Q. The Southwest Medical Associates' record,
 7 on the date of the incident, reflects that you
 8 arrived there at 6:36 p.m., and according to the
 9 police, the car accident happened at 3:00 o'clock
 10 p.m. Does that three and a half hour difference
 11 tell you when you drove home?
 12 A. It tells me that I probably went home and
 13 waited for my wife to get home from work.
 14 Q. What time did she normally get home from
 15 work?
 16 A. I believe at that time it was between
 17 5:30 and 6:00. She starts earlier now and gets off
 18 earlier now.
 19 Q. Now, at the Urgent Care, the note reads
 20 that your chief complaint when you went there was
 21 left elbow pain and tenderness in the back of his
 22 head.
 23 So far today you have told me that you
 24 thought it was your right elbow?
 25 A. Yes. I remember.

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1 Q. Does this entry here a typo or might it
 2 have been your left elbow?
 3 A. It could have been my left elbow.
 4 Absolutely.
 5 Q. And it says here that you were
 6 seat-belted and that is true; right?
 7 A. Yes.
 8 Q. And there was no air bag deployment?
 9 A. No.
 10 Q. You already said that was true. There
 11 was no glass breakage, it says; is that correct?
 12 A. No. No, there was no breakage.
 13 Q. What did the folks do for you there at
 14 the Urgent Care?
 15 A. On the first visit?
 16 Q. Yes.
 17 A. Basically, they would not even listen to
 18 me.
 19 Q. What did you say that they did not listen
 20 to?
 21 A. I told them that my head hurt, the back
 22 of my head, and I had pressure in the back of my
 23 head, and that was it. That is what it seemed like
 24 to me, that they did not listen. They did not do
 25 any tests or do anything or even go any deeper with

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1 that except for writing down my complaint.
 2 Q. Now, the records here reflect that X-rays
 3 were taken of your neck and left elbow. Do you
 4 remember that?
 5 A. On that first visit?
 6 Q. Yes. On April 15th.
 7 A. No, not really. I remember taking
 8 X-rays. I do not remember if it was during that
 9 visit or a different visit. I had a lot of X-rays
 10 since then. And at that time the back of my head
 11 hurt, and I had pressure on the back of my head.
 12 Q. It says here that the current medications
 13 that you were taking in April of 2005 were -- I'm
 14 not sure if I'm pronouncing this right --
 15 Amitriptyline?
 16 A. Yes. I did take that. I do not know if
 17 I was taking it at that time.
 18 Q. What for?
 19 A. Migraines.
 20 Q. And Butalbital?
 21 A. Migraines.
 22 Q. And Enalapril?
 23 A. That is for high blood pressure.
 24 Q. Clarinex?
 25 A. Allergies. I do not know.

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1 Q. Rhinocort?
 2 A. I don't know.
 3 Q. Did you have a sinus condition at that
 4 time?
 5 A. No.
 6 Q. Cromolyn, it was an eyedrop?
 7 A. I have no idea. For migraines, probably.
 8 I tried a lot of things for migraines over the
 9 years.
 10 Q. Well, it sounds like your experience
 11 there was unsatisfactory?
 12 A. As far as the pain in my head, yes,
 13 definitely. It just seemed like they were not
 14 listening, and I told them that I had pressure on
 15 the back of my head in this area right here and at
 16 that time there was a lump and a bruise, so maybe
 17 they figured that was what it was, and it continued
 18 to bother me.
 19 Q. There was a lump there?
 20 A. Yes.
 21 Q. And when you say there was a bruise, do
 22 you just mean it was sore to the touch?
 23 A. Right.
 24 Q. Because you could not see it, obviously?
 25 A. No.

13 (Pages 49 to 52)

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<p style="text-align: right;">Page 53</p> <p>1 Q. How big was the lump?</p> <p>2 A. I do not know. I do not remember at all.</p> <p>3 Q. Did you play sports growing up?</p> <p>4 A. I did not.</p> <p>5 Q. Had you ever had a concussion growing up?</p> <p>6 A. No.</p> <p>7 Q. Well, let me see what my records show.</p> <p>8 After that first visit you returned again a couple</p> <p>9 of weeks later on May 4th, 2005 to check up on your</p> <p>10 headaches. Do you remember that?</p> <p>11 A. To the Urgent Care?</p> <p>12 Q. It was to Southwest Medical, and I</p> <p>13 believe that one -- that next visit might have been</p> <p>14 with Mr. Hill. Do you remember the first time you</p> <p>15 saw him after the accident?</p> <p>16 A. I do not. I do not remember the first</p> <p>17 time. I have seen him several times.</p> <p>18 Q. Now, you had seen him before the accident</p> <p>19 too; right?</p> <p>20 A. Yes.</p> <p>21 Q. And the first time you went to</p> <p>22 Southwest Medical on the date of the incident, you</p> <p>23 saw someone other than Mr. Hill?</p> <p>24 A. Yes. That was the Urgent Care that we</p> <p>25 went to.</p>	<p style="text-align: right;">Page 55</p> <p>1 scan done on May 11th, and you returned to</p> <p>2 Southwest Medical the following day, May the 12th.</p> <p>3 And the physician's assistant that day was</p> <p>4 Nancy Bahnsen, B-a-h-n-s-e-n.</p> <p>5 Do you remember speaking with Ms. Bahnsen</p> <p>6 regarding the CT scan?</p> <p>7 A. Where was that visit at?</p> <p>8 Q. At Urgent Care.</p> <p>9 A. So that was -- I did go to Urgent Care in</p> <p>10 between the visits again. Again between the first</p> <p>11 Urgent Care visit and the visit to Britt Hill?</p> <p>12 Q. No. Let me give you the chronology</p> <p>13 again.</p> <p>14 A. Because I'm not understanding.</p> <p>15 Q. The date of the incident is April 15th.</p> <p>16 A. Yes.</p> <p>17 Q. You go to Urgent Care that day?</p> <p>18 A. Yes.</p> <p>19 Q. And they take some X-rays, and then the</p> <p>20 next time you treated was on May 4th, and on May 4th</p> <p>21 you saw Mr. Hill.</p> <p>22 A. Okay.</p> <p>23 Q. And then the next time you treated was to</p> <p>24 get the CT scan on May 11th. And then on May 12th,</p> <p>25 the day after the CT scan, you went to the</p>
<p style="text-align: right;">Page 54</p> <p>1 Q. And then a couple of weeks later you went</p> <p>2 back to Southwest Medical and you saw Mr. Hill</p> <p>3 and --</p> <p>4 A. Did I go to Urgent Care again?</p> <p>5 Q. No. Just Southwest Medical. If you did,</p> <p>6 I do not know about it.</p> <p>7 Now, at that time, Mr. Hill wrote that</p> <p>8 there was no evidence of a scalp hematoma. This</p> <p>9 lump that you described earlier, it went away by</p> <p>10 that time?</p> <p>11 A. I don't remember.</p> <p>12 Q. Do you remember him referring you out for</p> <p>13 a CT scan of the head?</p> <p>14 A. Yes. He referred me to a CT scan.</p> <p>15 Q. Now, did you work in that roughly</p> <p>16 two-week period between the date of the incident and</p> <p>17 the time that you returned to Southwest Medical?</p> <p>18 A. I did work. I'm not sure if I went the</p> <p>19 next day or two, but I did.</p> <p>20 Q. And then after the CT scan was done, you</p> <p>21 met with Mr. Hill. Do you remember what he told you</p> <p>22 about the findings on the CT scan?</p> <p>23 A. I do not remember.</p> <p>24 Q. Now, here he reported that -- I'm sorry.</p> <p>25 It actually was not with Mr. Hill. You had the CT</p>	<p style="text-align: right;">Page 56</p> <p>1 Urgent Care.</p> <p>2 A. Okay.</p> <p>3 Q. And that is where you saw Ms. Bahnsen who</p> <p>4 was the physician's assistant you saw back on</p> <p>5 April 15th.</p> <p>6 A. Okay.</p> <p>7 Q. Do you remember talking with her about</p> <p>8 it?</p> <p>9 A. I knew I had been to the Urgent Care</p> <p>10 twice. I'm not sure if I saw Brett Hill in between</p> <p>11 or after that. I thought it was after that. It was</p> <p>12 a mistake.</p> <p>13 Q. Well, the physician's assistant note of</p> <p>14 May 12th reports that the radiologist read the</p> <p>15 CT scan as negative. It did not show any findings.</p> <p>16 Do you remember having a discussion with anybody</p> <p>17 about that?</p> <p>18 A. I probably did. I do not remember.</p> <p>19 Q. Well, at this visit the physician's</p> <p>20 assistant wrote that you were not satisfied with the</p> <p>21 negative CT results and requested a referral for an</p> <p>22 MRI. Do you remember this discussion?</p> <p>23 A. I kind of do, yes. Because I knew I</p> <p>24 still had pain, and they did not come up with</p> <p>25 anything.</p>

14 (Pages 53 to 56)

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1 Q. And then you were referred out for the
2 brain MRI. And do you remember speaking with anyone
3 about the findings of that study?

4 A. I don't.

5 Q. Well, the radiologist reported that the
6 brain MRI was normal and you saw Britt Hill a couple
7 of days after the brain MRI, and he reported that he
8 advised you of that, but you do not remember that
9 discussion?

10 A. I have had so many discussions. I mean,
11 seriously.

12 Q. Now, at this point, treatment stops for
13 about four and a half months after the brain MRI.
14 What happened during that four and a half months?

15 A. Well, what happened was they told me
16 that, like you said, that they take the CT scan and
17 MRI and nothing was wrong, and so I figured that I
18 would -- that they were the doctors, there was
19 nothing wrong. So I went home and the pain got
20 progressively worse and the symptoms did not go
21 away. So I made an appointment and started going
22 again.

23 Q. When did you start experiencing neck
24 pain?

25 A. I don't remember.

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1 Q. Because according to the records, it was
2 not in the months immediately following the
3 accident, because the reports here suggest that you
4 were complaining of migraines?

5 MR. PALERMO: I will issue an objection
6 as to misleading. There is a mention of neck pain
7 in the first report.

8 BY MR. ROGERS:

9 Q. Well, after the date of the incident, did
10 the neck pain stop?

11 A. I do not understand what you mean.

12 Q. As your counsel pointed out, the
13 Urgent Care record, the complaints listed are neck,
14 back, left shoulder, left elbow, and back of the
15 head. And the left elbow and the back of the head
16 were listed as the chief complaints, and then after
17 that there is no mention of neck pain on the
18 following visits.

19 So did you have no neck pain at that
20 time?

21 A. The head pain was -- I had so much
22 pressure on the back of my head, and the head pain,
23 I was so worried about that. So, no. I still had
24 shoulder pain and neck pain, but they could not do
25 anything for the head pain, the pressure.

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1 Q. Well, did the head pain later subside
2 then?

3 A. No. I still have that too.

4 Q. Is it the same as it was on the date of
5 the incident or is it less or more, for that matter?

6 A. I don't know. It is either the same or
7 more.

8 Q. And what of the neck pain, is it the same
9 or different?

10 A. It is worse. It is way worse.

11 Q. Now, Mr. Hill advised you to quit smoking
12 due to the migraines. Did you ever quit?

13 A. I did not.

14 Q. How much do you smoke a day?

15 A. On average probably somewhere around half
16 a pack.

17 Q. Now, so far what we have covered is that
18 initial treatment right after the accident. You had
19 the CT scan and the MRI, and then you stopped
20 treating for a season, and then you returned. And
21 then you treated a couple of times and then came --
22 there came another gap in treatment of a couple of
23 months. You came back and treated for about a week
24 and then stopped again for a while. Why did you
25 stop again?

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1 MR. PALERMO: I will object as to vague
2 and ambiguous and as to form.

3 But you can answer.

4 THE WITNESS: Because I just felt that I
5 was not getting any kind of results. And I wanted
6 to know what the problem was and why I had the pain,
7 and I just felt that it was -- you know, and they
8 told me with the scans there was nothing wrong, and
9 I just assumed that everything would get better and
10 not worse.

11 BY MR. ROGERS:

12 Q. Then after you returned to treatment, the
13 folks at Southwest Medical referred you to physical
14 therapy?

15 A. Yes.

16 Q. Did that help?

17 A. Like for temporary relief.

18 Q. By temporary, do you mean an hour a day,
19 a week?

20 A. The physical therapy, it was an hour a
21 day, yes. The physical therapy.

22 Q. Then after physical therapy, you returned
23 to Southwest Medical and treated with Dr. Tsai,
24 T-s-a-i.

25 Do you remember him?

15 (Pages 57 to 60)

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<p style="text-align: right;">Page 61</p> <p>1 A. I'm not sure.</p> <p>2 Q. Now, we're around 11 months after the car</p> <p>3 accident, so in March of 2006 and at this point the</p> <p>4 folks there at Southwest Medical refer you for a</p> <p>5 cervical MRI. Did you ever talk with anyone about</p> <p>6 the findings on that neck MRI?</p> <p>7 A. I'm not sure which one it is or which</p> <p>8 doctor I went to.</p> <p>9 Q. Well, this is still at Southwest Medical,</p> <p>10 so it is Mr. Hill or the physician he is working</p> <p>11 with.</p> <p>12 A. I would imagine I talked to the physician</p> <p>13 about it.</p> <p>14 Q. Do you remember talking with the</p> <p>15 physician about it?</p> <p>16 A. I am not really sure exactly what test we</p> <p>17 are talking about.</p> <p>18 Q. The neck MRI.</p> <p>19 MR. PALERMO: I think he has had a lot.</p> <p>20 That is probably why he was confused.</p> <p>21 BY MR. ROGERS:</p> <p>22 Q. As I said, this was in March of 2006, so</p> <p>23 this is about a year after the accident.</p> <p>24 A. I have no idea who I saw and at what</p> <p>25 time. I really do not.</p>	<p style="text-align: right;">Page 63</p> <p>1 Q. Well, anyway, right after you see</p> <p>2 Dr. McNulty for the first time, and this is a year</p> <p>3 after the accident now, you go back to</p> <p>4 Southwest Medical to this pain management center.</p> <p>5 Do you remember treating there?</p> <p>6 A. Uh-huh.</p> <p>7 Q. Is that yes?</p> <p>8 A. Yes.</p> <p>9 Q. Do you remember who you treated with</p> <p>10 there?</p> <p>11 A. I do not.</p> <p>12 Q. There are two providers who are mentioned</p> <p>13 at the outset. One is Adam Arite, A-r-i-t-e, and</p> <p>14 the other is Donna Barnavon, B-a-r-n-a-v-o-n. Do</p> <p>15 you remember either of them?</p> <p>16 A. I remember names, yes.</p> <p>17 Q. Do you remember what kind of treatment</p> <p>18 they provided?</p> <p>19 A. I believe that it was Donna -- correct?</p> <p>20 Q. Yes.</p> <p>21 A. I believe Donna was the physical</p> <p>22 therapist like with the TENS. They -- the TENS</p> <p>23 unit, massage, whatever the therapy was at the time,</p> <p>24 and I believe Dr. Arite was for the injections.</p> <p>25 Q. Now, Donna wrote about psychological</p>
<p style="text-align: right;">Page 62</p> <p>1 Q. Well, it was shortly after this MRI that</p> <p>2 Mr. Hill referred you to Nevada Orthopedic where you</p> <p>3 saw Dr. McNulty?</p> <p>4 A. Yes.</p> <p>5 Q. Does that jog your memory about that MRI</p> <p>6 or about what he told you?</p> <p>7 A. I talked to Dr. McNulty about it.</p> <p>8 Q. Most likely, but what did Dr. McNulty</p> <p>9 tell you about it?</p> <p>10 A. Dr. McNulty had few words for me. He</p> <p>11 just told me that I needed surgery when I went in</p> <p>12 for the visit.</p> <p>13 Q. Is that what he told you at the first</p> <p>14 visit?</p> <p>15 A. I do not know which visit it was. I'm</p> <p>16 not sure what test you are talking about. I imagine</p> <p>17 there were not any tests done in my first visit to</p> <p>18 him, so, no. It would not be the first visit. I</p> <p>19 imagine he would have had the request test. I don't</p> <p>20 know. That is usually how it went.</p> <p>21 Q. Well, at the first visit, at least his</p> <p>22 record of the first visit, he discusses surgery. Do</p> <p>23 you remember whether Dr. McNulty discussed surgery</p> <p>24 with you at your first visit with him?</p> <p>25 A. I don't remember.</p>	<p style="text-align: right;">Page 64</p> <p>1 therapy for pain. Do you remember speaking with</p> <p>2 anyone about psychological treatment?</p> <p>3 A. I spoke to a couple of people over the</p> <p>4 years now. I'm sure.</p> <p>5 Q. Who else?</p> <p>6 A. I do not recall. I don't remember.</p> <p>7 Q. Did you treat with Donna anymore than</p> <p>8 once?</p> <p>9 A. I did.</p> <p>10 Q. And she did the TENS unit and those</p> <p>11 things that you described a moment ago?</p> <p>12 A. Yes.</p> <p>13 Q. Let's shift to the injections. Actually,</p> <p>14 according to the medical records, the doctor did the</p> <p>15 first epidural injections in your neck. It was not</p> <p>16 Dr. Arite. It was a fellow named Ross S-c-i-b-e-l.</p> <p>17 Do you remember him?</p> <p>18 A. Not right offhand, no.</p> <p>19 Q. Do you remember the first time you had an</p> <p>20 epidural injection in your neck?</p> <p>21 A. I do not. I do not remember.</p> <p>22 Q. Well, according to the records, you had</p> <p>23 this first injection and the injection decreased</p> <p>24 your pain and according to the provider, you were</p> <p>25 very satisfied with the outcome, but then -- and</p>

16 (Pages 61 to 64)

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1 this is in July of 2006 -- and then the following
 2 month in August, you reported an exacerbation of
 3 pain. What happened? What was the exacerbation?
 4 A. What do you mean?
 5 Q. In August 2006.
 6 A. It would just be the regular pain, I
 7 would imagine. I don't know.
 8 Q. Well, do you remember any of the
 9 injections that Dr. Arite or Dr. Scibel did?
 10 A. Absolutely.
 11 Q. What do you remember of them?
 12 MR. PALERMO: Objection. Vague and
 13 ambiguous. Overbroad.
 14 You can answer.
 15 THE WITNESS: That I went to several
 16 different places and got injections.
 17 BY MR. ROGERS:
 18 Q. What were the results of the injections?
 19 A. The results were the shoulder pain that
 20 we talked about earlier, the shoulder pain had
 21 lightened up quite a bit anywhere from a day to a
 22 week with the injections. It did not do anything
 23 for the head or the neck, though. It was nice to
 24 just get rid of the shoulder pain.
 25 Q. Do you remember undergoing different

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1 A. No.
 2 Q. Now, over the course of your treatment
 3 you have undergone three cervical MRIs. Have you
 4 talked with your doctors about any of them?
 5 A. I'm sure I have. I don't remember the
 6 exact conversations of any of them.
 7 Q. You do not remember any of your providers
 8 saying, Okay, the films from these tests show
 9 negative or positive findings?
 10 A. I do not recall which ones or which, no.
 11 Q. Well, there was actually a fourth kind of
 12 injection that was done, but it was not done in your
 13 neck, at least not to the cervical spine. It is
 14 called a trigger point injection.
 15 Do you remember ever hearing that phrase
 16 "trigger point injection"?
 17 A. I have.
 18 Q. Now, was it the trigger point injections
 19 that they were doing along your left shoulder?
 20 A. I'm not sure.
 21 Q. Do you know if was the trigger point
 22 injections that were relieving the left shoulder
 23 pain?
 24 A. I'm not sure which ones they were.
 25 Q. Then after undergoing these various

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1 kinds of injections in the neck?
 2 A. I have gone through a couple of different
 3 kinds, yes.
 4 Q. The ones that I see referenced in the
 5 records are epidurals, selective nerve root blocks,
 6 and radiofrequency. Sometimes it is referred to as
 7 rhizotomy.
 8 A. Okay.
 9 Q. Did one of those injections provide more
 10 relief than the others?
 11 A. I do not remember.
 12 Q. Did any of those injections provide
 13 relief of your pain for longer than a day or I think
 14 you said a day to a week?
 15 A. Yes. Some of them. I'm not sure which
 16 ones said a day to a week.
 17 Q. But did any of the injections --
 18 A. It did not take the pain away. It
 19 lightened it up. I mean a lot, the shoulder pain,
 20 yes.
 21 Q. Did any of the injections relieve your
 22 neck pain?
 23 A. I do not believe so.
 24 Q. Did any of the injections relieve your
 25 head pain?

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1 injections with Southwest Medical's Pain Management
 2 Center, you went back to Dr. McNulty.
 3 A. Okay.
 4 Q. This takes us up to September 2007. So,
 5 in other words, you had been undergoing treatment at
 6 the Southwest Pain Management Center for a year and
 7 a half from March 2006 up until roughly
 8 September 2007.
 9 Do you remember going back to Dr. McNulty
 10 after that year and a half away from him?
 11 A. I do remember going back.
 12 Q. What happened when you went back to him?
 13 A. As far as -- I believe he ordered a test
 14 or something, X-ray. I'm not sure. I know the pain
 15 management, because I wanted to find out what the
 16 problem was. The pain management referred me back
 17 to him, I believe.
 18 Q. Did you get the impression that
 19 Southwest Medical Pain Management providers failed
 20 to figure out what the problem was?
 21 A. I got the impression that the problem was
 22 not figured out, because if it was, then the pain
 23 would be gone. A solution could be found and the
 24 pain would be gone.
 25 Q. Did Dr. McNulty do injections on you?

17 (Pages 65 to 68)

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<p style="text-align: right;">Page 69</p> <p>1 A. I believe he did, yes.</p> <p>2 Q. Did he recommend surgery when you went</p> <p>3 back to him after that year and a half away?</p> <p>4 A. Yes.</p> <p>5 Q. Did Dr. McNulty tell you what he saw on</p> <p>6 the MRIs?</p> <p>7 A. He did, but I did not understand at the</p> <p>8 time. I do not remember exactly. Something C3-C4</p> <p>9 or something. I did not understand at the time.</p> <p>10 Q. Do you understand now what he said?</p> <p>11 A. I understand now what needs to be done,</p> <p>12 yes.</p> <p>13 Q. What is K?</p> <p>14 A. It is surgery to replace a couple of</p> <p>15 discs.</p> <p>16 Q. Has someone talked with you about disc</p> <p>17 replacement or disc removal?</p> <p>18 A. Removal. I'm not sure.</p> <p>19 Q. Has anyone talked about artificial discs</p> <p>20 in your neck?</p> <p>21 A. I do not recall. I talked about a lot of</p> <p>22 things. I asked a lot of questions, but I do not --</p> <p>23 Q. So just to clarify, you do not know if a</p> <p>24 doctor has suggested disc replacement or disc</p> <p>25 removal?</p>	<p style="text-align: right;">Page 71</p> <p>1 discogram.</p> <p>2 A. So it is generally to relieve pain; it is</p> <p>3 the one that they do that they have you sit in their</p> <p>4 office after they do it, and they try to find out if</p> <p>5 the pain is gone in the area where they gave you the</p> <p>6 shot?</p> <p>7 Q. Yes.</p> <p>8 A. I have had that done several times.</p> <p>9 Q. Right. Do you remember what the results</p> <p>10 of Dr. McNulty's epidural was? Did it relieve pain?</p> <p>11 A. I do not remember.</p> <p>12 Q. Now, earlier you testified that the</p> <p>13 epidurals -- let me start over.</p> <p>14 Earlier you testified that none of the</p> <p>15 injections relieved your neck pain. None of them</p> <p>16 relieved your head pain; that some of them relieved</p> <p>17 your left shoulder pain for a day to a week?</p> <p>18 A. Right.</p> <p>19 Q. And that applies to all of the</p> <p>20 injections; right?</p> <p>21 MR. PALERMO: I don't know if that was</p> <p>22 addressed.</p> <p>23 But you can answer.</p> <p>24 BY MR. ROGERS:</p> <p>25 Q. That is my question.</p>
<p style="text-align: right;">Page 70</p> <p>1 A. I believe -- for McNulty?</p> <p>2 Q. For any doctor at this point. And then</p> <p>3 we will narrow it down to who?</p> <p>4 A. The understanding I have from Dr. Grover</p> <p>5 was that the discs would be removed, and I guess the</p> <p>6 bones would be fused. That is the understanding I</p> <p>7 have, but I talked to a lot of people, and I</p> <p>8 really -- I don't know.</p> <p>9 Q. Let's get back to the question I had</p> <p>10 earlier, and that is the injections that Dr. McNulty</p> <p>11 did. I have a record of epidural injections. Do</p> <p>12 you remember those?</p> <p>13 A. I had injections with him, yes.</p> <p>14 Q. Do you remember what the results of that</p> <p>15 epidural were?</p> <p>16 A. Which one was the epidural?</p> <p>17 Q. The one that was done in November of</p> <p>18 2007.</p> <p>19 A. What does it consist of?</p> <p>20 Q. Where they inject steroids and anesthesia</p> <p>21 onto the disc.</p> <p>22 A. Is that done through the front or the</p> <p>23 back?</p> <p>24 Q. They could do it either way. This is</p> <p>25 generally just to relieve pain. It is not the</p>	<p style="text-align: right;">Page 72</p> <p>1 A. I don't know. No. I mean there is -- I</p> <p>2 mean, I really do not understand the question. When</p> <p>3 you go in with Dr. McNulty, the one that you are</p> <p>4 talking about, is a temporary thing. Does it</p> <p>5 relieve it? I believe the areas of injection, I'm</p> <p>6 not sure if it did or not. I believe that that is</p> <p>7 why the test is taken because they do it, and if it</p> <p>8 relieves it, then they know where to X-ray and where</p> <p>9 to look at, whatever. I understand that, but I do</p> <p>10 not remember -- I do not remember which ones did</p> <p>11 what. I do not know the names of the shots, if</p> <p>12 there were four different names that you are giving</p> <p>13 me.</p> <p>14 Q. Right. So let's not complicate it like</p> <p>15 that.</p> <p>16 A. I have no idea on some of the tests you</p> <p>17 are asking me. Just bottom line is bottom line.</p> <p>18 Q. And the bottom line is -- and I'm trying</p> <p>19 to pull out all of those technical medical phrases</p> <p>20 and stuff. The bottom line is that as you look back</p> <p>21 over the injections that you have undergone, they</p> <p>22 did not provide relief of neck pain. They did not</p> <p>23 provide relief of head pain, but they did provide</p> <p>24 temporary relief of left shoulder pain?</p> <p>25 A. Pretty much, yes.</p>

18 (Pages 69 to 72)

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1 Q. Now, did Dr. McNulty do a discogram on
2 you?
3 A. I do not remember.
4 Q. You had a discogram not long ago?
5 A. Uh-huh.
6 Q. Do you remember that with Dr. Rosler?
7 A. Yes.
8 Q. And that is the one where they inflate
9 the disc with dye and pressurize it to see if it
10 elicits pain. They are not trying to relieve your
11 pain. They are trying to cause pain?
12 A. Right.
13 Q. So that is a different injection from all
14 of the other ones that you have had?
15 A. Yes.
16 Q. Did you undergo a discogram back in
17 December 2007?
18 A. I do not remember.
19 Q. All right. Well, there is a record from
20 Dr. McNulty that, in fact, reports that he did do a
21 discogram in December 2007. And the records reflect
22 that that was the last time you saw him. Why did
23 you leave McNulty?
24 A. I guess my wife and I went to the
25 appointment for the results of the test that they

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1 not ready for it. My question was why did you leave
2 him? Was this, I guess, bedside manner of springing
3 it on you the reason that you left or was there
4 something else?
5 A. That is what I thought initially because
6 I was floored. I did want to get another opinion
7 also. And I actually did talk to the people on the
8 phone about scheduling for the surgery, but I did
9 not. There actually were a couple of reasons. One
10 was I wanted another opinion, and two, I had gone to
11 the dentist, and they had found an issue in my
12 mouth.
13 Q. What was the issue?
14 A. There was a tumor.
15 Q. Was it cancerous?
16 A. No. It turned out not to be.
17 Q. And that happened right around
18 December 2007 when you stopped seeing Dr. McNulty?
19 A. Yes. It was right around that time. And
20 I actually went into the office and talked to one of
21 the girls that works for him and explained that I was
22 going to hold off, and I wanted to get another
23 opinion and that I wanted to see what was wrong with
24 my mouth, my jaw before I did anything and made my
25 decision.

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1 did, which I'm not sure that they did, and we went
2 and sat in a room, and when Dr. McNulty came in, he
3 put the film pictures on the light thing and said,
4 Yeah. You need surgery. Do you have any questions?
5 Pretty much -- I don't remember the exact words, but
6 it was a pretty short conversation, and I was not
7 ready for -- I had no idea that I was going to need
8 surgery or anything. I was kind of floored. I was
9 kind of floored with the results. I don't know what
10 I expected but -- I don't know.
11 Q. You know what, I'm looking now at the
12 records, and I was -- I think I was mistaken. It
13 does not look like Dr. McNulty did a discogram.
14 MR. ROGERS: Let's go off the record.
15 (Off the record.)
16 BY MR. ROGERS:
17 Q. While we were off the record, I went
18 through the medical records that your counsel has
19 produced and, in truth, it appears that I was
20 mistaken, that Dr. McNulty did not do a discogram in
21 December 2007, but December 2007 was the last time
22 you saw him.
23 And right before our break you testified
24 that at that last visit he sort of sprung on you
25 that he was suggesting surgery, and that you were

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1 Q. Did you undergo an operative procedure
2 for the tumor?
3 A. I did.
4 Q. What did they do?
5 A. They just cut it open, looked at it, and
6 pulled it out, I guess.
7 Q. Were you unconscious during the procedure
8 or were you just sitting in the dentist chair awake
9 and numbed?
10 A. I was awake. It was not a dentist. It
11 was a surgeon who did it.
12 Q. Who was it? Was it a guy named Glyman?
13 A. Yes.
14 Q. But you did not go to a surgical center
15 or a hospital for the surgery?
16 A. I went to his office. I do not know if
17 it was a surgical center or not.
18 Q. And they did not put you under general
19 anesthesia?
20 A. Where I go to sleep?
21 Q. Right.
22 A. No.
23 Q. Let me make sure that I understand. You
24 stopped seeing McNulty, because you wanted to get a
25 second opinion about his recommendation for surgery;

19 (Pages 73 to 76)

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<p style="text-align: right;">Page 77</p> <p>1 right?</p> <p>2 A. Yes. Part of it, yes.</p> <p>3 Q. And coincidentally right around that same</p> <p>4 time you had a scare about a tumor in your mouth?</p> <p>5 A. Yes.</p> <p>6 Q. And after that scare was resolved, you</p> <p>7 went and got a second opinion with Dr. Grover?</p> <p>8 A. Yes.</p> <p>9 Q. Now, who referred you to Dr. Grover?</p> <p>10 A. I had asked around and talked to a lot of</p> <p>11 people and his name had come up several times, and</p> <p>12 then I called Jerry at the attorney's office,</p> <p>13 because obviously, I do not have the money to do it,</p> <p>14 and found out he would work with me for --</p> <p>15 MR. PALERMO: Do not go into any details</p> <p>16 about attorney-office conversation.</p> <p>17 THE WITNESS: Absolutely. And that is</p> <p>18 how I ended up there.</p> <p>19 BY MR. ROGERS:</p> <p>20 Q. You said you talked with several people</p> <p>21 and that Dr. Grover's name came up more than once?</p> <p>22 A. Yes.</p> <p>23 Q. Who recommended Grover to you?</p> <p>24 A. I don't even know his name, an older</p> <p>25 gentleman that had had a neck and some kind of lower</p>	<p style="text-align: right;">Page 79</p> <p>1 separate, that I did have problems.</p> <p>2 Q. Well, then you go to Dr. Grover?</p> <p>3 A. Uh-huh.</p> <p>4 Q. And describe your treatment with him?</p> <p>5 A. I just went back for several different</p> <p>6 appointments for different tests, and I'm not even</p> <p>7 sure. And I did go in for some of the shots that</p> <p>8 they do.</p> <p>9 Q. And that was with Dr. Rosler?</p> <p>10 A. And Grover; same office, yes.</p> <p>11 Q. And did you get the same results from the</p> <p>12 injections that Dr. Rosler did as you did with the</p> <p>13 ones done by Drs. McNulty and Arite?</p> <p>14 A. That is all of the shots -- there were</p> <p>15 different kind of shots that I had.</p> <p>16 Q. Right. But earlier you testified that</p> <p>17 the shots really did not relieve your neck pain.</p> <p>18 That all they relieved was the shoulder pain</p> <p>19 temporarily. Was it the same result with Dr. Rosler</p> <p>20 as it was with the others?</p> <p>21 A. I don't believe it was the same kind of</p> <p>22 shots that I got.</p> <p>23 Q. Well, did you get a different result from</p> <p>24 Dr. Rosler?</p> <p>25 A. No, not really. Any result, I do not</p>
<p style="text-align: right;">Page 78</p> <p>1 back or hip or something surgery, so one of them. I</p> <p>2 talked to my customers and the people I worked with.</p> <p>3 The other names came up too, and people I worked</p> <p>4 with, but most of them are like in L.A. or</p> <p>5 something, and I cannot go that way.</p> <p>6 Q. Did any other surgeons' names come up in</p> <p>7 these discussions with friends and co-workers?</p> <p>8 A. Yes. Absolutely.</p> <p>9 Q. Who else?</p> <p>10 A. I do not remember.</p> <p>11 Q. And you said that you cannot afford the</p> <p>12 treatment. By that did you mean that you have</p> <p>13 treated with Dr. Grover on a lien?</p> <p>14 A. Yes.</p> <p>15 Q. Did you ask around for any surgeons who</p> <p>16 would accept your insurance?</p> <p>17 A. I was under the understanding that I had</p> <p>18 to get a referral and this and that, and I was not</p> <p>19 sure if they would go with the same records or same</p> <p>20 pictures that were already taken, so it was a</p> <p>21 personal thing too that I wanted to go outside of</p> <p>22 Southwest Medical, because it is more like going</p> <p>23 to -- I just look at it like they all kind of work</p> <p>24 together. I did not want any shared information or</p> <p>25 anything. I just wanted to know from someone else,</p>	<p style="text-align: right;">Page 80</p> <p>1 think. I don't remember. I mean, I'm not sure when</p> <p>2 they were doing the tests. Like, I guess, they try</p> <p>3 to numb parts so they know where to X-ray from what</p> <p>4 I understand or where to look for the problem.</p> <p>5 Q. Well, I mean, Dr. Rosler did one of those</p> <p>6 injections that numbs the area back in July of 2008,</p> <p>7 so just a couple of months ago. And he wrote, No</p> <p>8 significant improvement with your neck pain, and</p> <p>9 that report suggests that that injection was the</p> <p>10 same as the ones that came before. It did not</p> <p>11 really relieve your neck pain.</p> <p>12 A. But there are different kinds of</p> <p>13 injections. The ones that relieve the shoulder pain</p> <p>14 I got like 20 shots at one time.</p> <p>15 Q. That is called a trigger point injection.</p> <p>16 A. Okay. I don't know the difference in</p> <p>17 what they are called. That is what I was telling</p> <p>18 you earlier. I'm not sure, and I believe you are</p> <p>19 confusing all of the shots with the different --</p> <p>20 Q. It does sound like we're not really on</p> <p>21 the same page. Let me put it to you this way. The</p> <p>22 trigger point injection, the one where they can do</p> <p>23 20 of them at the same time and they can do it in</p> <p>24 their clinic, that is the one I understood relieved</p> <p>25 your shoulder pain?</p>

20 (Pages 77 to 80)

<p style="text-align: right;">Page 81</p> <p>1 A. Yes.</p> <p>2 Q. Now, the other injections are generally</p> <p>3 done in the Surgicenter, that is the epidurals, the</p> <p>4 selective nerve root blocks, the radiofrequency,</p> <p>5 those were the ones that I understood you said that</p> <p>6 they did not relieve your neck or head pain?</p> <p>7 A. Right. And if any of them did, it was</p> <p>8 like very, very temporary. We are talking an hour</p> <p>9 to a day. We're talking like an hour or whatever.</p> <p>10 It was no noticeable relief.</p> <p>11 Q. Okay. Now we're on the same page then.</p> <p>12 And then the injections that Dr. Rosler did, the one</p> <p>13 I just read to you, was a selective nerve root</p> <p>14 block, and Dr. Arite did those as well. It sounds</p> <p>15 like Dr. Rosler's injections in the neck was the</p> <p>16 same as Dr. Arite's, that it provided the same</p> <p>17 result, which was basically little to no relief at</p> <p>18 all?</p> <p>19 A. I cannot remember Dr. Arite's shots. I</p> <p>20 thought those were the ones going across my</p> <p>21 shoulder.</p> <p>22 Q. He did both. Let's just focus on</p> <p>23 Dr. Rosler's injections in July -- I'm sorry. This</p> <p>24 was done in May of 2008. I'm reading from a July</p> <p>25 note. And it said that you had that injection in</p>	<p style="text-align: right;">Page 83</p> <p>1 level?</p> <p>2 A. C5-C6. I do not know.</p> <p>3 Q. So Dr. Grover has told you that fissures</p> <p>4 in your neck are causing the pain?</p> <p>5 A. I believe so.</p> <p>6 Q. And what kind of treatment did he</p> <p>7 recommend to resolve the pain?</p> <p>8 A. I do not recall.</p> <p>9 Q. There is a record that your counsel</p> <p>10 produced yesterday or the day before of the</p> <p>11 treatment with Dr. Grover on September 2, 2008. So</p> <p>12 just a little over a month ago, and in it he wrote,</p> <p>13 I believe that at this point, he, being Mr. Simao,</p> <p>14 has approached the point where he is considered to</p> <p>15 be a reasonable candidate for an interbody fusion</p> <p>16 reconstruction and decompression at C3-4, C4-5.</p> <p>17 Follow-up in four to six weeks.</p> <p>18 Now, do you have a follow-up appointment?</p> <p>19 A. I do.</p> <p>20 Q. When is it scheduled?</p> <p>21 A. I think it is next week sometime. I'm</p> <p>22 not positive. It is written in my daily planner</p> <p>23 note.</p> <p>24 Q. Have you decided whether you're going to</p> <p>25 choose to undergo the surgery?</p>
<p style="text-align: right;">Page 82</p> <p>1 the neck and not on the shoulder with no significant</p> <p>2 improvement.</p> <p>3 A. Okay.</p> <p>4 Q. Does that sound correct?</p> <p>5 A. It sounds correct.</p> <p>6 Q. Well, anyway, we got onto Rosler really</p> <p>7 just on a tangent there. You went to see</p> <p>8 Dr. Grover. I know that he did the injections. But</p> <p>9 what else? What other kind of treatment did he</p> <p>10 provide?</p> <p>11 A. Basically, he was just trying to run</p> <p>12 tests and find out what the problem was and that was</p> <p>13 about it.</p> <p>14 Q. Did he ever find what the problem was?</p> <p>15 A. I believe he did, yes.</p> <p>16 Q. What did he tell you the problem was?</p> <p>17 A. I think it is just the term "fissures."</p> <p>18 Q. Did he tell you where the fissures were?</p> <p>19 A. Into the discs in my neck.</p> <p>20 Q. Did he say which discs?</p> <p>21 A. I believe C3-C4.</p> <p>22 Q. Just the one level?</p> <p>23 A. I think there were two levels. I'm not</p> <p>24 sure.</p> <p>25 Q. Did he tell you which was the other</p>	<p style="text-align: right;">Page 84</p> <p>1 A. I have not yet. It is a big decision.</p> <p>2 Q. Now, I asked your wife yesterday if she</p> <p>3 or you have considered seeing a neurosurgeon because</p> <p>4 Drs. McNulty and Grover are orthopedic surgeons, and</p> <p>5 this recommended surgery involves the surgical</p> <p>6 spine, a place where a lot of neurosurgeons regard</p> <p>7 themselves as superiorly trained. Have you or your</p> <p>8 wife talked about visiting with any of the</p> <p>9 neurosurgeons in town?</p> <p>10 A. We have not.</p> <p>11 Q. Has Dr. Grover discussed with you the</p> <p>12 idea of canceling with a neurosurgeon?</p> <p>13 A. I do not remember if he did or not. I'm</p> <p>14 not sure.</p> <p>15 Q. Has Dr. Grover suggested any alternative</p> <p>16 courses of therapy that would be less invasive than</p> <p>17 a two-level fusion?</p> <p>18 A. I'm not sure if he did on the last visit</p> <p>19 or not. I think before he had mentioned like</p> <p>20 different exercise movement or whatever and pain</p> <p>21 medications, which I have not taken from him.</p> <p>22 Q. Are you taking pain medication now?</p> <p>23 A. Just for migraines.</p> <p>24 Q. Tell me about this discogram that</p> <p>25 Dr. Rosler did. Tell me what it was like.</p>

21 (Pages 81 to 84)

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1 MR. PALERMO: Objection. Vague and
2 ambiguous as to form.
3 You can answer.
4 THE WITNESS: It was like a test. I
5 guess they -- from what I understand, they shot dye,
6 I guess, into the discs, and then I went somewhere
7 else, and they did some kind of scan.
8 BY MR. ROGERS:
9 Q. Well, did they give you medication
10 beforehand?
11 A. Before?
12 Q. Before injecting the dye?
13 A. Yes. I believe so.
14 Q. Were you awake?
15 A. No.
16 Q. Somewhat impaired?
17 A. I think I was asleep when they did it. I
18 do not remember.
19 Q. Do you remember speaking with the
20 physician who was injecting the dye while the
21 procedure was being done?
22 A. No, I don't remember.
23 Q. Just describe how it was done at their
24 center. You go in and you check in and generally
25 they will begin by giving the patient some kind of

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1 sedative. Do you remember them giving you a pill or
2 maybe gas or something like that?
3 A. I think it was gas. I did not get a pill
4 or anything, and it was when I was laying down.
5 Q. You were with your wife before you go in
6 to the OR; right?
7 A. Uh-huh.
8 Q. Take me then from what you can remember
9 from when you are sitting with your wife and you are
10 still coherent up until the time that you leave the
11 center.
12 A. We were in the waiting room, and then
13 they called my name, and then we walked into one of
14 the small offices and my wife came in and sat there.
15 I guess they took my blood pressure, whatever, and
16 then I went to another room, and I do not know if my
17 wife sat in the small room or went back out to the
18 waiting room. I'm not sure. And I think there were
19 three or four or five people. I'm not sure how many
20 were in there, and I laid down on the table and yes,
21 I believe it was something that I breathed in that
22 they gave me. And he was explaining, you know, what
23 he was going to do all of the way, and that that was
24 it, really.
25 Q. And you woke up after it was done?

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1 A. Pretty much, I believe so.
2 Q. Was it Dr. Rosler who did that procedure?
3 A. Yes. I believe it was, yes.
4 Q. Did you talk with any of those providers
5 in the recovery room?
6 A. Any of the providers?
7 Q. Rosler or any of the other -- I think you
8 said four or five people were in the operating room?
9 A. That I talked to in the recovery room?
10 Q. Yes. As I understand it, they wheel you
11 into the operating room, and they give you gas, you
12 go to sleep, and then the next coherent moment you
13 have is when it is over and you are in the recovery
14 room?
15 A. I believe I talked to Dr. Rosler after.
16 Q. In the recovery room or when you returned
17 to his office sometime later?
18 A. I do not remember.
19 Q. Now, this was done a couple of months
20 ago; right?
21 A. Yes.
22 Q. Do you think you do not remember this
23 thing that happened a couple of months ago simply
24 because you were -- well, gassed? You were
25 incoherent?

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1 A. No. I think it was because all of these
2 tests and everything just kind of run together and
3 I'm looking for the results to get rid of the pain
4 and I was kind of more focused on what I could do to
5 get rid of that permanently than everything else,
6 you know.
7 Q. Well, what did Dr. Rosler tell you was
8 the finding from that discography?
9 A. On that visit?
10 Q. Whenever you talked to him about what the
11 result was of that test.
12 A. I guess that there were fissures or
13 cracks or whatever. They did explain it to me.
14 Q. Was it Dr. Grover who explained it to you
15 or Dr. Rosler?
16 A. It was Dr. Grover.
17 Q. So Dr. Rosler did not explain it to you?
18 A. No.
19 Q. Did Dr. Grover ever discuss with you
20 concerns about potential false positives on a
21 discogram study?
22 A. I do not recall.
23 Q. In other words, did he ever tell you,
24 Look, this is a test that is not always reliable;
25 that it can have some problems?

22 (Pages 85 to 88)

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1 A. I do not remember if he said that or not.
 2 Q. Have you ever heard anybody say that
 3 before me saying it today?
 4 A. Probably not.
 5 Q. What did Dr. Grover tell you about the
 6 success rate of a two-level cervical fusion?
 7 A. I don't know if we got into any exacts,
 8 but I did ask him. And he said that most of them go
 9 very well and people can live normal lives, and
 10 there is not a lot of difference and some of them
 11 obviously do not. That is what I took from that.
 12 Q. So, in other words, he said that the
 13 greater likelihood of this two-level fusion would
 14 relieve your pain, but that there was a chance that
 15 it would not?
 16 A. He did say there was a chance that it
 17 would not.
 18 Q. And when he said go onto lead normal
 19 lives, did he tell you that that would mean --
 20 (Telephonic interruption.)
 21 BY MR. ROGERS:
 22 Q. Did he tell you that that would mean that
 23 the pain would be resolved?
 24 MR. PALERMO: Objection. Vague and
 25 ambiguous.

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1 You can answer.
 2 THE WITNESS: No. I have asked the
 3 question of everyone I have seen and nobody can
 4 guarantee everything, and I understand that.
 5 BY MR. ROGERS:
 6 Q. What did he tell you about what the pain
 7 would be like, if any, after the surgery?
 8 A. It varies. That it varies. Some people
 9 have discomfort. Some people I think did go through
 10 a lot with everybody that I talked to.
 11 Q. You mentioned one man you spoke with who
 12 had surgery with Dr. Grover on his neck; right?
 13 A. Yes.
 14 Q. What did he tell you his neck was like?
 15 A. He was happy with it, and one of the
 16 other guys at work had neck surgery and he was
 17 really happy with it, and I have talked to people;
 18 one of the gals at work that she was very unhappy
 19 with her neck surgery. I have met people along the
 20 way, customers that I have talked to, this and that,
 21 that some are happy and some are not.
 22 Q. Well, you are going to go back to see
 23 Dr. Grover in roughly a week, and what is your plan
 24 at that meeting?
 25 A. I do not know. I would imagine to make a

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1 decision on the surgery or not.
 2 Q. So as you sit here today, you do not
 3 really know what kind of future treatment you will
 4 plan to undergo?
 5 A. Not really.
 6 Q. Well, let's take about your present
 7 condition then. You have already provided some
 8 insight into it. You said that your head pain is
 9 the same or worse, that your neck pain is worse than
 10 it was back when the accident happened. What about
 11 your left shoulder?
 12 A. It is the same or worse. It is constant.
 13 It is all constant pain, never ever stops. It is
 14 always there.
 15 Q. Do you have any restrictions in your
 16 normal activities?
 17 MR. PALERMO: Objection as to form.
 18 Vague and ambiguous.
 19 You can answer.
 20 THE WITNESS: I imagine there is a lot of
 21 them. I can still lift 100 pounds. I mean, I have
 22 not lost any of my strength, but there were a lot of
 23 things that I do not do now. I sold my motorcycle,
 24 because I cannot sit and ride that.
 25 BY MR. ROGERS:

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1 Q. When did you sell it?
 2 A. Probably about six or seven months ago.
 3 I mean, I do not even know. It is just little
 4 things. I don't know.
 5 Q. Are there any activities that you used to
 6 do that you can no longer do at all?
 7 A. Yes. Sit in a chair.
 8 Q. Well, when I say not at all, I mean
 9 period, because you have sat in a chair today for
 10 quite a while.
 11 A. Right. I cannot sit still. I have to
 12 keep adjusting to be comfortable, so anything that I
 13 have to sit for a long time is pretty much out of
 14 the question.
 15 Q. Well, let me be more specific about the
 16 question. I want to start with activities that you
 17 cannot do, period, and then I want to get into a
 18 discussion of activities that you're limited in, but
 19 you can still do it.
 20 So are there any activities that you used
 21 to do that you cannot do at all?
 22 A. No.
 23 Q. Now let's discuss those activities that
 24 you used to do that you can still do, but that you
 25 have some limitations in. Sitting you have said is

23 (Pages 89 to 92)

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<p style="text-align: right;">Page 93</p> <p>1 one. What else?</p> <p>2 A. I do not know. I really do not have any</p> <p>3 idea. It is a day-by-day thing that I notice.</p> <p>4 Q. And can you think of anything that you</p> <p>5 have limitations in doing other than sitting for</p> <p>6 prolonged periods of time?</p> <p>7 A. Yes. My work. If we have buffers that</p> <p>8 we have to run, like a standup buffer that you have</p> <p>9 to run with the arms, I cannot run those for as long</p> <p>10 as I used to; carpet cleaning, I cannot do it</p> <p>11 anymore. It is mostly what my company does. That</p> <p>12 is pretty much my daily activities. I don't know.</p> <p>13 Q. So you can run the buffer, but not as</p> <p>14 long as you used to?</p> <p>15 A. Yes.</p> <p>16 Q. What is the difference in time? Like you</p> <p>17 used to do it for how long and how long do you do it</p> <p>18 now?</p> <p>19 A. I do not know. I used to do it as long</p> <p>20 as I needed, to take more breaks now or I will bring</p> <p>21 someone to help me. Time wise, I don't know the</p> <p>22 difference.</p> <p>23 Q. Now, what is the difference between</p> <p>24 operating a buffer and carpet cleaning?</p> <p>25 A. I can stand up straighter with the</p>	<p style="text-align: right;">Page 95</p> <p>1 Q. And have you seen any surgeons other than</p> <p>2 Grover and McNulty?</p> <p>3 A. No. Not to my knowledge I have not, no.</p> <p>4 Q. Now, when we started out this deposition,</p> <p>5 I asked you some questions about your company and</p> <p>6 about your income.</p> <p>7 A. Yes.</p> <p>8 Q. Are you bringing a claim for lost income</p> <p>9 as a result of this car accident?</p> <p>10 A. At this point, I do not know how much</p> <p>11 time I have lost.</p> <p>12 Q. So you're claiming that you lost time</p> <p>13 from work?</p> <p>14 A. I lost a lot of time from work, a lot.</p> <p>15 Just from a year of physical therapy, I lost a lot</p> <p>16 of time from that.</p> <p>17 Q. You mean going to the appointments?</p> <p>18 A. Yes. I lost a lot of time. I go home</p> <p>19 half day now sometimes. In fact, I used to go out</p> <p>20 and help William finish. There is a big difference.</p> <p>21 There is a huge difference.</p> <p>22 Q. How much income have you lost as a result</p> <p>23 of the accident?</p> <p>24 A. I cannot even tell you. It is my</p> <p>25 business, so it is what I schedule or do not</p>
<p style="text-align: right;">Page 94</p> <p>1 buffer, and I do not have to hunch over with the --</p> <p>2 like you do with the carpet cleaner. There is not a</p> <p>3 lot of arm movement with the carpet cleaner. You</p> <p>4 have to go back and forth constantly with your arms.</p> <p>5 With the buffer, you pretty much stand still, and it</p> <p>6 does all of the work. That is a big difference.</p> <p>7 Q. And you cannot operate the carpet cleaner</p> <p>8 machine at all?</p> <p>9 A. I try my hardest not to. Very, very</p> <p>10 seldom. I doubt if I do a job in a month now. I</p> <p>11 knew that much.</p> <p>12 Q. Your son does that work now?</p> <p>13 A. Yes. He does all of it.</p> <p>14 Q. When you go out on a job then, do you</p> <p>15 just run the buffer machine?</p> <p>16 A. Most of those jobs I do not go out to. I</p> <p>17 only go out when I have to. Most of what I do is</p> <p>18 sealing grout.</p> <p>19 Q. Have you seen any doctors that we have</p> <p>20 not discussed today?</p> <p>21 A. I think we discussed a lot of doctors. I</p> <p>22 have no idea.</p> <p>23 Q. Are you seeing any doctors today other</p> <p>24 than Rosier and Grover?</p> <p>25 A. No.</p>	<p style="text-align: right;">Page 96</p> <p>1 schedule, what I think I can handle or what I do not</p> <p>2 think I can handle. If I have to send someone else,</p> <p>3 I will not take the job. It is accounts that I</p> <p>4 cannot go out and get, because I won't go do the</p> <p>5 work. It is a family business. I don't trust a lot</p> <p>6 of people to work for me. It is different.</p> <p>7 Q. Now, you did not own this business until</p> <p>8 about two and a half years after the accident;</p> <p>9 right?</p> <p>10 A. Yes.</p> <p>11 Q. Is that yes?</p> <p>12 A. Yes.</p> <p>13 Q. Did you lose income between the date of</p> <p>14 the accident and the date that you bought the</p> <p>15 business?</p> <p>16 A. Yes.</p> <p>17 Q. How much?</p> <p>18 A. Again, I would not know.</p> <p>19 Q. How would you know? I mean what would</p> <p>20 you research to figure it out?</p> <p>21 A. I would have to research a lot of things.</p> <p>22 I probably would go through the schedule book and</p> <p>23 see what days I had appointments at different places</p> <p>24 or the work that we review is kind of tough. You</p> <p>25 can not take on a big new account if you cannot do</p>

24 (Pages 93 to 96)

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<p style="text-align: right;">Page 97</p> <p>1 the work, so I do not know. I do not even know 2 where to start. I would start with my scheduling 3 book, obviously. 4 Q. Well, you said earlier that you were 5 earning a salary and not a commission? 6 A. Uh-huh. 7 Q. Is that right? 8 A. Yes. 9 Q. Did you lose any of your salary -- 10 A. I did not. 11 Q. -- after the accident? 12 A. I did not lose any of the salary, no. 13 Q. Now let's focus on this specific 14 question. If you did not lose salary, what income 15 did you lose after the accident before you bought 16 the business? 17 A. Before I bought the business, what we 18 meant by a silent partner was if there was anything, 19 any profit after everything, I would get a portion 20 of that, and right now owning the business if there 21 is any profit after expenses, then obviously that 22 would be mine. 23 Q. So you did not lose any income derived 24 from your salary? 25 A. My salary, right.</p>	<p style="text-align: right;">Page 99</p> <p>1 Mr. Duncan or Mr. Gonzalez to go out and try to get 2 new accounts? 3 A. Actually, William has gotten a couple. 4 Michael has not. And Eduardo has not, but actually 5 William has had a couple. I never asked him to go 6 out during the day, but we do hang like anybody, 7 different kind of advertising or doorknob hangers or 8 going to real estate companies, which he has done 9 stuff like that. 10 Q. It is the new accounts that you think you 11 have lost as a result of the accident? 12 A. No. I will not overbook us either, if 13 I'm not going to do the work. I can only take on 14 what we can do. I will not take on what we cannot 15 do. There are certain things that only now with 16 just the two of us, there are certain things that I 17 can do, he does not know. I imagine I could teach 18 him if he was not doing something else at the time I 19 had to do that. There is different aspects of the 20 business. Everything from polishing travertine to 21 grout to carpet cleaning. It is all totally 22 different. 23 Q. And again, why doesn't Mr. Duncan work 24 with you now? 25 A. I honestly do not remember. I'm not sure</p>
<p style="text-align: right;">Page 98</p> <p>1 Q. But do you believe you lost some income 2 from the distribution that the company made at the 3 end of the year? 4 A. I believe so. 5 Q. Would that reduction be reflected in your 6 tax returns? 7 A. I do not know. 8 Q. It sounds like you really do not know 9 what your lost income is, but you believe that you 10 did lose income; is that right? 11 A. I believe I did, yes. The reason I 12 believe that is if I was not at the appointments or 13 going home early more work could have been done, 14 even if I have another employee. If more work is 15 done by me, obviously I do not have to pay an 16 employee, so it is a huge difference. Two and a 17 half, three years ago I had employees. I was not 18 doing the work, you know. I had employees. So it 19 is a big difference. 20 Q. Is there anybody else in the company who 21 could go out and get new accounts? Is your son 22 capable of that? 23 A. I imagine he might be capable. I don't 24 know. 25 Q. Have you ever asked your son or</p>	<p style="text-align: right;">Page 100</p> <p>1 if he quit or if I did not need him anymore. I do 2 not know. 3 Q. And why doesn't Mr. Gonzalez work with 4 you now? 5 A. I think he went back to Venezuela or 6 something. He was on a work visa and his father got 7 sick. That is right. His father got sick and he 8 went back and I guess he did not like come back 9 here. 10 Q. Have you looked into hiring anybody else? 11 A. I might have had other employees since 12 then. 13 Q. And why don't they work with you now? 14 A. Well, I do not know. I'm not as busy as 15 I used to be, obviously. Everything has slowed down 16 with the economy. It probably has a lot to do with 17 it. 18 Q. Well, it sounds like if we are going to 19 get an answer to these questions trying to quantify 20 any lost income, that you do not have the answers. 21 They will be in records at your business; is that 22 right? 23 A. I have no idea. 24 Q. Well, let me wrap up then with an area 25 that I discussed with your wife yesterday, and this</p>

25 (Pages 97 to 100)

1 was this loss of consortium claim. You heard her
 2 testimony about how the accident has affected your
 3 relationship with her. Let me get your testimony on
 4 that question then, and I will begin with the
 5 general question of how has this accident affected
 6 your marriage?
 7 A. I imagine it has put a lot of stress on
 8 our marriage.
 9 Q. You heard what your wife testified to
 10 yesterday; right?
 11 A. Yes.
 12 Q. Is there anything that you would add to
 13 what she testified to about how this accident has
 14 affected your marriage?
 15 A. Yes. I can add a little bit to what she
 16 could not say. She would not say that I don't help
 17 her cook dinner anymore. She would not say that I
 18 do not help her with the dishes or help her around
 19 the house like I did before and that I pretty much
 20 just sit around. It is a lot different. It is a
 21 lot different.
 22 Q. Is it different in any way other than
 23 your not helping out around the house like you used
 24 to?
 25 A. As far as -- I do not understand.

1 Q. You are saying that it is a lot different
 2 now than it was before the accident?
 3 A. Right.
 4 Q. That the only specific that you have
 5 given me is that you used to help around the house
 6 more than you do now. Is it --
 7 A. It is everything.
 8 Q. Has it changed in any other particulars?
 9 A. The time we spend together is not even
 10 the same anymore. Like I said, everything that we
 11 used to do, we used to do together, and we do not
 12 even anymore. And the reason we don't is I will be
 13 sitting on the couch because my shoulder, my neck,
 14 whatever, or I took medication or whatever. It is
 15 always something. I cannot ride motorcycles. We do
 16 not go out. Video poker, she used to love video
 17 poker. We do not do that anymore -- no. I will not
 18 say we do not do it anymore. We do not do it near
 19 as often, not even a tenth as often as we used to.
 20 I will never ride motorcycles again. We used to
 21 ride motorcycles. It is huge differences.
 22 Everything that we did together.
 23 Q. Did your wife own a motorcycle too?
 24 A. Yes.
 25 Q. Did she sell hers?

1 A. Yes.
 2 Q. When?
 3 A. Same time as mine.
 4 Q. Was that something that you did
 5 frequently before the car accident?
 6 A. That was something that we did always
 7 together, yes.
 8 Q. How frequently did you ride?
 9 A. Whenever we felt like it. I do not even
 10 know.
 11 Q. Was it like a weekly occurrence?
 12 A. Oh, yes.
 13 Q. A monthly occurrence?
 14 A. Yes. Weekly. Sometimes three times a
 15 week. Sometimes one time a week. It all depended.
 16 Q. Any other past times that you guys have
 17 seen a change in? So far you have described biking
 18 and going to the casinos.
 19 A. Just everyday going anywhere, doing
 20 anything has changed. She had mentioned shopping,
 21 and she has to go by herself.
 22 Q. Have you considered going to counseling
 23 over this?
 24 A. For my neck and back problem, no.
 25 Q. That is a smart point. My question,

1 though, was to the issue of marriage counseling.
 2 A. I never thought -- the thought never
 3 crossed my mind, honestly.
 4 Q. Now, earlier on in the deposition I asked
 5 you about this gal, Donna Barnavon, and as I
 6 understand it, she is a psychologist. I never met
 7 her, and I do not know anything about her, but I
 8 think from the alphabet soup after her name that is
 9 what she is, and she wrote a suggestion that she had
 10 for coping with your neck pain from a psychological
 11 perspective.
 12 Have you followed up with anyone on that
 13 approach?
 14 MR. PALERMO: Objection. Vague and
 15 ambiguous as to form.
 16 You can answer.
 17 THE WITNESS: And I do not even
 18 understand the question at all. Donna was the
 19 physical therapist. I'm not very got with names.
 20 I'm sorry.
 21 BY MR. ROGERS:
 22 Q. Let me just read you what I have in my
 23 notes from Donna. Here she is writing of things
 24 that she talked about with you. That pain is a very
 25 complex process that involves our physical

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EXHIBIT “3”

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UCLA School of Medicine
1250 16th Street, Suite 745
Santa Monica, CA 90404

OFFICE: 310 319 3334
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Independent Medical Evaluation (IME)

Patient: William Simao

Date of service: Feb. 10, 2009

Date of Injury: April 15, 2005

History:

Mr. William Simao is a 45-year-old gentleman who was 42 years-old on April 15, 2005, when he was involved in a motor vehicle accident. He was on a freeway and the traffic was stopped and he was hit from behind. He was in his work vehicle and he reports that his head whipped back against the steel cage which was behind his head. He denies any loss of consciousness. Later he went to an urgent care. He does not remember the exact workup at the urgent care, but thinks they did a few x-rays and told him they could not find anything wrong. He states that several days later he went back because he was still having symptoms. Since that time, he claims that he has had back pain and pain in his left shoulder, left side of his face, back of his head, and base of his neck. He has had physical therapy, tens units, massage, heat, ice, ultrasound, which he states did not help him at all. He did have some epidural injections, which he reports helped temporarily. He has not had surgery, although he says that he has been worked up and someone has talked to him about surgery and he is planning on having surgery for his symptoms. His pain is worsened by certain positions and movement. He reports that one year prior to this accident, he did have a motorcycle accident but he did not have any residual injuries. He also has a history of headaches, which he states were increased by the accident. He states that he did not have any neck pain or shoulder pain prior to the accident.

Past surgical history: His past surgical history is negative.

Allergies: His allergies are to penicillin.

Past medical history: His medical problems include migraines, which started 10 years ago and he gets these a couple times a week. Other medical problems are high blood pressure, high cholesterol, and neck pain.

Medications: His current medications are enalapril, lovastatin, and he started taking zomig occasionally for his headaches.

Family history: His family history is negative. His father is 70-years-old and healthy. His mother was deceased at 56.

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Social History: He works on floor care where he cleans tiles and carpeting. He is in a small business and he says that he basically works before and after the accident. He said that he may have taken a couple of days off for medical appointments, but did not have to take any other time off. He smokes 10 cigarettes per day. He lives with his spouse and two children.

Review of systems is positive for headaches, muscle pain, poor sleep.

Medical Records Review:**Records Reviewed:**

1. NHP TAR
2. UMC
3. Southwest Medical Associates
4. Steinberg Diagnostics
5. Desert Valley Therapy
6. Nevada Orthopedic and Spine Center
7. Las Vegas Surgery Center
8. Medical District Surgery Center
9. Jaswinder Grover, MD
10. Hansjorg Rosler, MD
11. Center for Spine and Special Surgery
12. Newport MRI
13. Las Vegas Radiology
14. Nevada anesthesiology consultants

Time Line:

4/15/05 MVA

State of Nevada TAR

- 2 vehicle accident
- V1= Jenny Rish; 2001 Chevy Suburban
- V2= William Simao; 1994 Ford Econoline Van
- Both V1 and V2 were traveling southbound on I15 in 1 travel lane
- V2 was in front of V1 slowed down to complete stop due to congested traffic
- V1 failed to decrease her speed and struck V2 rear with V1 front
- Both vehicles were moved prior to NHP arrival

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- V2 damage listed as moderate rear
- V1 damage listed as moderate front
- Both vehicles were driven away by drivers
- No one reported as injured in V1

(1930) SouthWest Medical Associates
 Urgent Care – Nancy Bahnsen PA-C

Complaint /History

- 41 y/o
- S/p MVA at 1530
- Neck Pain
- Headache
- Began having left elbow pain at impact
- Rear-ended in his van
- Hyperextended neck and hit cage; also hyperflexed
- EMS on scene but patient declined evaluation

Exam:

- Scalp tender in occipital midline area
- C-Spine tender C6 with full ROM

Meds

- AMitriptyline
- Butalbital-APAP-Caffeine
- Enalapril Malcate
- Clarinex
- Rhinocort
- Cromolyn

Assessment / Plan:

- Neck Sprain
- Left elbow sprain
- Use Left upper extremity sling for 3 days
- Ice / NSAID

Cervical Spine x-ray

Impression:

1. No fractures

Left Forearm and Elbow x-ray

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Impression

1. Degenerative spurring noted posteriorly about olecranon process
2. Minimal degenerative changes about elbow joint
3. No effusion

5/04/05 SouthWest Medical Associates

Complaints / History:

- Check up on Headaches
- Deep pressure in head
- Occipital headaches
- Has history of Migraine HA
- However he feels that this HA is different
- No LOC at time of MVA
- No neurological symptoms

Exam:

- Tender to palpation over occipital scalp
- Neck exam- supple; FROM

Assessment / plan:

1. S/p MVA with potential closed head injury
2. Refer patient to CT of head

5/12/05 SouthWest Medical Associates

Urgent Care

- Head pressure
- Blurred vision
- Facial "Numbness" x 2 weeks
- S/p MVA with head trauma
- Head CT neg
- Probable tension HA
- MRI to rule out intracranial lesion

5/23/05 Steinberg Diagnostic

MRI Brain

Impression:

1. Unremarkable

5/26/05 SouthWest Medical Associates

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- Routine F/U
- Explained to patient that all imaging studies were normal
- Patient does not seek further treatment
- Routine follow up over next 6 months

10/06/05 SouthWest Medical Associates

- Headaches worse over last few months
- More frequent with Nausea and vomiting
- Occasionally start with tightness in Left shoulder which radiates into neck and then becomes migraine HA.

Plan:

- Topamax
- Carisoprodol

10/12/05 SouthWest Medical Associates

- Evaluated for feet swelling

Assessment / Plan:

1. Nicotine dependence – possible vascular insufficiency
2. Stop smoking
3. Tension HA associated with Left shoulder discomfort; will order Neck and left shoulder x-ray.

10/08/05 SouthWest Medical Associates

Cervical X-ray

Impression:

1. Normal

Left Shoulder x-ray

Impression:

1. Normal

12/21/05 SouthWest Medical Associates

History / Complaints:

- Neck and shoulder pain off and on over last several months
- Worse over last 2 weeks
- Has not medicated

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Exam:

- No apparent distress
- Full range of motion of neck and shoulders
- Palpable tensed musculature in trapezial area bilaterally (L>R)

Assessment / Plan:

1. Trapezial / cervical muscle strain
2. Heat
3. Feldene
4. PT for neck and traps

1/16/06 The Patient Group Physical Therapy
 Referred by Dean Tsai, M.D.
 Matt Thomas, MSPT

History / Complaints:

- Date of Onset = 6 months ago
- Sustained injury to neck and upper trap after MVA in April last year
- Was rear ended when stopped and other vehicle going 55 mph
- Left hand goes numb
- Posterior neck and left upper trapezius pain
- Increased frequency of migraines

Exam:

- Cervical Flex / Ext = 51/40 degrees
- Shoulder ROM normal
- Strength cervical 5/5; shoulder 4/5
- Special tests negative
- Sensation and reflexes intact
- Mild discomfort with cervical ROM
- Presence of myofascial pain creating radicular symptoms down left upper extremity

Plan:

1. PT for 4-6 wks
2. Cervical traction
3. Home exercise program

1/19/06 Southwest Medical Associates

2/13/06 The Patient Group Physical Therapy.

Complaints:

- More localized pain to left side

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- Decreased HA
- Numbness of Left hand; unable to play guitar
- Gets 4-6 hrs relief from TENS unit

3/09/06 Southwest Medical Associates

- Persistent recurrent cervical neck pain with radiculopathy of numbness or burning sensation in left upper extremity.
- Migraine HA
- Muscle Contracture HA
- No improved with Chiro and PT

Exam:

- FROM of Spine and extremities
- Discomfort radiating to left shoulder with numbness with ROM of neck

Plan:

1. Order MRI of Cervical Spine
2. Consider Ortho Consult

3/22/06 Steinberg Diagnostic
 MRI Cervical Spine

Impression:

1. C3-4 facet hypertrophy on left mildly narrowing Left neural foramen; may be contact with left exiting C4 nerve root.
2. C4-5 central broad based 2-3mm disc protrusion without stenosis.

4/05/06 SouthWest Medical Associates
 Referral to Orthopedic Surgeon by Brett Hill PA-C
 Indication:

- 42 y/o with back/ spine pain
- Recurrent cervicgia, headaches and Left arm radiculopathy
- MRI demonstrated C3-4 facet hypertrophy with neural foramen narrowing and C4-5 bulge.

4/18/06 Nevada Orthopedic and Spine Center
 Patrick McNulty, M.D.

History / Complaints:

- Neck Pain (75%)
- Left Arm Pain (25%)

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- Upper Back Pain
- Headaches
- Pain diagram shows the following areas in pain:
 - Occipital region
 - Frontal and bitemporal regions
 - Bilateral trapezius region
 - Bilateral posterior shoulders
 - Left posterior/anterior Arm down through hand
- 1 yr history of posterior cervical thoracic pain with occipital radiation and bilateral parascapular radiation
- Left upper extremity paresthesias
- Pain worse with movement and better with massage
- Has undergone medications and PT
- Symptoms started after MVA

Medications:

- Enalapril Maleat
- Clarinex
- Ibuprofen PRN
- Soma
- Fioronal
- Lovastatin

Diagnostic Testing:

- MRI Cervical Spine
 - Mild Narrowing Left neural foramen at C3-4
 - May contact Left C4 root
 - Small Central protrusion; C4-5

Assessment:

1. Axial Cervical Pain
2. Dermatomal Pattern C4 does NOT fit patient's clinical symptoms of Left Upper Extremity paresthesias.

Plan:

- Would likely require surgical intervention to have any long term relief.
- Pain injection may help to locate generator but probably no long term pain relief.
- Refer to pain management for Bilateral C3-4, C4-5 facet blocks with concomitant bilateral C4 and C5 SNRB

5/10/06

Southwest Medical Associates
 Donna Bar-Navon, psy, D.

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Psychological Evaluation

- Part of pain management program

05/11/06 Southwest Medical Associates

Radiology Report

Dr. not noted

CT head without contrast

Impression

- Normal scan of head

6/07/06 Southwest Medical Associates

Surgeon:

- Ross Seibel, M.D.

Indications:

- Migraine
- Tension HA
- Cervicalgia with LUE radiculopathy
- Cervical radiculopathy at C4 Left secondary to facet hypertrophy

Procedure:

1. Bilateral C3-4 Transforaminal steroid injection

6/20/06 Southwest Medical Associates

Douglas Young PA-C

History / Complaints:

- Worsening neck and hand pain over past year
- Recurrent migraine HA
- Whiplash injury from MVA
- Denise specific radicular symptoms into Left UE
- Increased muscle tension and pain in the muscular area of left trapezius and upper parathoracic area
- S/p C3-4 Transforaminal epidural with good overall response to steroid injection.
- Decrease in severity and frequency of HA
- Continued pain in left trap.
- Trigger point injection will be done today.

6/27/06 Southwest Medical Associates

Douglas Young PA-C

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History / Complaints:

- Continues to do very well
- Neck pain and HA frequency have reduced since epidural
- Not taking any medication
- Very satisfied with outcome

Assessment / Plan:

1. Bulging disc C4-5
2. Cervical Radiculopathy at C4 secondary to facet hypertrophy
3. Episodic tension HA
4. Migraine HA
5. Nicotine Dependence
6. Follow up 3 months

07/27/06 Southwest Medical Associates

Douglas Young PA-C

Progress note

Initial presentation

- 43 year old male
- Left sided neck pain
- Upper back pain
- History of worsening neck and hand pain over past year
- History of chronic recurrent migraine headaches
- Involved in rear end MVA while he was driving vehicle that was stopped and rear-ended by another car
- Did have whiplash type injury
- Noticed increasing frequency of migraine headaches
- Increasing pain over the left trapezial area
- Denies any specific radicular symptoms into left upper extremity
- Increased muscle tension and pain in muscular area of left trapezius and upper parathoracic area
- Very active male
- does not wish to be on any significant medications during the day
- Has been on tylenol with codeine
- Lortab
- Does not take those because of way they make him feel during day
- Has been on topamax for migraine prophylaxis in past
- Did not improve symptoms significantly
- Used clavil

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- Did improve his headaches by reducing frequency of recurrent migraines as well as helping him sleep at night
- Interested in restarting regime if possible
- Interested in any type of interventional treatments that may be helpful in controlling his pain

Interval history

- Continues to do very well
- Headache frequency has significantly reduced as is his neck pain
- Not currently taking any medications
- Very satisfied with outcome of procedures and treatment
- Return in 3 months

Current meds

- Enalapril
- Clarinex
- Ibuprofen
- Butalbital
- Carisoprodol
- Lovastatin
- Piroxicam
- Amitriptyline

PE

- No significant objective change in exam

Active problems

- Bulging disc C4-5
- Cervical radiculopathy
- Cervical radiculopathy at C4 left secondary to facet hypertrophy
- Cervicalgia with LUE radiculopathy
- Episodic tension type headache
- Migraine headache
- Nicotine dependence

Assessment

- Bulging disc C4-5
- Migraine headaches
- Cervicalgia
- Cervical radiculopathy
- Cervical radiculopathy at C4 left
- Secondary to facet hypertrophy

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Plan

- No further recommendations
- Follow up in 3 months

8/24/06 SouthWest Medical Associates
 Adam Arita, M.D.

History / Complaints:

- 43 yo who was evaluated by Douglas Young for his left sided neck and upper back pain
- Insidiously worsening neck and hand pain over last year
- H/o recurrent chronic migraine headaches
- Approximately 1 yr ago involved in MVA
- Whiplash type injury from MVA
- Since then noticed increasing frequency of migraine and increasing pain over left trapezial area
- Denies specific left upper extremity symptoms.
- Very active male and does not want to be on pain medications during day.
 - Has taken T#3 & Lortab in past
 - He does not continue to take because of how makes him feel during the day.
 - Topamax in past for migraines but did not work
 - Elavil in past which did reduce frequency of migraines and helped him sleep; he would like to restart.
- Today with exacerbation of left trapezial pain
- Had transforaminal epidural with limited benefit
 - Had reduction in frequency of HA but, pain over C4 on left continued to worsen with more frequent exacerbations
- Discussed Left C4 SNRB as a diagnostic test and he would like to try.
 - If this works we can try pulsed RF modulation of C4 nerve vs Surgical intervention
 - Will do procedure in 2 weeks.

Impression:

1. Bulging Disc C4-5
2. Cervical radiculopathy Left C4; secondary to facet hypertrophy
3. Cervicalgia with left upper extremity radiculopathy
4. Episodic Tension HA
5. Migraine
6. Nicotine dependance

Medications:

- Enalapril

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- Clarinex
- Ibuprofen PRN
- Butalbital APAP-Caf PRN
- Carisoprodol PRN
- Lovastatin
- Piroxicam
- Amitriptyline

Physical Exam

- No significant changes in exam

Assessment / Plan

1. Bulging Disc C4-5
2. Cervicalgia with LUE radiculopathy
3. Cervical Radiculopathy at C4 Left
4. SNRB at C4

10/03/06 Las Vegas Surgery Center

Surgery Center Procedure Noted

Active Problems

- Bulging Disc C4-5
- Cervical radiculopathy
- Cervical Radiculopathy at Left C4 nerve Root; secondary to facet hypertrophy
- Cervicalgia with Left upper extremity Radiculopathy
- Episodic Tension type HA
- Migraine
- Myalgia and myositis
- Nicotine dependence

Medications:

- Enalapril
- Lovestatin

Surgeon: Adam Arita, M.D.

Procedure:

1. Left C4 Selective Nerve Root Block (SNRB)

10/11/06 SouthWest Medical Associates

History / Complaints

- Left C4 radiculopathy
- Myofascial pain of Left trapezius and neck
- Pain 7-8/10

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- S/p Left SNRM at C4 and had 50-75% relief
- Discussed RF to Left C4

Assessment / Plan:

1. Left C4 Radiculopathy with + response to SNRB (>50% relief for 5 hrs)
2. Myofascial pain left trapezius
3. Pulsed RF of cervical Left C4
4. Trial of cymbalta for neuropathic pain
5. Baclofen for spasm of neck

11/08/06 SouthWest Medical Associates

History / Complaints:

- Pain 7-8/10
- Positive response to L C4 SNRB (60-80% relief for 5 hrs)
- Patient has not tried Cymbalta yet
- Awaiting Pulsed RF to Left C4
- Alternative to procedure is surgery; doing nothing or medications like cymbalta, lyrica, baclofen and opiates
- He decided to try RF first

Medications:

- Enalapril Maleat
- Clarinex
- Ibuprofen PRN
- Butalbital APAP-Caf PRN
- Carisoprodol PRN
- Lovastatin
- Piroxicam
- Amitriptyline

Active Problems

- Bulging Disc C4-5
- Cervical radiculopathy
- Cervical Radiculopathy at Left C4 nerve Root; secondary to facet hypertrophy
- Cervicalgia with Left upper extremity Radiculopathy
- Episodic Tension type HA
- Migraine
- Nicotine dependance

Assessment / Plan

1. Left C4 radiculopathy

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2. Schedule Left C4 pulsed RF
3. Cymbalta

11/18/06 Las Vegas Surgery Center

Surgery Center Procedure Noted

Active Problems

- Bulging Disc C4-5
- Cervical radiculopathy
- Cervical Radiculopathy at Left C4 nerve Root; secondary to facet hypertrophy
- Cervicalgia with Left upper extremity Radiculopathy
- Episodic Tension type HA
- Migraine
- Myalgia and myositis
- Nicotine dependence

Medications:

- Enalapril
- Lovastatin

Surgeon: Adam Arita, M.D.

Procedure:

1. Left C4 SNRB with Pulsed RF
2. Also injected 1m of lidocaine 4% and 1ml of Celestone

Pain level After Procedure = 2; able to move neck

1/10/07 SouthWest Medical Associates

History / Complaints:

- Pain 7-8/10 on average
- Intermittent and not constant
- Patient believes that Pulsed RF Left C4 did help and continues to be of benefit
- No improvement after 1 month of cymbalta

Exam:

- Cervical ROM is full with no pain
- Axial load with NO pain
- Cervical motor intact
- DTRs intact
- Grip intact
- Sensory intact

Assessment / Plan:

1. Cervical radiculopathy, Left C4 improved after pulsed RF

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2. F/u 3 months

3/22/07 SouthWest Medical Associates
 Adam Arita, M.D.

History / Complaints:

- 7-8/10 Left Neck and Shoulder pain
- S/p Left C4 SNRB with Pulsed RF 2-3 months ago
- Patient wants to repeat procedure and if not effective will consider surgery.

Problem List:

1. Bulging Disc C4-5
2. Cervical Radiculopathy @ C4 Left secondary to facet hypertrophy
3. Cervicalgia with LUE radiculopathy
4. Episodic Tension HA
5. Migraine
6. Nicotine dependence

Medications:

- Enalapril Maleat
- Clarinex
- Ibuprofen PRN
- Butalbital APAP-Caf PRN
- Carisoprodol PRN
- Lovastatin
- Piroxicam
- Amitriptyline

Assessment:

1. Cervical Radiculopathy Left C4

Plan:

1. Cervical SNR Injection with Pulsed RF at Left C4
2. Opana ER
3. Lyrica
4. F/U 1 month

3/27/07 SouthWest Medical Associates
 Surgery Center Procedure Noted

Active Problems

- Bulging Disc C4-5
- Cervical radiculopathy

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- Cervical Radiculopathy at Left C4 nerve Root; secondary to facet hypertrophy
- Cervicalgia with Left upper extremity Radiculopathy
- Episodic Tension type HA
- Migraine
- Myalgia and myositis
- Nicotine dependence

Medications:

- Enalapril
- Lovestatin

Surgeon: Adam Arita, M.D.

Procedure:

3. Left C4 SNRB with Pulsed RF (#2)

Pain level Before Procedure = 7

Pain level After Procedure = 3

4/09/07 SouthWest Medical Associates

History / Complaints:

- Pain improved over left shoulder and trap area
- Pain is 3/10
- Today with discrete pain around Left medial scapular and paravertebral area as well as C2 paravertebral area; These are trigger points
- Is taking Lyrica
- He is not sure how much relief is from Lyrica and how much from Pulsed R.F.

Plan:

1. Trigger point injections today
2. Continue Lyrica and MSC 15mg TID
3. RTC 2 months

6/04/07 SouthWest Medical Associates

History / Complaints

- Patient stopped morphine and Lyrica 2 weeks ago due to lack off effect and side effects
- Pain 8/10
- Prefers to repeat SNRB C4 with pulsed RF

6/12/07 SouthWest Medical Associates
 Surgery Center Procedure Noted

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Active Problems

- Bulging Disc C4-5
- Cervical radiculopathy
- Cervical Radiculopathy at Left C4 nerve Root; secondary to facet hypertrophy
- Cervicalgia with Left upper extremity Radiculopathy
- Episodic Tension type HA
- Migraine
- Myalgia and myositis
- Nicotine dependence

Medications:

- Enalapril
- Mevacor

Surgeon: Adam Arita, M.D.

Procedure:

1. Left C4 SNRB with Pulsed RF (#3)

Pain level Before Procedure = 7-8 ; Neck / Left Shoulder

Pain Level After Procedure= 20-30% improvement

6/18/07 SouthWest Medical Associates

History / Complaints

- Pain 4-5/10 left neck and shoulder
- Requests trigger point injection
- Patient also wants surgical opinion and will contact Dr. McNulty

9/24/07 Steinberg Diagnostic

MRI Cervical Spine

Impression:

1. Negative MRI
2. No herniation

10/05/07 SouthWest Medical Associates

Adult Medicine Progress Note

Complaints / History

- Pre-Op Eval
- Shoulder & Neck pain
- H/o cervical degenerative disc disease with radiculopathy
- Is being scheduled for hemilaminectomy and foraminotomy

Objective

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- Exam was performed and all was normal

Assessment / Plan:

1. History of Migraine HA
2. Cervical Radiculopathy
3. C3-4, C4-5 surgery pending by Dr. McNulty
4. Pre-op labs ordered

11/13/07 Nevada Orthopedic and Spine
 Patrick McNulty, M.D.

Complaints:

- Persistent Left sided Neck pain

MRI of Cervical Spine

1. Central disc herniation C4-5
2. Foraminal narrowing Left C3-4

Recommendations:

- C3-4, C4-5 transforaminal epidural

11/16/07 University Medical Center
 Procedure note

Surgeon: Patrick McNulty, M.D.

Indications:

- Occasional Left Arm paresthesias
- Left sided Neck Pain
- Occipital pain

Pre-Operative Diagnoses

- Degenerative C3-4, C4-5

Post-Operative Diagnoses

- Degenerative C3-4, C4-5
- Left sided only

Procedure:

- Left C3-4, C4-5 transforaminal epidural injection

Outcome

- 80% improvement in recover room from anesthetic phase of injection

12/06/07 Nevada Orthopedic and Spine
 Patrick McNulty, M.D.
 Complaints / History

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- Significant pain relief from L C3-4, C4-5 transforaminal epidural which essentially confirms 2 levels as pain generators
- Failed reasonable conservative care with disc herniation and foraminal narrowing

Plan:

1. Anterior Cervical Reconstruction; 2 level arthrodesis C3-C5, 3 level partial corpectomy, anterior instrumentation C3-C5, Placement of biomechanical structural device x 2 and spinal cord monitoring.

03/28/08 Nevada Spine Clinic

Dr. Jaswinder Grover

Consultation

Chief complaint

- Neck pain
- Left parascapular pain
- Lower back discomfort

HPI

- 44 year old right hand dominant male
- Restrained driver of automobile
- Involved in rear end type collision 2-3 years ago
- Hit the back of his head on metal cage of vehicle
- Has been suffering since then pain in back of head, left parascapular and interscapular areas
- Occasionally radiating into LUE
- Has been treated since that time through variety of modalities
- Under care of Dr. McNulty who recommended surgical treatment
- Reports ongoing symptomatology at this time up to 10/10
- Essentially 3/10 on ongoing basis
- Aching, penetrating, occasionally unbearable symptomatology

PMH

- HTN
- Hypercholesterolemia

PSH

- None significant

Social History

- Married
- 1/2 PPD x 20 years
- Does not drink
- Owner and manager of cleaning company

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PE

- Tenderness to left parascapular area
- Some discomfort with left cervical rotation as compared to right

Gait

- Ambulates independently
- Stance and swing phase duration are equal
- No evidence of gross spinal deformity
- Erect posture with no significant kyphoscoliosis noted in erect or forward flexed Adams position
- Does not demonstrate focal myotomal or dermatomal deficits

Neurological

- Motor UE 5 bilaterally
- Motor LE 5 bilaterally
- Reflex 2+ bilaterally
- No clonus bilaterally

Nerve root tension signs

- Axial compression positive for left parascapular and suboccipital pain
- Spurling sign positive on left and negative on right

Radiographs and testing

- MRI scan of cervical spine
- No significant cervical disc herniation
- Some facet tropism in proximal segments C3-4, C4-5
- Marginal quality study

Impression

- Persistent neck, left parascapular, left UE symptomatology in pt
- Has had ongoing symptoms for past 2-3 years
- Has been recommended in past for anterior cervical fusion C3-5 by Dr. McNulty based on injection therapy

Recommendations

- Updated MRI cervical spine
- Electrodiagnostic studies of UE
- C3-4, C4-5 selective nerve root block on left side and possible facet blocks on therapeutic and diagnostic basis
- May consider CT of cervical spine to better understand facet anatomy

04/15/08 Nevada Spine Clinic
 Dr. Jorg Rosler

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Consultation

Chief complaint

- Neck pain radiating into LUE

HPI

- 44 year old male
- MVA 2-3 years ago
- Restrained driver
- Involved in rear end collision
- Hit back of head on metal cage on vehicle upon impact
- Has been suffering from neck pain, interscapular pain, left parascapular pain that is radiating his LUE as well as pain in occiput
- Undergone physical modalities, injection therapy
- Seen Dr. McNulty who recommended surgical intervention
- Ongoing, constant, localized, aching symptoms
- Average 6-7/10
- Denies any loss of bowel or bladder function

PMH

- HTN
- Hypercholesterolemia

PSH

- Not significant

Medications

- Enalapril
- Lovastatin

Social history

- Married
- ½ PPD
- Does not drink alcohol
- Runs own cleaning company

Family history

- Noncontributory

PE

General

- Apparent discomfort

Neuro

- CN 2-12 grossly intact
- Loss of cervical lordotic curvature

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- Pain to palpation paraspinous area as well as interscapular and left parascapular area
- Sensation grossly intact
- No evidence of long tract signs

Gait

- Ambulates independently
- Stance and swing phase durations are equal
- No evidence of gross spinal deformity
- Has erect posture with no significant kyphoscoliosis noted in erect or forward flexed adams position

Neurological

- Motor UE 5/5 bilaterally
- Motor LE 5/5 bilaterally
- No focal sensory deficits appreciated
- Reflex 2+ bilateral bicep, triceps, brachioradialis
- 1+ knee jerk and ankle jerk bilateral
- Clonus negative bilaterally

Nerve root tension signs

- Axial compression positive
- Spurling sign positive to left

Radiographs

- MRI scan cervical spine
- Some possible facet tropism in proximal segments at C3-4 and C4-5

Impression

- Persistent neck pain and interscapular pain with occasional LUE radiculopathy s/p MVA

Recommendations

- Left sided C4, C5 selective nerve root blocks

04/30/08 Nevada Spine Clinic MRI

Radiology Report

Dr. Patrick Boland

MRI cervical spine without contrast

Findings

- Height C2-3 disc space is preserved
- Signal intensity is slightly decreased suggesting desiccation
- Subtle focus increased signal intensity seen within peripheral margins of annulus to left of midline on inversion recovery sequence
- Consistent with subtle annular tear

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- Left paramedian protrusion identified measuring 6mm extending into canal 2mm
- Effaces portions of epidural fat
- Does not appear to cause significant impression on ventral aspect of thecal sac
- Thecal sac measures 16mm
- Foramina preserved
- Height C3-4 disc space preserved
- Signal intensity decreased suggesting desiccation
- Central disc protrusion identified measuring 8 mm extending into canal 3mm
- Midsagittal dimension thecal sac measures 10mm
- Foramina preserved
- Desiccation and 1-2 mm of annular bulging is seen at C5-6 level
- Midsagittal dimension of thecal sac measures 10mm
- Foramina are preserved
- Height of C6-7 disc space preserved
- Mild desiccation may be present
- No evidence of dorsal disc pathology, spinal canal or foraminal narrowing
- C7-T1 level appeared normal

Impression

- Annular tear with left paramedian protrusion at C2-3 level
- Central annular bulging at C3-4 level
- Central protrusion at C4-5 level

05/10/08 Center for Spine & Special Surgery

Operative Report

Preoperative diagnosis

- Persistent neck pain
- Interscapular pain
- Occasional left upper extremity radiculopathy status post MVA

Postoperative diagnosis

- Unchanged

Preoperative pain score

- 6/10

Postoperative pain score

- 1/10

Procedures

- Left sided C4 and left sided C5 selective nerve root block

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- Fluoroscopy
- epidurogram

Physical Examination:

General: The patient is awake, alert, oriented. The patient has intact recent and remote memory and is oriented to time, place and person. The patient has normal mood and affect. The patient is without any distress and has reasonably normal stature.

Skin examination reveals normal inspection of the head and neck. Normal inspection and palpation of the trunk as well as upper and lower extremities bilaterally.

Musculoskeletal examination: The patient has normal gait with normal toe-to-toe gait, and reasonably steady heel-to-heel gait. The patient does not have any sacroiliac joint pain to palpation. There are negative Patrick signs bilaterally and a normal stable lumbar spine without any pelvic diathesis.

Lumbar spine: The patient has anterior flexion of 60 degrees, extension of 5 degrees with no back pain with full extension. The patient has lateral flexion 15 degrees to the left and right without discomfort at the extremes of motion. There is no paraspinal tenderness to palpation in the paraspinal muscles in the lower spinal area.

Cervical spine: He has good range of motion in the cervical spine. He reports having some minor tenderness at the base of his neck on palpation. He also complains of tenderness with a Spurlings, which is to his left side and radiates to his left shoulder.

Neurovascular examination: Lower extremities demonstrates 5/5 motor strength in the bilateral lower extremities. Sensation is intact to light touch and pinprick throughout the bilateral lower extremities. Deep tendon reflexes are 2 plus and symmetrical in the lower extremities. There is a negative Babinski test in the lower extremities. Toes are down going. There is no evidence of clonus.

Upper extremities demonstrates 5/5 motor strength in the bilateral upper extremities. Sensation is intact to light touch and pinprick throughout the bilateral upper extremities. Deep tendon reflexes are 2 plus and symmetrical in the upper extremities without a Hoffmann's reflex.

Left Shoulder: He has some mild tenderness to palpation. His left shoulder is positive to Hawkins and Neer's in supraspinatus testing.

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Assessment / Opinions / Future Care:

All of my opinions below are based on my training, clinical teaching practice and the medical literature. I am currently the director for the UCLA Comprehensive Spine Center and Chief of the Orthopaedic Spine Service at the UCLA Medical Center. My opinions are also based on a reasonable medical probability. I am seeing this patient for evaluation purposes only. There is no doctor-patient relationship and he understands that is only for an evaluation.

Mr. William Simao was involved in a motor vehicle accident. He reports experiencing neck pain and left shoulder pain soon after the collision. He was initially evaluated at an urgent care and radiographs did not demonstrate any acute traumatic changes, but findings consistent with mild chronic degenerative changes. He may have sustained a soft-tissue whiplash injury to his cervical spine and exacerbated his long history of headaches. Based on the limited medical visits and complaints at those visits, he did not require specific medical treatment for his spine over the subsequent 7-8 months. According to the medical records, it was not until 9 months following the MVA that Mr. Simao began some physical therapy for his cervical symptoms. He also began complaining of left sided radicular symptoms at about that time. These were not reported until January of 2006. Workup following this included an MRI, about one year after the MVA (3/2006), which was again consistent with chronic degenerative changes without any significant nerve compression or traumatic structural changes

He then began a long course over the next two years of conservative treatments for his cervical spine including injections which gave him some partial temporary relief. An MRI on 9/24/07 was negative for traumatic injuries and consistent with degenerative changes appropriate for his age. A third MRI (4/30/08) was done and reportedly demonstrates some mild disc bulges but again, no significant nerve compression at these levels.

In summary, it is my opinion that Mr. Simao sustained a soft tissue "whiplash" type injury as a result of the MVA of April 2005. This injury did not require any specific treatment until nine months following the MVA. His imaging studies reveal chronic degenerative changes which most likely pre-existed the MVA. His current symptoms are consistent with his chronic degenerative changes which appear by report to have worsened slightly from the MRI of the cervical spine in 2006 to the most current MRI of 2008. The MVA did not result in any acute traumatic structural injuries, but may have contributed to his symptoms immediately following the MVA. The fact that he is a smoker probably contributes to neck pain and degeneration. This is consistent with his current symptoms which are most probably caused by his pre-existing degeneration in his neck. As far as apportionment I relate the initial treatment done from the time of the MVA through 5/26/05 to the MVA. His treatment for his symptoms of neck pain after this I apportion no more than 25% to the MVA of 2005. His initial headaches may have been part of his whiplash syndrome but his current migraines seem compatible to his pre-MVA headaches which were not causally related to the MVA.

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As far as future care goes, Mr. Simao reports that he was recommended to have cervical fusion. Under the circumstances, this is a controversial surgery, with unknown success rates for complete alleviation of his pain. I do think the surgery is being recommended for his arthritic changes, which pre-existed the MVA.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Wang".

Jeffrey C. Wang, MD
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EXHIBIT “4”

In the Supreme Court of Nevada

Case Nos. 58504, 59208 and 59423

Electronically Filed
Aug 14 2012 04:12 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

JENNY RISH,

Appellant,

vs.

WILLIAM JAY SIMAO, individually, and
CHERYL ANN SIMAO, individually and as
husband and wife,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JESSIE WALSH, District Judge
District Court Case No. A539455

**APPELLANT'S APPENDIX
VOLUME 13
PAGES 2905-3155**

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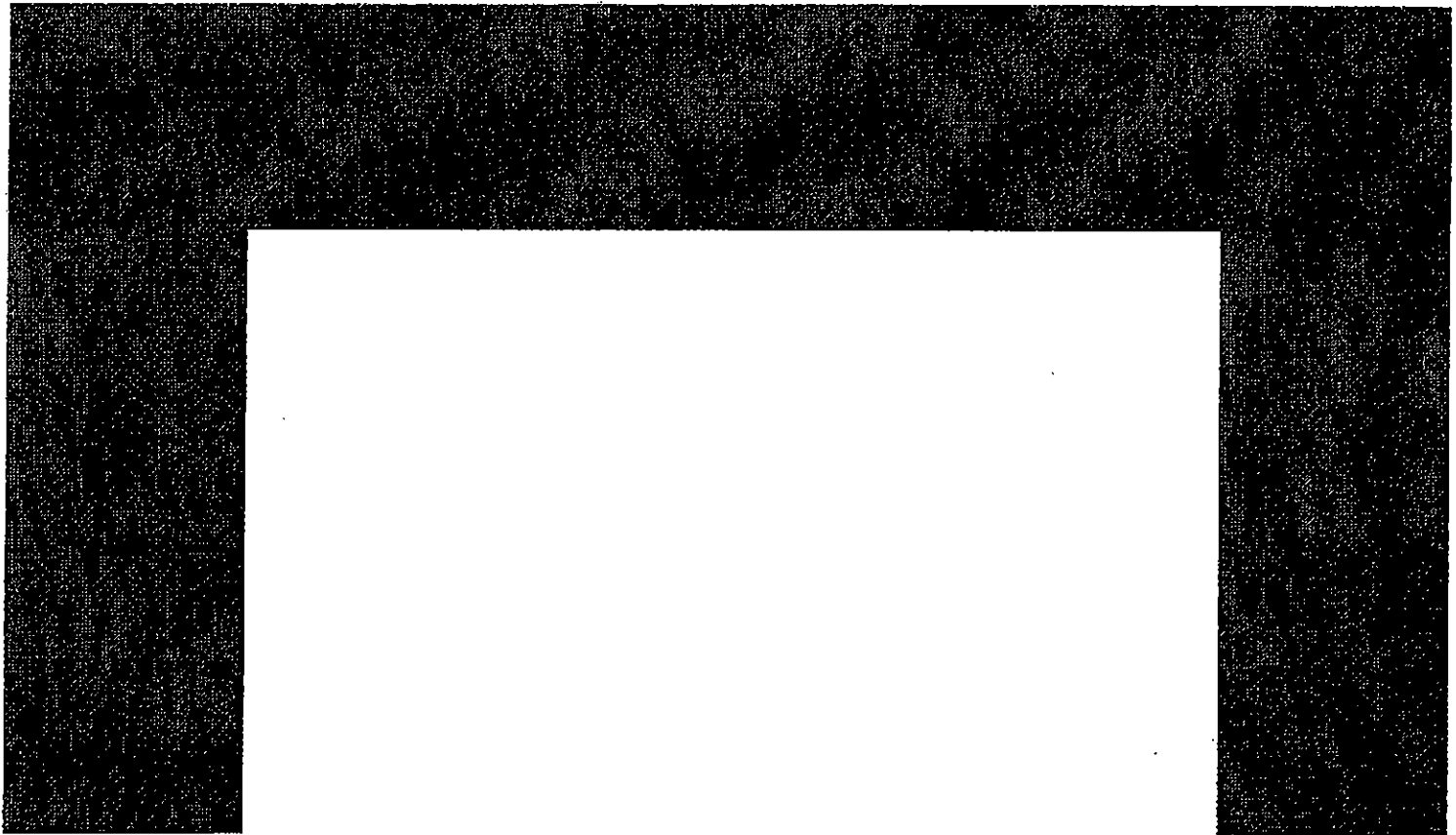
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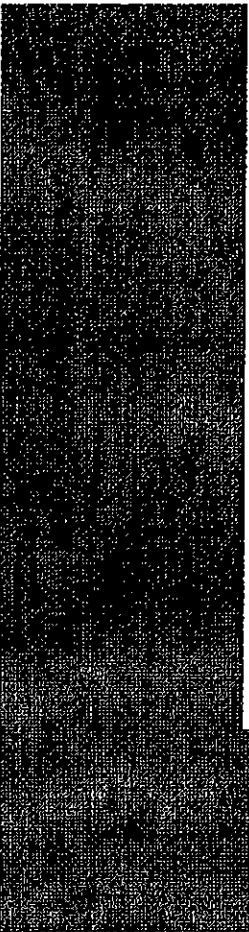
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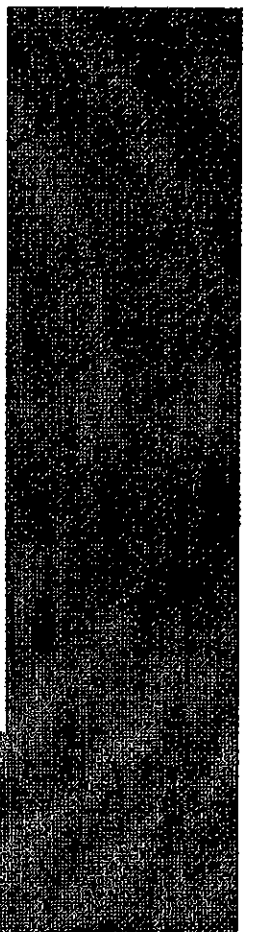
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156	Portion of Jury Trial - Day 14 (Bench Conferences)	03/31/11	22	5090-5105



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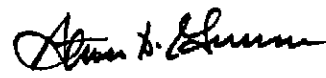
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04/07/2011 02:50:25 PMDISTRICT COURT
CLARK COUNTY, NEVADA
CLERK OF THE COURTCHERYL A. SIMAO and
WILLIAM J. SIMAO,

Plaintiffs,

v.

JAMES RISH, LINDA RISH
and JENNY RISH,

Defendants.

CASE NO. A-539455

DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

FRIDAY, APRIL 1, 2011

REPORTER'S TRANSCRIPT
SUMMATION HEARING

APPEARANCES:

For the Plaintiffs: DAVID T. WALL, ESQ.
ROBERT T. EGLET, ESQ.
Mainor EgletFor the Defendants: STEVEN M. ROGERS, ESQ.
Hutchison & Steffen, LLC
DANIEL F. POLSENBERG, ESQ.
Lewis and Roca, LLP

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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1 FRIDAY, APRIL 1, 2011 AT 12:58 P.M.

2 THE CLERK: Please come forward. Court X is in session.
3 The Honorable Judge Jessie Walsh is presiding.

4 THE COURT: Good afternoon. Please be seated.

5 Mr. Wall.

6 MR. WALL: We're ready to proceed with our summation of
7 the damages, Your Honor.

8 THE COURT: Very well.

9 MR. WALL: Judge, you're obviously quite aware of this
10 case and the facts that were presented. We're here to discuss
11 Mr. Simao's damages, as well as his wife's. Obviously,
12 damages for his injuries, recovery for his past medical
13 expenses, the pain and suffering both past, future, as well as
14 the loss of enjoyment of life, the hedonic damages under Banks
15 that are allowed and that were testified to by Dr. Smith.
16 He's also entitled, as is his wife, under Rule 55(b) for a
17 default prove up to his attorney's fees and the cost of
18 litigation.

19 You're aware, certainly, of the injuries that were
20 suffered in this crash: The left elbow strain documented by
21 the records of April 15th, 2005, the day of the crash; the
22 contusion to the back of his head, that occipital scalp, that
23 occurred during the crash documented in the record from the
24 day of the accident; and the tenderness, the palpation of the
25 occipital scalp, even noted weeks later on May 4th, 2005.

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1 Included in his head injuries, the exacerbation of
2 his migraine headaches, which to some extent, preexisted the
3 accident, he did have the history prior to the accident, but
4 they were made worse, as you know, by the motor vehicle
5 collision in this case. The records from May of 2005 show
6 that he does have a history of migraine headaches; however, to
7 him, these feel different, which is consistent, also, with his
8 testimony on direct. Later, in May of 2005, again, although
9 they note a history of migraine headaches, he experienced a
10 change in the headache intensity and character after the motor
11 vehicle accident.

12 In July of 2006, almost a year-and-a-half after the
13 accident, it, again, is noted the he has a history of chronic
14 recurrent migraines, but now with an increased frequency, as
15 well as a difference in the character of those headaches.

16 He also had muscle tension headaches after this
17 accident, different, obviously, from the migraines that he had
18 suffered from prior to the accident; the pain in the back of
19 his head and at the top of his neck, noted even in the October
20 2005 records, both migraine and tension-type headaches.

21 March of 2006, before his initial evaluation with
22 Dr. McNulty, a note of episodic tension headaches, as well as
23 migraine headaches. Again, in May of 2006, October of 2006,
24 June of 2007, all the way through June of 2010, notes of both
25 episodic tension-types of headaches, as well as migraines.

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1 And of course the injury to his neck; the C3-4 and
2 C4-5 disc disruption, requiring an anterior cervical
3 discectomy and a two-level fusion at C3-4 and C4-5.

4 You know, by now, that there was no evidence of any
5 prior neck pain, none before the accident. All the treating
6 physicians testified that there were no -- there were no prior
7 neck pain documented anywhere. Even both Dr. Fish and Dr.
8 Wong agree that there was no evidence of neck pain before the
9 April 15th, 2005 collision. It was their ultimate conclusion,
10 though, at times they tried to indicate that they just weren't
11 aware and obviously that was one of the Court orders.

12 His neck injuries were more than just the soft
13 tissue sprain or strain injury in the accident. Southwest
14 Medical initially diagnosed him with a cervical strain and the
15 physicians assistants at Southwest Medical thought that his
16 neck injury would resolve with time and told him to return in
17 six months. You know from all the doctors' testimonies that
18 soft tissue injuries like a cervical sprain or strain
19 typically resolve in a short period of time. But his neck
20 injury persisted, as you know. He returned in four-and-a-half
21 months since the symptoms and pain hadn't gone away.

22 Dr. Fish's testimony is also consistent with William
23 sustaining more than just a cervical sprain or straining.

24 [Video Played in Courtroom]

25 MR. WALL: Dr. McNulty, Dr. Grover, and Dr. Rosler all

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1 testified that he sustained a traumatic, internal disc
2 disruption.

3 And, of course, after the collision he continued to
4 complain of neck or occipital pain at the back of his head and
5 top of his neck. He complained of it immediately after the
6 collision. It didn't resolve after a few weeks. And from the
7 day of the crash forward, he's continued to experience pain in
8 his neck or his occiput region noted by the records on the day
9 of the crash: Neck, back, and left shoulder pain. Contusion
10 of the scalp. Three weeks after the crash: Recurrent
11 occipital pain. Patient complains of occipital head pain,
12 again, three weeks after the crash, tenderness to palpation
13 over the occipital scalp.

14 Five-and-a-half months after the crash, a check up
15 for his neck and shoulder pain and headaches. Occasionally
16 they start as tightness and pain in his shoulder, which then
17 radiates up into his neck.

18 Six months after the crash, they're still taking x-
19 rays of his neck and left shoulder because of a history of
20 migraine tension-type headaches and neck pain. They did six
21 different views of the cervical spine in October of 2005
22 because of continuous neck pain eight months after the crash;
23 refer to physical therapy because of continuous neck and
24 shoulder pain as a result of the accident.

25 Nine months after the crash, an injury to his neck

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1 and upper trapezius region as a result of the motor vehicle
2 accident, pain in the back of his neck and his upper
3 trapezius.

4 Eleven months after the crash, no described as
5 chronic neck pain because it's been there for eleven months.

6 Twelve months and three days after the crash, his
7 initial evaluation with Dr. McNulty, the patient has a primary
8 issue of axial cervical pain, again, since the date of the
9 accident. You know, by now, that he's had 14 separate
10 invasive surgical procedures from the transforaminal steroid
11 injections to the selective nerve root blocks to the pulsed
12 radio frequency that Dr. Arita performed, to the nerve root
13 blocks, discography in August of 2008, more injections, even
14 by Dr. McNulty, ultimately the surgery in March of 2009 to
15 fuse his vertebrae together and remove two discs, and
16 continued injections in 2010 when the pain came back. You
17 know that Dr. McNulty performed a two-level cervical fusion.
18 He's the only physician in this case that actually observed
19 the injured discs at the time of surgery; not Dr. Fish and not
20 Dr. Wong.

21 You know from the x-rays that he still has that
22 plate in his neck with six screws holding it to the vertebrae.
23 He's obviously continued to complain of pain in his neck, or
24 occipital region, since the crash. Even though it's not --
25 sometimes it's not specifically in the Southwest Medical

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1 records, it is clear that he continued to have symptoms. Some
2 of the records do not state neck pain, something that's been
3 brought up by Mr. Rogers. In the records, however, they
4 continue to provide treatment for his neck injury. the
5 medications that they give him; Flexeril, Soma, Ibuprofen are
6 all to treat musculoskeletal injuries, the cervical sprain or
7 strain that they say they first treated, not his migraines.

8 They did x-rays, obviously, not of his cervical
9 spine during that period, where the defense claimed Mr. Simao
10 wasn't complaining of neck pain. And Dr. Grover's testimony
11 on cross-examination, perhaps better than any testimony in the
12 whole case, confirms that William continued to have neck
13 symptoms and how that is medically an appropriate conclusion.

14 [Video Played in Courtroom]

15 MR. WALL: Dr. Grover outlines it better than I could and
16 in contrast to what the defense presented to this jury.
17 Doctors McNulty, Rosler, Grover, and Arita each testified that
18 the cost of the medical treatment they provided was reasonable
19 and customary. There is no evidence that refutes the medical
20 expenses in the fact that they were reasonable and customary.
21 In fact, before trial, the defense even stipulated that the
22 past medical expenses were reasonable and customary, they
23 challenged causation. The amount on Exhibit 1 was agreed,
24 \$194,380.96 in past medical specials for Mr. Simao.

25 Doctors McNulty, Rosler, Grover, and Arita, all of

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1 the treating physicians who testified in this case, each said
2 that the medical treatment they provided was necessary and
3 causally related to the motor vehicle collision on April 15th,
4 2005.

5 So when the judgment that this Court ultimately
6 enters, it would be our request that past medically and
7 related expenses in the amount \$194,380.96 be awarded.

8 What the Court must deal with next is the issue of
9 pain and suffering. The sixth year anniversary of this crash
10 is two weeks from now; six years of past pain and suffering.
11 We allocated approximately fifteen cents per minute, which
12 comes out to about \$9 an hour if it was a job. And, of
13 course, the Court, how it instructs juries on pain and
14 suffering, would take into consideration, certainly how bad
15 the pain was, whether it was just an annoyance, whether it's
16 all encompassing. You know that Mr. Simao's pain threshold,
17 at times, was ten-out-of-ten, often seven or eight-out-of-ten,
18 as described by the doctors. You heard from him and his wife
19 that it changed both of their lives.

20 I would ask the Court to, not only factor in that,
21 but also the pain of surgery, the pain of the recovery, and
22 event eh ten-out-of-ten that they create during the
23 discography. You also should consider, of course, how long
24 the pain lasts: Is it fleeting; is it for an hour; is it for
25 a month; or even just a year? The evidence here is, that it

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1 will last for the rest of his life, significantly every day,
2 since the motor vehicle accident.

3 For past pain and suffering, we would ask the Court
4 to award an amount of \$473,040.

5 The Court must also take into consideration the fact
6 that this pain has not gone away and will not go away.

7 The issue of future pain and suffering is before the
8 Court and, of course, Bill is expected to live until age 78,
9 based on the statistical averages. That's 31 more years based
10 on the government's statistics, the life expectancy table, for
11 which the Court took judicial notice; 31 more years of the
12 pain.

13 We would ask the Court, conservatively, to consider
14 seven cents per minute for that pain. That comes out to an
15 amount of \$1,140,552 in future pain and suffering over the
16 next 31 years.

17 We would ask the Court to, also, consider the issue
18 of loss of enjoyment of life, the hedonic damages accepted by
19 the Nevada Supreme Court in Banks versus Sunrise Hospital, as
20 testified to by Dr. Smith. He discussed a range of values for
21 the loss of enjoyment of life. He said, well, if there's one
22 number -- and this was Exhibit 68 -- if he's lost thirty
23 percent of his lost -- of his enjoyment of life, there's one
24 number; if he's lost fifteen percent, here's another number.

25 We would ask the Court to split the difference to

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1 award at the middle value, which is \$905,169.

2 You heard from him and from his wife how this injury
3 has affected him, and how the pain has affected him, how it
4 has indirectly affected her, and how it has affected their
5 relationship. And so a median range, I would submit to the
6 Court, is conservative and reasonable.

7 And then of course, there is Cheryl Simao's claim;
8 her claim for loss of consortium; her loss of society and
9 relationship with her husband based on the pain and the
10 injuries from the accident. Of course, in this default prove
11 up, she's also entitled to attorney's fees and costs under
12 55(b) and the case law that supports that.

13 Exhibit 68 is from Dr. Stan Smith's testimony, based
14 on his calculations, and he used the conservative number of
15 fifteen percent for her of the loss of society on
16 relationship. And we would ask the Court to award that:
17 \$681,286 in the category of Cheryl Simao's loss of consortia.

18 What is left, then, is the issue of this prove up of
19 attorney's fees. As the Court is aware, whether to award
20 attorney's fees is left to the sound discretion of the Court
21 under Laforge, under the Uniroyal case. Here the contingency
22 fee agreement that the plaintiff signed with their counsel is
23 forty percent of the amounts recovered, which is standard.
24 And that obviously recognizes the validity of contingent fee
25 agreements in such cases. District courts within this

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1 building, including the Court, I believe have awarded
2 attorney's fees based on a contingent fee amount.

3 Ultimately, the method upon which attorney's fees
4 are determined is left to the sound discretion of the Court
5 and it is certainly within your discretion to not be limited
6 to one specific approach, but rather to award the fees based
7 upon the contingent fee agreement.

8 There is, of course, a long line of precedent
9 establishing an award of attorney's fees at the time of a
10 default judgment, most recently the Goodyear Tire case, going
11 back almost 50 years to the Bromberg case. And the Court is
12 obviously on solid ground in awarding attorney's fees and the
13 costs at the time of a default judgment.

14 The total damages that we've outlined so far, for
15 the Court, are \$3,394,427.96, that's merely adding up the
16 numbers that we had suggested to the Court in closed judgment
17 thus far. The forty percent attorney's fees based on the
18 contingent fee agreement, in doing the math, would be
19 \$1,357,771.18. We would ask that that be awarded. That takes
20 into account both Bill and Cheryl Simao combined.

21 There is also an entitlement to the costs that have
22 been incurred in the case. We are still, frankly, Judge,
23 accruing those and adding them together. We will provide the
24 Court, pursuant to the local rule, with a memorandum of costs
25 within seven days, and we would include that in a proposed

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1 judgment.

2 The total amount ultimately to be awarded, based on
3 our requests on all of the foregoing, is \$4,752,199.14 plus
4 costs to be determined. We would submit it to the court.

5 THE COURT: Thank you, Mr. Wall.

6 Okay. Mr. Rogers.

7 MR. ROGERS: Thank you, Your Honor.

8 With that said, Your Honor, this is our truncated
9 closing. I'm going to quote only the plaintiff's medical
10 providers, nothing at all, then, from the defense experts.
11 Each one of the plaintiff's own medical providers have
12 testified, with regard to past specials, the conditions with
13 which they diagnosed the plaintiff can be caused with or
14 without trauma; that none of the extensive diagnostic tests
15 done in this case ever imaged or evidenced a traumatic injury.
16 The only condition observed in the cervical spine was a
17 preexisting condition, the C4 facet hypertrophy.

18 Each one of the providers testified that their
19 causation opinion is based on patient history and nothing
20 more. They've each admitted, on the stand, that there is no
21 scientific or medical peer-review study to verify the
22 reliability of determining cause, based on patient history.
23 They've also testified that the likelihood that this accident
24 caused injury is diminished if the plaintiff did not have
25 ongoing neck symptoms during his many gaps in treatment

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1 immediately following the accident.

2 The plaintiff claims that the PAs, the mid-level
3 providers as they've characterized them, somehow missed these
4 neck complaints; however, the deposition transcript that the
5 parties agreed to read into evidence, because this PA was
6 unavailable and out of the country, establishes that the PAs
7 always do report complaints. There's no evidence that any PA
8 missed a complaint here. The plaintiff suggests that he
9 continued complaining of medical -- or pardon me -- of neck
10 pain, but none of the medical records verify that.

11 The surgery that was ultimately performed,
12 tellingly, has an eighty-five to ninety percent success rate,
13 an overwhelming majority of success, unless there was no
14 injury to the discs which were fused. And, in this case, the
15 plaintiff claims that he has ongoing symptoms. That surgery
16 was not a success, we get back to the original question: Was
17 injury caused to the cervical spinal, particularly level C3-4
18 and C4-5, as a result of this accident. None of the medical
19 evidence provided, establishes that it did.

20 Dr. Arita testified that, in his opinion, the
21 plaintiff's complaints were inconsistent with the physical
22 findings and that he had concerns that there were non-
23 physiologic basis for his complaints.

24 In short, just from the plaintiff's medical
25 providers' own testimony, it appears that this accident

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1 probably caused only one condition, and that was an
2 aggravation of his preexisting headaches. He complained of
3 occipital headaches afterwards and migraines before; however,
4 as Dr. Arita testified, the occipital headaches were relieved
5 by the time the plaintiff presented to him, which was roughly
6 a year to a year-and-a-half after the accident.

7 The accident may have, also, potentially caused a
8 neck sprain, although, Dr. McNulty testified that that
9 diagnosis is a more or less a diagnosis of exclusion. It's a
10 word used interchangeably with pain. If he presented with
11 neck pain on the date of the incident, Dr. McNulty that there
12 was no diagnosis of it. What the diagnostic evidence
13 establishes is that, there was no injury requiring surgery.

14 Next, it appears, from the specials, that the
15 plaintiff has abandoned his claim for future specials. That
16 would include the spinal cord stimulator, which was an issue
17 of great debate here in court, as well as the adjacent-level
18 fusion, which was also disputed. So we will pass on arguing
19 on those points.

20 Now, if what we have, then, is a claim for past
21 medical specials, no future treatment, that brings us to, what
22 would generally be the general damages discussion, but now is
23 tied into Mr. Smith's hedonic damages testimony. Hedonic
24 damages are not a separate category from general damages. Mr.
25 Smith testified that, in his opinion, there are benchmarks to

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1 be employed. He testified that he incorporated the
2 plaintiff's claim for future specials into these -- into this
3 analysis and that the jury could consider it; however, he also
4 testified that he has no basis, factual or statistical or any
5 other basis within his expertise, that would establish that
6 there's a fifteen percent or a thirty percent loss. That
7 these numbers are simply benchmarks.

8 The evidence establishes that he relies on
9 psychologists to help establish these benchmarks; what is the
10 loss, in other words, of enjoyment. That's something that a
11 psychologist will supply. He doesn't have a vocational
12 rehabilitation specialist to quantify a given loss. He simply
13 supplies these numbers.

14 The plaintiff suggests that the Court should split
15 the difference between fifteen and thirty percent. The
16 defense submits that the evidence, particularly if the futures
17 are being waived, would not amount anywhere near fifteen
18 percent.

19 Remember, when the plaintiff took the stand and
20 testified, he said that there's nothing he can't do anymore,
21 he continues doing everything he did before, with one
22 exception and that's ride motorcycles. That's the only thing
23 that he's given up.

24 Mr. Smith repeatedly referred to hobbies or
25 activities that give fulfillment to one's life as the measure

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1 of a loss. In this case, we have only the example of
2 motorcycle riding.

3 Next in the loss of society, Mr. Smith extrapolates
4 a loss of enjoyment from a death to arrive at a hedonic
5 damages number. He, then, extrapolates again to extend that
6 number to a third party, the spouse. This has a questionable
7 undertaking. We understand that the Court is already
8 recognized the authority that permits hedonic damages, but
9 taking this number and extending it to loss of consortium is a
10 different matter. Both plaintiffs have testified that they
11 have not undergone any counseling or treatment of any kind for
12 loss of consortium or problems within the relationship. They
13 have testified that there have been problems occasioned by the
14 surgery which failed, but nothing that comes close to the
15 number that they've asked the Court for. In this case, I
16 believe it was \$680,000.

17 Now, that brings us to fees. This is something that
18 is generally taken up in a separate hearing, this did come as
19 a surprise. I spoke with plaintiff's counsel earlier today,
20 there was no mention of it. It was our understanding that
21 there would be no power point today, that this would be a
22 truncated, an abbreviated close, and the defense would ask for
23 a separate hearing on the motion for fees and costs. I guess
24 costs will be brought separately.

25 One of the authorities that the plaintiffs cited in

1 their request for fees was Goodyear, a case in which no fees
2 were awarded.

3 In conclusion, nothing short of proof establishing
4 that this car accident caused the injuries alleged would
5 support an award of -- or a finding of probability that this
6 accident resulted in this surgery that the plaintiff
7 underwent. As I've outlined, none of the evidence establishes
8 a condition at the levels that were fused.

9 The plaintiff has not met his burden of proof. Mrs.
10 Rish asks that you return a verdict finding that she is not
11 responsible for the neck treatment that followed this accident
12 and to the extent that she might be -- it would be limited to
13 the sprain, with which the plaintiff was diagnosed on the date
14 of the incident and of which he did not complain for the
15 following six months.

16 The specials that would be compensable under that
17 analysis would approximate \$16,000, the general damages should
18 be an award commensurate with that.

19 And with that, Your Honor, we will leave it to your
20 discretion.

21 THE COURT: Thank you, Mr. Rogers.

22 MR. ROGERS: Thank you.

23 MR. WALL: May I respond --

24 THE COURT: Mr. Wall.

25 MR. WALL: -- briefly, Your Honor.

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1 THE COURT: Yes.

2 MR. WALL: First of all, with respect to this truncated
3 closing, just a reminder of where we are procedurally. This
4 is a prove up under N.R.C.P 55, there's basically a defacto
5 default in place based on the Court striking the defendant's
6 answer. You've heard from the defense, based on a very
7 limited right under Hamlet to be heard before the Court assess
8 damage, but this is not the same as a closing argument. Rule
9 55(b) sub (2) says that, in determining damages in such cases
10 when there's a default, and I quote, "If, in order to enable
11 the Court to enter judgment or to carry it into effect, it is
12 necessary to take an account, or to determine the amount of
13 damages, or to establish the truth of any averment by
14 evidence, the Court may conduct such hearings or orders such
15 reference as it deems necessary and proper." And that's
16 essentially what today is.

17 Now, I feel compelled to respond to this sort of
18 repetitious claim of surprise by Mr. Rogers. He did call me
19 at 11:30 this morning and he asked me, do you understand that
20 I get to still address the Court about whether the accident
21 caused the damages. That was the subject of the conversation.
22 I told him, yeah, I think you can under Hamlet, based on that
23 limited exception that we didn't oppose, but that I'm going to
24 go for about 20 or 25 minutes on what the damages ought to be;
25 that my understanding is, that you would, then, get 10 or 15

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1 minutes and I would get a brief rebuttal. There wasn't any
2 question to me about what we were going to ask for, including
3 pain and suffering, including hedonic damages, and including
4 attorney's fees.

5 I keep hearing this causation argument as the Court
6 has. Obviously, you heard from Dr. McNulty, Dr. Rosler, Dr.
7 Arita, Dr. Grover; they say that the conditions are caused
8 without trauma, but the treating physicians render their
9 opinions based, not only on the history, the diagnostic test,
10 the medical records, not just the history.

11 You saw Dr. Grover's testimony about what the
12 condition would be and how we diagnose it based on the fact
13 that there were a -- there was a continuing complaint of neck
14 pain from Mr. Simao.

15 This gap in treatment that they've talked about,
16 even Dr. Wong, the defense expert, said that if the pain
17 persisted and there wasn't a gap in pain, then his opinion on
18 causation would be different.

19 [Video Played in Courtroom]

20 MR. WALL: What evidence is there, or was there, or could
21 there have been to show that this gap in treatment is the same
22 as a gap in the pain? There was none, Your Honor, and there
23 wouldn't have been any if this trial had proceeded to its
24 conclusion. A gap in treatment isn't the same as a gap in
25 pain. He had pain throughout. He was told at the end May of

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1 2005, based on the tests they did initially, it'll resolve on
2 its own, go home, and come back and see us in six months.

3 You know that none of the tests that they did,
4 before that period of time, would have diagnosed the actual
5 injury that he suffered. You heard that he's a -- I think Dr.
6 McNulty said, he's a man's man, Mr. Simao. He believes the
7 physicians' assistants when they tell him that it'll go away
8 on its own. And this claim that the first five weeks doesn't
9 show that he suffered a neck injury is belied by all the
10 medical records that we showed the first time I was before
11 you.

12 They continued to claim that there isn't any
13 evidence to support the treatment that he had. First of all,
14 there is no evidence to support, including from Dr. Fish and
15 Dr. Wong, that there was any intervening event during this
16 supposed gap that would have caused his pain. They continued
17 to pursue this theory that he wasn't injured; that if he
18 suffered an injury, it was a soft tissue injury only and
19 resolved by May 26th despite all of the occipital complaints,
20 all of the ongoing systems -- symptoms.

21 For this to even be remotely true, it would mean
22 that he had no neck pain before the accident; suffered a neck
23 injury at the time of the accident; they treated it for five
24 weeks, had occipital complaints during that time, had never
25 had them before; it magically goes away; and the exact same

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1 pain reappears in September or so of 2005 without any
2 intervening event, in the exact same spot as the pain after
3 the motor vehicle accident with most, if not all, of the same
4 symptoms resulting in the following five years of treatment.
5 Obviously, there's zero evidence of that particular scenario.

6 And they persist in this theory that he was treated
7 unnecessarily and that all of his treatment beyond May 26th,
8 2005 is unnecessary; that the discs that were removed weren't
9 damaged. I just have to ask the Court to think with what this
10 means. This means that all of the doctors, all of the board
11 certified, fellowship trained surgeons, pain management
12 doctors, neurologists, RNs, PAs, nurse's assistants, Mr. Simao
13 apparently fooled them all. He pretended he had an injury.
14 There was apparently no injury. His discs were removed even
15 though he wasn't injured. He fooled the MRI machine, the CT
16 after the discography, the injection needles, the fluoroscopy
17 images. He had 14, apparently, false positives in all of his
18 surgical procedures. He fooled the surgeons who recommended
19 surgery, two independent ones, by the way. He fooled the
20 surgeon who was actually inside his neck and saw the damaged
21 discs.

22 And I would just submit that there's a certain
23 audacity of Dr. Fish, Dr. Wong, and even Mr. Rogers to say
24 that he hadn't suffered any injury in the motor vehicle
25 accident. They're saying he has no pain without understanding

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1 what he's been through.

2 This statement by Mr. Rogers that we abandoned, or
3 he even used the word "waived," certain future medical
4 treatments is incorrect. With respect to the stimulator,
5 unfortunately, Dr. Sible didn't get to testify as to the
6 original genesis of that notice to the defense of that
7 particular treatment.

8 With respect to the future fusion surgery that Dr.
9 Wong testified, because he couldn't come back, pursuant to his
10 own schedule rather than the Court's, he wasn't able to come
11 back and within cross, say that his opinions were to a
12 reasonable degree of medical probability, as the law would
13 require under more staccato. So instead, we try and be as
14 fair, and as conservative, and as reasonable as we could, and
15 to follow the law in the case, a novel approach, but we
16 decided to follow the law of the case.

17 They go on to say that there's no pain and
18 suffering, no loss of enjoyment of life. I would ask the
19 Court and submit it to the Court, based on the testimony you
20 heard of Mr. and Mrs. Simao, that Mr. Simao lived by the
21 rules. He -- you've seen the kind of person he is. He's a
22 hard working guy, he's a simple guy, he's a family man, and he
23 did nothing to cause this accident, nothing. And what they've
24 done to him is to systematically try to tear him down.
25 They've tried to discredit every opinion of every doctor he

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1 saw. They've even challenged whether he was really in pain.
2 They hired their usual experts from UCLA to attack him and his
3 doctors. The expert witnesses who disregarded whatever Mr.
4 Simao told them and who disregarded whatever all of the
5 treating doctors said, all to make you or the jury, ultimately
6 the Trier of fact, either dislike Bill and Cheryl, reject
7 them, reject the facts that support their case, or somehow
8 establish that they are not truthful. And, of course, they
9 have violated nearly every order that this Court entered
10 before the trial began and as it continued.

11 MR. ROGERS: Your Honor, I'm going to object to argument
12 on this front when today's meeting is simply to establish
13 compensable damages. There are damages that emanate from --

14 MR. WALL: First of all --

15 MR. ROGERS: conduct that he's complaining of at this
16 time. The only question is whether the accident caused the
17 damages that are being presented to the Court.

18 MR. WALL: He is exactly right. I don't think he has
19 standing to object, frankly, but he is exactly right. And
20 what I'm asking the Court to do, despite what they've done in
21 this case, is to set all of that aside for purposes of
22 establishing what the appropriate damages are; set aside every
23 violation of every order and approach this case, as I know the
24 Court will, to determine damages only on the evidence that's
25 been presented so far and what's been presented factually in

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1 this summation.

2 MR. ROGERS: But, Your Honor, it's presumed that those
3 things are set aside. I'm not sure why counsel is invoking
4 it. It seems like it's meant to aggravate the Court and we
5 don't want that to enter into the Court's analysis.

6 THE COURT: Objection is noted for the record. I hope
7 you will consider the fact that I will carefully consider
8 everything that was argued and everything that was heard in
9 this court.

10 MR. ROGERS: Thank you.

11 THE COURT: Mr. Wall.

12 MR. WALL: I admit that for some who have sat where you
13 sit that it may be difficult to disregard the conduct of one
14 party during the course of a case when it comes time to do
15 that. I'm confident the Court can do that.

16 What we've asked for is, reasonable, conservative,
17 and fair in view of the law, in view of the facts, in view of
18 the evidence. We asked that we be allowed to prepare for the
19 Court a proper judgment for the amounts we've set forward and
20 of course the order on the motion to strike the answer to
21 prepare for the Court. Thank you very much.

22 THE COURT: Thank you, Mr. Wall.

23 What I would appreciate, frankly, is for counsel to
24 prepare a proposed judgment, but to leave these categories
25 blank so the Court can fill them in, and I want an opportunity

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1 to review the evidence, I also would like an opportunity to
2 review the cases as cited by counsel. I wasn't able to write
3 down all of the citations as quickly as they flashed up on the
4 screen, particularly those relating to attorney fee issues.

5 MR. WALL: We will provide that to the Court.

6 MR. POLSENBERG: Your Honor, if I may, on fees, could --
7 I don't see where 55 provides for fees.

8 THE COURT: One of the reasons why, Mr. Polsenberg, I
9 asked for a copy of those case citation is, because I'd like
10 read and each of those cases that plaintiff's cited.

11 MR. POLSENBERG: Well, and I think -- well, I think they
12 should make a motion for fees just as Mr. Rogers argued in his
13 argument. I don't think they are necessarily a part of this
14 and to have them bring it in for the first time in this
15 closing argument and give you a list of cases, I think we need
16 -- due process would required that we have the right to
17 respond.

18 Mr. Rogers is right, Goodyear didn't award fees.
19 The fees under Foster versus Dingwall were under rule 37 for
20 discovery and under 18, because the defenses were brought in
21 bad faith. They didn't have to do with the default itself,
22 and 55 doesn't mention the word fees. It mentions costs only
23 in (b) (1) and we're under (b) (2). Now, I'm not saying they
24 don't get costs, but I don't see where they get fees. I think
25 they need to bring a separate motion for fees.

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1 THE COURT: Mr. Wall.

2 MR. WALL: We'll bring it if you wish, Your Honor, but
3 having stricken the answer, I'm not sure that they have an
4 opportunity to file an opposition.

5 MR. POLSENBERG: No, we do.

6 MR. WALL: I'm not sure that that's correct. So it is --
7 I'm sure the Court has awarded fees and costs in dozens of
8 default judgments over the years. That is what is routinely
9 allowed in such cases and we'll provide you the case law that
10 we have.

11 MR. POLSENBERG: And they're routinely allowed under
12 1801.02(a), when the plaintiff recovers \$20,000 or less.
13 They're not allowed over \$20,000.

14 THE COURT: Does defense wish to brief this issue
15 regarding attorney fees?

16 MR. POLSENBERG: Yes, I would. Thank you, Your Honor.

17 THE COURT: How much time do you need?

18 MR. POLSENBERG: I think they would need to go first,
19 unless you just want one brief from us?

20 MR. EGLET: Two briefs equally submitted at the same
21 time.

22 THE COURT: No, I would like to see -- yeah.

23 MR. POLSENBERG: I can't do it at the same time, because
24 that denies due process where I don't get to see what they're
25 arguing that their basis for fees are on. I think they should

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1 make a motion and we'll do in opposition in ten days.

2 THE COURT: Mr. Wall.

3 MR. WALL: Well, the Court order blind briefs or the
4 Court can order us to do it first, it really -- we'll do it
5 either way the Court -- we will submit it.

6 THE COURT: How much time do you need to prepare an order
7 -- or a motion with respect to fees?

8 MR. WALL: Two weeks; does that work?

9 THE COURT: Two weeks for the parties to submit their
10 briefs simultaneously.

11 MR. POLSENBERG: But, Your Honor, I won't know what their
12 basis is.

13 THE COURT: That's right and they won't know what yours
14 is.

15 MR. POLSENBERG: They won't know what my basis is that
16 they don't get fees? I think due process requires that we be
17 allowed to know what their basis for the briefs are -- for the
18 fees are.

19 MR. EGLET: We're giving up the right to file a reply
20 brief --

21 MR. POLSENBERG: Well --

22 MR. EGLET: -- by doing them simultaneously.

23 THE COURT: I think the Court can review the briefs that
24 are submitted to the Court blind and if the Court feels that
25 it needs further briefing the Court can request some of the

1 parties.

2 MR. POLSENBERG: All right. But if they rely on anything
3 other than rule 55 and that list of cases, which I would also
4 like to see, I think everybody in this room knows that I will
5 scream bloody-murder.

6 THE COURT: No doubt. If counsel will be so kind as to
7 provide us a list of those cases to Mr. Polsenberg, as well as
8 a list to the Court --

9 MR. EGLET: All right.

10 THE COURT: -- I would appreciate it. So two weeks for
11 counsel to file their respective briefs and --

12 THE CLERK: April 15.

13 THE COURT: April 15.

14 MR. WALL: Well, that's -- so April 15 for the briefs?
15 All right.

16 THE COURT: Okay.

17 MR. POLSENBERG: Thank you, Your Honor.

18 MR. WALL: Do you want to set a hearing date, Judge, or
19 just do it -- just do it in chambers?

20 THE COURT: I'm just inclined to put it on the chambers'
21 calendar two weeks after the April 15th date; where does that
22 take us to? I need an opportunity to review and --

23 THE CLERK: April 19th.

24 THE COURT: April 29 on the chambers' calendar for the
25 Court to review.

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1 MR. WALL: Well, is your chamber calendar on Friday or
2 Thursday?

3 THE COURT: No, it's generally on Thursday.

4 MR. WALL: Thursday, so the 28th?

5 THE CLERK: Thursday the 28th.

6 MR. POLSENBERG: Your Honor, if you're going to have a
7 hearing, my May is very messy. So if you want to do it in
8 April, that would work better for me.

9 THE COURT: Not planning to hold a hearing, unless I
10 think it's necessary, Mr. Polsenberg.

11 MR. POLSENBERG: Very good, Your Honor. Thank you much.

12 THE COURT: In which case, I'll do my best to work around
13 counsel's schedule.

14 MR. POLSENBERG: Thank you.

15 THE COURT: You're welcome.

16 MR. ROGERS: Your Honor, at this time, defense requests
17 the plaintiff's 727 briefs, we haven't seen them.

18 THE COURT: Very well, Mr. Wall.

19 MR. EGLET: I actually didn't bring them.

20 MR. WALL: We didn't bring them with us, but we can have
21 them sent over.

22 THE COURT: All right.

23 MR. ROGERS: Could we get an order that they be produced
24 within a given time?

25 THE COURT: Yes, how soon can you get those briefs to Mr.

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1 Rogers, Mr. Wall?

2 MR. EGLET: Next week -- what brief, Your Honor.

3 THE COURT: Those briefs that he's requesting.

4 MR. ROGERS: 727, your --

5 MR. EGLET: As soon as I walk back, I'll send them right
6 over.

7 THE COURT: Okay.

8 MR. EGLET: And I'll bring them --

9 THE COURT: Thank you.

10 MR. ROGERS: Thank you, Your Honor.

11 MR. EGLET: Unless the Court wants to take a recess, I
12 can send a member of my staff right now to get them and file
13 them in open court, however you wish.

14 MR. POLSENBERG: That's fine.

15 THE COURT: What about that, Mr. Rogers?

16 MR. EGLET: Well, Mr. Polsenberg says it's fine, he
17 trusts that I'm going to get them to Mr. Rogers.

18 THE COURT: Did you say that, Mr. Polsenberg?

19 MR. POLSENBERG: I did.

20 THE COURT: Okay. Good, then.

21 [Proceedings Concluded at 1:48 p.m.]

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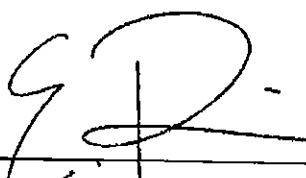
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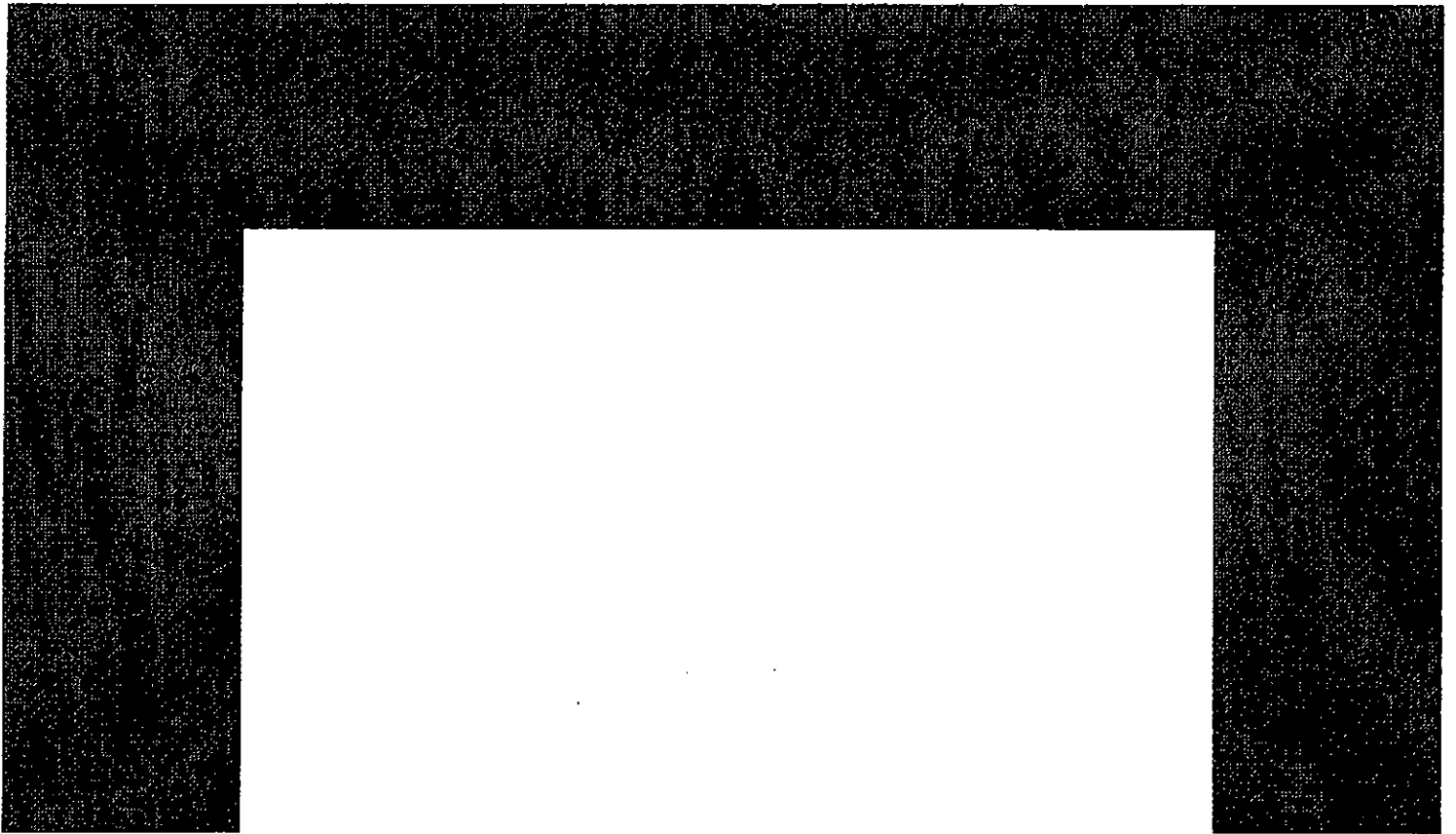
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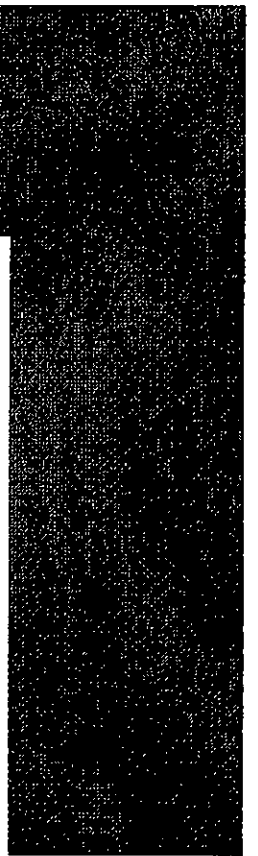
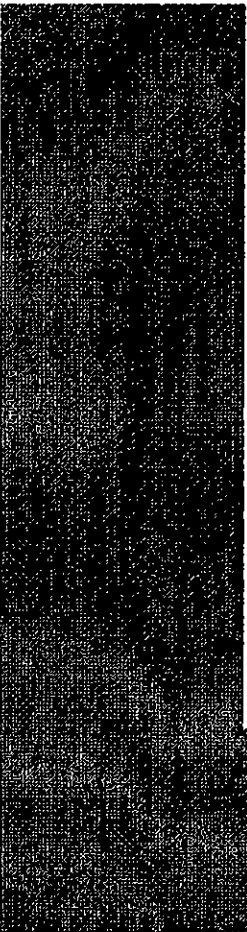

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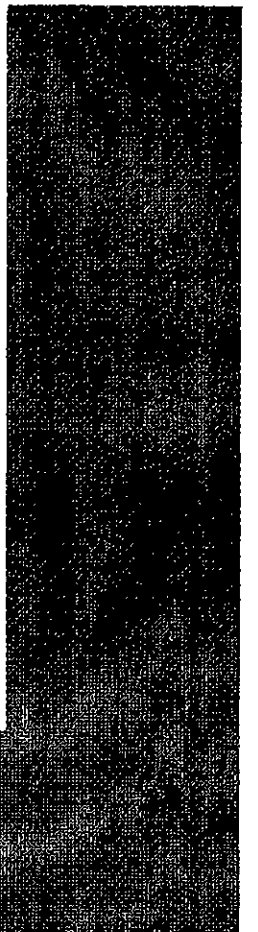
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REGISTER OF ACTIONS
CASE No. 07A539455

William Simao, Cheryl Simao vs Jenny Rish

www.pearsoned.com.au

Case Type: Negligence - Auto

Date Filed: 04/13/2007

Location: Department 10

Conversion Case Number: A539455

Supreme Court No.: 68504

59208

59423

PARTY INFORMATION

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Plaintiff **Simao, William J**

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702-450-5400(W)

EVENTS & ORDERS OF THE COURT

04/01/2011 | Hearing (1:00 PM) (Judicial Officer Walsh, Jessie)
Hearing: Prove-up of damages

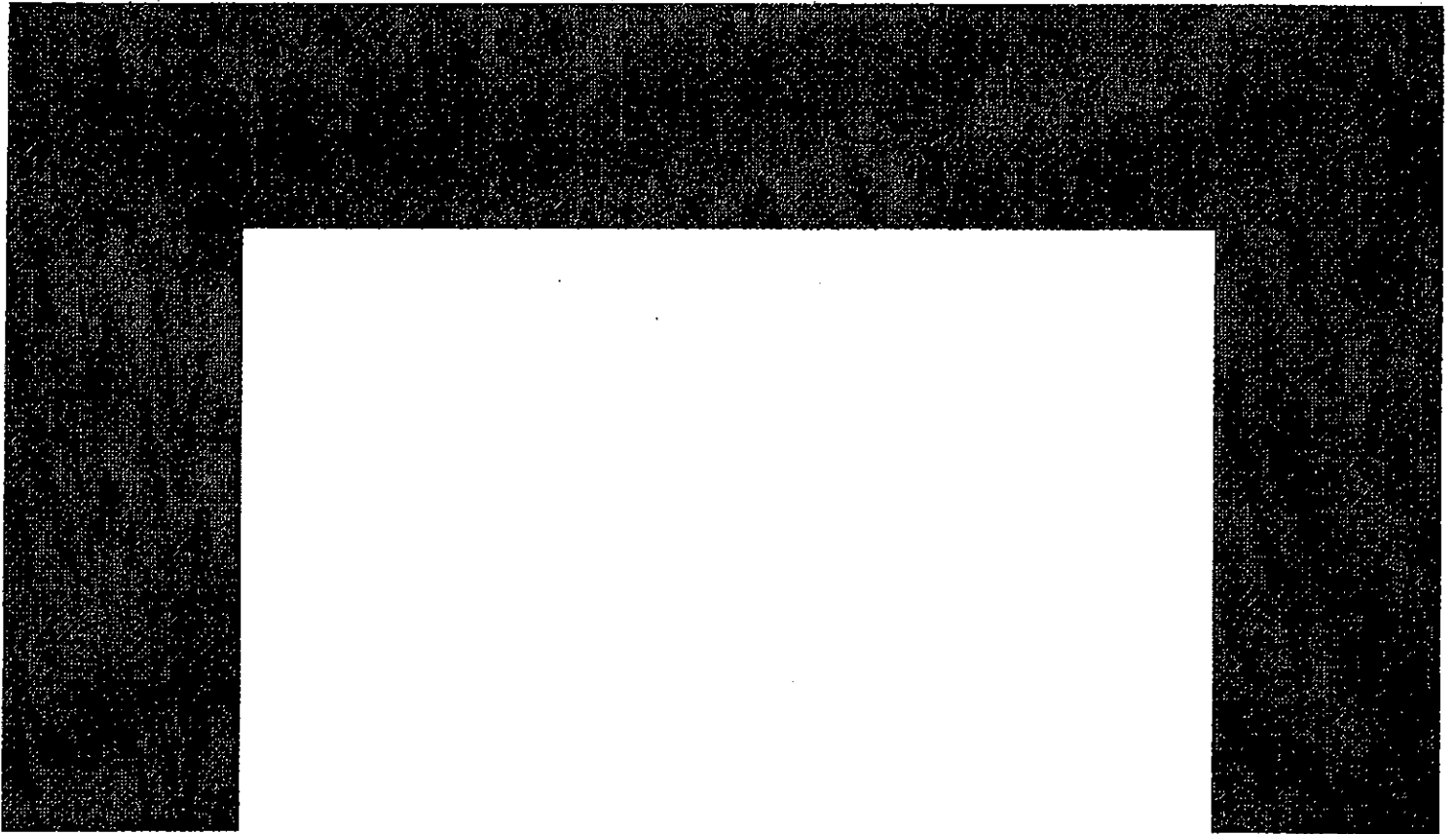
Minutes

04/01/2011 1:00 PM

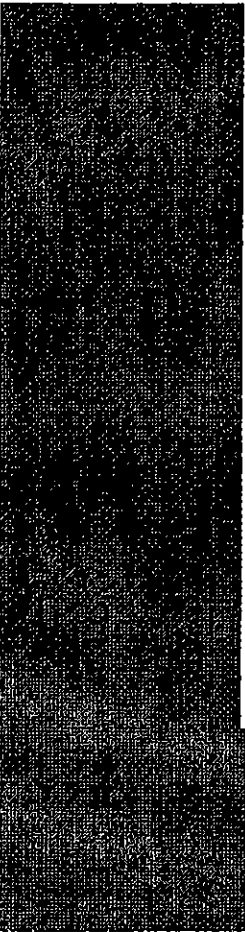
- Damages presented by counsel. Arguments by counsel. At request of counsel, COURT ORDERED, counsel to submit additional briefing on fees and costs simultaneously on 4/15/11. Matter SET for Status Check: Fees and Costs on the Chambers Calendar. Court will order additional briefing if necessary. There will be no further hearings. 4/28/11 STATUS CHECK: FEES AND COSTS - CHAMBERS

Parties Present

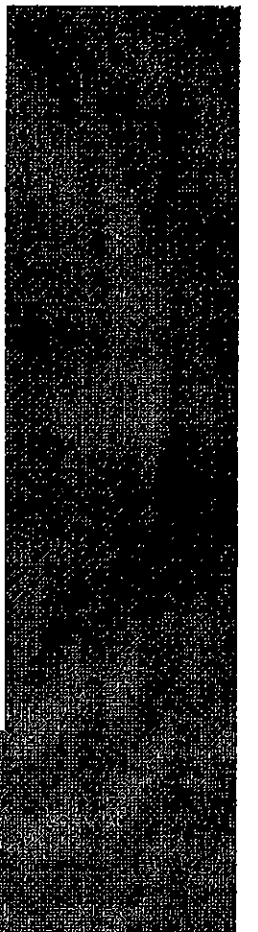
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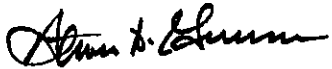
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

WILLIAM JAY SIMAO, individually and
CHERYL ANN SIMAO, individually, and as
husband and wife,

Plaintiffs,

v.

JENNY RISH; JAMES RISH; LINDA RISH;
DOES I through V; and ROE CORPORATIONS I
through V, inclusive,

Defendants.

CASE NO.: A539455

DEPT. NO.: X

**PLAINTIFFS' CONFIDENTIAL
TRIAL BRIEF**

This Trial Brief is served pursuant to Eighth Judicial District Court Rule 7.27 which
specifically states:

MAINOR EGLET

002940

Unless otherwise ordered by the court, an attorney may elect to submit to the court in any civil case, a trial memorandum of points and authorities prior to the commencement of trial by delivering one unfiled copy to the court, without serving opposing counsel or filing the same, provided that the original trial memorandum of points and authorities must be filed and a copy must be served upon opposing counsel at or before the close of trial.

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II.

PRELIMINARY STATEMENT

On or about April 15, 2005, Plaintiff, WILLIAM SIMAO, was driving his vehicle on southbound Interstate 15 in the #1 travel lane near the Cheyenne interchange in Las Vegas, Nevada. William had slowed his vehicle to a complete stop for congested traffic when Defendant, JENNY RISH, failed to decrease her speed and collided with the rear end of William's vehicle. As a result of the crash, William suffered severe and debilitating injuries

1 which have resulted in past medical damages in excess of \$190,000.00 and will result in special
2 and general damages which will more likely than not total in the millions of dollars.

3 III.

4 LEGAL ARGUMENT

5 A. **PLAINTIFFS' COUNSEL HAS A SUBSTANTIVE RIGHT TO LIBERAL**
6 **VOIR DIRE OF THE PROSPECTIVE JURORS IN ORDER TO GATHER**
7 **INFORMATION TO INTELLIGENTLY EXERCISE PEREMPTORY**
8 **CHALLENGES AS WELL AS FOR CAUSE CHALLENGES**

9 The purpose of voir dire is to facilitate the identification and removal of potential jurors
10 "who, because of bias or prejudice, cannot serve as fair and impartial jurors." *Silver State v.*
11 *Shelley*, 105 Nev. 309, 774 P.2d 1044 (1989). The Nevada Supreme Court has specifically held
12 that an attorney has a substantive right to participate in voir dire. *See Whitlock v. Salmon*, 104
13 Nev. 24, 26, 752 P.2d 210 (1988). In *Whitlock*, Appellants, Phyllis and J.T. Whitlock, brought
14 an action against Donald Salmon, M.D. for injuries received by Mrs. Whitlock during surgery for
15 removal of a brain tumor. *Id.* at 25. The Whitlocks' counsel specifically requested permission
16 of the trial judge to voir dire the jury. *Id.* However, voir dire was conducted exclusively by the
17 judge. *Id.* The Supreme Court found the trial judge's failure to permit counsel to voir dire the
18 jury to be reversible error. *Id.*

19
20 NRS 16.030(6) provides:

21
22 The judge shall conduct the initial examination of the prospective jurors and **the**
23 **parties or their attorneys are entitled to conduct supplemental examinations**
which must not be unreasonably restricted.

24 [Emphasis Added]. The Court in *Whitlock* held that "the statute confers a substantive right to
25 reasonable participation in voir dire by counsel; and this court will not attempt to abridge or
26 modify a substantive right." *Id.* at 26. In so holding, the Court explained:

27
28 Usually, trial counsel are more familiar with the facts and nuances of a case and
the personalities involved than the trial judge. Therefore, they are often more able
to probe delicate areas in which prejudice may exist or pursue answers that reveal

1 a possibility of prejudice. Moreover, while we do not doubt the ability of trial
 2 judges to conduct voir dire, there is concern that on occasion jurors may be less
 3 candid when responding with personal disclosures to a presiding judicial officer.
 4 Finally, many trial attorneys develop a sense of discernment from participation in
 5 voir dire that often reveals favor or antagonism among prospective jurors. The
 6 likelihood of perceiving such attitudes is greatly attenuated by a lack of dialogue
 between counsel and the individuals who may ultimately judge the merits of the
 case. In that regard, we expressly disapprove of any language or inferences in
Frame that tend to minify the importance of counsel's voir dire as a source of
 enlightenment in the intelligent exercise of peremptory challenges.

7 *Id.* at 28.

8 The Supreme Court further explained the importance of trial counsel's substantive right
 9 to participate in voir dire by emphasizing that this right was specifically safeguarded by the
 10 legislature via a statutory enactment:
 11

12 NRCP 47(a) contemplated a healthy respect on the part of trial judges for
 13 appropriate supplemental participation by trial counsel in voir dire. Historically,
 14 in most of Nevada's courts of general jurisdiction, counsel have been accorded
 15 meaningful opportunities for involvement in the voir dire of prospective jurors.
 16 The Legislature thus saw fit to enthrone the historical practice selectively enjoyed
 by counsel in most trial procedures, in a substantive enactment that vouch-safes
 the right to all counsel in every department of our district courts. We accordingly
 view the statutory right thus bestowed as an acceptable solidification of the basic
 17 intendment of N.R.C.P. 47(a).

18 *Whitlock*, *supra*, at 26.

19 The constitutional guarantee of the right to be represented by counsel includes the right to
 20 have counsel interrogate the members of the jury panel. *Whitlock*, *supra* at 26. "The importance
 21 of a truly impartial jury, . . . is so basic to our notion of jurisprudence that its necessity has never
 22 really been questioned in this country." *Id.* citing *United States v. Bear Runner*, 502 F.2d 908,
 23 911 (8th Cir. 1974). Trial counsel's participation is integral to the preservation of this right.
 24 "The voir dire process is designed to ensure -- to the fullest extent possible -- that an intelligent,
 25 alert and impartial jury which will perform the important duty assigned to it by our judicial
 26 system is obtained." *Id.*, citing *De La Rosa v. State*, 414 S.W.2d 668, 671 (Tex.Crim.App.
 27 1967). "The purpose of voir dire examination is to determine whether a prospective juror can
 28

1 and will render a fair and impartial verdict on the evidence presented and apply the facts, as he or
2 she finds them, to the law given." *Id.*, citing *Oliver v. State*, 85 Nev. 418, 422, 456 P.2d 431,
3 434 (1969).

4 The Supreme Court pointed out that "one study suggests that the judge's presence evokes
5 considerable pressure among jurors toward conforming to a set of perceived judicial standards
6 and that this is minimized when an attorney conducts voir dire." *Whitlock*, at 28, citing Jones,
7 Judge-Versus Attorney-Conducted Voir Dire; and Emperical Investigation of Juror Candor, 11
8 Law and Human Behavior 131, 143-44 (1987).

10 In the instant matter, William Simao has suffered severe life-altering injuries as a result
11 of Defendant's carelessness and, as such, William will be requesting from the jury millions of
12 dollars to compensate him for his injuries. Moreover, William's wife, Cheryl Ann Simao, will
13 be requested monetary damages for the losses she has sustained as a result of William's injuries.
14 Therefore, Plaintiffs' counsel is entitled to conduct voir dire of the jury panel which should not
15 be unreasonably restricted. "The voir dire examination of jurors . . . [is] to enable counsel to
16 exercise intelligently the peremptory challenges allowed by the law." *State v. Brown*, 53 N.C.
17 App. 82, 280 S.E. 2d 31, Cert Denied, 304 N.C. 197, 285 S.E. 2d 102 (1981). Therefore, the
18 purpose of voir dire is for counsel to gather information for peremptory as well as for cause
19 challenges. However, "[p]eremptory challenges are worthless if trial counsel is not afforded an
20 opportunity to gain the necessary information upon which to base such strikes." *Id.* at 27, citing
21 *United States v. Ible*, 630 F.2d 389, 395 (5th Cir. 1980).

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1 B. **ANY PROSPECTIVE JUROR WHOSE VIEWS MIGHT IMPAIR THEIR**
2 **ABILITY TO BE FAIR AND IMPARTIAL IS DISQUALIFIED AS A**
3 **MATTER OF LAW; THE PROSPECTIVE JUROR CANNOT BE**
4 **REHABILITATED; THE PROSPECTIVE JUROR'S IMPAIRMENT**
5 **DOES NOT NEED TO BE SHOWN WITH UNMISTAKABLE CLARITY;**
6 **AND, ANY DOUBT MUST BE WEIGHED BY THE TRIAL JUDGE IN**
7 **FAVOR OF DISQUALIFICATION**

8 The United States Supreme Court has recognized the fundamental importance of
9 empanelling a fair and impartial jury, stating: "[i]t is difficult to conceive of a more effective
10 obstruction to the judicial process than a juror who has prejudged the case." *In re Michael*, 326,
11 U.S. 224, 228, (1945). "The test for evaluating whether a juror should [be] removed for cause is
12 whether a prospective juror's views would prevent or substantially impair the performance of
13 his duties as a juror in accordance with his instruction and his oath." *Weber v. State*, 121 Nev.
14 Adv. Rep. 57, 119 P.3d 107, 125 (2005), citing *Leonard v. State*, 117 Nev. 53, 65, 17 P.3d 397,
15 405 (2001); See also *Wainwright v. Witt*, 496 U.S. 412 (1985).

16 The United States Supreme Court in *Wainwright* held that prospective jurors must be
17 excused if their views could substantially impair their ability to perform their function as jurors,
18 and the impairment need not be shown with unmistakable clarity. The Supreme Court of Nevada
19 has provided guidance for the District Court and trial counsel in determining whether a juror
20 should be removed for cause. The Court explained, "[i]t is not enough to be able to point to
21 detached language which, alone considered, would seem to meet the statute requirement, if, on
22 construing the whole declaration together, it is apparent that the juror is not able to express an
23 absolute belief that his opinion will not influence his verdict." *Thompson vs. State of Nevada*,
24 111 Nev. 439, 443, 894 P.2d 375, 377 (1995), citing *Bryant v. State*, 72 Nev. 330, 305 P.2d 360
25 (1956). This rule was recently affirmed by our Supreme Court, wherein the court stated:
26 "[d]etached language considered alone is not sufficient to establish that a juror can be fair when
27 the juror's declaration as a whole indicates that she could not state unequivocally that a
28

1 preconception would not influence her verdict." *Weber v. The State of Nevada*, 119 P.3d 107,
2 126, 121 Nev. Adv. Rep. 57 (2005), citing *Thompson, supra*.

3 Consequently, the views expressed by a prospective juror, which evidence the juror's
4 partial beliefs should not be subsequently obviated by a simple "yes" response to voir dire
5 questions such as "can you follow the law?" or "can you be fair and impartial?" Such questions
6 are coercive and, thus, gather no reliable information. In fact, these kinds of questions border on
7 bullying. They intimidate even self-assured jurors into giving false answers such as "yes, I can
8 follow the law" or "yes, I can be fair and impartial," which are insufficient under the law, if the
9 court truly wants to discover prospective jurors whose biases or prejudices may affect their
10 ability to fairly serve. Thus, if a juror expresses views during voir dire which might substantially
11 impair the performance of his or her duties as a juror the juror should be removed for cause, even
12 if the juror answers "yes" to the generic question, "can you follow the law?" Such "detached
13 language," without more, should not allow an otherwise partial juror to remain on the panel.
14 Moreover, a juror's impairment does not need to be shown with "unmistakable clarity."
15 *Wainwright, supra*. Any doubt should be weighed in favor of being excused in order to remove
16 even the possibility of bias or prejudice infecting the deliberations. See *Walls v. Kim*, 549 S.E.2d
17 797, 250 Ga.App. 259 (Ga. 2001).

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21 The Nevada Supreme Court emphasized this point in *Thompson*, and found that,
22 "...[s]imply because the district court was able to point to detached language that prospective
23 juror eighty-nine could be impartial does not eradicate the fact that he previously demonstrated
24 partial beliefs, capped by an unequivocal statement that [the Defendant] was guilty." *Thompson*,
25 *supra* at 443. The Court further explained: "It may be true that on examination [the prospective
26 juror's] answers tended to contradict his previous statements, but we believe that his very self-
27 contradictions do not increase his fitness as a juror." *Id.* citing *Bryant*, 72 Nev. at 334. The
28

1 *Thompson* court ultimately concluded that “. . . it was prejudicial error that [the] prospective
2 juror was not excused for cause. At the conclusion of voir dire, the defense had exhausted all
3 four of its peremptory challenges. Therefore, if the defense had used one of its peremptory
4 challenges to excuse [the] prospective juror, then a juror that was unacceptable to the defense
5 would have remained on the jury” *Id.*

6
7 This principle is echoed in Courts throughout our country. Notably, the Georgia Court of
8 Appeals in *Walls, supra* discussed the fallacy of the “rehabilitation question” often relied upon
9 by judges to justify retention of biased jurors. The *Walls* Court discussed the fact that in too
10 many cases, judges confronted with clearly biased jurors use their significant discretion by
11 asking a version of the following question, which the *Walls* Court characterized as a “loaded
12 question”:

13
14 After you hear the evidence and my charge on the law, and considering the oath
15 you take as jurors, can you set aside your preconceptions and decide this case
16 solely on the evidence and the law?

17 *Id.* at 799. The *Walls* Court further explained, “[n]ot so remarkably, jurors confronted with this
18 question from the bench almost inevitably say, ‘yes.’”

19 The *Walls* case is a classic example of a trial Judge’s misuse of the “rehabilitation
20 question.” The Georgia Court of Appeals found that the Judge erred in not dismissing the juror
21 for cause and reversed the judgment and remanded for a new trial. *Id.* The Court explained that
22 the mere fact the juror told the court she could decide the case on the law and facts did not
23 eliminate the reality of her potential bias. The Court further explained that a trial judge should err
24 on the side of caution by dismissing biased jurors, rather than trying to rehabilitate them, because
25 in reality, the judge is the only person in the courtroom whose primary concern, and primary
26 duty, is to ensure the selection of a fair and impartial jury. *Id.* at 799.

27
28 A decision from the Supreme Court of Appeals of West Virginia is also illustrative of the

1 commonplace fallacy of a judge's attempt to rehabilitate jurors who already demonstrate
2 potential bias and prejudice. See *O'Dell v. Miller*, 565 S.E.2d 407, 211 W.Va. 285 (Va. 2002).
3 The trial judge refused to strike a prospective juror for cause who made statements that cast
4 doubt on his ability to be fair and impartial, and the Plaintiff was forced to use a preemptory
5 strike to remove the challenged juror. *Id.*

6
7 The *O'Dell* Court reiterated what the *Walls* Court and what the majority of Courts have
8 stated, namely, that "[t]rial judges must resist the temptation to 'rehabilitate' prospective jurors
9 simply by asking the 'magic question' to which jurors respond by promising to be fair when all
10 the facts and circumstances show that the fairness of that juror could reasonably be questioned."
11 *Id.* at 412. The court explained that "[o]nce a prospective juror has made a clear statement
12 during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the
13 prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent
14 questioning, later retractions, or promises to be fair." *Id.* The Court held that the trial court is
15 required to consider the totality of the circumstances and grounds relating to potential request to
16 excuse a prospective juror, rather than reliance upon a simple "yes" in response to the "magic
17 question" from a judge in an attempt to rehabilitate the juror. *Id.* at 413.

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20 **C. IN PERSONAL INJURY CASES THERE ARE A NUMBER OF COMMON**
21 **BIASES AND PREJUDICES WHICH IMPAIR SOME PROSPECTIVE**
22 **JURORS ABILITY TO BE FAIR AND IMPARTIAL. THUS, COUNSEL**
23 **MUST BE PERMITTED TO EXPLORE THESE AREAS DURING VOIR**
24 **DIRE**

25 There are a number of common troubling beliefs, or attitudes, held by prospective jurors
26 in personal injury cases which "substantially impair" their ability to follow the law. These
27 beliefs and attitudes must be discovered during voir dire to ensure a fair trial. Thus, there are
28 specific topics trial counsel must be permitted to openly discuss with the prospective jurors to
ensure they can follow the law. They include:

1 **1. Damages For Pain And Suffering**

2 The Nevada Supreme Court has made it clear that if the jury finds that William suffered
3 injury as a result of the subject car crash, they must award damages for pain and suffering. *Shere*
4 *v. Davis*, 95 Nev. 491 (1979); *Drummand v. Mid-West Growers*, 91 Nev. 698 (1975). It is
5 unquestionable that some people in our society today don not believe in giving money for pain
6 and suffering. In order for William to receive a fair trial counsel must be permitted to assess this
7 issue during voir dire. Any prospective juror who states they do not believe in compensating
8 personal injury victims for pain and suffering and would have trouble doing that if they were on
9 the jury must be excused for cause.
10

11 **2. Personal Injury Lawsuits, Tort Reform And Damages Caps**

12 Tort reform and anti-lawsuit campaigns are part of our political and media driven climate.
13 There is no doubt that many people have very strong views on these subjects that may
14 substantially impair their ability to follow the law. Trial counsel must be permitted to address
15 these issues during jury selection.
16

17 **3. Plaintiffs' Counsel Is Allowed To Ask The Venire Whether They Have**
18 **Any Biases Or Prejudices That Would Prevent Them From Returning**
19 **A Multi-Million Dollar Verdict in any Personal Injury Case Even If**
20 **such a Verdict was Justified by the Evidence**

21 Any method of questioning during voir dire is sufficient provided it is probative on the
22 issue of impartiality. *United States v. Brown*, 938 F.2d 1482, 1485 (1st Cir.), cert. denied, 116 L.
23 Ed. 2d 633, 112 S. Ct. 611 (1991); *Ristaino v. Ross*, 424 U.S. 589, 47 L. Ed. 2d 258, 96 S. Ct.
24 1017 (1976). See *Rosales-Lopez v. United States*, 451 U.S. 182, 189, 68 L. Ed. 2d 22, 101 S. Ct.
25 1629 (1991). In this regard, Plaintiffs' counsel is permitted to ask the venire questions relating to
26 whether the jurors have any biases or prejudices that would prevent them from returning a multi-
27 million dollar verdict in any personal injury case even if such a verdict was justified by the
28 evidence. Such questions specifically relate to the jurors' ability to be fair and impartial.

1 Further, these questions fully comply with EDCR 7.70(c) as they are NOT questions
2 which touch upon a verdict a jury would return based on hypothetical facts. Trial counsel will
3 NOT be posing questions such as: "If the evidence shows that this plaintiff has special damages
4 of two (2) millions dollars and general damages of two (2) million dollars would you be willing
5 to return a verdict of four (4) million dollars in this case if that is what the evidence shows?" Nor
6 does Plaintiff's counsel expect that defense counsel will be posing questions such as" If the
7 evidence shows that this plaintiff is who caused the motor vehicle accident will you return a
8 defense verdict? Or, if the evidence shows that this plaintiff's damages are only three hundred
9 thousand (\$300,000.00) dollars would you return that verdict?" However, trial counsel may ask
10 the general question about any kind of general personal injury case posed above just as defense
11 counsel should be permitted to ask prospective jurors if they have any biases or prejudices that
12 would prevent them from returning a defense verdict in any personal injury case.

13
14
15 In *National Bank of Commerce v. HCA Health Services of Midwest, Inc.*, 304 Ark. 55, 59
16 (Ark. 1990), during voir dire, plaintiff's counsel was allowed to ask the following question over
17 objection:

18
19 Do any of you have a feeling that you would not be able to award as much as ten
20 million dollars or in that neighborhood under any circumstances, no matter what
21 the proof has shown, no matter what the process of law is, does anybody have any
22 hesitation about awarding as much as ten million dollars if you thought the
evidence justified? This may be the most important question that I will ask you
and I would like to ask you the question individually...

23 Similarly, in *Gragg v. Neurological Associates*, 176 Ga. App. 516, 517 (Ga Ct. App.
24 1985), the trial judge permitted Plaintiff's counsel to ask the following question to the venire:

25 Assume that the evidence in this case justifies a very large verdict, say in excess
26 of a million dollars, just hypothetically. Would any of you have difficulty in
27 returning a verdict in that amount if the evidence justified it and it was in
accordance with the charge of the court, simply because it was so much money?

28 The Georgia Court of Appeals affirmed the decision of the trial court and found that

1 questions relating to the juror's ability to award a large verdict if justified by the evidence was
2 relevant to the juror's ability to be fair and neutral *Id.* at 518.

3 Most notably, in *De Young v. Alpha Constr. Co.*, 186 Ill. App. 3d 758, 764-65, the court
4 took it upon itself to ask the venire whether they would be willing to award a verdict "in the
5 millions." The Illinois Court of Appeals specifically found that this was not an attempt to
6 indoctrinate the jury, that the Judge has discretion in determining what questions to pose to the
7 jury and that it is proper to inquire whether potential jurors have fixed ideas about awards of
8 specific sums of money. *Id.* citing *Kinsey v. Kolber*, 103 Ill. App. 3d 933, 431 N.E.2d 1316
9 (1982).
10

11 Finally, consider *North Carolina Mut. Life Ins. Co. v. Holley*, 533 So. 2d 497, 506 (Ala
12 1987), in which a lone dissenting justice of the Supreme Court of Alabama thought the majority
13 should have addressed "the propriety of trial counsel's statement, in closing argument, that the
14 jurors' prior assurance, expressed on voir dire, that they would not be hesitant or reluctant to
15 return a one million dollar (\$1,000,000) verdict against an insurance company and its agent
16 merely because it was a large sum of money, mandated that the jury return a substantial verdict
17 for the plaintiff under the facts in this case." It is clear from reading the dissenting opinion, that
18 the trial Judge permitted plaintiff's counsel to specifically ask the jurors whether they would be
19 hesitant or reluctant to return a \$1 million verdict against an insurance company simply because
20 it was a large sum of money. The majority of the Supreme Court Justices found no issue with
21 this question posed to the venire.
22

23 Questions to the prospective jurors relating to whether they would be hesitant or reluctant
24 to award a multimillion dollar verdict in a personal injury case are extremely important to ferret
25 out potential juror bias. If a juror is unable to award a large sum of money simply because of the
26 juror's preconceived notions as to what would be an "unreasonable award," the juror would not
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28

1 be able to be impartial. The jurisdictions that have addressed this issue hold that questions
2 relating to whether the jurors have any biases or prejudices that would prevent them from
3 awarding millions of dollars if justified by the evidence are related to the jurors' ability to be fair
4 and impartial. Further, if a prospective juror indicates that he/she cannot vote for a verdict in
5 excess of a certain sum of money, does not believe in pain and suffering damages, or believes
6 there should be caps on pain and suffering damages or jury verdicts, regardless of what the
7 evidence shows, that prospective juror must be excused for cause. This would be a clear
8 indication of bias preventing the juror from being fair and impartial in a case such as the one at
9 bar.
10

11 **4. The Jury's Determination Of Plaintiffs' Damages Must Be Based**
12 **Only On The Harms And Losses To Them And Nothing Else**

13 As a direct result of the Tort Reform, Anti-Lawsuit and so called Anti-Judicial Activism
14 campaigns many jurors want to infuse into their decision process about money damages
15 consideration of factors other than the harms and losses suffered by the Plaintiffs. Some of these
16 common factors include, but are not limited to the following:
17

- 18 - Whether the money would do any good;
- 19 - Whether it might harm the Defendant;
- 20 - Whether the Defendant can afford it ;
- 21 - Whether there is insurance; and
- 22 - Whether it might make prices go up.

23
24 Trial counsel is permitted to make sure the jurors can base their damages verdict only on
25 the harms and losses to the Plaintiffs and not consider other factors. If a prospective juror says he
26 or she will consider other factors then they should be excused for cause.
27

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1 5. **In Civil Cases Jurors Must Decide the Issues Based Upon A**
2 **Preponderance of the Evidence (More Likely than Not), and Not**
3 **Impose A Higher Standard**

4 Many prospective jurors do not feel that a plaintiff's burden of proof should only be by a
5 preponderance (more likely than not) and feel that plaintiffs should be required to prove the
6 elements of their case by a higher standard of proof. Many prospective jurors believe that the
7 more likely than not standard is unfair to the Defendant. Many feel that they cannot make
8 decisions on that basis – and, possibly, that the Courts should not either. Therefore, trial counsel
9 must be able, during voir dire, to have any prospective jurors who cannot make their decisions as
10 a juror using the “more likely than not” standard excused for cause. These prospective jurors
11 would be “substantially impaired” from following the law.

12 **D. RESTRICTIONS ON EXERCISE OF RACE-BASED PEREMPTORY**
13 **CHALLENGES TO JURORS APPLY IN CIVIL LITIGATION**

14 A private litigant in a *civil* case may not use peremptory challenges to exclude jurors on
15 account of race. See *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S. Ct. 2077,
16 114 L. Ed. 2d 660 (1991); *Davis v. Baltimore Gas and Elec. Co.*, 160 F.3d 1023 (4th Cir. 1998);
17 *Robinson v. Birmingham-Jefferson County Transit Authority*, 555 So. 2d 173 (Ala. 1989); *Hicks*
18 *v. Westinghouse Materials Co.*, 78 Ohio St. 3d 95, 1997-Ohio-227, 676 N.E.2d 872 (1997).

19 Such a race-based exclusion through the use of peremptory challenges violates the equal
20 protection rights of the excluded jurors, because discrimination on the basis of race in selecting a
21 jury in a *civil* proceeding harms the excluded juror no less than such discrimination in a criminal
22 trial, since, in either case, race is the sole reason for denying the excluded venireperson the honor
23 and privilege of participating in the nation's system of justice. *Edmonson v. Leesville Concrete*
24 *Co., Inc.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991).

25 It is discriminatory state action for the government to establish and maintain a system of
26 jury selection permitting blatant racial discrimination by any litigants. *civil or criminal*. using the
27
28

1 court supported by and paid for by the government. 58 Antitrust & Trade Reg. Rep. (BNA) 422.
2 The party who exercises a challenge invokes the formal authority of the court. **This is true**
3 **whether the party is a civil defendant or a criminal defendant.** *United States v. De Gross*,
4 960 F.2d 1433, 1440 (9th Cir. Cal. 1992)

5 In *Edmonson v. Leesville Concrete Co.*, *Edmonson v. Leesville Concrete Co.*, 500 U.S.
6 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660, 674 (1991), the Supreme Court extended the
7 applicability of *Batson* to civil trials. Describing the statutory scheme responsible for the
8 establishment of the jury trial system in general, and the peremptory challenge procedure in
9 particular, the *Edmonson* Court observed that "without overt, significant participation of the
10 government, the peremptory challenge system, as well as the jury trial system of which it is a
11 part, simply could not exist." *Id.* at 622. The Court's finding of state action led it to apply the
12 *Batson* prohibition against the discriminatory exercise of peremptory challenges to *civil* as well
13 as criminal trials.
14

15
16 In *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), another
17 decision expanding the rule announced in *Batson*, the Supreme Court held that a defendant has
18 standing to object to race-based exclusion of jurors by peremptory challenge whether or not the
19 defendant and the excluded jurors are members of the same race. Reasoning that racial
20 discrimination in the selection of jurors casts doubt on the integrity of the judicial process and
21 places the fairness of a proceeding in doubt, the *Powers* Court concluded the race of a litigant
22 challenging the discriminatory exercise of a peremptory challenge was "irrelevant to a
23 defendant's standing to object to discriminatory use of peremptory challenges." *Id.* at 415-416.
24

25
26 In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994),
27 a paternity suit in which the defendant challenged the state's use of peremptory challenges to
28 exclude men from the jury, the Supreme Court extended the reach of *Batson* to claims of gender

1 discrimination in the exercise of peremptory challenges, holding that "gender, like race, is an
2 unconstitutional proxy for jury competence and impartiality." *Id.* at 146 (challenge based on
3 gender in paternity suit disallowed).

4 A party can establish a prima facie *Batson* challenge in a civil case by demonstrating that:
5 (1) the party is a member of a cognizable racial group; (2) the juror is of the same group; and (3)
6 the relevant circumstances of the voir dire support an inference of discriminatory purpose. *U.S.*
7 *Xpress Enters. v. J.B. Hunt Transp., Inc.*, 320 F.3d 809, 812-813 (8th Cir. 2003) (party made
8 prima facie showing of discriminatory use of peremptory challenge).

9
10 If a prima facie showing of discriminatory use of a peremptory challenge has been made,
11 the burden shifts to the party who has exercised the challenge "to come forward with a neutral
12 explanation for challenging" the prospective juror. *Batson v. Kentucky*, 476 U.S. 79, 97, 106 S.
13 Ct. 1712, 90 L. Ed. 2d 69 (1986). A race-neutral explanation is one that is based on something
14 other than the race of the juror and is free of "discriminatory animus." *Forrest v. Beloit Corp.*,
15 424 F.3d 344, 350 (3d Cir. 2005). The objector then has an opportunity to present rebuttal
16 evidence. *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989).

17
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19 *See e.g. Shaw v. Hahn*, 56 F.3d 1128 (9th Cir. Cal. 1995), wherein the court affirmed the
20 district court's dismissal of plaintiff venireperson's action because a *Batson* claim was fully and
21 fairly litigated by the plaintiffs in the *civil* litigation in which the peremptory challenge was
22 exercised.

23 **E. PLAINTIFFS' EXHIBITS SHOULD BE PRE-ADMITTED INTO EVIDENCE**
24 **PRIOR TO COMMENCEMENT OF TRIAL**

25 **Defendant has agreed not to object to Plaintiffs' medical records, billing records, or**
26 **diagnostic imaging studies on the basis of foundation or authenticity.**

27 On March 10, 2011, counsel for the parties' attended the mandatory EDCR 2.67 pre-trial
28 conference and exchange their respective exhibits. During said conference, Plaintiffs' exhibits

1 were discussed individually and Defendant agreed that she would not be objecting to the
 2 admission of Plaintiff's medical and billing records, or his diagnostic imaging studies, at trial on
 3 the basis of foundation or authenticity but reserved the right to object on the basis of
 4 reasonableness and necessity of the treatment and the costs therefrom. (See Transcript of EDCR
 5 2.67 Conference attached hereto as **Exhibit "1"** at p.6:9-25 and pg.7:1-2). Consequently,
 6 Plaintiff's medical records, billing records, and diagnostic imaging studies should be pre-
 7 admitted pursuant to the Defendants' representation during the EDCR 2.67 conference. (See
 8 *Id.*).
 9

10 **F. THE DEPOSITION OF DEFENDANT MAY BE USED FOR ANY PURPOSE**

11 NRCP 32 governs the manner in which depositions may be used in court proceedings.

12 Subsection (a)(2) provides:

13
 14 *Use of depositions.* (a) Use of depositions. At the trial or upon the hearing or a
 15 motion of an interlocutory proceeding, any part or all of a deposition, so far as
 16 admissible under the rules of evidence applied as though the witness were then
 17 present and testifying, may be used against any party who was present or
 18 represented at the taking of the deposition or who had reasonable notice thereof,
 19 in accordance with any of the following provisions:

20 (2) **The deposition of a party or of anyone who at the time of taking the**
 21 **deposition was an officer, director, or managing agent, or a person designated**
 22 **under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation,**
 23 **partnership or association or governmental agency which is a party may be used**
 24 **by an adverse party for any purpose.**

25 [Emphasis Added].

26 During opening statement, and his case in chief, Plaintiffs' counsel intends to display and
 27 refer to portions of the deposition transcript of Defendant. The use of this deposition is clearly
 28 provided for pursuant to the aforementioned rule.

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1 **G. PLAINTIFFS' COUNSEL MAY USE AN OVERHEAD PROJECTOR,**
2 **POWER POINT PRESENTATION, MODELS, CHARTS AND/OR OTHER**
3 **DEMONSTRATIVE EXHIBITS DURING OPENING STATEMENT**

4 Counsel for Plaintiffs anticipates using an overhead projector, PowerPoint presentation,
5 models, charts, animations, story boards and/or other demonstrative aids during opening
6 statement to lay out the facts in a coherent way to help the jury better understand the case. In the
7 last twenty-two (22) years Plaintiffs' counsel has successfully used demonstrative aids in nearly
8 every case tried in the Eighth Judicial District Court. In fact, several District Court Judges
9 (Honorable Cherry, Saitta, Gibbons, Huffaker, Bell, Gonzalez, Adair, Porter, Loehrer, Leavitt,
10 Denton, Cory, Gates, Mosley, Johnson, Barker, Wall, Williams, Glass and even Your Honor,
11 Judge Jessie Walsh) have even encouraged and thus allowed the use of PowerPoint presentations
12 to assist the jury throughout trial and have been laudatory thereafter as to the effectiveness and
13 time saving nature of such presentations.
14

15 In *4 County Electric Power Ass'n v. Clard*, 72 So.2d 144 (Miss. 1954), the Court allowed
16 use of a chart in opening statement to outline damages.

17 Plaintiff's counsel has a right to state his case orally and to outline the evidence
18 by which he expects to sustain it. He would have a right to state orally and in
19 detail what damages he expected to prove, and he would have the right to take a
20 pencil, list those items of damages, and show that sheet of paper to the jury in the
21 opening statement and arguments. So we cannot see any reason why counsel
22 should be denied the equivalent right to prepare in advance a chart outlining what
23 he expects to prove, and to use it in the opening statement and in the arguments.

24 *Id.* at 151.

25 Plaintiffs' counsel has a right to state what facts he expects to prove during the course of
26 trial. This will serve to assist the jury when viewing this outline in visual form. In *Young Mines*
27 *Co., Ltd. V. Blackburn*, 196 P.167 (1921), for instance, counsel used a diagram of the scene of
28 the accident in his opening statement and while questioning a witness. The Court held it was not
error to allow its use and to not admit it into evidence when it was used only for illustrative

1 purposes. *Id.* at 170. In *Deveny v. Rheem Mfg. Co.*, 319 F.2d 134 (Vt. 1963), the Court even
2 allowed the use of a blackboard during opening statement to demonstrate damages.

3 Here, counsel for Plaintiffs wishes to use visual aids (PowerPoint and blow-ups) to assist
4 in presentation of the facts and to display how each fact will be proved during the course of trial.
5 These visual aids will assist the jury in understanding the evidence, facts and issues presented, all
6 in an effort to bring the case to a just verdict.
7

8 **H. PLAINTIFFS' COUNSEL IS PERMITTED TO USE ANY EXHIBITS**
9 **DURING OPENING STATEMENT IN WHICH THERE IS A GOOD FAITH**
10 **BELIEF THAT THEY WILL BE ADMITTED DURING TRIAL**

11 "The purpose of an opening statement is to relate the facts that will be offered in
12 evidence, so that the court and jury may better and more readily understand the testimony when
13 it is introduced. It behooves all attorneys...to limit their opening remarks to **the facts they in**
14 **good faith expect to prove.**" *State v. Williams*, 28 Nev. 395, 411 (Nev. 1905). [Emphasis
15 Added]. It is proper for counsel to outline his theory of the case and to propose those facts he
16 intends to prove. *State v. Olivieri*, 49 Nev. 75, 236 P. 1100 (Nev. 1925). However, it is his duty
17 to state such facts fairly, and to refrain from stating facts which he will not be permitted to prove.
18 *State v. Olivieri, supra*; *Seflon v. State*, 72 Nev. 106, 295 P.2d 385; *State v. Erwin*, 101 Utah 365,
19 120 P.2d 285. *Garner v. State*, 78 Nev. 366, 371 (Nev. 1962). Counsel's opening address is a
20 statement of what he expects to prove. **"If made in good faith, it cannot constitute error."**
21 *State v. Olivieri*, 49 Nev. 75 (Nev. 1925). [Emphasis Added].
22

23 There are restrictions however; for example, the discussion of inadmissible evidence or
24 evidence of doubtful admissibility during the opening statement is precluded. See Ronald
25 Carlson & Edward Imwinkelreid, *Dynamics of Trial Practice: Problems and Materials* 5.5, at 88
26 (2d ed. 1995). **Importantly, counsel can discuss evidence during opening statement when**
27 **there is a "good faith belief" that the evidence will be admitted during trial.** *State v. Smith*,
28

2006 Haw. LEXIS 163 (Haw. 2006).

An opening statement merely provides an opportunity for counsel to advise an outline for the jury, the facts and questions in the matter before them." *State v. Simpson*, 64 Haw. 363, 369, 641 P.2d 320, 324 (1982) (citations omitted). See also *State v. Greyson*, 70 Haw. 227, 232 n.4, 768 P.2d 759, 762 n.4 (1989). Hence, "the purpose of an opening statement is to explain the case to the jury and [to] outline the proof. It is not an occasion for argument." 8A J. Moore, Moore's Federal Practice (Moore's) P29.1.06, at 29.1-76 (2d ed. 1996).

Ordinarily, "the scope and extent of the opening statement is left to the sound discretion of the trial judge." *Id.* However, the trial court should "exclude irrelevant facts and stop argument if it occurs." *Id.* **The State should only refer in the opening statement to evidence that it has "a genuine good-faith belief" will be produced at trial.** *Greyson*, 70 Haw. at 232 n.4, 768 P.2d at 762 n.4.

State v. Sanchez, 82 Haw. 517, 528 (Haw. Ct. App. 1996). [Emphasis Added].

Moreover, counsel is permitted to use visual charts and/or records during opening statement to explain what is expected to be proven during trial. *4 County Electric Power Ass'n v. Clard*, 72 So.2d 144 (Miss. 1954); *Young Mines Co., Ltd. v. Blackburn*, 196 P.167 (1921); *Deveny v. Rheem Mfg. Co.*, 319 F.2d 134 (Vt. 1963).

In like manner to the above, Plaintiffs' counsel wishes to employ the use of certain photographs and documents during opening statement to outline what is expected to be proven at trial. Plaintiffs' counsel has a right to say what facts they expect to prove. It will assist the jury to view this in visual form through the use of a PowerPoint presentation which will contain photographs and records, among other documents produced during the course of discovery.

As Plaintiffs' counsel has a good faith belief that the photographs and records intended to be used during opening statement will be admitted during trial, Plaintiffs should be permitted to utilize the records during Opening Statements.

I. PLAINTIFFS MUST BE PERMITTED TO SHOW DEMONSTRATIVE PHOTOGRAPHS, SURGICAL VIDEOS AND DIAGNOSTIC FILMS SINCE THEY PROVIDE PROBATIVE PROOF OF AN ELEMENT OF HIS CASE

"Pain and suffering" is a difficult element of damages to convey to the jury especially in

1 light of the small window of time in which a plaintiff is given to plead his case. Thus,
2 demonstrative photographs and other such evidence like video will assist a jury's understanding
3 of one's pain and suffering.

4 It is anticipated that Defendant will raise an objection to the use of these forms of
5 demonstrative evidence on the basis of relevance arguing that the offered evidence is more
6 prejudicial than probative and will only serve to inflame the jury's senses.¹

7
8 Quite the contrary, photographs, video, and diagnostic films offer significant probative
9 information as a means of conveying an otherwise difficult element of damages, pain and
10 suffering, to the jury. This form of demonstrative evidence provides the jury, a panel of
11 laypersons, with a clearer understanding of the medical issues in this case, the medical treatment
12 provided, as well as the condition William suffered as a result of the subject accident. The
13 photographs, video, and/or diagnostic films to be offered at the time of trial very importantly
14 illustrate what William has had to endure and will endure in the future, as a result of Defendant's
15 negligence. When courts have excluded footage, video or photographs, it has been when the
16 offered evidence is more prejudicial than probative; for instance, body parts of a plaintiff who
17 was killed. This is not the case here.
18
19

20 Here, Defendant's anticipated argument would exclude the only objective evidence that
21 depicts William's pain and suffering claim. To not allow William to tell his tale of physical
22 hardships as a result of this accident would greatly prejudice his case. Again, the photographs,
23 video, and/or diagnostic films of William should be permitted as demonstrative evidence as they
24 are highly probative of his claims. There is not a single prejudice that Defendant would suffer
25 from the introduction of this evidence at the time of trial. Indeed, Plaintiffs' counsel has spoken
26 with many jurors following completion of a number of other unrelated trials involving significant
27

28
¹ Prejudicial is defined as "within rule allowing exclusion of relevant evidence if probative value is substantially outweighed by the danger of unfair prejudice, means undue tending to move the tribunal to decide on an improper basis. State v. Trafton, Me. 425 A.2d 1320, 1344 (1981).

1 back, neck and other spinal injuries. Those jurors confirmed that the photographs, video, and/or
2 diagnostic films, offered during the course of the trial, assisted them in understanding the
3 surgical procedures as well as the plaintiff's pain and suffering explaining that they lacked the
4 knowledge regarding the invasiveness of such procedures as well as what a person's body goes
5 through in such procedures.

6
7 Of course, Defendant does not want the jury to see what William has had to go through as
8 a result of Defendant's carelessness. It has been awful, and will be awful in the future, for him
9 having to have his body poked, prodded, cut open, sewn up and invaded by numerous surgical
10 instruments. This is a large part of William's damages claims. As such, the jury needs to be
11 educated about what he has had to endure and visually understand what he will need to endure in
12 the future. It would be unfair prejudice to William to not allow him to present his damages to the
13 jury.
14

15 **J. PLAINTIFFS HAVE THE RIGHT TO SUBPOENA DEFENDANT, JENNY**
16 **RISH, AT DEFENSE COUNSEL'S OFFICE AS THIS IS THE ADDRESS**
17 **DEFENDANT HAS PROVIDED**

18 With respect to effectuating service, NRCP 5(b)(1) provides as follows:

19 Whenever under these rules service is required or permitted to be made upon a
20 party represented by an attorney, the service shall be made upon the attorney
unless the court orders that service be made upon the party.

21 Consequently, Plaintiffs may subpoena Defendant, Jenny Rish, at defense counsel
22 Stephen H. Rogers, Esq.'s office because (1) she is a party; and, (2) this is the address provided
23 with the designation of Ms. Rish by defense counsel.

24
25 **K. DEFENDANT'S MEDICAL EXPERT, DR. JEFFREY WANG, OR ANY**
26 **OTHER WITNESS, MUST BE PRECLUDED FROM REFERENCING THE**
27 **SUB ROSA VIDEO DURING HIS TRIAL TESTIMONY**

28 **a. Dr. Wang should be precluded from mentioning or referring to the Sub Rosa**
video based upon this Court's prior Order.

On March 1, 2011, Plaintiffs' Motion to Exclude Sub Rosa Video was heard by this

1 Court. The basis for said Motion is the fact that the surveillance footage simply presents
2 William conducting activities of daily living; activities in which he has never represented that he
3 absolutely could not do. In fact, at his deposition, Defense specifically asked, "So are there any
4 activities that you used to do that you cannot do at all," to which William responded, "No." See
5 William's Deposition Transcript at Exhibit "2," p. 92, ll:20-22. Furthermore, William's treating
6 physicians have not restricted him from continuing his employment and routine activities within
7 his daily life. **The surveillance video is devoid of any footage showing that William was not**
8 **telling the truth. Therefore, because the video does not in any way discredit William's**
9 **testimony, it would be improper to use this video to impeach William.**

11 Based upon the above, this Court ruled that evidence of the Sub Rosa video would be
12 excluded until after William's direct examination in order to gauge whether or not the door had
13 been opened to entitle Defendant to use the Sub Rosa video as impeachment evidence against
14 him. Since this ruling, however, Defendant has informed Plaintiffs' counsel that one of
15 Defendant's medical expert witnesses, Jeffrey Wang, M.D., is only available to testify on
16 Monday, March 21, 2011, which is during Plaintiffs' case in chief. In the spirit of cooperation,
17 Plaintiffs have agreed to allow Dr. Wang testify out of order to accommodate his busy schedule.
18 The circumstances of Dr. Wang's availability, however, present an interesting dynamic with
19 regard to this Court's order to exclude (at least for the time being) the Sub Rosa video because
20 Dr. Wang will be called to testify before William takes the stand. It is anticipated that the
21 defense will attempt to elicit testimony from Dr. Wang regarding the Sub Rosa video during
22 direct examination, forcing Plaintiffs' counsel to object. Once testimony regarding the Sub Rosa
23 video has been elicited, however, the bell cannot be unrung and Plaintiffs' will be forever
24 prejudiced by the same throughout the remainder of trial, despite this Court's prior ruling.

25 By way of background, Dr. Wang has been retained by Defendant as a medical expert

1 witness to dispute Plaintiff's medical causation claims. After reviewing literal volumes of
2 medical records and performing a Defense Medical Examination, Dr. Wang has authored three
3 (3) separate reports dated February 10, 2009, October 1, 2009, and July 4, 2010, which are
4 attached hereto as **Exhibits "3," "4," and "5,"** respectively. In each of these three (3) reports,
5 Dr. Wang offers the opinion that only 25 % of William's medical conditions are attributable to
6 the subject motor vehicle collision. (*See Id.*). Notwithstanding this long survived opinion (since
7 February 10, 2009), Dr. Wang was recently deposed on February 15, 2011 and testified (without
8 warning) that his apportionment opinion has changed, in part, because he has had an opportunity
9 to view the Sub Rosa video taken of William between the dates of June 4, 2008 and July 18,
10 2008. It is NOW Dr. Wang's opinion that he would apportion "much less than 25%" of the
11 medical conditions William suffers currently from to the subject motor vehicle collision and
12 testified that it would be hard to relate any of the current symptomatology to the incident. (*See*
13 Deposition of Dr. Wang, attached hereto as **Exhibit "6,"** at 70:8-25; 72:1-3).

16 Notably, the Sub Rosa video that Dr. Wang reviewed and relied upon in changing his
17 apportionment opinions was taken approximately seven (7) months before Dr. Wang authored
18 his first written report on February 10, 2009 and approximately (2) years before he authored his
19 last written report on July 4, 2010. Moreover, Defendant produced said Sub Rosa video to
20 Plaintiffs on September 10, 2008. (*See* Defendant Jenny Rish's First Supplement to the 16.1
21 Early Case Conference Production of Document and/or Witnesses attached hereto as **Exhibit**
22 **"7"**). Inexplicably, however, the defense chose not to provide Dr. Wang with the Sub Rosa
23 video until sometime after he had authored his latest report in July 2010 and when he was
24 deposed in February 2011. There is simply no justifiable excuse for Defendants' delay in
25 supplying their own expert with the Sub Rosa video and springing brand new apportionment
26 opinions upon Plaintiffs just weeks before the commencement of trial. Moreover, should Dr.

1 Wang be permitted to mention the Sub Rosa video at trial. it would run afoul of this Court's
2 previous Order to exclude the Sub Rosa video until after William has testified on direct.

3 Defendant will likely argue that Dr. Wang should be permitted to testify regarding the
4 Sub Rosa video because it is information relied upon by him in coming to his final
5 apportionment opinions and prejudice will result should he be disallowed to express the same.
6 Such an argument, should it be made, amounts to nothing more than a red herring as Dr. Wang
7 has made it clear that based upon other information he has reviewed. excluding the Sub Rosa
8 video, his opinions regarding apportionment have changed to attribute "much less than 25%" to
9 the subject incident. (See Exhibit "6," at 21:19-25; 22-11). In other words, with or without
10 relying upon the Sub Rosa video, Dr. Wang's apportionment opinion is that much less than 25%
11 of William's medical condition is attributable to the subject motor vehicle collision.
12 Specifically, Dr. Wang testified:
13
14

15 Q.Based on the physical therapy records, the Southwest Medical
16 records, and the records of Dr. Winkler that you reviewed since your last
17 report, has that changed your conclusions in any way?

18 A Well, it's hard to answer that question because I've reviewed these
19 records along with the surveillance video. So are you asking me to
20 hypothesize sort of a theoretical situation where I just totally forget about
21 the surveillance video and then look only at these records and see whether
22 that changes my opinion?

23 Q Correct.

24 A So without the surveillance video, in my prior reports I apportioned no
25 more than 25 percent of the patient's symptomology to the motor vehicle
26 accident in question on April 15th, 2005. Looking at these new records and
27 discounting the surveillance video, I think it's reinforced my opinions that
28 there really were not many radiographic changes following the motor
vehicle accident. And the fact that I initially had apportioned 25 percent of
his ongoing pain was because giving the patient the benefit of the doubt,
assuming he's reliable, that I would trust his reports of his pain, and I
believe he had a soft tissue injury. The problem with that is that these soft
tissue injuries typically resolve with time. And the fact that this patient has
gone on to have continued pain without a specific pain generator, or at least
in my opinion, I probably would apportion much less than 25 percent.

(See *Id.*).

1 Based upon Dr. Wang's deposition testimony, it is clear that his opinion regarding
2 apportionment can be expressed without mentioning the Sub Rosa video and no prejudice to the
3 Defendant will stem from the exclusion of this evidence until after William has testified on
4 direct, pursuant to this Court's previous order.

5 Consequently, Plaintiffs request that Dr. Wang be precluded from relying upon and
6 referencing the Sub Rosa video during his trial testimony, and, that prior to Dr. Wang taking the
7 stand, defense counsel and Dr. Wang be advised by this Court, outside the presence of the jury,
8 to abide by this Court's previous ruling regarding the mention of the Sub Rosa video.

9
10 **b. Dr. Wang's recently changed opinion regarding apportionment should be**
11 **excluded because of Defendant's violations of NRCP 16.1 and 26.**

12 Because of the improper and egregious late disclosure of the surveillance video to Dr.
13 Wang, this Court would be well within its rights to preclude Dr. Wang from relying upon the
14 Sub Rosa video in its entirety regardless of whether or not the Sub Rosa video is determined to
15 be admissible after the direct examination of William.

16
17 NRCP 16.1 (a)(2)(B) requires a retained expert to provide all opinions and the bases
18 therefore in a written report. *See Id.* The purpose of the rule is to put the adverse party on notice
19 of the opinions expected to be expressed at trial so that there is no surprise or "trial by ambush."
20 Rule 26 (e)(1) provides that a party is under a duty to supplement its expert's opinions "at
21 appropriate intervals" and specifically provides that an expert's opinions are to be provided, at
22 the latest, by the time that a party's pre-trial disclosures are due under Rule 16.1(a)(3), which is
23 no later than thirty (30) days before trial. *See Id.* NRCP 37 (c)(1) permits this Court to strike
24 evidence not properly disclosed in compliance with Rule 16.1. *See Id.* Dr. Wang's recently
25 changed opinion should be excluded on the grounds that Dr. Wang did not make Plaintiffs aware
26 of the same until February 15, 2011, during Dr. Wang's deposition, which was twenty-seven (27)
27 days before the March 14, 2011 trial date. As a result, Dr. Wang's changed opinion regarding
28

1 apportionment should be excluded in its entirety pursuant to NRCp 26 (e)(1), NRCp 16.1(a)(3)
2 and NRCp 37 (c)(1). *See Id. See also Writ of Mandamus in the matter of Kinstel v. The Eighth*
3 *Judicial District Court of Nevada*, attached hereto as **Exhibit "8"**).

4 There is absolutely no justification for the two (2) full year delay in supplying the Suh
5 Rosa video to Defendant's medical expert. The only explanation for such a delay is to prejudice
6 Plaintiffs in an attempt to gain a tactical advantage at trial. Defendant must not gain an
7 advantage in such a manner and must not be awarded for their failure to comply with the Nevada
8 Rules of Civil Procedure. Thus, Dr. Wang's trial testimony should be limited as requested
9 above.
10

11 **L. PLAINTIFFS' COUNSEL MAY USE LEADING QUESTIONS TO EXAMINE**
12 **ANY ADVERSE WITNESS DURING HIS CASE IN CHIEF DURING CROSS-**
13 **EXAMINATION**

14 Plaintiffs may lead an adverse witness during his case in chief. Whether leading
15 questions should be allowed or not is a matter largely within the discretion of the trial court.
16 *Anderson v. Berrum*, 36 Nev. 463, 136 Pac. 973 (1913), cited, *Lloyd v. State*, 85 Nev. 576, at
17 578, 460 P.2d 111 (1969); *Barcus v. State*, 92 Nev. 289, at 291, 550 P.2d 411 (1976), see also,
18 *Leonard v. State*, 117 Nev. 53, at 70, 17 P.3d 397 (2001). Regarding the issue, NRS 50.115
19 allows a party to utilize leading questions when examining an adverse party, or a witness
20 identified with an adverse party.
21

22 Here, the Court should exercise its discretion and, pursuant to statute, allow Plaintiffs to
23 utilize leading questions to examine any adverse witness during his case and chief in order to
24 make the interrogation and presentation effective for the ascertainment of the truth and avoid
25 needless consumption of time. NRS 50.115(1)(a) and (b).
26

27 It is also Plaintiffs' right to ask leading questions on cross-examination and for the Court
28 to require the witness to respond only with a "Yes" or "No" to those questions without

1 explanation. NRS 50.115. The purpose of this is to elicit testimony supporting the Plaintiffs'
2 case and to impeach the witness. Once the cross-examination has concluded it is then the
3 Defendants' right to attempt rehabilitation on re-redirect examination.

4 Plaintiffs' counsel has specific experience with witnesses who refuse to answer leading
5 questions and insist on attempting to engage opposing counsel in argument instead of simply
6 answering the questions that are posed. During trial, counsel could have to request the Trial
7 Court to instruct Defendant's witnesses to answer counsel's leading questions and that the
8 witnesses can explain his answers on re-direct. Plaintiffs' trial counsel will also be requesting the
9 Court to strike non-responsive answers by any of Defendant's witnesses.

11 It is always appropriate for a witness to rehabilitate his testimony, where an attempt is
12 made on cross-examination to impeach his credibility. *Klas v. Goetz*, 505 P.2d 726, 211 Kan.
13 126 (Kan. 1973). On re-direct examination, a witness may explain matters made subject to
14 cross-examination testimony and to correct any wrong impression which may have been created.
15 *Wood v. Dwyer*, 515 P.2d 1291, 85 N.M. 687 (N.M. App. 1973). It is usually a basic function of
16 re-direct examination to allow a witness to explain his testimony elicited on cross-examination.
17 *Sandville v. State*, 593 P.2d 1340 (Wyo. 1979), including "yes" and "no" answers.

19 Plaintiffs have a right to ask only leading questions on cross-examination of an adverse
20 witness and to restrict the witness's answer to responding to the questions without explanation.
21 This is the only tool a party has to effectively examine an adverse witness and present the theory
22 of their case through that witness. If counsel is not permitted to limit the responses of any
23 adverse witness to "yes" or "no" on cross-examination this right is seriously diminished. It is the
24 purpose of re-direct examination to allow the witness to explain.
25
26
27
28

M. THE POLICE REPORT MAY BE USED TO REFRESH OFFICER HAGGSTROM'S MEMORY; AS PAST RECOLLECTION RECORDED

N.R.S. 50.125 provides:

If a witness uses a writing to refresh his memory, either before or while testifying, an adverse party is entitled (a) to have it produced at the hearing; (b) to inspect it; (c) to cross-examine the witness thereon; and (d) to introduce in evidence those portions which relate to the testimony of the witness for the purpose of affecting his credibility.

If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in chambers, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal.

N.R.S 51.125 provides

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately is not inadmissible under the hearsay rule if it is shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly.

The memorandum of record may be read into evidence but may not itself be received unless offered by an adverse party.

In this case, a written Traffic Accident Report prepared by Officer Haggstrom may or may not be admissible by either party as an exhibit. *See Frias v. Aurello*, 101 Nev. 219 (1985). However, both NRS 50.125 and 51.125 may be utilized to use the Traffic Accident Report in relation to the testimony of the police officer, should the occasion arise.

N. DEFENDANT AND HER WITNESSES MUST BE PROHIBITED FROM OFFERING ANY AND ALL TESTIMONY RELATED TO A MINOR IMPACT DEFENSE

On March 1, 2011, this Court granted Plaintiffs' Motion in Limine to (1) Preclude Defendant from Raising a "Minor" or "Low Impact" Defense. The Motion in Limine specifically argued that "[t]he defense must be precluded from commenting upon the dynamics of the motor vehicle crash and from arguing, suggesting or insinuating at trial that the crash was

1 a "minor impact" or "low impact" collision, and not significant enough to cause Plaintiff's
2 injuries." (See Motion in Limine at 7, attached hereto as Exhibit "9"). Moreover, the Motion
3 asked that all expert witnesses be precluded from arguing the same and that any and all property
4 damage photographs and repair estimates be excluded. (See *Id.*, generally). This Court Granted
5 the subject Motion in its entirety. Notwithstanding, it is anticipated that the defense will
6 attempt to elicit information from the Defendant herself and other witnesses that the collision
7 was "minor," which would be a blatant violation of this Court's Order.

9 As discussed in Plaintiffs' Motion, only a qualified expert in the area of biomechanical
10 engineering may offer opinions regarding the nature and extent of the forces imparted to a body
11 and how those forces may or may not cause trauma. The defense, however, will likely attempt to
12 argue that whether or not an impact is "minor" is a common sense issue that a lay witness is
13 permitted to explain. Despite this anticipated argument, accident reconstruction and
14 biomechanical issues are not common sense issues within the common knowledge of lay
15 persons. In fact, the Nevada Supreme Court has set forth stringent foundational requirements
16 with respect to expert testimony relating to these areas of expertise. See *Hallmark v. Eldridge*,
17 189 P.3d 646 (Nev. 2008); *Levine v. Remolif*, 80 Nev. 168, 390 P.2d 718 (1964) and *Choat v.*
18 *McDorman*, 86 Nev. 332, 468 P.2d 354 (1970). These cases hold that expert testimony cannot
19 be based upon speculation. *Id.* Rather, such testimony must come from a qualified expert and
20 must be based upon hard data, such as the speed of the vehicles, the depth of the crush damage
21 based upon a visual inspection of the vehicles, and the weight and height of the vehicles, to name
22 a few. *Id.*

26 Defense counsel's only purpose to introduce testimony from the Defendant, and or other
27 lay witnesses, as to the actual impact that occurred is to create speculation regarding whether or
28 not the subject impact could have caused the medical conditions being claimed in this case.

1 Because of the rank speculation that would occur should a "minor impact defense" be
2 introduced, this Court has specifically excluded the same from trial and has prohibited Defendant
3 medical expert witnesses from testifying regarding the impact. If Defendant's medical experts
4 (who arguably have some understanding of the affect a minor impact can have on the human
5 body) are prohibited from testifying or suggesting that the subject impact was "minor" given the
6 prejudice that would befall Plaintiffs, then certainly all lay witnesses, including the Defendant
7 herself, should be precluded from testifying to the same.
8

9 **O. JUDICIAL NOTICE SHOULD BE TAKEN OF THE LIFE EXPECTANCY**
10 **TABLE**

11 This Court may take judicial notice of "facts in issue or facts from which they may be
12 inferred." NRS § 47.130. "A judicially noticed fact must be (a) Generally known within the
13 territorial jurisdiction of the trial court; or (b) Capable of accurate and ready determination by
14 resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject
15 to reasonable dispute." *Id.*
16

17 The Life Expectancy Table is published by the United States Census Bureau and is a
18 statistical abstract of the United States population. The data as set forth in the Life Expectancy
19 Table is generally known in Nevada and is capable of accurate and ready determination by
20 simple reference to reliable federal governmental sources. Moreover, the Life Expectancy Table
21 is often relied upon by experts in Nevada District Courts. As such, the Court in this matter
22 should take Judicial Notice of the Life Expectancy Table so the parties may readily refer to the
23 data as set forth in the table during the trial of this matter. A true and correct copy of the Life
24 Expectancy Table is attached hereto as **Exhibit "10"**.
25

26 **P. WILLIAM'S PHYSICIANS WILL BE PROVIDING TESTIMONY ABOUT**
27 **HIS ONGOING MEDICAL TREATMENT**

28 Over the course of this litigation, William's treating physicians have reviewed additional

1 medical information, performed additional procedures, physical examinations and diagnostic
2 testing upon William, and may be offering opinions regarding this additional information.
3 William's medical problems are ongoing and he has continued to treat with his physicians up to
4 the time of and during trial. As such, his physicians will be providing testimony regarding his
5 additional examinations, diagnosis, and recommendations for future treatment and prognosis of
6 William. His medical conditions and treatment do not exist in a vacuum. Injured plaintiffs are
7 not required to cease all ongoing medical treatment between the close of discovery and trial. It is
8 respectfully requested that this court consider the same when William's doctors testify regarding
9 his current and future condition.
10

11 Compensation for future medical expenses is a recoverable category of damages. See
12 *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233 (1998). Additionally, a plaintiff may
13 recover damages for future pain and suffering as well. *Sierra Pac. Power v. Anderson*, 77 Nev.
14 68, 75-76 (1961) (finding that in order to recover for future pain and suffering, there must be
15 sufficient evidence from which the jury can arrive at the conclusion that the party will probably
16 suffer such damages in the future). "An award of future medical expenses must be supported by
17 sufficient and competent evidence." *Yamaha*, at 249, citing *K-Mart Corp. v. Washington*, 109
18 Nev. 1180, 1196 (1993).
19
20

21 In *Yamaha*, the Nevada Supreme Court was faced with the issue of whether a jury award
22 for future medical expenses in the amount of \$500,000 was excessive. The Court held that the
23 award was supported by substantial evidence in the record. *Id.* at 249-50. In so holding, the
24 court found that plaintiff had presented competent medical testimony as to the accrued medical
25 costs *sustained as of the date of trial and that her injuries would require recurrent medical*
26 *attention.* *Id.* Thus, the Nevada Supreme Court found it appropriate for the plaintiff to present
27 evidence of medical costs as of the date of trial.
28

1 Just as the plaintiff in *Yamaha* was permitted to present evidence of his ongoing medical
2 care, including the cost of treatment through trial, William should be permitted to present
3 evidence of his ongoing medical care. Further, William should also be entitled to present
4 evidence pertaining to his future medical needs as well.

5 **Q. WILLIAM'S EXPERTS AND TREATING PHYSICIANS/EXPERTS SHOULD**
6 **BE PERMITTED TO TESTIFY DESPITE THE ANTICIPATED ARGUMENT**
7 **THAT THEIR TESTIMONY WILL CONSTITUTE THE PRESENTATION**
8 **OF CUMULATIVE EVIDENCE.**

9 It is anticipated that the defense will attempt to argue that William's treating physicians'
10 and experts' testimony will constitute the needless presentation of cumulative evidence. Despite
11 this argument, however, all the experts and physicians that will be called at trial have different
12 fields of expertise and all offer unique perspectives as to William's care and condition. Courts
13 will not exclude expert testimony where each expert, although testifying to similar topics, offer a
14 unique perspective to the issue being addressed. In *Stone v. Stoker*, 1992 U.S. App. LEXIS
15 10417 (4th Cir. 1992), the court examined the application of FRE 403, which is identical to NRS
16 48.035, and held that:

17
18 We cannot say on the record before us that the district court abused its discretion
19 in deciding that the relevance of three doctors' testimony regarding causation was
20 not "substantially outweighed by . . . prejudice . . . or needless presentation of
21 cumulative evidence." See Fed.R.Evid. 403. Causation was the crucial element
22 of the case and, in the district court's view, each witness offered a distinct
23 insight to the question.

24 See also *Coleman v. Home Depot, Inc.*, 306 F.3d 1333 (3rd Cir. 2002), holding that, "there is a
25 strong presumption that relevant evidence should be admitted, and thus for exclusion
26 under Rule 403 to be justified, the probative value of evidence must be "substantially
27 outweighed" by the problems in admitting it. As a result, evidence that is highly probative
28 is exceptionally difficult to exclude."

"Cumulative evidence is not bad per se; it is the 'needless presentation' that is to be

1 avoided." 22A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure
2 § 5220 (1978). District courts have broad discretion to place reasonable limits on the
3 presentation of evidence to prevent undue delay, waste of time, or needless presentation of
4 cumulative evidence. *United States and Cas. Co. v. Historic Preservation Trust*, 265 F.3d 722,
5 727-28 (8th Cir. 2001) (citing *First Nat'l Bank and Trust Co. v. Holingsworth*, 931 F.2d 1295,
6 1304 (8th Cir. 1991)).
7

8 As stated above, each treating physician and/or expert is designated for a unique purpose
9 and their testimony will not be cumulative regardless of whether they touch on similar topics. A
10 surgeon's insight differs from that of a physiatrist, from that of a pain management physician,
11 from that of a life care planner, from that of a neuropsychologist, and so on. Each expert is
12 entitled to testify to matters within the scopes of their expertise in spite of that their opinions may
13 apply to the same issue (for instance, damages or causation). This is not "needless presentation
14 of evidence" such that it is "cumulative" within the meaning of the Nevada Rules of Civil
15 Procedure.
16

17 **R. DEFENDANT IS LIABLE FOR ANY DAMAGES ASSOCIATED WITH THE**
18 **MEDICAL CARE WILLIAM SOUGHT FOR HIS INJURIES**

19 It is anticipated that Defendant will attempt to argue that she is not liable for William's
20 injuries, medical procedures, or need for future surgeries because there was no need for such
21 intervention and/or the intervention was inappropriate. However, William's medical providers
22 will testify that he needed the medical interventions, and other treatment as a result of the subject
23 accident.
24

25 Furthermore, William is entitled to rely on his physicians' opinions as to the necessary
26 course of his treatment. **Even if those physicians' opinions are incorrect, Defendant is still**
27 **chargeable with those damages because subsequent medical malpractice is a foreseeable**
28 **consequence of Defendant's negligence.** *Nelson v. 1683 UNICO, Inc.*, 246 A.2d 447, 448

1 (N.Y. 1998). The courts deem the original tortfeasor liable for any harmful consequences of
2 medical or surgical treatment of the original injury which are normal or reasonably foreseeable
3 risks incident to the original injury. 100 A.L.R. 2d 808.

4 Since William has had invasive medical procedures, Defendant should not be allowed to
5 argue such medical treatment was unnecessary because that argument is tantamount to alleging
6 medical malpractice. If William's physicians recommended or performed medical procedures
7 that were unnecessary, then their care fell below the standard of care. Defendant would thus still
8 be liable for the costs of these procedures and any resultant injury therefrom.

10 In addition, Defendant is not permitted to make such an argument unless they do so
11 through competent medical expert testimony. *See* NRS 50.275; *See also Layton v. Yankee*
12 *Caitness Joint Venture*, 774 F.Supp. 576 (1991); *Fernandez v. Admirand*, 108 Nev. 963, 973,
13 843 P.2d 354 (1993); *Brown v. Capanna*, 105 Nev. 665, 671-72, 782 P.2d 1299 (1989).

15 **S. PLAINTIFFS MAY NOT BE CROSS-EXAMINED REGARDING ANY ISSUE**
16 **NOT TESTIFIED TO ON DIRECT, MEDICAL CONDITIONS NOT**
17 **CLAIMED TO BE CAUSED BY DEFENDANT'S NEGLIGENCE OR**
18 **MEDICAL CONDITIONS NOT SUPPORTED BY QUALIFIED MEDICAL**
19 **EXPERT OPINION**

20 Despite this Court's clear orders precluding William's unrelated injuries, Plaintiffs
21 anticipate that Defendant will attempt to discredit him by interjecting William's unrelated
22 medical history into the instant case. Defendant should not be permitted to elicit any testimony
23 from William or his medical witnesses regarding any medical conditions that William does not
24 pursue on direct examination unless Defendant can show through competent medical evidence
25 that the condition about which he is inquiring is what is causing William's present symptoms.
26 *See* NRS 50.115, Mode and order of interrogation, which provides in pertinent part that:

27 **2. Cross-examination is limited to the subject matter of the**
28 **direct examination** and matters affecting the credibility of the
witness, unless the judge in the exercise of discretion permits
inquiry into additional matters as if on direct examination.

1 (Emphasis Added).

2 In addition, any testimony regarding William's unrelated medical history is irrelevant to
3 the claims at issue in the case and is therefore inadmissible under 48.025(2). See also
4 *Sokolowski v. Medi Mart, Inc.*, 24 Conn.App. 276, 587 A.2d 1056 (1991), ("[a]bsent competent
5 and relevant evidence of a causal connection between the pre-existing condition and the injury
6 complained of, evidence of the pre-existing condition is inadmissible."). Even if relevant, the
7 testimony is inadmissible under NRS 48.035, entitled "Exclusion of relevant evidence on
8 grounds of prejudice, confusion or waste of time," which holds in pertinent part:
9

- 10
- 11 1. Although relevant, evidence is not admissible if its probative value is
12 substantially outweighed by the danger of unfair prejudice, of confusion of the
13 issues or of misleading the jury.
 - 14 2. Although relevant, evidence may be excluded if its probative value is
15 substantially outweighed by considerations of undue delay, waste of time or
16 needless presentation of cumulative evidence.

17 The Court is authorized to exclude even relevant evidence if its probative value is
18 substantially outweighed by the danger that it will confuse the issues, mislead the jury, or result
19 in undue delay. *Southern Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 243, 577 P.2d 1234, 1235
20 (1978).

21 It is anticipated that the defense will attempt to introduce testimony at trial with regard to
22 a minor motorcycle accident in 2003 wherein William sustained soft tissue injuries and abrasions
23 to his right elbow, William having high blood pressure and/or high cholesterol. Importantly,
24 this Court has ruled that all evidence regarding these matters is excluded. Accordingly,
25 Defendant is precluded from cross-examining William, or any other witness with regard to the
26 above referenced matters, or any other matter which was not addressed during direct
27 examination.
28

IV.

THIS COURT HAS RULED AS FOLLOWS IN PRE-TRIAL MOTIONS

The Court has made the following rulings on Plaintiff's Omnibus Motion in Limine:

- 1) Plaintiffs' request to exclude prior and subsequent unrelated accidents, injuries and medical conditions and prior and subsequent claims or lawsuits was GRANTED in all respects;
- 2) Plaintiffs' request to preclude reference to William being a malingerer, magnifying symptoms or manifesting secondary gain motives was GRANTED, such that medical witnesses may testify to medical inconsistencies, but references to Plaintiff being a malingerer, magnifying symptoms or manifesting secondary gain motives are excluded;
- 3) Treating physicians do not need to prepare expert reports separate from and in addition to their medical records and dictated reports;
- 4) Plaintiffs' request to preclude reference to defense medical examiners as "independent" was GRANTED;
- 5) Plaintiffs' request to preclude argument that this case is "attorney driven" or a "medical-buildup" case" was GRANTED;
- 6) Plaintiffs' request to preclude references to collateral sources of payment or medical bills and all other expenses, including health insurance, liens and/or Medicare be excluded was GRANTED; and
- 7) Plaintiffs' request to exclude evidence of when Plaintiffs retained counsel was GRANTED.

Plaintiffs' Motion in Limine to (1) Preclude Defendant from Raising a "Minor" or "Low Impact" Defense; (2) Limit the Trial Testimony of Defendant's Expert, David Fish, M.D. and; (3) Exclude Evidence of Property Damage was ruled upon as follows:

- 1) Plaintiffs' request to preclude Defendant from Raising a "Minor" or "Low Impact" Defense was GRANTED.
- 2) Plaintiffs' request to limit the trial testimony of Defendant's expert, David Fish, M.D. to those areas of expertise that he is qualified to testify in regards to is GRANTED. Neither Dr. Fish nor any other defense expert shall opine regarding biomechanics or the nature of the impact of the subject crash at trial.
- 3) Plaintiffs' request to exclude the property damage photos and repair invoice(s) was GRANTED.

1 Plaintiffs' Motion to Exclude Sub Rosa Video is deferred until after Plaintiff's direct
2 testimony, so that Defendant can establish how it impeaches the Plaintiff. Defendant is
3 precluded from showing the sub rosa video or referring to it until that time.
4

5 The Court ruled on Plaintiffs' Second Omnibus Motion in Limine as follows:

- 6 1) Plaintiffs' request to exclude Plaintiffs' prior and subsequent unrelated accidents,
7 injuries and medical conditions and prior and subsequent claims or lawsuits was
8 GRANTED in part and DENIED in part. Any and all evidence relating to
9 Plaintiffs' lawsuit concerning their home is excluded. However, William's
10 diagnosis of a non-cancerous tumor may be admitted for the limited purpose to
11 show emotional distress.
- 12 2) Plaintiffs' request to exclude hypothetical medical conditions was GRANTED as
13 written.
- 14 3) Plaintiffs' request to exclude evidence of the absence of medical records for any
15 period of time prior to the accident was GRANTED.
- 16 4) Plaintiffs' request to exclude any reference to an alleged federal grand jury
17 investigation into doctors and lawyers in Las Vegas was GRANTED.
- 18 5) Plaintiffs' request to exclude reference to attorney advertising was GRANTED.
19 However, if during voir dire members of the venire volunteer information on the
20 subject of attorney advertising based upon questions in the Jury Questionnaire, the
21 subject of attorney advertising may be inquired into during voir dire.

22 The Court has ruled on Defendant's Motions in Limine as follows:

- 23 1) Defendant's Motion in Limine Enforcing the Abolition of the Treating Physician
24 Rule was GRANTED;
- 25 2) Defendant's Motion in Limine to Exclude the Traffic Accident Report and the
26 Investigating Officer's Conclusions was GRANTED.
- 27 3) Defendant's Motion in Limine to Preclude Questions Regarding Verdict Amounts
28 During Voir Dire was DENIED in part. Attorneys are allowed to follow-up on
questions in Jury Questionnaire;
- 4) Defendant's Motion in Limine to Prevent Plaintiff from Arguing "Responsibility
Avoidance" was GRANTED in part to the extent the Motion sought to preclude
argument during voir dire, but DENIED in all other respects.
- 5) Defendant's Motion in Limine to Limit the Testimony of Plaintiff's Treating

Physicians was DENIED:

- 6) Defendant's Motion in Limine to Preclude Plaintiffs' Medical Providers and Experts From Testifying Regarding New or Undisclosed Medical Treatment and Opinions was DENIED;
- 7) Defendant's Motion in Limine to Exclude Graphic and Lurid Video or Animated Depictions of Surgical Procedures was GRANTED regarding bloody and/or lurid video depictions, but DENIED as to photos that are not too lurid and animations;
- 8) Defendant's Motion in Limine to Preclude Witnesses from Offering Testimony Regarding the Credibility or Veracity of Other Witnesses was GRANTED;
- 9) Defendant's Motion in Limine to Exclude Evidence of Senate Investigation was GRANTED;
- 10) Defendant's Motion in Limine to Preclude Argument of the Case During Voir Dire was GRANTED in part regarding argument during voir dire. DENIED in all other respects;
- 11) Defendant's Motion in Limine to Exclude Duplicative and Cumulative Testimony was DENIED;
- 12) Defendant's Motion in Limine to Exclude Plaintiffs' Life Care Expert, Kathleen Hartmann, R.N. was DENIED without prejudice. subject to Plaintiff laying proper foundation for her life care plan conclusions;
- 13) Defendant's Motion in Limine to Exclude the Report and Opinions Plaintiff's Accident Reconstruction Expert, David Ingebretsen was GRANTED regarding actual causation, but DENIED without prejudice on all other issues, subject to Plaintiff laying proper foundation; and
- 14) Defendant's Motion in Limine to Exclude the Report and Opinions Plaintiff's Economist, Stan V. Smith was GRANTED as to loss of business income, given insufficient foundation and DENIED as to the loss of household services, loss of consortium and hedonic damages as long as proper foundation is laid.

V.

THE PARTIES HAVE STIPULATED TO THE FOLLOWING MOTIONS IN LIMINE

- 1) Reference to or evidence of Plaintiff pulling a muscle in his lower back 23 to 24 years ago while moving a keg of beer at California Beverage Company;
- 2) Reference to or evidence of a motor vehicle accident that occurred 25 years ago wherein Plaintiff was pulling a boat with his pick up truck and another vehicle hit the boat and knocked it off the trailer;

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- 3) Argument regarding improper use of prescription medications;
- 4) Plaintiffs' and/or Defendants' specially retained non-testifying consultants, if any;
- 5) Improper attorney arguments, such as those prohibited by the Nevada Supreme Court. *See Lioce v. Cohen*, 122 Nev., Advance Opinion 115 (2006);
- 6) Reference to this accident being unavoidable;
- 7) Any evidence relating to the fact that a recovery by Plaintiff would or would not be subject to taxation, or that Plaintiff's income would or would not be subject to taxation;
- 8) Any reference to offers of settlement or compromise;
- 9) The fact that either party filed any pre-trial motions, any ruling made by the court regarding the motions, or the content thereof;
- 10) Reference to or evidence of treatment not reflected in the parties' document production;
- 11) Reference to or evidence that James and Linda Rish were parties to the action;
- 12) Brandon's medical billing is usual and customary in Las Vegas, Nevada;
- 13) Non-testifying witnesses shall be excluded from the courtroom; and
- 14) The deposition testimony of Britt Hill, P.A.C may be read to the jury, as Mr. Hill is unavailable to appear at trial (reserving the right to redact or designate portions of the deposition to be read).

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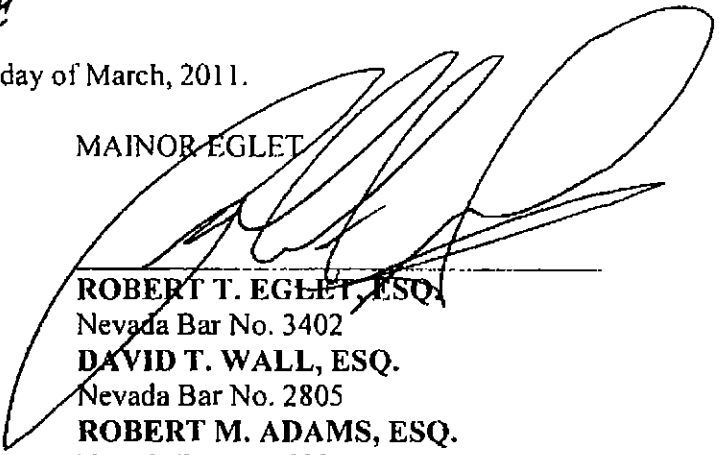
VI.

CONCLUSION

Plaintiffs ask this Court to consider the above law and argument throughout the trial of this case.

DATED this 14th day of March, 2011.

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