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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 foraminatomy
- 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

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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&P
Chief 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 diskectomy 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

- Xray 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.

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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.

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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

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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 lympadenopathy
- 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-T1dermatomes 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
- Fluticason proprionate 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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- 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
- Fluticason proprionate 50mcg
- Lovastatin 20 mg
- Zomig 5mg
- Amitryptaline 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 Soutwest 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
- Fluticason proprionate 50mcg
- Lovastatin 20 mg
- Zomig 5mg
- Amitryptaline 50mg
- Butalbital-APAP-Caff-COD
- Naproxen 500 TID

Assessment

1. Neck pain secondary to DDD
2. Resart 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 Amitryptyline 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 proprionate 50 mcg/ACT spray
- Enalaprial Maleate 20 gm
- Naproxen 500 mg TID
- Amitryptyline 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

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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 heat 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 LA 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

003095

003095

3/09/10 Desert Valley Therapy

- Doing good
- treatment

3/12/10 Desert Valley Therapy

- Sore in upper right back
- treatment

3/16/10 Desert Valley Therapy

- Still hurting
- Treatment

3/19/10 Desert Valley Therapy

- 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
- Fluticason Proprionate 50 mg nsal
- Zomig 5mg
- Enalaprial 20 mg

003098

003098

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.

003099

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.

003099

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.

003100

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.

003100

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.

003101

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.

003101

Sincerely,

J Wang

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EXHIBIT "6"

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, Plaintiffs, vs. JENNY RISH; JAMES RISH; LINDA RISH; DOES 1 through V; and ROE CORPORATIONS 1 through V, inclusive, Defendants.	Case No. A539455

003103

003103

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

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 I through V; and ROE CORPORATIONS I 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. Slockbower, Certified Shorthand Reporter No. 10676.

APPEARANCES:
For Plaintiffs:
(Appearing telephonically and through Skype)

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EXHIBITS

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Exhibit 8	Work file consisting of 9 CDs (attached)	18	77
	Current bills to date and whether they've been paid or not (Retained by Dr. Wang)		

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

with any question that I ask that it doesn't come through clearly, go ahead and ask me to restate it; is that all right?
A Yes.
Q If you don't, I'm just going to sort of assume, I guess, from the transcript that you understood my question; fair enough?
A Yes.
Q You have had your deposition taken on a number of occasions; is that right?
A Yes.
Q Would you waive the standard admonitions that we normally give during a deposition?
A Yes.
Q All right. I have – strike that.
Do you have a copy of a current CV?
A Yes.
Q All right. I'm going to ask that that be marked as Exhibit 1. How current is it?
A I mean, it's current within the last year.
Q All right. The copy I have, just by way of reference, shows that your children are 8 and 10. How current is mine?
A They're now 17 and 14 going to be 15.
Q All right. Not so current. Are you board

certified in any area?
A I'm board certified in orthopaedic surgery.
Q And how long have you been so board certified?
A About 12 years.
Q Are you a member of NASS?
A Yes.
Q Are you a member of ISIS, I-S-I-S?
A No.
Q Is there a reason why you're not a member?
A I'm not sure what ISIS is.
Q You have not heard of it?
A I've heard of the abbreviation. I'm not sure what the official name of that organization is.
Q Do you routinely perform discography or discograms?
A I've never performed a discogram.
Q Do you rely on them in the course of your practice?
A Well, I do order them and I gain some useful information from them.
Q On cervical, thoracic and/or lumbar cases?
A I'm sorry, I think the beginning of the question got cut off a little bit. Could you repeat the question?
Q Do you order discograms on cervical cases?
A I have in the past, yes.

Q How about lumbar?
A Yes.
Q Thoracic?
A It's pretty rare, I'm not sure if I've done so in the past.
Q Okay. Do you believe that discography is a reliable diagnostic tool?
A No.
Q Why not?
A Well, there are many studies showing that it can be quite variable. The results are not definitive. It's just another piece of information.
Q When you say it's just another piece of information, you order them on occasion; approximately how many times a year do you order a discogram?
A Boy, if I had to estimate my best guess would be fifteen.
Q Do you use them as part of a range of tools for diagnostic purposes?
A Yeah, I mean, it's just another test, it gives us some information.
Q All right. Now, are you with the UCLA School of Medicine; is that right?
A Yes.
Q I need to ask you a couple questions about your

position with UCLA. Were you formerly the Executive Co-Director of the UCLA Spine Center?
A Yes.
Q Were you removed from that position?
A No.
Q Are you still an Executive Co-Director of the UCLA Spine Center?
A No, several years ago we gave up those titles.
Q What do you mean we?
A Well, the physicians in the spine center decided that we would not have Executive or Co-Director titles, and that we would all be sort of equal when it comes to the directorship of the spine center.
Q Were you removed from any position at the UCLA Spine Center after news broke of the Senate investigation?
A No. In the news article they stated that I was no longer the Executive Co-Director of the UCLA Spine Center, which I believe implies that I was removed, but in actuality I had given that title up several years prior to that.
Q Were there any sanctions at all taken as a result of that Senate investigation?
A Are you asking whether the Senate or whether my department?

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Q Your department. Thank you for clarifying.
A No.
Q Have you ever testified that you thought it was UCLA's reaction to the article that was the reason that you were asked to step down as Executive Co-Director of the UCLA Spine Center?
A I'm sorry, could you repeat that question.
Q Have you ever previously testified that it was UCLA officials reaction to the article regarding the Senate investigation that was the reason you were asked to give up the title of Executive Co-Director of the UCLA Spine Center?
A I can't recall.
Q Is it true that the university's reaction to the article was to remove you as Executive Co-Director of the UCLA Spine Center?
A As – I believe as a reaction to the article, they – they asked that I no longer use that title, but as I stated previously, I had given up that title several years prior to that time. So obviously I was happy to abide by that.
Q What did you understand the focus of the Senate investigation, to the extent that it focused on you, what did you understand it was about?
A I guess I'd have to ask you to clarify the

stop the question there. Is that what you understood the allegations to be?
A I don't recall that Senator Grassley alleged that. I do recall reading that in an article written by a reporter.
Q And was that true or not true?
A Well, yes. I received consulting money from spine companies, and in accordance with our department policies at the time, we were not required to report that to our department.
Q Did you check no on the forms when asked whether you had received income of $500 or more from those companies that were funding the clinical research?
A Which form are you referring to?
Q Any form. Any form that you would be required to disclose that information.
A Well, there are many forms that we have to fill out as a result of research. I guess I'd have to ask you to specify which form you're talking about.
Q Did you report on any form that you had not collected in excess of $500 when in fact you had?
A Again, there are many forms that we have to fill out during the course of research. I can't recall specifically every single form that I had to fill out.
Q Doctor, do you understand my question?

question.
Q Did you understand that it was alleged within the Senate investigation or the article surrounding the Senate investigation that you had collected in excess of $450,000 from companies for which you were doing clinical research?
A Yeah, I'm not sure I understand the question.
Q What did you understand the focus of the Senate investigation to be as it related to you?
A Well, from my point of view, I believe the Senate asked UCLA for some records, and that's the last I've heard from any type of Senate investigation.
Q Do you understand that Mr. Grassley alleged that you had collected in excess of $450,000 from companies for whom you were providing clinical research services?
A I'm not sure I understand the first part of the question. I have collected consulting money. Many of these companies I have performed research with, and I believe the amounts were the amounts that I gave to them.
Q Who did you understand Mr. Grassley to be? Was he a Senator from the state of Iowa?
A I believe that's correct.
Q Did you understand that he alleged that you had failed to inform UCLA of an excess of $450,000 that you were paid by companies from 2004 through 2007 – let me

A I do.
Q So is it your testimony that there was no substance or truth to the allegation in the Senate investigation that you had received in excess of $450,000 between 2004 and 2007 by medical device and drug companies for whom you were doing clinical research that you failed to report?
A I think I've already testified that I received moneys from my consulting with spinal device companies, and that I did not report those to UCLA as per our department policies at the time.
Q What if any action did UCLA take after that investigation became public?
A Well, it's my understanding that they asked me to not use the title of Executive Co-Director of the UCLA Spine Center.
Q All right. Do you have with you a list of cases on which you testified either in deposition or in trial over the last four years?
A I have a list dating back to about 2006.
Q 2006 you say?
A Yes.
Q I'm going to ask that that be marked as Exhibit 2.
Are any of those cases also with Mr. Rogers'

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

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

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

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

Q Do you have a document that reflects how much you've been paid so far or how much you've billed so far?
A I may, I can certainly check in my office as soon as we conclude this deposition.
Q All right. Assuming that you're able to do that, I would ask that that be -- well, let me hold off on that for one moment.
Actually, I'm going to ask that -- do you have your entire work file?
A I have all the records that I've reviewed.
Q Are those on disc or are those -- or are they hard copied?
A They're on disc.
Q All right. I'm going to ask that that disc be marked as Exhibit 8. I'm going to ask that you include with Exhibit 8 at the end of your deposition your current bills to date and whether they've been paid; is that fair?
A Well, are you saying at the conclusion -- you're saying today or is there a period of time?
Q Today or tomorrow because we're going to want to expedite the transcript.
A I can definitely, at the conclusion of this deposition today, I can search my records and see if I have the invoices which I believe I will be able to do.

As far as whether or not they've been paid or not, I will have to check with my wife.
Q All right.
THE COURT REPORTER: Did you say Exhibit 8 on those discs?
MR. WALL: Yeah, 'cause his report is already, for my own purposes, marked as 5, 6, and 7.
Q What did you do to prepare for your deposition today, Doctor?
A I read my reports.
Q Anything else?
A I spoke to Mr. Rogers.
Q When was that conversation?
A Probably about maybe an hour ago.
Q What was the nature of that conversation?
A I had asked him whether or not this trial was going forward.
Q Did you discuss with him your -- the conclusions in your report?
A No.
Q I have three reports that you've prepared in this case, does that sound right?
A Yes.
Q I have an original report dated February 10, 2009, which I have marked as Exhibit 5; I have Addendum

Number 1, dated October 1st, 2009, which I would ask be marked as Exhibit 6. And I have Addendum Number 2, it is July 4th, 2010, which I'll ask be marked as Exhibit 7. Are those the three reports you prepared in this case?
A Yes.
Q Since the date of your last report which was July 4, 2010, have you reviewed additional documents before today's deposition?
A Yes.
Q What documents did you review?
A I don't have a list in front of me. Since my last addendum from July 4, 2010, I've reviewed some of the records which I believe are mostly physical therapy, there are some records from Southwest Medical or -- I'm not sure of the full official name -- and I've read the report of a Mark Winkler.
Q Is that the extent of the additional documents?
A That's what I have listed here.
Q Did any of those documents change any of your opinions in the case?
A I apologize. Since that time I've also reviewed some surveillance videos.
Q Did the physical therapy records, the records from Southwest Medical, or the report of Dr. Winkler change any of your opinions in this case?

A I'm sorry, did you include the surveillance video or did you specifically not include the surveillance video?
Q Not yet, that will be my next question.
A I'm sorry, you do not want me to talk about the surveillance video?
Q That will be my next question, Doctor.
Based on the physical therapy records, the Southwest Medical records, and the records of Dr. Winkler that you reviewed since your last report, has that changed your conclusions in any way?
A Well, it's hard to answer that question because I've reviewed these records along with the surveillance video. So are you asking me to hypothesize sort of a theoretical situation where I just totally forget about the surveillance video and then look only at these records and see whether that changes my opinion?
Q Correct.
A So without the surveillance video, in my prior reports I apportioned no more than 25 percent of the patient's symptomology to the motor vehicle accident in question on April 15th, 2005. Looking at these new records and discounting the surveillance video, I think it's reinforced my opinions that 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.

Q Is that based on the physical therapy records?

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

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

(Brief pause in proceedings.)

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

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

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

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

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

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

A Yes.

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

A Yes.

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

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

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

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

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

Q How about that?

A There you go, yeah, good.

Q Do you recall my question?

A Could you please repeat it?

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

A June and July of 2008.

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

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

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

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

that heavy lifting.

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

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

A Yes.

Q And tell me exactly how it changed it.

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

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

A No.

Q When did you receive the surveillance video?

A I can't recall the exact date.

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

A I do not.

Q Where did you receive it from?

A I assume it came in the mail.

Q From whom?
A I would assume it's from Mr. Rogers law firm. I'm sorry, could you repeat that?
Q Did you request that it be provided to you?
A No.
Q It wasn't sent with a letter which would have a date on it?
A It may have been, but by the time it arrived on my desk it was just the CD.
Q Would that letter be in your file?
A No, I brought my file with me, with the exception of the billing forms, and I do not see this letter.
Q Do you presume that you received it after the preparation of your last report?
A Yes.
Q So your reports do not contain a complete statement of all your opinions that you'll express in this case, does that sound correct, based on what you told me today?
A That's correct.
Q And they don't state a complete statement of the basis or reasons for your opinions, is that correct based on what you've told me today?
A You're asking in my reports?

Q Correct.
A That's correct.
Q But you were never requested to prepare an additional report with your new conclusion; is that correct or incorrect?
A That's correct.
Q Had you informed defense counsel of your new conclusion?
A No.
Q So today is the first time you told anyone about your new conclusion; is that correct?
A Yes.
Q I'm sorry?
A Yes, that's correct.
Q When did you form those conclusions?
A I believe over the past week.
Q Did you receive that video within the last week?
A Yes.
Q Your first report, Exhibit 5, lists on the second page -- and by the way, I don't think mine has page numbers on it -- lists on the second page a list of fourteen items that are under the category, Records Reviewed; is that right?
A Yes.
Q Your other two reports don't have a similar

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

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

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A Again, I don't know the exact time when it was given to me, I don't open my own mail, but I've read through them all.
Q Did you request all those depositions or were they just sent to you out of the blue?
A I don't believe I've requested any records on this case. The records are just sent to me.
Q Did those depositions change your opinions in this case?
A No.
Q Your original report is dated February 10th, 2009; is that right?
A Yes.
Q What's the date that you saw Mr. Simao?
A I'm sorry, did you ask me if that's the date I saw him?
Q Correct.
A I believe so.
Q So you prepared your report on the same day that you saw him?
A Well, on my report it says, Date of service. I listed the date that I saw him as the date of service.
Q Okay. How long did you see him?
A I can't recall.
Q What's the normal length of time for an

independent medical examination?
A It can range anywhere from 15 to 45 minutes to an hour.
Q Do you have any records which would suggest how long you met with Mr. Simao?
A No.
I'm sorry, could you repeat that?
Q Did you meet with him at the same time that Dr. Fish met with him?
A I can't recall.
Q Do you have any record which would indicate whether you and Dr. Fish saw my client at the same time?
A I don't.
Q Do you have an independent recollection of the examination?
A No.
Q Did you discuss your reports in this case with Dr. Fish at any time from February of 2009 'til today's date?
A No.
Q Who prepares the medical history that is about pages 2 through about 24 of your report?
A I did.
Q Do you dictate and then it's transcribed or did you prepare it yourself?

A I typically dictate it.
Q So when you prepared this report that lists on the second page of records reviewed, it is all the documents that you had available to you at that time; is that correct?
A I believe so.
Q You describe on the third page of that report at the top, vehicle damage as moderate for both vehicles. Do you see that?
A Yes.
Q Is that fact significant to you?
THE COURT REPORTER: I did not hear that objection.
MR. ROGERS: Objection, mischaracterization. Moderate, in other words, is a vague term and that characterizes --
THE COURT REPORTER: I'm sorry, could you repeat that objection.
MR. ROGERS: Mischaracterizes and it's vague.
BY MR. WALL:
Q Doctor, you may answer the question.
A I'm sorry, could you please repeat the question.
Q The listing of the vehicle damage as moderate for both vehicles, is that fact significant to you in your analysis?

MR. ROGERS: Same objections.
THE WITNESS: Yeah, I guess I'm not sure what you mean by significant.
BY MR. WALL:
Q Well, did you use it as a basis for any of your opinions?
A It's part of the medical records, I read it, and I took that into account along with the other facts that were involved in the medical records to form my opinion, but I did not base my opinion entirely on just that one fact.
Q Well, actually, it's not part of the medical records, it's a Traffic Accident Report; is that right?
A When I use the term medical records, I guess I was referring to the records I received and reviewed. This Traffic Accident Report came in the batch of records that I received.
Q Do you plan to state an opinion at trial on whether the impact was severe enough to cause injury?
A If you're asking me whether or not I'm going to talk about force factors and whether or not I have a Ph.D. in physics and can understand the science of impact and collisions, then no, I'm not going to claim to be an expert in that regard.
Q Okay. On that same page you reviewed records of

when Mr. Simao presented at urgent care on the day of the motor vehicle accident; do you see that?
A Yes.
Q There were complaints of neck and shoulder pain that day; is that correct?
A Yeah, I see neck pain, headache, left elbow pain. I'm not sure I see anything about shoulder pain.
Q What's the -- what would be the purpose of placing his left arm in a sling?
A I assume that the doctor who was treating him wanted to immobilize his arm.
Q Okay. It says, hyperextended neck and bit cage; also hyperflexed, what's the difference?
A Well, if you look at the words, hyperextended is when you extend your neck and hyperflex is when you flex your neck. So it's a different motion of the neck.
Q So they're opposite directions; is that right?
A Typically, the way those terms are used, that is correct.
Q It also notes tenderness in the cervical spine; is that correct?
A It says, C-Spine tender, C6 with full range of motion.
Q It looks as though a cervical spine X-ray was done on that day; is that correct?

A Yes.
Q Were you able to determine from the records what they were looking for when they ordered an X-ray of the cervical spine?
A Well, the impression was no fractures. I would assume they were looking for fractures.
Q On the next page of your report, the records from May 4th of 2005 that you reviewed note the history of migraine headaches; is that correct?
A Yes.
Q And that the patient also reported that the headaches he was suffering on that day felt different; is that correct?
A Yes.
Q It says there's a follow-up on May 12th of 2005 with a referral for an MRI; is that correct?
A Yes.
Q What did you understand the purpose of that MRI to be?
A Well, it says here MRI to rule out intracranial lesion. So I think they wanted to rule out an intracranial lesion.
Q It was not an MRI on the cervical spine; is that correct?
A That is correct.

Q And then by May 23rd, of 2005 -- strike that.
On May 26, 2005, moving on to the next page of your report that is Exhibit 5, it looks like the medical provider at Southwest Medical explained to Mr. Simao that the imaging studies were normal; is that right?
A Yes.
Q What was the instructions that he received at that time?
A Well, I only have what's documented in the note, I'm not sure if they gave him other instructions, but it says, Patient does not seek further treatment, routine follow-up over next six months.
Q Do you believe that he was told on that day that whatever problems he was suffering from would resolve on their own?
A I see no documentation of that.
Q Is that what routine follow-up over next six months would indicate to you?
A I'm not sure that I can get that from what you just said. Routine follow-up over the next six months, the way I typically use that, means that over the next six months if there's any problems come to see me, but I'd like to see you in six months for a routine follow-up.
Q Mr. Simao returned to Southwest Medical in a

little over four months; is that right?
A Yes.
Q And what were his complaints on that day?
A Well, I have documented headaches, nausea and vomiting, tightness in left shoulder radiates into neck and then becomes migraine headache.
Q And his headaches were worsening over the last few months; is that correct?
A That's what it says.
Q By October 12th of 2005 was there a referral for neck and left shoulder X-ray?
A Yes.
Q And what did you understand the purpose of a neck and left shoulder X-ray to be at that point based on your review of the record?
A Well, it's a little hard to say because it looks like the main problem was feet swelling, and I don't see any orders for any feet X-rays. And then under the Assessment and Plan, it says, Nicotine dependence, possible vascular insufficiency, stop smoking, tension headache associated with left shoulder discomfort, and then they talk about ordering the study. So I think they were ordering it in relationship to the tension headache.
Q Why would you do a left shoulder X-ray for a tension headache, what would you expect to find or rule

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out?
A Well, in this note it says, tension headache associated with left shoulder discomfort. So they probably ordered the shoulder X-ray because he had left shoulder discomfort.
Q On page -- well, the second to last page which I have as the 26th page of Exhibit 5, the report says that Mr. Simao didn't beginning complaining of neck and shoulder pain until nine months after the accident. Is that right?
Strike that. Let me rephrase.
Well, yeah, you state that, According to the medical records, it was not until nine months following the motor vehicle accident that Mr. Simao began some physical therapy for his cervical symptoms. He also began complaining of left sided radicular symptoms at about that time. Is that right?
A That's a direct quote from any report.
Q But he obviously complained of neck pain on the day of the accident; is that right?
A Yes.
Q Is it your testimony that the medical records reflect no evidence of any ongoing neck pain from April through October of 2005?
A Well, I do see on the day of the accident which

was April 15, 2005, he's complaining of neck pain. And then we've kind of covered the subsequent medical visits where he's talking about a lot of his complaints and at no point do I see that he's complaining of neck pain until October 6, 2005.
Q So is it your -- is it your opinion that the medical record established no consistent neck pain from May through October of 2005?
A I certainly do not see any documentation of any neck pain during that time period.
Q In January of 2006, physical therapy was ordered, is that -- or he was referred to physical therapy; is that right?
A It appears that on December 21, 2005 when he was at Southwest Medical Associates, under their Assessment and Plan it seems they have under number four PT for neck and traps, and I believe that's when they were thinking of the referral.
Q And on January 16, 2006, the physical therapy records reflect that the date of onset neck and upper trap problems was approximately six months ago; is that correct?
A Yes.
Q In the exam portion of the physical therapy record it says, Presence of -- what I'm going to call --

myofascial pain creating radicular symptoms down left upper extremity. What would be the source of that myofascial pain, do you know?
A Yeah, one of the problems is the physical therapist used a completely different set of terminology than a spine surgeon. So I'm not sure exactly what they're referring to. It's probably some terminology that's used within the realm of physical therapy.
Q How do you define myofascial pain?
A For me there's a very general statement. There is fascia over the muscles, myo implies that there's muscular pain, and so that's a combination of words that are used to describe patients with pain. But for me that really doesn't -- I don't use that term as a specific diagnosis.
Q What would be the purpose of cervical traction at that point?
A Well, it's one of the modalities that many physical therapists use.
Q For what?
A Are you asking for a specific diagnoses or are you asking more in general?
Q Well, what would be the purpose of placing someone in cervical traction at that point in time?
A Well, in the literal sense when you place

someone in traction you're stretching their neck. I guess taken very literally, that's what the literal purpose is. As far as treating specific diagnoses, you know, sometimes the therapists use it to treat patients with radicular pain, sometimes therapists just use it as a modality.
Q In your examination of Mr. Simao in February of 2009 -- on the 25th page of what I believe is a 27-page exhibit -- under cervical spine you noted minor tenderness at the base of his neck on palpation; is that right?
A Yes.
Q And he also complains of tenderness with a Spurlings; what's a Spurlings?
A It's a test that we perform where we tilt their head to the side, extend the neck, and rotate it towards the side.
Q What would tenderness with a Spurlings indicates to you?
A It's a subjective reporting of some tenderness when we put their neck into sort of an extreme position.
Q What's the significance of the tenderness with a Spurlings being to his left side and radiating to his left shoulder?
A It may indicate some nerve irritation.

Q What did you note during the medical examination with respect to his left shoulder?
A I can read from my report, we found that there were some tenderness when we palpated it, and that his left shoulder was positive to Hawkins and Neer's test in supraspinatus testing. That's just some positions of the shoulder and the arm that we place the arm and the hand in.
Q You said we, who's we?
A Well, you asked me in general. When I examine patients in my practice I'm typically there with residence and fellows.
Q What's Hawkins or is it -- or is Hawkins and Neer's one test?
A They're different tests. Basically Hawkins is when you extend the shoulder and bring the arm over the front of the body and internally rotate it; and Neer's Test is when you put the thumbs down, extend the arms at about 15, 20 degrees outward and give it some resistance.
Q And what was the significance to you of the test you performed on *Mr. Simao's left shoulder*?
A It may indicate some rotator cuff inflammation.
Q Had you seen a medical record anywhere that *referenced rotator cuff inflammation*?
A I don't recall that, but if you point it out to

me, I'll be happy to take a look at it.
Q I'm asking you if you've ever seen a medical record that references rotator cuff inflammation for Mr. Simao?
A I don't recall.
Q Did you review the various MRIs and other radiographic studies in this case?
A Yes.
Q Your Addendum Number 2, which is Exhibit 7, your final report, seems to reflect that the -- in fact you reviewed all --
THE COURT REPORTER: Could you repeat that?
BY MR. WALL:
Q Hold on. In Exhibit 7, beginning on what I believe to be the 19th of -- strike that.
The 18th of 21 pages you reference the radiographic studies that you viewed in this case; is that right?
A Yes.
Q Is that -- I assume you didn't have the actual films when you prepared the first two reports?
A Yeah, I can't recall if I did or didn't, but when I actually view the studies I typically put that in my report. So I -- this implies that I did not put this in my first two reports, so I probably was seeing this at

the time of my second report.
Q On the 19th page of Exhibit 7, with -- well, it's 18 and 19 pages of Exhibit 7 -- with respect to the March 22, 2006 MRI, you wrote, Decreased signal at C2-3. So that's based on your viewing of the films rather than just the report; is that correct?
A Yes.
Q And what does that mean, Decreased signal at C2-3?
A It meant that there was some mild degeneration at that level.
Q *Define what you mean by mild degeneration.*
A I typically use that term to -- generation, meaning, arthritis.
Q *Okay. You also noted a, Small central disc* bulge that I would regard as insignificant at C4-5; is that correct?
A Yes.
Q Obviously that's from your view of the films and not from the report; is that right?
A That's correct.
Q That's somewhat different than the report from Steinberg Diagnostic date of that MRI; is that right?
A I guess I'd have to ask you to define the question. It just seems too general.

Q On the 7th page of your first report, Exhibit 5, you noted that the impression under March 22, 2006 MRI cervical spine was as follows: One, C3-4 facet hypertrophy on the left mildly narrowing left neural foramen; may be contact with left exiting C4 nerve root. Do you see that?
A Yes.
Q Also, C4-5 central broad based two to three-millimeter disc protrusion without stenosis. Do you see that?
A Yes.
Q When you made your conclusion after reviewing the films, you didn't say anything about C3-4; is that right?
A That's correct.
Q You disagree with the report from Steinberg Diagnostic, 2006 MRI?
A I'm not sure the term is disagree. When I reviewed the reports -- or I'm sorry -- when I reviewed the MRI personally, I did see that the facets were at a different angle on the right to the left side at, I believe, the C3-4 level. That's more of a congenital finding. Meaning, the patient was born that way. I can certainly see how someone may think that that represents an arthritic change because we can see that *in patients*

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with arthritis. But I thought that that was just the way the facets were oriented.
Q So you would disagree with the impression as it relates to C3-4 from the Steinberg Diagnostic report; is that right?
A I don't think you can make a blanket statement like that. They're saying that there's facet hypertrophy. I think there's a facet difference. And that's, I think, a matter of opinion.
Q But you didn't note it at all in your report; is that right?
A That's correct.
Q The September 2007 MRI, our last report, Exhibit 7, on the 19th page, you write, Decreased signal at C2-3, small central bulge at C4-5, and no neural compression; do you see that?
A Yes.
Q Did you think that the September 2007 MRI was the same as the March 2006 MRI?
A Yes.
Q Did it show degenerative changes in Mr. Simao's cervical spine? I don't mean from one MRI to the next, I mean overall.
MR. ROGERS: Object, it may be vague.
Go ahead, Doctor.

THE WITNESS: Well, I -- I listed in the September 24, 2007, Decreased signal at C2-3, which I noted on the prior report. And as I stated, that is more of an arthritic or degenerative change.
BY MR. WALL:
Q Was the film essentially the same as the March 2006 MRI?
A I believe so.
Q There was another in April of 2008; what is mild signal loss at C2-3 on sagittal cuts mean?
A I think for all intents and purposes it means the same as decreased signal at C2-3. I was just a little bit more specific that I saw it primarily on the sagittal cut, which is different from the axial cut.
Q Did you find that the April 2008 MRI was significantly different or different in any way from the September 2007 MRI?
A I believe it was essentially the same.
Q You have reviewed the medical records and so you're aware that Mr. Simao has had a multitude of injections for either diagnostic or therapeutic purposes from 2006 to 2010; is that correct?
A Yes.
Q Do you believe that at any time the pain generator in Mr. Simao's neck has been isolated?

A No.
Q Do you believe that the injections -- let's go all the way from 2006 up 'til the time of the surgery, but not including the surgery -- the injections that were -- that he underwent were reasonable and necessary? Setting aside for now the issue of causation.
A Well, I think they were reasonable in the sense that I believe the doctors ordered them in order to try and alleviate his pain to try to help him and try to identify the pain generator. As far as necessary, I guess I'd have to ask you to define what you mean by necessary.
Q Well, setting aside the issue of causation, do you believe any of the injections that he received were unnecessary?
A Well, as I stated, I think that they were -- there was a reasonable thought given to why they gave him the injections but -- and I believe the doctors felt like they were trying to help him. Looking back at the multitude of injections, many of them didn't really help him or have any long lasting effect. So I'm not sure that they were all necessary, but I think that they were reasonable.
Q Did you review the medical bills in this case?
A I recall seeing them.

Q But do you intend to offer testimony at trial as to whether the charges for his treatment were reasonable and customary in Las Vegas?
A No.
Q All right. The discogram in August of 2008, it's not referenced in your first report of February of 2009, is it because you didn't have the records surrounding that at the time of your independent medical examination?
A I'm sorry, could you please repeat that.
Q The discogram in August of 2008, it's not referenced in your February 2009 report, which is Exhibit 5, is that because you didn't have those records at that time?
A Yeah, looking at my first report, it looks like the records went up 'til May 10th, 2008.
Q You referenced it in Exhibit 6, which is your Addendum Number 1 and the discography to have revealed --
A I'm sorry, we didn't hear that.
Q You reference the discography in Exhibit 6, which is your Addendum Number 1 from October of 2009, what do you understand the discography to have revealed?
A Well, from the records dated 8/8/08 from Dr. Rosler, it says that there was positive provocation discography C3-4, C4-5 with negative C5-6 discography.

Q What does that mean, positive provocation discography C3-4?
A It means that when he injected the material and tried to provoke pain, that it caused pain at C3-4 and C4-5 but not at C5-6.
Q What would cause that pain?
A Well, you're injecting contrast with a needle into the disc, and when you pressurize it, it can cause pain in the disc.
Q Which would be an indication of what to a spine surgeon?
A Well, it would mean that the discography was positive at those two levels and negative at the other level.
Q What does morphologically abnormal disc mean?
A I believe it would be the injectionist, which was Dr. Rosler, when he injected the contract he felt like there was some abnormality in the disc when he injected the contrast.
Q What type of abnormality?
A I don't believe that it says.
Q What type of abnormality would result in a description of a morphologically abnormal disc?
A Well, again, I'm not Dr. Rosler, I'm not sure how he uses those terms.

Q Do you have any reason to believe that the procedure was done incorrectly?
A It doesn't state that it was done incorrectly.
Q Do you have any reason to believe that it was done incorrectly?
A No.
Q Do you have any reason to believe that this would constitute a false positive?
A Well, I guess -- I guess in reviewing Dr. Mark Winkler's report, I believe he had some issues on whether or not the discogram was administered appropriately.
Q I'm asking you.
A Yeah, and I've already stated my opinion on that.
Q And what did you understand Dr. Winkler's criticism to be?
A I believe that he felt that the injection was given in the annulus and not in the nucleus, which is the wrong anatomic region to give the injection.
Q And what was his basis for that belief?
A I believe it was upon him examining the CT scan and the records that he had available to him regarding the injection.
Q You have the same records and CT scan; is that right?

Q Was there a radiology report that was prepared in conjunction with the discography?
A I believe they did a CT scan following the discogram.
Q And what was the result of the CT scan? That was the same day, right?
A Yes. I have here in my records that at C3-4 there was a grade 4 annular fissure and at C4-5 contrast was noted in the ventral subarachnoid space probably secondary to grade 5 fissure.
Q What's the difference between a grade 4 and a grade 5 fissure?
A I believe grade 5 is a more extensive tear.
Q Would those tears constitute morphologically abnormal discs?
A Again, it depends on how they use the terminology, but I suspect that's what they were discussing.
Q After your review of the records from August 8th, 2008 as well as the CT scan, do you agree with the description of the results?
A I'm not sure I can answer that question. I mean, these are the results of a person administering a test. I'm not sure I can agree or disagree with it. I wasn't present at the time.

A Yes.
Q Do you agree with Dr. Winkler's criticism?
A I certainly don't dispute it. I believe he's a neuroradiologist. I typically do not order a CT scan following a discography.
Q I'm asking for your independent review. What is the result of your independent review of the records and the CT scan?
A When I looked at the post discogram CT scan, again, I don't do these injections, so I'm not here to criticize the methodology. I do see where the injection was given in the annulus; but again, I don't rely on the CT scans in my practice when I do discography or when I order discography.
Q So do you discount the results of the discogram as it relates to Mr. Simao?
A I believe there's a lot of reasons to question whether or not these discograms are reliable.
Q Are annular fissures, such as those noted in the report of the CT scan, commonly associated with arthritic changes?
A They're typically associated with arthritic changes.
Q In fact, you note that in your report that is Addendum 1, which is Exhibit 6, it says, The

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

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

Q Yeah, about the middle of the second paragraph.

A That's correct, I see it.

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

A I'm not sure I understand the question.

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

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

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

A It's certainly possible.

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

MR. ROGERS: Objection, foundation.

Go ahead, Doctor.

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

BY MR. WALL:

Q Fair enough. Let me break it down.

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

A Yes.

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

A Yes.

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

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

A No, they're common.

Q Are they always symptomatic?

A No.

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

MR. ROGERS: Same objection as before.

Go ahead, Doctor.

THE WITNESS: Yeah, I don't -- I'm not sure. What is clear is that patients who have pre-existing degenerative changes can get into an accident and have pain. I believe that many people who cannot identify a pain generator will attribute that to the pre-existing degenerative changes. I'm not so sure that those previously asymptomatic changes can become definitively symptomatic. Although, I do agree that patients can experience pain following a traumatic incident.

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

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

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

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

Q It's on the last page.

A I see it, that's correct.

Q What did you mean by, not necessary?

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

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

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

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

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

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

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

Q Do you recall that Dr. Grover described 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 start 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

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?

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.

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

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

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

whiplash injury to his cervical spine and exacerbated his long history of headaches.
Well, let me back up. Make sure that -- let me just go in order.
Your original report says on the second to last page, He may have sustained a soft tissue whiplash injury to his cervical spine and exacerbated his long history of headaches.
Do you see that?
A Yes.
Q Yes?
A Yes, I see that.
Q On the last page of Exhibit 6, Addendum Number 1, you state, In summary, it is still my opinion that Mr. Simao may have sustained a soft tissue whiplash-type injury as a result of the motor vehicle accident.
Do you see that?
A Yes.
Q And on Exhibit 7, on the last page, In summary, it is still my opinion that Mr. Simao may have sustained a soft tissue whiplash-type injury as a result of the motor vehicle accident in April 2005.
Do you see that?
A I do.
Q Do you believe, as reflected in all three

reports, that Mr. Simao continued to experience pain in his neck from the end of 2005 at least, forward to the present; is that correct?
A Yes, based on the records.
Q I'm sorry?
A Based on the medical records, yes.
Q And your evaluation of him in 2009?
A Yes.
Q And that's beyond migraine headaches; is that correct?
A Yes.
Q Now, in all three reports you relate the initial treatment from the date of the motor vehicle accident until May 26th, 2005 to the motor vehicle -- to the motor vehicle accident; is that right?
A Yes.
Q And in all three reports you state that treatment for symptoms of neck pain after May 26, 2005, I apportion no more than 25 percent to the motor vehicle accident. Is that what you wrote in all three of your reports?
A I believe so.
Q How did you arrive at 25 percent when you prepared those three reports?
A Well, at the time that I was preparing the

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

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

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

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

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

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

Q Yes.

A I think it would.

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

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

Q At the time you prepared your reports when you

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

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

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

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

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

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

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

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

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

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

prior to the accident.

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

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

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

A No.

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

A Yes.

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

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

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

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

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

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

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.

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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is that your impression?
A Well, he was symptom-free in regards to his neck until, I believe, October. In his medical visits, although he's detailing many other complaints, I see no complaints of neck pain.
Q And then as of October of 2005, that five plus years, he is symptomatic in the same area where he was symptomatic on the day of the accident?
THE COURT REPORTER: Could you repeat that please, Counsel.
BY MR. WALL:
Q So then in October of 2005 he becomes symptomatic in his cervical spine in the same area, with the same complaint that he had on the day of the accident?
MR. ROGERS: I'm going to object, that mischaracterizes the medical records.
Go ahead, Doctor.
THE WITNESS: Yeah, I wouldn't say it's the same complaints. I mean, he's got complaints that have gone all over the place, you know, back in -- even after his surgery he started complaining of pain that went to his hand, and even Dr. McNulty's notes on July 14, '09 said that prior to the surgery it didn't go past his elbow and now he's talking about problems at C-6. I mean, this

guy's symptoms have been all over the place.
So I guess I -- I'm not sure that I can say it's in the same place. But I think that what you said earlier was pretty reasonable in my testimony, the guy had an accident, reported neck pain the day of the accident, a few weeks later he sees his providers and there's no neck pain. And there's a gap of, what, four to five months where there is no reports of neck pain and then he starts getting neck pain. It's hard for me to attribute it to an accident that occurred five or six months prior, especially when this guy has been working and seeing the type of work that he does.
Q Do you believe that -- do you agree with Dr. Hernandez that neck and shoulder pain can trigger headaches or migraine headaches?
A Well, I'm not an expert in migraines, but I know that there are many things that can trigger headaches; lights, when my sons play video games there's a little warning that comes on that says, You may get headaches when you play this video game.
Q Did you understand my question, Doctor?
A Maybe I didn't. Could you repeat it.
Q Do you agree with the note from Dr. Hernandez --
A I'm sorry, could -- well, okay.
Q -- on the 10th and 11th page of your July 4th,

2010 report, where he notes the neck and shoulder pain may trigger headache?
A What's the date on that note?
Q December 7th, 2009.
A Well, as I stated before, there are many things that can trigger headaches. I'm not disputing that statement that this doctor is making.
Q Do you understand that Dr. Hernandez is a neurologist?
A Yes.
Q In that same note under Assessments, what's neck pain secondary to DDD?
A DDD is typically Degenerative Disc Disease, it's an abbreviation.
I'm sorry, can we go off the record please for a second?
MR. WALL: Sure, we'll go off.
(Brief discussion held off the record.)
MR. WALL: We can go back on the record.
Doctor, in light of the fact that you just indicated to us off the record that you have a surgery to perform, an emergency surgery to perform, I don't have any other questions.

EXAMINATION

BY MR. ROGERS:
Q Doctor, I have one question before you go. And that is what is your current position at UCLA?
A Well, I'm the chief of the spine service, and I'm the acting chairman of our department when the chairman is out of town or wants me to cover for him.
Q Okay. So, no sanctions by UCLA with regard to this Senate investigation that counsel opened the deposition with, your position not only continues but has been promoted?
A That's correct.
MR. ROGERS: Okay, I'll let you do your surgery. We'll reconvene the deposition if we need to.
MR. WALL: Off the record, Madam Reporter.
Expedited transcript, can you do it by Friday?
THE COURT REPORTER: Absolutely.
MR. ROGERS: Make that two of them.

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

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

CERTIFICATE OF DEPONENT

PAGE LINE CHANGE REASON

* * * * *

I, JEFFREY C. WANG, M.D., deponent herein, do hereby certify and declare the within and foregoing transcription to be my deposition in said action; that I have read, corrected, and do hereby affix my signature, under penalty of perjury, to said deposition.

JEFFREY C. WANG, M.D., Deponent DATE

CERTIFICATION
OF
CERTIFIED SHORTHAND REPORTER

I, the undersigned, a Certified Shorthand Reporter of the State of California do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name _____

Dianne G. Slockbower, CSR No. 10676

Dated: _____

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EXHIBIT "7"

SUPP
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DISTRICT COURT OF NEVADA

COUNTY OF CLARK

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, Plaintiffs, vs. JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive, Defendants.	Case No.: A 539455 Department X

003155

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

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

LIST OF DOCUMENTS

1. Two (2) dvd's containing surveillance footage of Plaintiff William Samao..

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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.	)	

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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.

APPEARANCES:

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EXHIBITS

LAS VEGAS, NEVADA; THURSDAY, MARCH 10, 2011
10:55 A.M.
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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.

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

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

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

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

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think we had a motion on that. Right?
MR. WALL: I can't remember if we did it as part of the stipulation or whether there was -- I don't think there was a specific motion on it, but if there wasn't, it was because we agreed in the stip.
MR. ROGERS: I don't know. We had our disagreements about the experts, who might use them.
MR. WALL: But not the table itself.
MR. ROGERS: Right. So I don't recall how we -- or even if we addressed that.
(Interruption in proceedings.)
(Discussion off the record.)
MR. ROGERS: Where did we leave off?
MR. ADAMS: On No. 59, I'm looking at the stipulation, and I don't see the life expectancy table in the stipulation. We're checking our orders right now and we'll see if we filed a motion on it.
MR. ROGERS: Whose table is it? Do you know?
MR. ADAMS: It would be the table that Smith relied on. It says Smith Reports. We were given judicial notice on it so...
MR. ROGERS: Let's hold off on this one for a minute just so that I can get a look at it because I haven't sat down and studied this.

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MR. ADAMS: Okay.
MR. CRAFTON: It's not on here. Ashley's pulling the minutes right now.
MR. ADAMS: All right. Then No. 60 and 61 are your clients' responses to interrogatories and requests to admit.
MR. ROGERS: Okay.
MR. ADAMS: Any objection to those?
MR. ROGERS: Well, you don't admit those back to the jury?
MR. ADAMS: No, but we're going to be using them, so I list them here. I don't want to admit them.
MR. ROGERS: Right. We'd have to redact them like crazy.
MR. ADAMS: Well, they are redacted.
MR. ROGERS: Okay. I'm doing the same thing, but I don't have any intention of giving them to the jury.
MR. ADAMS: All right. The only reason we put them in here is because we don't really know your position on liability, so that's one of the primary reasons.
MR. ROGERS: No. No. You guys do. We've admitted it. I just -- I thought we handled that.

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MR. WALL: It was handled in Gallion, I believe, but it wasn't ever really handled in this one. I think there's correspondence from Dan in Gallion, maybe even a stip that's been sent over, but not in Simao.
MR. ROGERS: Yeah. I know that I saw something recently from Ashley about Gallion, but I thought we handled this on Rish a long time ago, maybe in front of the judge.
MR. WALL: Not that I'm aware of.
MR. ADAMS: Not that I'm aware of either.
MR. ROGERS: So she's not disputing liability.
MR. ADAMS: You're not going to dispute liability?
MR. ROGERS: No.
MR. ADAMS: So can we send a stip over or you send a stip over?
MR. WALL: Why don't we just have her prepare one right now?
MR. ADAMS: Will you go do that?
MR. ROGERS: There was something in the language of the Gallion stip that I didn't see it, but I was told that it was too expansive when all we're doing is admitting breach of duty for a

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negligence action, so again, if you would, tell her to keep the language confined to that.
MR. ADAMS: Did we come to agreement on the Gallion one? Did you actually sign one?
MR. ROGERS: I haven't been involved enough in that.
MR. ADAMS: All right. See if we have an agreement on that one and let's look at that one as a sample.
62 and 63 is the complaint and answer. Again, we're not planning on admitting them at trial, but at trial they may come up, so...
MR. ROGERS: All right.
MR. WALL: So we want to hold off on 60 and 61?
MR. ADAMS: Yeah. Well -- yeah.
MR. ROGERS: Yeah. If you guys -- at her depo, I recall that she said, I rear-ended him and I don't have any reason to think he did any wrong, and ever since then -- that was a long time ago -- I've never really pushed liability on this thing.
MR. ADAMS: Right. It pretty much says that in her interrogatories as well. That's why I listed the interrogatories.
Okay. So we've got an issue with the life

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expectancy table we're going to follow up on. Right?
MR. ROGERS: I'll call you. Now that I don't have the settlement conference this afternoon, I can get right on this.
MR. ADAMS: All right. Then we just list all of our demonstratives. I got some over there if you want to see the spine and that type of stuff.
MR. ROGERS: I saw that, but, you know, I just, a couple months ago, tried a case in front of Bell, and she had one curious thing, she admitted the written discovery responses into evidence, and I'm sitting in there thinking, "Hold up. I don't have authority to prove to you that that shouldn't go to the jury, but I'm pretty sure it shouldn't go," because it was just on the fly kind of thing she allowed it in.
But another thing that came up was the opposing party -- and they were right to object to this -- opposed stuff that I was showing on PowerPoint that I hadn't yet cleared with them or gotten admitted into evidence, and if we're -- if we're going to, you know, show some stuff in the PowerPoint in the opening, I just want to make sure that we're doing this clean. I'm not going to do anything that's going to show anything that's

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unpublished or that you guys don't agree with.
My thought is to do what I always do, and that's just to show medical records, show party depo comment, and that's about it here. I won't be able to show photos in the opening or property damage.
MR. ADAMS: We're going to do the same thing except for we're going to have some medical and animations, like cartoons, like we normally do.
MR. ROGERS: I may pull up one of those too.
MR. ADAMS: You know, that describe what procedure it was and that kind of stuff.
MR. ROGERS: Nice.
MR. ADAMS: Got a list? Looks like you got a list.
MR. ROGERS: I do, but it's in a borrowed binder. Okay. Off for a second.
(Discussion off the record.)
MR. ADAMS: One thing. If you look at all our demonstrative exhibits, we're going to show through Google Earth the general area where the accident was, so I don't want you to be thrown off by that. And we're going to make a timeline. I'm sure you will too in your PowerPoint.
MR. ROGERS: Now, while we're waiting on my exhibits, then, let's go through these witnesses. Do

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you have a witness list here, or is this just the documents?
MR. ADAMS: That's just the documents.
MR. ROGERS: See, what I want to do is when we're done here, I want to be able to tell the witnesses -- my out-of-state witnesses, when they can come.
MR. ADAMS: You're not going to be able to do that.
MR. WALL: Except for Wang the 21st.
MR. ROGERS: Right. But the other guys, I'd at least like to say, Look, you know, set aside -- pencil this block of a day or two to get here.
MR. ADAMS: Yeah. Our problem is we're dealing with two orthopedic surgeons and two pain management guys who we're trying to juggle their schedules right now. You're not going to have that detail by today. I can tell you that.
MR. ROGERS: Okay.
MR. ADAMS: McNulty and Grover right now we're just trying to figure out because some are clinic days versus a procedure day. They do not want to come on a procedure day. That's what we're having to deal with right now.
MR. ROGERS: Do you know whether you're

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going to be able to put them on consecutively, or are we going to bounce them out of order just like we've done Dr. Wang, or you're not that far yet?
MR. ADAMS: Not even that far.
MR. ROGERS: Okay. Because I could tell them, "Look, it won't be until the end of the second week."
Do you guys think your case is going to go further than that? Like a full two weeks?
MR. WALL: You know, three and a half hours a day, it's going to take a long time.
MR. ROGERS: Is there any way -- you know how Sturman offered to move this to Villani if he had full days? Is there a judge we can go full days with and not do half days?
MR. WALL: I don't think you can.
MR. ROGERS: This is going to be painfully long.
MR. ADAMS: This is going to be long, but we're getting affected by all of our other trials too. Most of our other trials. Let's put it that way.
MR. ROGERS: I'm not suggesting move the trial date. I'm just wondering is there anybody out there who can us give a full day?

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

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

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

MR. ROGERS: It's a short vowel.

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

MR. ROGERS: Right. See, I have three others -- two others who are out of town. Fish and Skoog. Skoog, you know, is a bit up in the air. Your treaters are certainly getting on. Smith, you know, that's a little bit -- jury's out on that one or the judge, I guess, is a little bit. I imagine Skoog will need to come in at some point.

MR. ADAMS: Winkler you have local. Right?

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

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

MR. WALL: We may not need the defendant.

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

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

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

MR. ROGERS: Lee?

MR. ADAMS: Yeah.

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

MR. WALL: Yeah.

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

MR. WALL: Understood.

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

MR. ADAMS: Oh, really?

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

MR. ROGERS: Sure.

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

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

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

MR. WALL: Right.

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

MR. WALL: Right.

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

MR. WALL: Bryan Lewis sent over a stipulation to dismiss them out, and so I don't know what would be the necessity of her testimony if we're not going to get into that whole thing that it's her car and all the 41.440 stuff.

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

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

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

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

All right, Brice. What did we figure out?

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

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

MR. CRAFTON: It wasn't filed.

MR. WALL: It wasn't?

MR. ADAMS: Okay.

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

MR. ADAMS: Okay.

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

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it's all here. Everything is the same, it looks like, but --

MR. ADAMS: Everything in your exhibits are the same?

MR. ROGERS: Yeah. And there's a little bit more but it's covered -- like there's an Exhibit O, but there's -- I don't see any exhibits attached, and Exhibit O is your medical records, so it's probably -- I'll look through those records.

MR. ADAMS: Will you go across and look at them and copy --

MR. ROGERS: Things are shuffled around a bit because of the order excluding photos and stuff like that.

MR. ADAMS: Have you had an opportunity to look at the questionnaires yet?

MR. ROGERS: No, but I did hear that someone from your office sent an Email saying that someone was dismissed already, and then Kade Baird -- he's a new guy just transferred over from Hall Jaffe & Clayton -- he said that one of those jurors -- how Hall Jaffe & Clayton found out, I don't know, because I don't talk to those guys really socially or anything, but one of those jurors is related to Hall Jaffe & Clayton, and they called Kade and said this

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person called us and, you know, you're over there. That may be a conflict. So there may be another dismissal coming.

Aside from that, though, I haven't looked at them to do like Gloria was suggesting, people we can agree to exclude.

MR. ADAMS: Right. Typically they like to have like somebody we can agree to exclude. Typically for hardship. They like to have that the day before they have to call those people in. These are kind of our notes. This is not everybody, but if we send you over a list later today, can you send us one and we can talk maybe tomorrow and agree upon a list and send it to the court? Because they call them in, and there's no need to call them in on Monday.

MR. ROGERS: What are the reasons, in the day that you were doing it? At this early stage what kind of reasons would you find?

MR. WALL: Travel, child care issues, transportation issues, taking care of -- you know, pretty much what Gloria said. Taking care of sick relatives, things like that. Basically for the questionnaires, anybody that the two sides agreed to we exclude. I didn't even get involved in it.

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Pretty much the same things that you would do once you're in there. If somebody came in and said, I have to pick up my kids at 3:30 and there's no one else to do it and I'm a single parent and there's nobody to watch them, I basically let them go. I let them go.

MR. ROGERS: I wonder if we should get extra alternates too. I mean, if we're going to go into three weeks.

MR. WALL: Yeah. I have no problem getting 8 and 4.

MR. ADAMS: Probably. 8 and 4.

(Exhibit 2 was marked.)

MR. ADAMS: Your list, Page 4.

MR. ROGERS: All right.

MR. ADAMS: A looks like a CV of Fish; B, CV of Wang; C, CV of Winkler; and D, CV of Skoog. You're not planning on admitting those. Right?

MR. ROGERS: Probably not. Just go through it with them. I doubt I'll even show it, but I don't want to foreswear it. I never have. Let me put it that way.

MR. ADAMS: Right, right. Okay. Surveillance footage of Simao. You're talking about the sub rosa?

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MR. ROGERS: Yeah. Right. And I'll be mindful of that discussion we had with the judge where -- what did she want again?

MR. WALL: Well, she wanted you to send it to her.

MR. ROGERS: I did, but I haven't heard from her.

MR. WALL: But she -- her order was that it's not to be mentioned, at least until the end of Direct of the plaintiff, at which time she would entertain arguing on whether and how it impeached his testimony.

MR. ROGERS: Okay.

MR. ADAMS: So I guess we'd object.

MR. ROGERS: Hold up just one second. I thought she was going to look at it and give me an answer as to whether we needed to go that far.

MR. ADAMS: Well, that -- that's -- no. Because she said it wasn't to be mentioned. Because I mentioned opening statement and things like that, and she said it wasn't -- it's not to be mentioned until after Direct, and then it's because it's for impeachment purposes only, and so she would take up the issue of whether it impeaches his testimony in any way after his Direct, but she did want to see it.

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

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

MR. WALL: Okay.

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

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

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

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MR. ROGERS: Okay.

MR. ADAMS: G.

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

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

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

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

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

MR. ADAMS: Okay.

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

MR. ADAMS: Okay. H is all documents produced by plaintiffs, including all pleadings and those attached to the deposition transcript. So same principle with that?

MR. ROGERS: Right.

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

MR. ROGERS: Yep.

MR. ADAMS: Okay.

MR. ROGERS: Oh, the reports.

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

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

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

MR. ROGERS: Okay.

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

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

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MR. ADAMS: The life expectancy table?

MR. ROGERS: That's what I meant.

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

MR. ROGERS: Yeah.

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

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

MR. ROGERS: Admit them.

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

Q, we objected because it was excluded.

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

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

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

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

MR. ADAMS: How is our slip coming?

MR. WALL: Right there.

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

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

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

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

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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 and 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

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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.

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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

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

MR. ROGERS: Okay.

MR. ADAMS: Do you want to do that?

MR. ROGERS: Let's go off for a second.

(Discussion off the record.)

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

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

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

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

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

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

MR. ADAMS: I'm just telling you selfishly.

(The proceedings concluded at 12:04 p.m.)

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CERTIFICATE OF REPORTER

STATE OF NEVADA)
SS:
COUNTY OF CLARK)

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

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

KELE R. SMITH, CCR NO. 672

003003

EXHIBIT "2"

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

Plaintiffs,

vs.

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

Defendants.

Case No. A539455
Dept. No. X

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

APPEARANCES:

For the Plaintiffs:
JOHN E. PALERMO, ESQ.
Aaron & Paternoster, Ltd.
2300 West Sahara Avenue
Suite 650
Las Vegas, Nevada 89102

For the Defendants:
STEPHEN H. ROGERS, ESQ.
Rogers, Mastrangelo, Carvalho & Mitchell
300 South Fourth Street
Suite 710
Las Vegas, Nevada 89101

I N D E X

E X H I B I T S

(Thereupon, Rule 30(b)(4) was waived prior to the commencement of the deposition proceedings.)

Thereupon --

WILLIAM SIMAO

was called as a witness by the Defendants, and having been first duly sworn, testified as follows:

EXAMINATION

BY MR. ROGERS:

Q. Would you state your name, please.

A. William J. Simao.

Q. Now, you were present for your wife's deposition yesterday; right?

A. Yes.

Q. And you heard the ground rules that I gave her before the deposition began. I will repeat the most important one, and that is that the oath that you just took carries the obligation to tell the truth and the penalties if you do not. Do you understand that?

A. Yes.

Q. Is there any reason that you would be unable to testify truthfully?

A. No.

Q. Well, did you review any documents in

preparation for your deposition?

A. Just the one -- I guess it was some deposition that I gave a while back.

MR. PALERMO: Interrogatories?

THE WITNESS: Yes.

BY MR. ROGERS:

Q. Let me show them to you and tell me if this is it. Was it this document?

A. Yes, I believe it was.

Q. And you just looked at your answers to interrogatories. We will attach a copy of these as Exhibit A.

(Defendants' Exhibit A was marked for identification.)

BY MR. ROGERS:

Q. Did you review any other documents?

A. I did not.

Q. Do you have any changes that you would make to your answers to interrogatories?

A. I would have to read through it. I don't believe so, no.

Q. Did you read through all of your answers to interrogatories today?

A. I did not.

Q. When did you?

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003004
003004

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A. A couple of days ago.
Q. And when you read through all of them, did you see anything that you thought was wrong?
A. I did not notice anything, no.
Q. Just as we did in your wife's deposition yesterday, I will go through some of your background to begin with.
Where do you live now?
A. Henderson, 121 Bear Coat Court.
Q. How long have you lived at the Bear Coat Court address?
A. Almost two years.
Q. Where did you move there from?
A. I moved there from Las Vegas -- I cannot remember the address I was at.
Q. You cannot remember?
A. No. I know it is Jewel Canyon or something.
Q. How long did you live in the Jewel Canyon address?
A. Like four years; somewhere around there.
Q. And is that Jewel Canyon address the first place you lived in the Las Vegas area?
A. Yes.
Q. And you moved there from Modesto?

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A. Yes.
Q. How long did you live in Modesto?
A. Probably maybe 15 years; somewhere around there.
Q. And did you move to Modesto from San Francisco?
A. San Francisco.
Q. Is that where you were born?
A. Yes.
Q. What is your date of birth?
A. May 8th, 1963.
Q. Have you been married to anyone other than to Cheryl?
A. I have not.
Q. Your children are William and Amanda, ages 22 and 19?
A. Yes.
Q. Do you have any other children?
A. I actually do.
Q. What is your other child's name?
A. It would be Justin. His last name is Ekliederger.
Q. How do you spell that?
A. I guess it would be E-k-l-e-d-e-r-g-e-r.
Q. How old is Justin?

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A. He will be 25.
Q. Where does Justin live?
A. I believe Santa Rosa right now.
Q. Was Justin born before you married Cheryl?
A. Yes.
Q. And when did you marry Cheryl, again?
A. 1984, November 2nd.
Q. What is your highest level of education?
A. Proficiency.
Q. Does that mean a GED?
A. It is kind of like it, yes.
Q. How far did you get in high school?
A. Part of the 11th grade.
Q. And did you go to work right after leaving high school?
A. I did.
Q. What kind of work?
A. Flooring related. Different things like installation, helper, sales, all different aspects of it.
Q. Have you worked in some capacity in the flooring industry since leaving high school?
A. I have.
Q. Have you gone to any kind of trade

Page 8

schools?
A. I have been to different classes for different things. I have a contractor's license, so I went to school for that and different things with the flooring trade.
Q. Do you have a contractor's license here in Nevada?
A. I do not.
Q. Where did you have the license?
A. California.
Q. When did you get it?
A. I do not recall.
Q. And what trade did you have the license in?
A. Flooring.
Q. Have you ever been convicted of a felony?
A. I have not.
Q. You're a licensed driver here in Nevada?
A. Yes.
Q. Has your driver's license ever been suspended or revoked?
A. It has not.
Q. Have you ever served in the military?
A. I have not.
Q. Now, I saw from your answers to

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003005

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interrogatories that on the date of the April 2005 incident you were employed in a company that you owned called Americlean?
A. Uh-huh.
Q. Is that a yes?
A. Yes.
Q. And your answers to interrogatories read that you were a silent partner at Americlean from March of 2005 to September 2007 when you became an owner?
A. Yes.
Q. What is the difference between an owner and a silent partner?
A. I did not own it at that time.
Q. So this was not the kind of partnership that had equity?
A. I do not understand the question.
Q. Well, in many businesses when you're a partner in a business you own a piece of it. You have an equity interest in it. So up until September 2007 you did not own a piece of Americlean?
A. I did not.
Q. What were your job duties as a silent partner?

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A. To run the company.
Q. Does that mean something like a management position?
A. Yes.
Q. Was that your job title there? Were you the manager at Americlean?
A. I guess, yes.
Q. Was that a salaried position?
A. Yes.
Q. Did you earn commissions also?
A. No.
Q. What was your salary as a manager or silent partner?
A. I believe at the time it was $1,000 a week.
Q. And was that your rate of pay from March 2005 through September 2007?
A. Through September 2007?
Q. When you became the owner.
A. Honestly, I'm not sure when it changed, but I do make a little bit more now, yes.
Q. Well, did your income change before you became an owner or did it remain the same until that point?
A. I believe it changed before.

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Q. Who was the owner when you were the silent partner?
A. That would be Steve Chesin, C-h-e-s-i-n.
Q. Is Mr. Chesin still an owner of Americlean?
A. No.
Q. You're the sole owner?
A. Yes.
Q. Was Mr. Chesin the sole owner before you?
A. I believe so.
Q. And then you bought the company from him?
A. Yes.
Q. And you said that you make more as an owner than you did as a silent partner. How much do you make as an owner?
A. Now, my salary is $1,250 a week.
Q. Do you make more than just a salary since you're an owner?
A. No.
Q. Is this a franchise?
A. No.
Q. What happens if Americlean has more income than it pays you? What happens to that money, say in December at the end of the year?
A. If and when it happens, I will find out.

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I would imagine -- I would imagine it would be taken out in dividends or however it works. I'm not sure. I have somebody who helps me with it. Put it at this point, with the economy --
Q. It is sort of academic right now?
A. Yes. Absolutely.
Q. Have you noticed a downturn in business lately?
A. Yes, a little bit.
Q. Are you making less in salary today than you did say a year ago?
A. No.
Q. Is this person who handles the finances there an office manager or is it someone who is independent of the company?
A. No. My daughter puts everything in. Whatever program she uses, takes care of all of that, and then I take it in at the end of the year. Sometimes I have someone come in and look at it, so I bought the company so I'm not really sure.
Q. You have not even had a full tax year with that company; right?
A. Right.
Q. How many people do you employ?
A. Right now, two -- well, three.

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003006

003006

Q. Full time?
A. Yes.
Q. What are their names?
A. That would be myself, my son, William, Jr., and Amanda.
Q. Your daughter?
A. Yes.
Q. And all three of you work full time?
A. Yes.
Q. How much did you buy the company for?
A. I don't recall.
Q. But that information would be in the corporate records?
A. Absolutely. Yes.
MR. PALERMO: Is there a lot of relevance to this?
MR. ROGERS: Only later I will get into whether there is a lost income or lost opportunity claim, and I don't know yet whether there will be.
BY MR. ROGERS:
Q. Did you employ more than you and your son and your daughter at the time of the April 2005 accident?
A. Yes.
Q. Who did you employ at that time?

A. Michael Duncan would be one, I believe at that time, but I'm not sure, Eduardo Gonzalez. I'm not sure about that, though.
Q. And why doesn't Mr. Duncan work for you anymore?
A. Because I do not need him, probably.
Q. Did your son or daughter replace either of those two former employees?
A. No. Actually he was working there when both of them were still working there.
Q. Was Amanda?
A. I'm not sure. Because I did have someone else in the office before Amanda.
Q. So Amanda replaced someone who was doing basically the same job?
A. Yes.
Q. When did William start working for Americlean?
A. I'm not sure.
Q. But you do know it was before the car accident?
A. No, I'm not sure about that.
Q. All the dates of employment and all of your employees' records will be in the corporate records?

A. I guess. I have records of everything.
Q. Is Americlean a corporation?
A. Yes.
Q. What kind of a corporation?
A. I believe it is an S-corporation.
Q. And you're the sole owner of it?
A. At that time, yes.
Q. Are you seeing a change in that in the near future?
A. No.
Q. Where did you work before March 2000?
A. At Carpets and More.
Q. What did you do there?
A. Salesman.
Q. What were your dates of employment there?
A. From when we moved here in 2002 until we went over to take over Americlean.
Q. Why did you leave Carpets and More?
A. Opportunity of the cleaning business.
Q. Do you make more with Americlean than you did with Carpets and More?
A. I probably do, yes. Carpets and More was commission so --
Q. At Carpets and More did your job duties include labor?

A. No.
Q. I will shift gears now and get into some other stuff. We may talk more about employment in a little bit. Have you ever had an on-the-job injury?
A. I have.
Q. When and where?
A. When -- it would be 23 or 24 years ago, and it was a company called California Beverage Company.
Q. What kind of injury did you sustain?
A. I think I pulled like a muscle in my lower back.
Q. So your wife mentioned this yesterday. How did you sustain that injury?
A. Trying to move a keg, a keg of beer.
Q. Did you have any medical treatment?
A. I believe -- I know they sent me to a chiropractor, and I was off work for a couple of weeks. I'm not sure how long.
Q. How long did you treat with the chiropractor?
A. I'm not sure, honestly. It was a long time ago. I would say, if I had to guess, I would say at least a couple of months, two or three months. I'm not sure.

Q. Did you treat with any medical providers other than a chiropractor?
A. I do not remember.
Q. Did you make any workers' compensation claim?
A. I don't understand the question. The workers' compensation claim would be -- did I get paid while I was off the job?
Q. That would be part of it, yes. There are all sorts of claims that can be made in the guise of workers' compensation that can be simple reimbursement of medical expenses. It could be payment for time off. It could be a disability rating like a permanent partial disability or a total disability. It could be all sorts of things like that.
A. So would it be the weekly check that I would not get while I was working?
Q. Well, if you did not get reimbursed for it, that probably suggests that you did not make a claim?
A. I still do not understand. Now, what I'm asking is while I was off work, I do believe that I received a check. I don't know who it was from. I'm not sure. I don't think this was from the

company. It could have been from workmen's comp or disability. I do not know. So, no. Did I make a claim, no. Other than the time I was off, I received like a portion of what I used to get paid, yes.
Q. Have you ever made a workers' compensation claim?
A. I have no idea.
Q. Have you ever been involved in a personal injury claim?
A. I have not.
Q. Have you ever been involved in a lawsuit other than this one?
A. Personal injury?
Q. Any kind.
A. I have.
Q. For what?
A. For my home.
Q. What happened?
A. There was a class action defect.
Q. What was the defect?
A. There were a lot of them.
Q. Was this in this Jewel Canyon home?
A. It was.
Q. And did that lawsuit go to trial or did

it settle?
A. I believe they settled.
Q. Was the settlement a repair of your home or was it a cash settlement?
A. It was a cash settlement which did not cover the repairs that were needed for the home.
Q. Have you settled with a company for a claim of any kind other than this construction defect claim?
MR. PALERMO: Objection; vague and ambiguous as to form.
You can answer.
THE WITNESS: No.
BY MR. ROGERS:
Q. Now, I want to talk about other car accidents you have been involved in. Your answers to interrogatories mention a motorcycle accident in 2003. We will get to that in a moment.
Have you been in any motor vehicle accidents other than the April 2005 accident and the 2003 motorcycle accident?
A. I have.
MR. PALERMO: I was going to say the time frame before or after?
MR. ROGERS: Just any.

MR. PALERMO: Then I will issue an objection. Overbroad, vague and ambiguous as to form.
But you can answer.
THE WITNESS: Yes, I have.
BY MR. ROGERS:
Q. Okay. When?
A. I will guess, but I'm probably pretty close. May 22nd of this year.
Q. What happened?
A. I was driving down the freeway. There was a car in front of me, a car in front of the car in front of me, and a truck pulling a trailer, and the tire popped off of the trailer and flew across the road and then the three of us went to stop and -- I do not believe that the car in front of me hit anyone, but I stopped and barely touched it to the back of their car.
Q. So you rear-ended the vehicle in front of you?
A. I did.
Q. Has anybody made an injury claim from that accident?
A. No.
Q. Did you sustain any property damage?

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A. No, none at all whatsoever. Not a dent. Not a ding, no.
Q. Any other car accidents?
A. No.
Q. Let's discuss the 2003 motorcycle accident. Your wife said it happened there on Sunset and Sunset. Describe what happened?
A. Sunset and Sunset, it is where -- going east on Sunset -- I believe it is Sunset Way and Sunset, but anyway, it turns to the right to go down the hill towards the mall and continued to be Sunset, and there is -- as you turn to the right there is a curb. On your left-hand side, there is like a turn lane; it is kind of hard to explain, but when I went to go around the turn, there was a little white pickup and it started coming over to my lane, and I was -- I was not going too fast, I do not think, but I popped up onto the curb, and got the bike almost to a stop and then laid it down.
So it is still on that curb right there where the turn lane is.
Q. Did you lay it down on the sidewalk or on the street?
A. Yes. On the sidewalk. I did not let it get to the street, no. There is like an island in

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the center.
Q. Right. Like a designated right turn lane with an island on the left side of it?
A. Yes.
Q. Did your bike end up on the island or on the sidewalk?
A. It was on the island, because I was in the left turn lane. There are two lanes there, and I was on the left lane, so I popped up onto the curb and then just kind of laid it down.
Q. Your wife mentioned some kind of injury. What was it?
A. My elbow.
Q. Which elbow?
A. My right elbow.
Q. So you were turning right in the left of two right turn lanes?
A. Yes.
Q. And a vehicle in the right of the two right turn lanes merged into your right-of-way?
A. Yes.
Q. And to avoid that vehicle you went up on the island to your left?
A. Yes.
Q. And you laid your bike down on the

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island?
A. Yes.
Q. What kind of right elbow injury did you have?
A. When I laid it down, it was still sliding forward and like a rock, piece of gravel went into my arm.
Q. It was just embedded up there?
A. Yes. I mean, it was not real deep. You can only go so deep, because the elbow -- it kind of ripped it open.
Q. Any other injuries?
A. I might have had a scrape or two on my arm. I probably did, but no, that was it.
Q. And your wife mentioned someone on the bike with you?
A. My daughter, Amanda.
Q. Was she injured?
A. Her elbow.
Q. Right elbow?
A. Right elbow, yes.
Q. What injury did she have?
A. It is about the same as mine, because when we went down onto the ground, we slid a little bit, probably half a foot or a foot, so I think she

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picked up a rock or a little bit of gravel that, you know, kind of gravel and a cut.
Q. And you underwent some treatment for it?
A. I went to -- just went to the Urgent Care, and they cleaned my arm and Amanda's arm, and that was it, I believe.
Q. How did you get to the Urgent Care?
A. I think Cheryl took us.
Q. Did you drive your bike to your house?
A. I did not. I do remember -- we were right there on Sunset and the Harley-Davidson dealer. It was about a block and a half down from where it happened, so we did get back on the motorcycle and ride it, and I believe I left it there for them to look at it, because the front fender was -- the front fender had scraped the ground when it went down, and Cheryl picked us up from there.
Q. So far as far as motor vehicle accidents are concerned, I know of three, the 2003 motorcycle accident, the accident with my client on April 15th, 2005, and then the May 2008 incident on the freeway. Are there any other motor vehicle accidents?
A. In my whole life?
Q. Yes.

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A. There is one where I was pulling my boat. I had a pickup truck pulling my boat. This was probably 25 years ago, and as I was going across the street, a car -- I cannot remember if they pulled out of the gas station, I believe, and as I was going down the street, they hit the boat and knocked it off of the trailer. It did not hit the vehicle or anything. I think that is the only other accident I have been in.

Q. Have you been involved in any other kinds of accidents, meaning nonmotor vehicle accidents in which you sustained injury? And by that I mean, you know, a fall or a sports incident, anything like that where you had medical treatment afterwards?

MR. PALERMO: Object. Vague and ambiguous as to form.

You can answer. Compound.

THE WITNESS: I have not.

BY MR. ROGERS:

Q. Who was your family doctor on the date of this car accident with my client?

A. I believe it was Britt Hill.

Q. I want to discuss conditions that you had prior to the car accident. Your wife mentioned migraines. We deposed Mr. Hill the other day, and

he did as well. Did you have any other prior conditions for which you were undergoing medical care?

MR. PALERMO: Objection. Vague and ambiguous as to form.

You can answer.

THE WITNESS: High blood pressure and high cholesterol.

BY MR. ROGERS:

Q. After moving to Las Vegas in 2002, did you treat with medical providers for any reason other than migraines, high cholesterol, and high blood pressure?

A. I do not believe so.

MR. PALERMO: Pursuant to; prior to the accident; right?

MR. ROGERS: No. Any time since 2002.

MR. PALERMO: Including the treatment for the accident?

MR. ROGERS: You're right then. It would be between the accident and moving here.

BY MR. ROGERS:

Q. The answer is still the same?

A. Yes, I do believe so.

Q. And have you ever undergone surgery?

A. Before the accident or --

Q. Let's start with before the accident?

A. I don't believe I have.

Q. And since the accident?

A. I have been to like injections and stuff, if those are -- I think they considered those like minor surgeries.

Q. Did you treat with a chiropractor at any time before the accident other than that two or three months for low back pain?

A. I did not.

Q. What were your injuries from the accident?

A. The back of my head, my neck, and my shoulder, my left shoulder.

Q. Now, as you were saying left shoulder, you were pointing to this muscle that runs between your neck and your shoulder. Is that the trapezius? Have you ever heard that word before, the "trapezius"?

A. I have not. No. Not that I recall, no.

Q. Is that the location of the pain, is right there between the neck and the shoulder?

A. Actually, no. Actually, it starts down in my shoulder down here and goes up to like the

back of my head.

Q. So right on the back of your left shoulder and then goes up to about the base of your skull on the left side?

A. Yes. It was kind of more on the side almost on the top than on the back, because it was like the side of my neck and to -- like the back of my head here.

Q. I'm trying to clarify for the record where you're pointing to, and tell me if I'm getting it right. You're pointing primarily to the -- the area I would say, basically, from the back of your shoulder, the shoulder blade, up to the base of your skull on the back left side?

A. Right. And that is the shoulder pain.

Q. Have you ever injured the back of your head, your neck, or your left shoulder before the car accident?

A. No.

Q. Did you ever have pain in the back of your head before the car accident?

A. Not that I recall, no.

Q. When you had migraines, where did you feel them?

A. Migraines were up under like the front

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part of your face, your eye, your forehead. Mostly on the left side, on one side. I had had them on the right before.

Q. Pardon me?

A. I have had them on the right side before, migraines.

Q. Had you ever had neck pain before the car accident?

A. I have not.

Q. Had you ever had pain in the left shoulder area before the car accident?

A. I have not, no.

Q. Let's talk about the car accident. As I understand it again, it happened on April 15th, 2005, somewhere right around 3:00 o'clock?

A. Yes.

Q. Where were you driving from and to?

A. I was driving from up north. I had just stopped by -- one of the guys that worked for me, just stopped on a job to see how he was doing, and he was actually just finishing up, and then I was on my way home. That would be Michael.

Q. And your answers to interrogatories, describe the traffic as stop and go. When you said stop and go, did you mean literally stopping or did

you mean simply slow traffic?

A. No, it was stopping.

Q. And this happened around the Sahara off-ramp; right?

A. I do not believe so. I think it was Cheyenne.

Q. You're right. So which lane were you in?

A. I guess it is a number one lane.

Q. Is it the fast lane?

A. The fast lane, yes.

Q. So you're going in this stop and go traffic. How long was traffic stopping and going before the accident happened from the time you got on the freeway?

A. I believe I had just got on the freeway maybe a couple of exits before. I'm not sure. Basically that is where it had congested at the area where I was stopped.

Q. But was it stop and go traffic from the moment you got on the freeway.

A. I do not recall, honestly. I don't remember.

Q. But you get on the freeway roughly a couple of exits before the area where the accident happens. You get over to the fast lane and then for

some time it is stop and go traffic, and then the accident happens; right?

A. I do not remember. I do not recall.

Q. You do not remember how long a time it was stop and go?

A. Stop and go; right.

Q. It sounded like you wanted to jump in and say something.

A. I do not remember if I had just stopped or it was stop and go. I do not even have an idea. I would just be guessing.

Q. Were you stopped when the accident happened?

A. Yes.

Q. How long were you stopped? Was it a split second or was it something longer than that?

A. No. It was a little bit longer than that.

Q. A few seconds?

A. I do not know. I would say yes. It would have been a few seconds.

Q. And did you have to come to a quick stop because of traffic in front of you or was it all going slow that nobody was moving quickly to begin with?

A. It was going pretty slow.

Q. So it was not as if you just drove up on a line of stopped cars and stopped and then got rear-ended? Traffic was already --

A. I believe it was.

MR. PALERMO: Let him finish his question.

THE WITNESS: I'm sorry.

BY MR. ROGERS:

Q. The end of it was simply that traffic was already slow, and you were in the slow part of it before the accident happened?

MR. PALERMO: Objection as to form. Vague and ambiguous.

You can answer.

THE WITNESS: I believe when I got on -- and I'm not even positive. You can see that it slows down ahead of you, so I slowed and I slowed to a stop, and I did -- I sat there a couple of seconds, and then the car hit me.

BY MR. ROGERS:

Q. Were you aware that you were going to be hit before it happened?

A. No.

Q. You did not hear any brakes or anything

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like that?
A. No.
Q. Did you have your radio on?
A. I do not remember. But no, I don't listen to loud music. I listen to news radio.
Q. So do you know if your windows were down?
A. I don't remember.
Q. But you do not think there was loud noise inside of your van just because you don't listen to --
A. I don't believe so, no.
Q. Was your van pushed forward as a result of the accident?
A. I believe it was, yes.
Q. Did your van hit the car in front of you?
A. It did not.
Q. You do not know how far forward your van was you pushed in?
A. I have no idea.
Q. Was there anymore than just the one impact?
MR. PALERMO: Objection. Vague as to form.
You can answer.
BY MR. ROGERS:

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Q. In other words, did your vehicle hit anything other than -- well, did it hit anything at all?
A. No.
Q. So there was the rear-end impact and no other impacts?
A. And no other impact.
Q. Did your seat break upon impact?
A. The vehicle seat?
Q. Yes.
A. No.
Q. Were you seat-belted?
A. Yes.
Q. Was the van equipped with air bags?
A. No. It did not come out. That is why I am saying no. So I don't think so. I do not believe it was.
Q. Do you wear glasses?
A. No.
Q. Were you wearing a hat when this happened? Anything on your face or your head?
A. No.
Q. Now, when the accident happened, did anything fly off the seat?
A. Yes.

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Q. What was it?
A. I imagine it would have been like the clipboards or -- normal stuff that I carry, soda spilled. Different papers or whatever was laying on the seat that leaked fluid all over.
Q. Did you have a soda in -- like a cup holder in there?
A. Yes.
Q. Was it like this, like a cup you would buy at a convenience store and fill up at a fountain or was it like a can of Coke?
A. No. It was a cup.
Q. It did not have a top on it then?
A. No, it did not.
Q. And it spilled?
A. It flew out of the cup holder, yes.
Q. Did your body hit anything inside of the car?
A. Yes.
Q. What?
A. There is a cage -- or I call it a cage. There is a cage behind the driver's seat that is steel.
Q. Actually, I want to get into that. What I meant was any part of your body other than your

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head hit anything in the car?
A. I think I hit my arm on the steering wheel. I do not remember.
Q. Which arm?
A. I believe my left hand and I hit my right elbow on the cage, but it was not bad when I hit my elbow, really.
Q. Any other part of your body hit anything in the car?
A. I do not believe so.
Q. You were talking about your head. You said that you hit the cage behind your seat; right?
A. Yes.
Q. How tall are you?
A. Six-six.
Q. And is the seat in that van equipped with an adjustable headrest?
A. No.
Q. That headrest does not go up higher than your head?
A. I don't believe it does. I believe it probably comes right about here.
Q. So below the base of your skull, right about the middle of your neck?
A. Probably.

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Q. How far behind the headrest is the cage?
A. It is directly — the seats are -- the seats are almost up against them by just a fraction of an inch.
Q. And I think your wife said that there was something like a plastic sheet or a Plexiglass sheet across the cage. Was she right?
A. Sort of. There is -- are you familiar with the cages?
Q. No.
A. Or do you want me to start from the beginning?
Q. Go ahead.
A. It goes from the floor to the ceiling from side to side of the van. It covers the whole thing. I'm not sure on that. There is -- sometimes there is a door in the middle. I'm not sure if that one has one or not, because all of the vans I have had those. But there are holes in part of it and parts of it are solid.
And by holes, I mean, so you can actually see through. So if I look in my rearview mirror in the center there are holes about the size of 50 cent pieces, probably two and a half feet by two and a half feet, three foot, so if you look in your

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rearview mirror you can actually see all through the holes.
The air conditioning does not work so good with those holes and a big van like that, so you put Plexiglass on it, so there is Plexiglass anywhere where those holes there.
Q. Are there holes in that portion of the cage that your head struck?
A. I don't know.
Q. Well, where your head struck, is there a plastic surface or a steel surface?
A. I believe it would be steel. I would have to see it, though. I believe it would be steel, but it would be where the plastic is. It is bolted to the steel.
Q. And is the steel a solid sheet or is it like woven threads of steel?
MR. PALERMO: Objection. Vague and ambiguous as to form.
You can answer.
THE WITNESS: It is a solid sheet of steel.
BY MR. ROGERS
Q. So it does not look like a steel fence around a construction area?

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A. No.
Q. Were you knocked unconscious in this accident?
A. Not unconscious, no.
Q. Were you dazed or stunned?
A. I was.
Q. Were you able to get out of your van without assistance?
A. I sat there for probably -- I don't know, three or four or five minutes before I got out.
Q. Were you bleeding?
A. I don't remember. Not from the head. I'm not sure if my elbow was or not.
Q. Well, did you sustain any cuts?
A. I do not remember.
Q. Any bruises?
A. I believe I had bruises on my right arm.
Q. Where?
A. Up above where the elbow is right here.
Q. Were you seated in some position other than just looking straight forward when this accident happened? Do you know how you are sitting in your car and your back is to the seat back, and you have your hands on the steering wheel, is that how you were sitting when this accident happened?

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MR. PALERMO: Objection. Compound as to form. Vague and ambiguous.
You can answer.
THE WITNESS: I do not remember.
BY MR. ROGERS:
Q. I am just trying to figure out how your right elbow got behind the seat to the cage?
A. No. I mean, I understand exactly what you are saying. Well, the seats are only as wide as I am. The cage is three inches behind the seat. So it is just sitting on the seat, if you put my elbow back, it would hit it just sitting on the seat.
Q. You mean like if your forearm was rested on the armrest, your elbow would be close to that cage?
A. Yes.
Q. Is there an armrest on that driver's seat?
A. I'm not sure.
Q. Well, I was wondering if maybe at the time the accident happened you were turned in your seat and maybe doing something with paperwork or getting the drink from the cup holder or turning the radio dial, something that would have moved your right elbow away from the seat?

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A. I do not believe so.
Q. You believe you were just looking straight forward?
A. I believe I was. I will try to elaborate on that. I know I do not answer a lot of questions, because I cannot even think. If I had an arrest, I could have been stopped and sitting there and like leaning my chin on my arm or something like that. And I honestly do not recall.
Q. Well, it is fine. If you do not recall, that is an appropriate answer. But if at any time you feel like, hold up, maybe -- there is this thing that I did not tell you, just jump in and say so. Okay?
A. I just did. Absolutely.
Q. Now, did you move your van from the area of the accident before the police arrived?
A. I do not remember.
Q. And tell me if this might jog your memory. You said you were in stop and go traffic, you were in the fast lane. Was there a shoulder to your left, a space there in which you could pull your car and get out of traffic?
A. I do not remember. I honestly do not remember. I don't know.

Q. I will tell you what the police officer wrote. Maybe this will jog your memory. It says that vehicle 2, and that is you, slowed down to a complete stop due to congested traffic. Vehicle 1 failed to decrease the speed and struck vehicle 2's rear. And then it says both vehicles were moved prior to NHP, Nevada Highway Patrol, arrival.
Do you remember now moving your vehicle before the highway patrolmen appeared?
A. I do not.
Q. Now, before the deposition began, I asked if you had any photos of this van that was involved in the accident. I believe you said you did not, but that you still have the van; is that right?
A. Yes.
Q. However, that van has been repaired?
A. Yes.
Q. Has it been involved in any accidents other than the April 2005 accident?
A. The one that I told you about, yes.
Q. In May 2008?
A. Yes.
Q. But that the damage from the May 2008 accident was to the front of the van; right?
A. There was no damage.

Q. That is right. But the impact was at the front?
A. Yes.
Q. And the damage to the van as a result of the April 2005 accident was to the rear?
A. Yes.
Q. And your counsel has produced an invoice for repair of your van from Frank's Auto Body. Is that where it was repaired?
A. Yes, I believe so.
Q. And the invoice was for $577.64. Is that what it cost to repair the van?
A. I have no idea.
Q. The repair was paid for by an insurance company, Liberty Mutual?
A. Yes.
Q. Did you pay for it?
A. No.
Q. The Liberty Mutual check was paid to you, which made me wonder if you had paid for it and then got reimbursed?
A. No. I believe I just gave them a check from the insurance company?
Q. And the check is dated June 28th of 2005, and the invoice is June 27th. So was the van

repaired on the 27th or 28th of June?
A. I do not remember.
Q. Roughly a couple of months after the accident?
A. I honestly do not remember.
Q. Were you able to drive the van before having it repaired?
A. Yes.
Q. Was the damage to the van, did it affect the mechanics of it or was it a cosmetic damage like to the bumper?
MR. PALERMO: Objection. Vague as to form and compound.
You can answer.
THE WITNESS: It was to the bumper and the back door.
BY MR. ROGERS:
Q. Did the repairs fix all of the problems or were there problems that were not repaired?
A. At first there was a problem that was not repaired when I went to pick up the vehicle. They had not fixed the back door. I guess they just replaced the bumper. They did not do any work to the back door, so they actually kept it an extra day or two and it did not work.

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Q. And then after they did that follow-up work, was all of the damage repaired?
A. Yes. I believe it was, yes.
Q. So let me get back to that earlier question. The van was drivable between the date of the accident and the date that it was repaired?
A. Yes.
Q. Who referred you to Frank's Auto Body?
A. I do not know.
Q. Did you know the folks over there?
A. No.
Q. So it was like an insurance company?
A. It was probably Liberty Mutual.
MR. PALERMO: Is this a good time for a break.
(Off the record.)
BY MR. ROGERS:
Q. Let's go back to the car accident scene. You said that you stayed in your car for a few minutes and then you got out. What did you do when you got out?
A. I went back to see if the other people were okay.
Q. And what did you find out when you went back there?

A. That they were okay.
Q. Who did you talk to?
A. The driver of the vehicle.
Q. Anybody else in the vehicle?
A. Yes. There were a few people in the vehicle.
Q. Right. I mean I know there were. There were I think a total of six people in there, but did you talk to anybody else in there?
A. I don't believe so.
Q. What all did you discuss with the driver?
A. I think I just asked them if they were all right. That was it.
Q. Did they say anything to you like to apologize? Anything? Did you discuss anything else?
A. I do not remember.
Q. And then after talking with the driver, what did you do?
A. I think I went back to my vehicle.
Q. And did you get back in it or just stand there and wait?
A. I'm not sure. I'm not sure.
Q. Well, did it take a long time for the police to get there?

A. I don't know how long it took. It did not seem like a long time. I guess it always does. I'm not sure how long it took, though.
Q. What kind of a vehicle was the policeman driving? Was it a motorcycle or a car?
A. I don't recall. I don't remember.
Q. Do you remember talking to the police officer?
A. Absolutely.
Q. What did you discuss?
A. Actually, I was sitting in my van, and he came up to the window and I think he asked if I needed to make a report, and I think he actually said, No, not really, and I guess he had gotten the report from him. I am not sure. That is kind of what I remember, but I'm not sure. I'm not positive.
Q. Did the policemen ask if you were injured?
A. They did. There was an ambulance there too. They asked me if I wanted to go in the ambulance, and I told them no.
Q. Who got there first, the paramedics or the police?
A. I'm not sure. It could have been the

paramedics.
Q. And did the paramedics tend to anybody in the car?
A. I don't believe so.
Q. Did you discuss anything with the police officer that you have not told me about?
A. I do not remember.
Q. And did you have any discussions with the folks in the car that was behind you other than what you have told me?
A. I do not remember.
Q. Did anybody in that other vehicle get out or did they all remain inside?
A. I'm not sure. I know they were not out when I walked back to see if they were okay. They were all inside. I believe so.
Q. Well, did you experience pain while you were there at the accident scene?
A. Yes. I had just hit my head, yes.
Q. Anywhere other than to your head?
A. I believe my elbow.
Q. And what did you do after the policeman was done with his work?
A. What do you mean?
Q. Well, you did not take an ambulance, so

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you drove from the scene?
A. Yes.
Q. Where did you go?
A. I'm not sure if I went home or if I met my wife at the Urgent Care. I'm not sure.
Q. The Southwest Medical Associates' record, on the date of the incident, reflects that you arrived there at 6:36 p.m., and according to the police, the car accident happened at 3:00 o'clock p.m. Does that three and a half hour difference tell you when you drove home?
A. It tells me that I probably went home and waited for my wife to get home from work.
Q. What time did she normally get home from work?
A. I believe at that time it was between 5:30 and 6:00. She starts earlier now and gets off earlier now.
Q. Now, at the Urgent Care, the note reads that your chief complaint when you went there was left elbow pain and tenderness in the back of his head.
So far today you have told me that you thought it was your right elbow?
A. Yes. I remember.

Q. Does this entry here a typo or might it have been your left elbow?
A. It could have been my left elbow. Absolutely.
Q. And it says here that you were seat-belted and that is true; right?
A. Yes.
Q. And there was no air bag deployment?
A. No.
Q. You already said that was true. There was no glass breakage, it says; is that correct?
A. No. No, there was no breakage.
Q. What did the folks do for you there at the Urgent Care?
A. On the first visit?
Q. Yes.
A. Basically, they would not even listen to me.
Q. What did you say that they did not listen to?
A. I told them that my head hurt, the back of my head, and I had pressure in the back of my head, and that was it. That is what it seemed like to me, that they did not listen. They did not do any tests or do anything or even go any deeper with

that except for writing down my complaint.
Q. Now, the records here reflect that X-rays were taken of your neck and left elbow. Do you remember that?
A. On that first visit?
Q. Yes. On April 15th.
A. No, not really. I remember taking X-rays. I do not remember if it was during that visit or a different visit. I had a lot of X-rays since then. And at that time the back of my head hurt, and I had pressure on the back of my head.
Q. It says here that the current medications that you were taking in April of 2005 were -- I'm not sure if I'm pronouncing this right -- Amitriptyline?
A. Yes. I did take that. I do not know if I was taking it at that time.
Q. What for?
A. Migraines.
Q. And Butalbital?
A. Migraines.
Q. And Enalapril?
A. That is for high blood pressure.
Q. Clarinex?
A. Allergies. I do not know.

Q. Rhinocort?
A. I don't know.
Q. Did you have a sinus condition at that time?
A. No.
Q. Cromolyn, it was an eyedrop?
A. I have no idea. For migraines, probably. I tried a lot of things for migraines over the years.
Q. Well, it sounds like your experience there was unsatisfactory?
A. As far as the pain in my head, yes, definitely. It just seemed like they were not listening, and I told them that I had pressure on the back of my head in this area right here and at that time there was a lump and a bruise, so maybe they figured that was what it was, and it continued to bother me.
Q. There was a lump there?
A. Yes.
Q. And when you say there was a bruise, do you just mean it was sore to the touch?
A. Right.
Q. Because you could not see it, obviously?
A. No.

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Q. How big was the lump?
A. I do not know. I do not remember at all.
Q. Did you play sports growing up?
A. I did not.
Q. Had you ever had a concussion growing up?
A. No.
Q. Well, let me see what my records show. After that first visit you returned again a couple of weeks later on May 4th, 2005 to check up on your headaches. Do you remember that?
A. To the Urgent Care?
Q. It was to Southwest Medical, and I believe that one -- that next visit might have been with Mr. Hill. Do you remember the first time you saw him after the accident?
A. I do not. I do not remember the first time. I have seen him several times.
Q. Now, you had seen him before the accident too; right?
A. Yes.
Q. And the first time you went to Southwest Medical on the date of the incident, you saw someone other than Mr. Hill?
A. Yes. That was the Urgent Care that we went to.

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Q. And then a couple of weeks later you went back to Southwest Medical and you saw Mr. Hill and --
A. Did I go to Urgent Care again?
Q. No. Just Southwest Medical. If you did, I do not know about it.
Now, at that time, Mr. Hill wrote that there was no evidence of a scalp hematoma. This lump that you described earlier, it went away by that time?
A. I don't remember.
Q. Do you remember him referring you out for a CT scan of the head?
A. Yes. He referred me to a CT scan.
Q. Now, did you work in that roughly two-week period between the date of the incident and the time that you returned to Southwest Medical?
A. I did work. I'm not sure if I went the next day or two, but I did.
Q. And then after the CT scan was done, you met with Mr. Hill. Do you remember what he told you about the findings on the CT scan?
A. I do not remember.
Q. Now, here he reported that -- I'm sorry. It actually was not with Mr. Hill. You had the CT

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scan done on May 11th, and you returned to Southwest Medical the following day, May the 12th. And the physician's assistant that day was Nancy Bahnsen, B-a-h-n-s-e-n.
Do you remember speaking with Ms. Bahnsen regarding the CT scan?
A. Where was that visit at?
Q. At Urgent Care.
A. So that was -- I did go to Urgent Care in between the visits again. Again between the first Urgent Care visit and the visit to Britt Hill?
Q. No. Let me give you the chronology again.
A. Because I'm not understanding.
Q. The date of the incident is April 15th.
A. Yes.
Q. You go to Urgent Care that day?
A. Yes.
Q. And they take some X-rays, and then the next time you treated was on May 4th, and on May 4th you saw Mr. Hill.
A. Okay.
Q. And then the next time you treated was to get the CT scan on May 11th. And then on May 12th, the day after the CT scan, you went to the

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Urgent Care.
A. Okay.
Q. And that is where you saw Ms. Bahnsen who was the physician's assistant you saw back on April 15th.
A. Okay.
Q. Do you remember talking with her about it?
A. I knew I had been to the Urgent Care twice. I'm not sure if I saw Brett Hill in between or after that. I thought it was after that. It was a mistake.
Q. Well, the physician's assistant note of May 12th reports that the radiologist read the CT scan as negative. It did not show any findings. Do you remember having a discussion with anybody about that?
A. I probably did. I do not remember.
Q. Well, at this visit the physician's assistant wrote that you were not satisfied with the negative CT results and requested a referral for an MRI. Do you remember this discussion?
A. I kind of do, yes. Because I knew I still had pain, and they did not come up with anything.

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Q. And then you were referred out for the brain MRI. And do you remember speaking with anyone about the findings of that study?
A. I don't.
Q. Well, the radiologist reported that the brain MRI was normal and you saw Britt Hill a couple of days after the brain MRI, and he reported that he advised you of that, but you do not remember that discussion?
A. I have had so many discussions. I mean, seriously.
Q. Now, at this point, treatment stops for about four and a half months after the brain MRI. What happened during that four and a half months?
A. Well, what happened was they told me that, like you said, that they take the CT scan and MRI and nothing was wrong, and so I figured that I would -- that they were the doctors, there was nothing wrong. So I went home and the pain got progressively worse and the symptoms did not go away. So I made an appointment and started going again.
Q. When did you start experiencing neck pain?
A. I don't remember.

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Q. Because according to the records, it was not in the months immediately following the accident, because the reports here suggest that you were complaining of migraines?
MR. PALERMO: I will issue an objection as to misleading. There is a mention of neck pain in the first report.
BY MR. ROGERS:
Q. Well, after the date of the incident, did the neck pain stop?
A. I do not understand what you mean.
Q. As your counsel pointed out, the Urgent Care record, the complaints listed are neck, back, left shoulder, left elbow, and back of the head. And the left elbow and the back of the head were listed as the chief complaints, and then after that there is no mention of neck pain on the following visits.
So did you have no neck pain at that time?
A. The head pain was -- I had so much pressure on the back of my head, and the head pain, I was so worried about that. So, no. I still had shoulder pain and neck pain, but they could not do anything for the head pain, the pressure.

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Q. Well, did the head pain later subside then?
A. No. I still have that too.
Q. Is it the same as it was on the date of the incident or is it less or more, for that matter?
A. I don't know. It is either the same or more.
Q. And what of the neck pain, is it the same or different?
A. It is worse. It is way worse.
Q. Now, Mr. Hill advised you to quit smoking due to the migraines. Did you ever quit?
A. I did not.
Q. How much do you smoke a day?
A. On average probably somewhere around half a pack.
Q. Now, so far what we have covered is that initial treatment right after the accident. You had the CT scan and the MRI, and then you stopped treating for a season, and then you returned. And then you treated a couple of times and then came -- there came another gap in treatment of a couple of months. You came back and treated for about a week and then stopped again for a while. Why did you stop again?

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MR. PALERMO: I will object as to vague and ambiguous and as to form.
But you can answer.
THE WITNESS: Because I just felt that I was not getting any kind of results. And I wanted to know what the problem was and why I had the pain, and I just felt that it was -- you know, and they told me with the scans there was nothing wrong, and I just assumed that everything would get better and not worse.
BY MR. ROGERS
Q. Then after you returned to treatment, the folks at Southwest Medical referred you to physical therapy?
A. Yes.
Q. Did that help?
A. Like for temporary relief.
Q. By temporary, do you mean an hour a day, a week?
A. The physical therapy, it was an hour a day, yes. The physical therapy.
Q. Then after physical therapy, you returned to Southwest Medical and treated with Dr. Tsai, T-s-a-i.
Do you remember him?

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A. I'm not sure.
Q. Now, we're around 11 months after the car accident, so in March of 2006 and at this point the folks there at Southwest Medical refer you for a cervical MRI. Did you ever talk with anyone about the findings on that neck MRI?
A. I'm not sure which one it is or which doctor I went to.
Q. Well, this is still at Southwest Medical, so it is Mr. Hill or the physician he is working with.
A. I would imagine I talked to the physician about it.
Q. Do you remember talking with the physician about it?
A. I am not really sure exactly what test we are talking about.
Q. The neck MRI.
MR. PALERMO: I think he has had a lot. That is probably why he was confused.
BY MR. ROGERS:
Q. As I said, this was in March of 2006, so this is about a year after the accident.
A. I have no idea who I saw and at what time. I really do not.

Q. Well, it was shortly after this MRI that Mr. Hill referred you to Nevada Orthopedic where you saw Dr. McNulty?
A. Yes.
Q. Does that jog your memory about that MRI or about what he told you?
A. I talked to Dr. McNulty about it.
Q. Most likely, but what did Dr. McNulty tell you about it?
A. Dr. McNulty had few words for me. He just told me that I needed surgery when I went in for the visit.
Q. Is that what he told you at the first visit?
A. I do not know which visit it was. I'm not sure what test you are talking about. I imagine there were not any tests done in my first visit to him, so, no. It would not be the first visit. I imagine he would have had the request test. I don't know. That is usually how it went.
Q. Well, at the first visit, at least his record of the first visit, he discusses surgery. Do you remember whether Dr. McNulty discussed surgery with you at your first visit with him?
A. I don't remember.

Q. Well, anyway, right after you see Dr. McNulty for the first time, and this is a year after the accident now, you go back to Southwest Medical to this pain management center. Do you remember treating there?
A. Uh-huh.
Q. Is that yes?
A. Yes.
Q. Do you remember who you treated with there?
A. I do not.
Q. There are two providers who are mentioned at the outset. One is Adam Arite, A-r-i-t-e, and the other is Donna Barnavon, B-a-r-n-a-v-o-n. Do you remember either of them?
A. I remember names, yes.
Q. Do you remember what kind of treatment they provided?
A. I believe that it was Donna -- correct?
Q. Yes.
A. I believe Donna was the physical therapist like with the TENS. They -- the TENS unit, massage, whatever the therapy was at the time, and I believe Dr. Arite was for the injections.
Q. Now, Donna wrote about psychological

therapy for pain. Do you remember speaking with anyone about psychological treatment?
A. I spoke to a couple of people over the years now. I'm sure.
Q. Who else?
A. I do not recall. I don't remember.
Q. Did you treat with Donna anymore than once?
A. I did.
Q. And she did the TENS unit and those things that you described a moment ago?
A. Yes.
Q. Let's shift to the injections. Actually, according to the medical records, the doctor did the first epidural injections in your neck. It was not Dr. Arite. It was a fellow named Ross S-c-i-b-e-l. Do you remember him?
A. Not right offhand, no.
Q. Do you remember the first time you had an epidural injection in your neck?
A. I do not. I do not remember.
Q. Well, according to the records, you had this first injection and the injection decreased your pain and according to the provider, you were very satisfied with the outcome, but then -- and

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this is in July of 2006 -- and then the following month in August, you reported an exacerbation of pain. What happened? What was the exacerbation?
A. What do you mean?
Q. In August 2006.
A. It would just be the regular pain, I would imagine. I don't know.
Q. Well, do you remember any of the injections that Dr. Arite or Dr. Scibel did?
A. Absolutely.
Q. What do you remember of them?
MR. PALERMO: Objection. Vague and ambiguous. Overbroad.
You can answer.
THE WITNESS: That I went to several different places and got injections.
BY MR. ROGERS:
Q. What were the results of the injections?
A. The results were the shoulder pain that we talked about earlier, the shoulder pain had lightened up quite a bit anywhere from a day to a week with the injections. It did not do anything for the head or the neck, though. It was nice to just get rid of the shoulder pain.
Q. Do you remember undergoing different

kinds of injections in the neck?
A. I have gone through a couple of different kinds, yes.
Q. The ones that I see referenced in the records are epidurals, selective nerve root blocks, and radiofrequency. Sometimes it is referred to as rhizotomy.
A. Okay.
Q. Did one of those injections provide more relief than the others?
A. I do not remember.
Q. Did any of those injections provide relief of your pain for longer than a day or I think you said a day to a week?
A. Yes. Some of them. I'm not sure which ones said a day to a week.
Q. But did any of the injections --
A. It did not take the pain away. It lightened it up. I mean a lot, the shoulder pain, yes.
Q. Did any of the injections relieve your neck pain?
A. I do not believe so.
Q. Did any of the injections relieve your head pain?

A. No.
Q. Now, over the course of your treatment you have undergone three cervical MRIs. Have you talked with your doctors about any of them?
A. I'm sure I have. I don't remember the exact conversations of any of them.
Q. You do not remember any of your providers saying, Okay, the films from these tests show negative or positive findings?
A. I do not recall which ones or which, no.
Q. Well, there was actually a fourth kind of injection that was done, but it was not done in your neck, at least not to the cervical spine. It is called a trigger point injection.
Do you remember ever hearing that phrase "trigger point injection"?
A. I have.
Q. Now, was it the trigger point injections that they were doing along your left shoulder?
A. I'm not sure.
Q. Do you know if was the trigger point injections that were relieving the left shoulder pain?
A. I'm not sure which ones they were.
Q. Then after undergoing these various

injections with Southwest Medical's Pain Management Center, you went back to Dr. McNulty.
A. Okay.
Q. This takes us up to September 2007. So, in other words, you had been undergoing treatment at the Southwest Pain Management Center for a year and a half from March 2006 up until roughly September 2007.
Do you remember going back to Dr. McNulty after that year and a half away from him?
A. I do remember going back.
Q. What happened when you went back to him?
A. As far as -- I believe he ordered a test or something, X-ray. I'm not sure. I know the pain management, because I wanted to find out what the problem was. The pain management referred me back to him, I believe.
Q. Did you get the impression that Southwest Medical Pain Management providers failed to figure out what the problem was?
A. I got the impression that the problem was not figured out, because if it was, then the pain would be gone. A solution could be found and the pain would be gone.
Q. Did Dr. McNulty do injections on you?

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A. I believe he did, yes.
Q. Did he recommend surgery when you went back to him after that year and a half away?
A. Yes.
Q. Did Dr. McNulty tell you what he saw on the MRIs?
A. He did, but I did not understand at the time. I do not remember exactly. Something C3-C4 or something. I did not understand at the time.
Q. Do you understand now what he said?
A. I understand now what needs to be done, yes.
Q. What is it?
A. It is surgery to replace a couple of discs.
Q. Has someone talked with you about disc replacement or disc removal?
A. Removal. I'm not sure.
Q. Has anyone talked about artificial discs in your neck?
A. I do not recall. I talked about a lot of things. I asked a lot of questions, but I do not --
Q. So just to clarify, you do not know if a doctor has suggested disc replacement or disc removal?

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A. I believe -- for McNulty?
Q. For any doctor at this point. And then we will narrow it down to who?
A. The understanding I have from Dr. Grover was that the discs would be removed, and I guess the bones would be fused. That is the understanding I have, but I talked to a lot of people, and I really -- I don't know.
Q. Let's get back to the question I had earlier, and that is the injections that Dr. McNulty did. I have a record of epidural injections. Do you remember those?
A. I had injections with him, yes.
Q. Do you remember what the results of that epidural were?
A. Which one was the epidural?
Q. The one that was done in November of 2007.
A. What does it consist of?
Q. Where they inject steroids and anesthesia onto the disc.
A. Is that done through the front or the back?
Q. They could do it either way. This is generally just to relieve pain. It is not the discogram.
A. So it is generally to relieve pain; it is the one that they do that they have you sit in their office after they do it, and they try to find out if the pain is gone in the area where they gave you the shot?
Q. Yes.
A. I have had that done several times.
Q. Right. Do you remember what the results of Dr. McNulty's epidural was? Did it relieve pain?
A. I do not remember.
Q. Now, earlier you testified that the epidurals -- let me start over.
Earlier you testified that none of the injections relieved your neck pain. None of them relieved your head pain; that some of them relieved your left shoulder pain for a day to a week?
A. Right.
Q. And that applies to all of the injections; right?
MR. PALERMO: I don't know if that was addressed.
But you can answer.
BY MR. ROGERS:
Q. That is my question.

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A. I don't know. No. I mean there is -- I mean, I really do not understand the question. When you go in with Dr. McNulty, the one that you are talking about, is a temporary thing. Does it relieve it? I believe the areas of injection, I'm not sure if it did or not. I believe that that is why the test is taken because they do it, and if it relieves it, then they know where to X-ray and where to look at, whatever. I understand that, but I do not remember -- I do not remember which ones did what. I do not know the names of the shots, if there were four different names that you are giving me.
Q. Right. So let's not complicate it like that.
A. I have no idea on some of the tests you are asking me. Just bottom line is bottom line.
Q. And the bottom line is -- and I'm trying to pull out all of those technical medical phrases and stuff. The bottom line is that as you look back over the injections that you have undergone, they did not provide relief of neck pain. They did not provide relief of head pain, but they did provide temporary relief of left shoulder pain?
A. Pretty much, yes.

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Q. Now, did Dr. McNulty do a discogram on you?
A. I do not remember.
Q. You had a discogram not long ago?
A. Uh-huh.
Q. Do you remember that with Dr. Rosler?
A. Yes.
Q. And that is the one where they inflate the disc with dye and pressurize it to see if it elicits pain. They are not trying to relieve your pain. They are trying to cause pain?
A. Right.
Q. So that is a different injection from all of the other ones that you have had?
A. Yes.
Q. Did you undergo a discogram back in December 2007?
A. I do not remember.
Q. All right. Well, there is a record from Dr. McNulty that, in fact, reports that he did do a discogram in December 2007. And the records reflect that that was the last time you saw him. Why did you leave McNulty?
A. I guess my wife and I went to the appointment for the results of the test that they

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did, which I'm not sure that they did, and we went and sat in a room, and when Dr. McNulty came in, he put the film pictures on the light thing and said, Yeah. You need surgery. Do you have any questions? Pretty much -- I don't remember the exact words, but it was a pretty short conversation, and I was not ready for -- I had no idea that I was going to need surgery or anything. I was kind of floored. I was kind of floored with the results. I don't know what I expected but -- I don't know.
Q. You know what, I'm looking now at the records, and I was -- I think I was mistaken. It does not look like Dr. McNulty did a discogram.
MR. ROGERS: Let's go off the record.
(Off the record.)
BY MR. ROGERS:
Q. While we were off the record, I went through the medical records that your counsel has produced and, in truth, it appears that I was mistaken, that Dr. McNulty did not do a discogram in December 2007, but December 2007 was the last time you saw him.
And right before our break you testified that at that last visit he sort of sprung on you that he was suggesting surgery, and that you were

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not ready for it. My question was why did you leave him? Was this, I guess, bedside manner of springing it on you the reason that you left or was there something else?
A. That is what I thought initially because I was floored. I did want to get another opinion also. And I actually did talk to the people on the phone about scheduling for the surgery, but I did not. There actually were a couple of reasons. One was I wanted another opinion, and two, I had gone to the dentist, and they had found an issue in my mouth.
Q. What was the issue?
A. There was a tumor.
Q. Was it cancerous?
A. No. It turned out not to be.
Q. And that happened right around December 2007 when you stopped seeing Dr. McNulty?
A. Yes. It was right around that time. And I actually went into the office and talked to one of the gals that works for him and explained that I was going to hold off, and I wanted to get another opinion and that I wanted to see what was wrong with my mouth, my jaw before I did anything and made my decision.

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Q. Did you undergo an operative procedure for the tumor?
A. I did.
Q. What did they do?
A. They just cut it open, looked at it, and pulled it out, I guess.
Q. Were you unconscious during the procedure or were you just sitting in the dentist chair awake and numbed?
A. I was awake. It was not a dentist. It was a surgeon who did it.
Q. Who was it? Was it a guy named Glyman?
A. Yes.
Q. But you did not go to a surgical center or a hospital for the surgery?
A. I went to his office. I do not know if it was a surgical center or not.
Q. And they did not put you under general anesthesia?
A. Where I go to sleep?
Q. Right.
A. No.
Q. Let me make sure that I understand. You stopped seeing McNulty, because you wanted to get a second opinion about his recommendation for surgery;

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right?
A. Yes. Part of it, yes.
Q. And coincidentally right around that same time you had a scare about a tumor in your mouth?
A. Yes.
Q. And after that scare was resolved, you went and got a second opinion with Dr. Grover?
A. Yes.
Q. Now, who referred you to Dr. Grover?
A. I had asked around and talked to a lot of people and his name had come up several times, and then I called Jerry at the attorney's office, because obviously, I do not have the money to do it, and found out he would work with me for --
MR. PALERMO: Do not go into any details about attorney-office conversation.
THE WITNESS: Absolutely. And that is how I ended up there.
BY MR. ROGERS:
Q. You said you talked with several people and that Dr. Grover's name came up more than once?
A. Yes.
Q. Who recommended Grover to you?
A. I don't even know his name, an older gentleman that had had a neck and some kind of lower

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back or hip or something surgery, so one of them. I talked to my customers and the people I worked with. The other names came up too, and people I worked with, but most of them are like in L.A. or something, and I cannot go that way.
Q. Did any other surgeons' names come up in these discussions with friends and co-workers?
A. Yes. Absolutely.
Q. Who else?
A. I do not remember.
Q. And you said that you cannot afford the treatment. By that did you mean that you have treated with Dr. Grover on a lien?
A. Yes.
Q. Did you ask around for any surgeons who would accept your insurance?
A. I was under the understanding that I had to get a referral and this and that, and I was not sure if they would go with the same records or same pictures that were already taken, so it was a personal thing too that I wanted to go outside of Southwest Medical, because it is more like going to -- I just look at it like they all kind of work together. I did not want any shared information or anything. I just wanted to know from someone else,

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separate, that I did have problems.
Q. Well, then you go to Dr. Grover?
A. Uh-huh.
Q. And describe your treatment with him?
A. I just went back for several different appointments for different tests, and I'm not even sure. And I did go in for some of the shots that they do.
Q. And that was with Dr. Rosler?
A. And Grover; same office, yes.
Q. And did you get the same results from the injections that Dr. Rosler did as you did with the ones done by Drs. McNulty and Arite?
A. That is all of the shots -- there were different kind of shots that I had.
Q. Right. But earlier you testified that the shots really did not relieve your neck pain. That all they relieved was the shoulder pain temporarily. Was it the same result with Dr. Rosler as it was with the others?
A. I don't believe it was the same kind of shots that I got.
Q. Well, did you get a different result from Dr. Rosler?
A. No, not really. Any result, I do not

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think. I don't remember. I mean, I'm not sure when they were doing the tests. Like, I guess, they try to numb parts so they know where to X-ray from what I understand or where to look for the problem.
Q. Well, I mean, Dr. Rosler did one of those injections that numbs the area back in July of 2008, so just a couple of months ago. And he wrote, No significant improvement with your neck pain, and that report suggests that that injection was the same as the ones that came before. It did not really relieve your neck pain.
A. But there are different kinds of injections. The ones that relieve the shoulder pain I got like 20 shots at one time.
Q. That is called a trigger point injection.
A. Okay. I don't know the difference in what they are called. That is what I was telling you earlier. I'm not sure, and I believe you are confusing all of the shots with the different --
Q. It does sound like we're not really on the same page. Let me put it to you this way. The trigger point injection, the one where they can do 20 of them at the same time and they can do it in their clinic, that is the one I understood relieved your shoulder pain?

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A. Yes.
Q. Now, the other injections are generally done in the Surgicenter, that is the epidurals, the selective nerve root blocks, the radiofrequency, those were the ones that I understood you said that they did not relieve your neck or head pain?
A. Right. And if any of them did, it was like very, very temporary. We are talking an hour to a day. We're talking like an hour or whatever. It was no noticeable relief.
Q. Okay. Now we're on the same page then. And then the injections that Dr. Rosler did, the one I just read to you, was a selective nerve root block, and Dr. Arite did those as well. It sounds like Dr. Rosler's injections in the neck was the same as Dr. Arite's, that it provided the same result, which was basically little to no relief at all?
A. I cannot remember Dr. Arite's shots. I thought those were the ones going across my shoulder.
Q. He did both. Let's just focus on Dr. Rosler's injections in July -- I'm sorry. This was done in May of 2008. I'm reading from a July note. And it said that you had that injection in

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the neck and not on the shoulder with no significant improvement.
A. Okay.
Q. Does that sound correct?
A. It sounds correct.
Q. Well, anyway, we got onto Rosler really just on a tangent there. You went to see Dr. Grover. I know that he did the injections. But what else? What other kind of treatment did he provide?
A. Basically, he was just trying to run tests and find out what the problem was and that was about it.
Q. Did he ever find what the problem was?
A. I believe he did, yes.
Q. What did he tell you the problem was?
A. I think it is just the term "fissures."
Q. Did he tell you where the fissures were?
A. Into the discs in my neck.
Q. Did he say which discs?
A. I believe C3-C4.
Q. Just the one level?
A. I think there were two levels. I'm not sure.
Q. Did he tell you which was the other

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level?
A. C5-C6. I do not know.
Q. So Dr. Grover has told you that fissures in your neck are causing the pain?
A. I believe so.
Q. And what kind of treatment did he recommend to resolve the pain?
A. I do not recall.
Q. There is a record that your counsel produced yesterday or the day before of the treatment with Dr. Grover on September 2, 2008. So just a little over a month ago, and in it he wrote, I believe that at this point, he, being Mr. Simao, has approached the point where he is considered to be a reasonable candidate for an interbody fusion reconstruction and decompression at C3-4, C4-5. Follow-up in four to six weeks.
Now, do you have a follow-up appointment?
A. I do.
Q. When is it scheduled?
A. I think it is next week sometime. I'm not positive. It is written in my daily planer note.
Q. Have you decided whether you're going to choose to undergo the surgery?

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A. I have not yet. It is a big decision.
Q. Now, I asked your wife yesterday if she or you have considered seeing a neurosurgeon because Drs. McNulty and Grover are orthopedic surgeons, and this recommended surgery involves the surgical spine, a place where a lot of neurosurgeons regard themselves as superiorly trained. Have you or your wife talked about visiting with any of the neurosurgeons in town?
A. We have not.
Q. Has Dr. Grover discussed with you the idea of canceling with a neurosurgeon?
A. I do not remember if he did or not. I'm not sure.
Q. Has Dr. Grover suggested any alternative courses of therapy that would be less invasive than a two-level fusion?
A. I'm not sure if he did on the last visit or not. I think before he had mentioned like different exercise movement or whatever and pain medications, which I have not taken from him.
Q. Are you taking pain medication now?
A. Just for migraines.
Q. Tell me about this discogram that Dr. Rosler did. Tell me what it was like.

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MR. PALERMO: Objection. Vague and ambiguous as to form.

You can answer.

THE WITNESS: It was like a test. I guess they -- from what I understand, they shot dye, I guess, into the discs, and then I went somewhere else, and they did some kind of scan.

BY MR. ROGERS:

Q. Well, did they give you medication beforehand?

A. Before?

Q. Before injecting the dye?

A. Yes. I believe so.

Q. Were you awake?

A. No.

Q. Somewhat impaired?

A. I think I was asleep when they did it. I do not remember.

Q. Do you remember speaking with the physician who was injecting the dye while the procedure was being done?

A. No, I don't remember.

Q. Just describe how it was done at their center. You go in and you check in and generally they will begin by giving the patient some kind of

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sedative. Do you remember them giving you a pill or maybe gas or something like that?

A. I think it was gas. I did not get a pill or anything, and it was when I was laying down.

Q. You were with your wife before you go in to the OR; right?

A. Uh-huh.

Q. Take me then from what you can remember from when you are sitting with your wife and you are still coherent up until the time that you leave the center.

A. We were in the waiting room, and then they called my name, and then we walked into one of the small offices and my wife came in and sat there. I guess they took my blood pressure, whatever, and then I went to another room, and I do not know if my wife sat in the small room or went back out to the waiting room. I'm not sure. And I think there were three or four or five people. I'm not sure how many were in there, and I laid down on the table and yes, I believe it was something that I breathed in that they gave me. And he was explaining, you know, what he was going to do all of the way, and that that was it, really.

Q. And you woke up after it was done?

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A. Pretty much, I believe so.

Q. Was it Dr. Rosler who did that procedure?

A. Yes. I believe it was, yes.

Q. Did you talk with any of those providers in the recovery room?

A. Any of the providers?

Q. Rosler or any of the other -- I think you said four or five people were in the operating room?

A. That I talked to in the recovery room?

Q. Yes. As I understand it, they wheel you into the operating room, and they give you gas, you go to sleep, and then the next coherent moment you have is when it is over and you are in the recovery room?

A. I believe I talked to Dr. Rosler after.

Q. In the recovery room or when you returned to his office sometime later?

A. I do not remember.

Q. Now, this was done a couple of months ago; right?

A. Yes.

Q. Do you think you do not remember this thing that happened a couple of months ago simply because you were -- well, gassed? You were incoherent?

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A. No. I think it was because all of these tests and everything just kind of run together and I'm looking for the results to get rid of the pain and I was kind of more focused on what I could do to get rid of that permanently than everything else, you know.

Q. Well, what did Dr. Rosler tell you was the finding from that discography?

A. On that visit?

Q. Whenever you talked to him about what the result was of that test.

A. I guess that there were fissures or cracks or whatever. They did explain it to me.

Q. Was it Dr. Grover who explained it to you or Dr. Rosler?

A. It was Dr. Grover.

Q. So Dr. Rosler did not explain it to you?

A. No.

Q. Did Dr. Grover ever discuss with you concerns about potential false positives on a discogram study?

A. I do not recall.

Q. In other words, did he ever tell you, Look, this is a test that is not always reliable; that it can have some problems?

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A. I do not remember if he said that or not.
Q. Have you ever heard anybody say that before me saying it today?
A. Probably not.
Q. What did Dr. Grover tell you about the success rate of a two-level cervical fusion?
A. I don't know if we got into any exacts, but I did ask him. And he said that most of them go very well and people can live normal lives, and there is not a lot of difference and some of them obviously do not. That is what I took from that.
Q. So, in other words, he said that the greater likelihood of this two-level fusion would relieve your pain, but that there was a chance that it would not?
A. He did say there was a chance that it would not.
Q. And when he said go onto lead normal lives, did he tell you that that would mean --
(Telephonic interruption.)
BY MR. ROGERS:
Q. Did he tell you that that would mean that the pain would be resolved?
MR. PALERMO: Objection. Vague and ambiguous.

You can answer.
THE WITNESS: No. I have asked the question of everyone I have seen and nobody can guarantee everything, and I understand that.
BY MR. ROGERS:
Q. What did he tell you about what the pain would be like, if any, after the surgery?
A. It varies. That it varies. Some people have discomfort. Some people I think did go through a lot with everybody that I talked to.
Q. You mentioned one man you spoke with who had surgery with Dr. Grover on his neck; right?
A. Yes.
Q. What did he tell you his neck was like?
A. He was happy with it, and one of the other guys at work had neck surgery and he was really happy with it, and I have talked to people; one of the gals at work that she was very unhappy with her neck surgery. I have met people along the way, customers that I have talked to, this and that, that some are happy and some are not.
Q. Well, you are going to go back to see Dr. Grover in roughly a week, and what is your plan at that meeting?
A. I do not know. I would imagine to make a

decision on the surgery or not.
Q. So as you sit here today, you do not really know what kind of future treatment you will plan to undergo?
A. Not really.
Q. Well, let's take about your present condition then. You have already provided some insight into it. You said that your head pain is the same or worse, that your neck pain is worse than it was back when the accident happened. What about your left shoulder?
A. It is the same or worse. It is constant. It is all constant pain, never ever stops. It is always there.
Q. Do you have any restrictions in your normal activities?
MR. PALERMO: Objection as to form. Vague and ambiguous.
You can answer.
THE WITNESS: I imagine there is a lot of them. I can still lift 100 pounds. I mean, I have not lost any of my strength, but there were a lot of things that I do not do now. I sold my motorcycle, because I cannot sit and ride that.
BY MR. ROGERS:

Q. When did you sell it?
A. Probably about six or seven months ago. I mean, I do not even know. It is just little things. I don't know.
Q. Are there any activities that you used to do that you can no longer do at all?
A. Yes. Sit in a chair.
Q. Well, when I say not at all, I mean period, because you have sat in a chair today for quite a while.
A. Right. I cannot sit still. I have to keep adjusting to be comfortable, so anything that I have to sit for a long time is pretty much out of the question.
Q. Well, let me be more specific about the question. I want to start with activities that you cannot do, period, and then I want to get into a discussion of activities that you're limited in, but you can still do it.
So are there any activities that you used to do that you cannot do at all?
A. No.
Q. Now let's discuss those activities that you used to do that you can still do, but that you have some limitations in. Sitting you have said is

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one. What else?
A. I do not know. I really do not have any idea. It is a day-by-day thing that I notice.
Q. And can you think of anything that you have limitations in doing other than sitting for prolonged periods of time?
A. Yes. My work. If we have buffers that we have to run, like a standup buffer that you have to run with the arms, I cannot run those for as long as I used to; carpet cleaning, I cannot do it anymore. It is mostly what my company does. That is pretty much my daily activities. I don't know.
Q. So you can run the buffer, but not as long as you used to?
A. Yes.
Q. What is the difference in time? Like you used to do it for how long and how long do you do it now?
A. I do not know. I used to do it as long as I needed, to take more breaks now or I will bring someone to help me. Time wise, I don't know the difference.
Q. Now, what is the difference between operating a buffer and carpet cleaning?
A. I can stand up straighter with the

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buffer, and I do not have to hunch over with the -- like you do with the carpet cleaner. There is not a lot of arm movement with the carpet cleaner. You have to go back and forth constantly with your arms. With the buffer, you pretty much stand still, and it does all of the work. That is a big difference.
Q. And you cannot operate the carpet cleaner machine at all?
A. I try my hardest not to. Very, very seldom. I doubt if I do a job in a month now. I knew that much.
Q. Your son does that work now?
A. Yes. He does all of it.
Q. When you go out on a job then, do you just run the buffer machine?
A. Most of those jobs I do not go out to. I only go out when I have to. Most of what I do is sealing grout.
Q. Have you seen any doctors that we have not discussed today?
A. I think we discussed a lot of doctors. I have no idea.
Q. Are you seeing any doctors today other than Rosler and Grover?
A. No.

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Q. And have you seen any surgeons other than Grover and McNulty?
A. No. Not to my knowledge I have not, no.
Q. Now, when we started out this deposition, I asked you some questions about your company and about your income.
A. Yes.
Q. Are you bringing a claim for lost income as a result of this car accident?
A. At this point, I do not know how much time I have lost.
Q. So you're claiming that you lost time from work?
A. I lost a lot of time from work, a lot. Just from a year of physical therapy, I lost a lot of time from that.
Q. You mean going to the appointments?
A. Yes. I lost a lot of time. I go home half day now sometimes. In fact, I used to go out and help William finish. There is a big difference. There is a huge difference.
Q. How much income have you lost as a result of the accident?
A. I cannot even tell you. It is my business, so it is what I schedule or do not

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schedule, what I think I can handle or what I do not think I can handle. If I have to send someone else, I will not take the job. It is accounts that I cannot go out and get, because I won't go do the work. It is a family business. I don't trust a lot of people to work for me. It is different.
Q. Now, you did not own this business until about two and a half years after the accident; right?
A. Yes.
Q. Is that yes?
A. Yes.
Q. Did you lose income between the date of the accident and the date that you bought the business?
A. Yes.
Q. How much?
A. Again, I would not know.
Q. How would you know? I mean what would you research to figure it out?
A. I would have to research a lot of things. I probably would go through the schedule book and see what days I had appointments at different places or the work that we review is kind of tough. You can not take on a big new account if you cannot do

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the work, so I do not know. I do not even know where to start. I would start with my scheduling book, obviously.

Q. Well, you said earlier that you were earning a salary and not a commission?

A. Uh-huh.

Q. Is that right?

A. Yes.

Q. Did you lose any of your salary --

A. I did not.

Q. -- after the accident?

A. I did not lose any of the salary, no.

Q. Now let's focus on this specific question. If you did not lose salary, what income did you lose after the accident before you bought the business?

A. Before I bought the business, what we meant by a silent partner was if there was anything, any profit after everything, I would get a portion of that, and right now owning the business if there is any profit after expenses, then obviously that would be mine.

Q. So you did not lose any income derived from your salary?

A. My salary, right.

Q. But do you believe you lost some income from the distribution that the company made at the end of the year?

A. I believe so.

Q. Would that reduction be reflected in your tax returns?

A. I do not know.

Q. It sounds like you really do not know what your lost income is, but you believe that you did lose income; is that right?

A. I believe I did, yes. The reason I believe that is if I was not at the appointments or going home early more work could have been done, even if I have another employee. If more work is done by me, obviously I do not have to pay an employee, so it is a huge difference. Two and a half, three years ago I had employees. I was not doing the work, you know. I had employees. So it is a big difference.

Q. Is there anybody else in the company who could go out and get new accounts? Is your son capable of that?

A. I imagine he might be capable. I don't know.

Q. Have you ever asked your son or

Mr. Duncan or Mr. Gonzalez to go out and try to get new accounts?

A. Actually, William has gotten a couple. Michael has not. And Eduardo has not, but actually William has had a couple. I never asked him to go out during the day, but we do hang like anybody, different kind of advertising or doorknob hangers or going to real estate companies, which he has done stuff like that.

Q. It is the new accounts that you think you have lost as a result of the accident?

A. No. I will not overbook us either, if I'm not going to do the work. I can only take on what we can do. I will not take on what we cannot do. There are certain things that only now with just the two of us, there are certain things that I can do, he does not know. I imagine I could teach him if he was not doing something else at the time I had to do that. There is different aspects of the business. Everything from polishing travertine to grout to carpet cleaning. It is all totally different.

Q. And again, why doesn't Mr. Duncan work with you now?

A. I honestly do not remember. I'm not sure

if he quit or if I did not need him anymore. I do not know.

Q. And why doesn't Mr. Gonzalez work with you now?

A. I think he went back to Venezuela or something. He was on a work visa and his father got sick. That is right. His father got sick and he went back and I guess he did not like come back here.

Q. Have you looked into hiring anybody else?

A. I might have had other employees since then.

Q. And why don't they work with you now?

A. Well, I do not know. I'm not as busy as I used to be, obviously. Everything has slowed down with the economy. It probably has a lot to do with it.

Q. Well, it sounds like if we are going to get an answer to these questions trying to quantify any lost income, that you do not have the answers. They will be in records at your business; is that right?

A. I have no idea.

Q. Well, let me wrap up then with an area that I discussed with your wife yesterday, and this

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was this loss of consortium claim. You heard her testimony about how the accident has affected your relationship with her. Let me get your testimony on that question then, and I will begin with the general question of how has this accident affected your marriage?

A. I imagine it has put a lot of stress on our marriage.

Q. You heard what your wife testified to yesterday; right?

A. Yes.

Q. Is there anything that you would add to what she testified to about how this accident has affected your marriage?

A. Yes. I can add a little bit to what she could not say. She would not say that I don't help her cook dinner anymore. She would not say that I do not help her with the dishes or help her around the house like I did before and that I pretty much just sit around. It is a lot different. It is a lot different.

Q. Is it different in any way other than your not helping out around the house like you used to?

A. As far as -- I do not understand.

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Q. You are saying that it is a lot different now than it was before the accident?

A. Right.

Q. That the only specific that you have given me is that you used to help around the house more than you do now. Is it --

A. It is everything.

Q. Has it changed in any other particulars?

A. The time we spend together is not even the same anymore. Like I said, everything that we used to do, we used to do together, and we do not even anymore. And the reason we don't is I will be sitting on the couch because my shoulder, my neck, whatever, or I took medication or whatever. It is always something. I cannot ride motorcycles. We do not go out. Video poker, she used to love video poker. We do not do that anymore -- no. I will not say we do not do it anymore. We do not do it near as often, not even a tenth as often as we used to. I will never ride motorcycles again. We used to ride motorcycles. It is huge differences. Everything that we did together.

Q. Did your wife own a motorcycle too?

A. Yes.

Q. Did she sell hers?

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A. Yes.

Q. When?

A. Same time as mine.

Q. Was that something that you did frequently before the car accident?

A. That was something that we did always together, yes.

Q. How frequently did you ride?

A. Whenever we felt like it. I do not even know.

Q. Was it like a weekly occurrence?

A. Oh, yes.

Q. A monthly occurrence?

A. Yes. Weekly. Sometimes three times a week. Sometimes one time a week. It all depended.

Q. Any other past times that you guys have seen a change in? So far you have described biking and going to the casinos.

A. Just everyday going anywhere, doing anything has changed. She had mentioned shopping, and she has to go by herself.

Q. Have you considered going to counseling over this?

A. For my neck and back problem, no.

Q. That is a smart point. My question,

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though, was to the issue of marriage counseling.

A. I never thought -- the thought never crossed my mind, honestly.

Q. Now, earlier on in the deposition I asked you about this gal, Donna Barnavon, and as I understand it, she is a psychologist. I never met her, and I do not know anything about her, but I think from the alphabet soup after her name that is what she is, and she wrote a suggestion that she had for coping with your neck pain from a psychological perspective.

Have you followed up with anyone on that approach?

MR. PALERMO: Objection. Vague and ambiguous as to form.

You can answer.

THE WITNESS: And I do not even understand the question at all. Donna was the physical therapist. I'm not very got with names. I'm sorry.

BY MR. ROGERS:

Q. Let me just read you what I have in my notes from Donna. Here she is writing of things that she talked about with you. That pain is a very complex process that involves our physical

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functioning, our nervous system, our belief system, our emotions, our stress level, our psychosocial situation, and our thoughts.

Have you spoken with anybody about addressing your neck pain through counseling with belief system, emotions, psychosocial situations, and things like that?

MR. PALERMO: Objection. Compound as to form.

You can answer.

BY MR. ROGERS:

Q. Does any of what I just read to you from Donna's notes ring a bell? Do you remember ever having that discussion?

A. I'm not sure. Maybe kind of. I'm not sure.

Q. But it is safe to say it is something that you have not followed up on?

A. As far as seeing a counselor?

Q. Right.

A. No, I have not. I have not seen a counselor, besides her, if she is one.

Q. What are you doing then to address this hardship that you have discussed in your marriage?

A. Living through it, trying to find how I

can get rid of the pain, and everything can just go back.

Q. Is there anything else that you would add to what your wife testified to about the consortium claim?

MR. PALERMO: Objection. Overbroad. Vague and ambiguous.

You can answer.

THE WITNESS: No.

BY MR. ROGERS: Well, here is what I will do then. I will adjourn today's deposition and reserve the right to come back with you and discuss whatever your plan is in the future once you formulate that plan, whether it be surgery or some other kind of medical care.

And that is all I have then for the day.

MR. PALERMO: I guess we're done then.

(Thereupon the taking of the deposition was concluded at 5:35 p.m.)

CERTIFICATE OF DEPONENT

PAGE LINE CHANGE REASON

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* * * * * *

DECLARATION OF DEPONENT

I, WILLIAM SIMAO, deponent herein, do hereby certify and declare the within and foregoing transcription to be my deposition in said action; that I have read, corrected, and do hereby affix my signature to said deposition this _____ day of _____, 2008.

_____

WILLIAM SIMAO

REPORTER'S DECLARATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, CAMEO L. KAYSER, CCR No. 569, declare as follows:

That I reported the taking of the deposition of the witness, WILLIAM SIMAO, commencing on Thursday, October 23, 2008 at 1:50 p.m.

That prior to being examined, the witness was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth; that before the proceedings' completion, the reading and signing of the deposition has been requested by the deponent or a party.

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

I further declare that I am not a relative or employee of any party involved in said action, nor a person financially interested in the action.

Dated at Las Vegas, Nevada this 3rd day of November, 2008.

_____

CAMEO L. KAYSER, RPR, CCR No. 560

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EXHIBIT "3"

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SANTA BARBARA • SANTA CRUZ

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UCLA School of Medicine
1250 16th Street, Suite 745
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OFFICE: 310 319 333-
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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, message, 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.

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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

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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

SouthWest Medical Associates
(1930) 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

- AMitryptyline
- Butalbital-APAP-Caffeine
- Enalapril Maleate
- 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 Assoicates

- 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 myofacial 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

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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 cervicalgia, 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 parasthesias
- 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 elavil

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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

- Enalparil
- Clarinex
- Ibuprofen
- Butalbital
- Carisocprodol
- 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
- Amitryptyline

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
- Amitryptyline

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
- Lovestatin

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 dependance

Medications:

- Enalapril Maleat
- Clarinex
- Ibuprofen PRN
- Butalbital APAP-Caf PRN
- Carisoprodol PRN
- Lovastatin
- Piroxicam
- Amitryptyline

Assessment:

1. Cervical Radiclupathy 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

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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

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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

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11/16/07 University Medical Center
Procedure note
Surgeon: Patrick McNulty, M.D.
Indications:

- Occasional Left Arm parasthesias
- 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
- ½ 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 parispinous 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 6cmm 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.

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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.

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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

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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,

Jeffrey C. Wang, MD
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Professor of Orthopaedic and Neurosurgery
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EXHIBIT "4"

In the Supreme Court of Nevada

Case Nos. 58504, 59208 and 59423

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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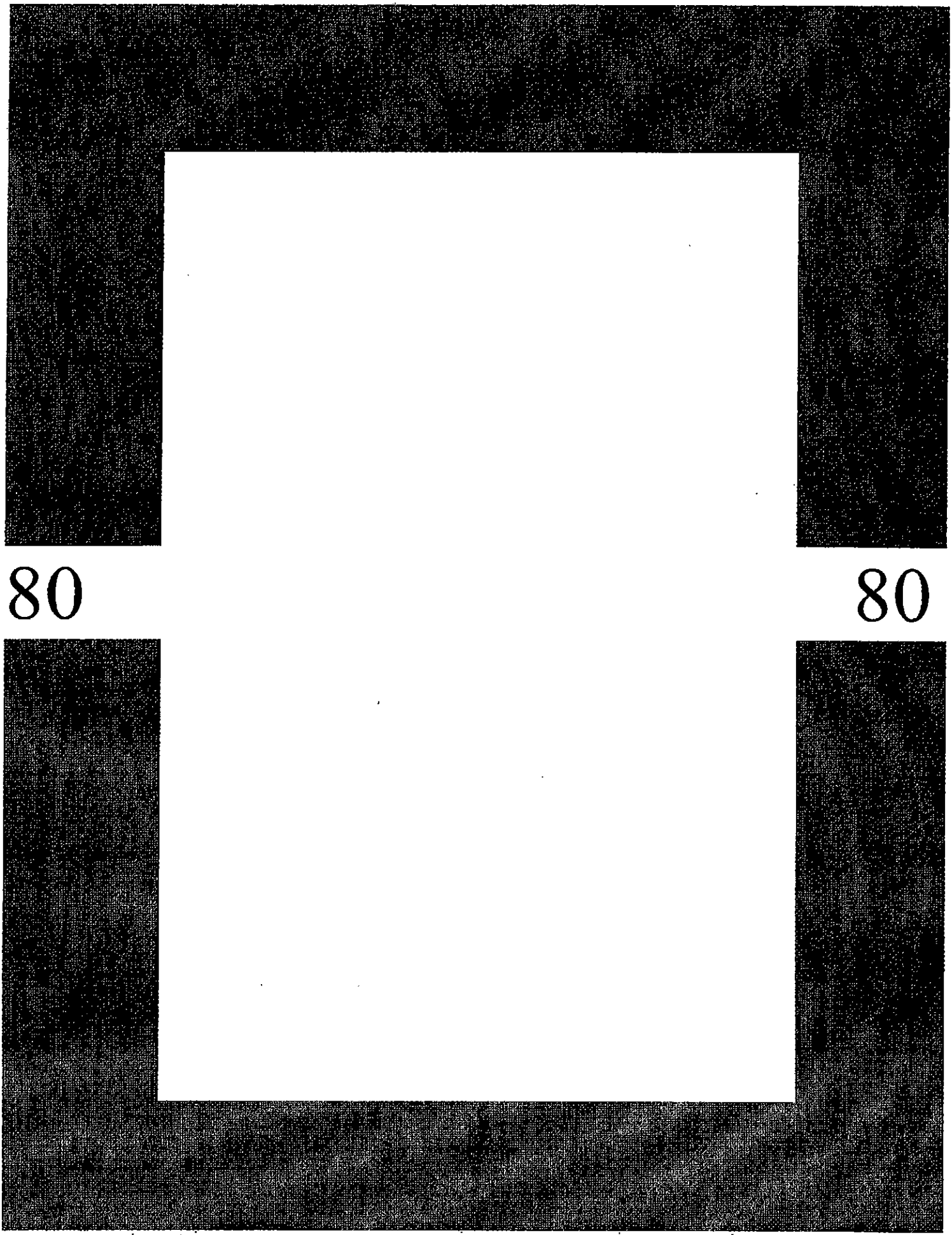

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DISTRICT COURT

CLARK COUNTY, NEVADA

CLERK OF THE COURT

CHERYL A. SIMAO and WILLIAM J. SIMAO, Plaintiffs,	)	CASE NO. A-539455
v.	)	DEPT. X
JAMES RISH, LINDA RISH and JENNY RISH, Defendants.	)	

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 Eglet

For the Defendants: STEVEN M. ROGERS, ESQ.
Hutchison & Steffen, LLC

DANIEL F. POLSENBERG, ESQ.
Lewis and Roca, LLP

RECORDED BY: VICTORIA BOYD, COURT RECORDER

FRIDAY, APRIL 1, 2011 AT 12:58 P.M.

THE CLERK: Please come forward. Court X is in session. The Honorable Judge Jessie Walsh is presiding.

THE COURT: Good afternoon. Please be seated.

Mr. Wall.

MR. WALL: We're ready to proceed with our summation of the damages, Your Honor.

THE COURT: Very well.

MR. WALL: Judge, you're obviously quite aware of this case and the facts that were presented. We're here to discuss Mr. Simao's damages, as well as his wife's. Obviously, damages for his injuries, recovery for his past medical expenses, the pain and suffering both past, future, as well as the loss of enjoyment of life, the hedonic damages under Banks that are allowed and that were testified to by Dr. Smith. He's also entitled, as is his wife, under Rule 55(b) for a default prove up to his attorney's fees and the cost of litigation.

You're aware, certainly, of the injuries that were suffered in this crash: The left elbow strain documented by the records of April 15th, 2005, the day of the crash; the contusion to the back of his head, that occipital scalp, that occurred during the crash documented in the record from the day of the accident; and the tenderness, the palpation of the occipital scalp, even noted weeks later on May 4th, 2005.

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Included in his head injuries, the exacerbation of his migraine headaches, which to some extent, preexisted the accident, he did have the history prior to the accident, but they were made worse, as you know, by the motor vehicle collision in this case. The records from May of 2005 show that he does have a history of migraine headaches; however, to him, these feel different, which is consistent, also, with his testimony on direct. Later, in May of 2005, again, although they note a history of migraine headaches, he experienced a change in the headache intensity and character after the motor vehicle accident.

In July of 2006, almost a year-and-a-half after the accident, it, again, is noted the he has a history of chronic recurrent migraines, but now with an increased frequency, as well as a difference in the character of those headaches.

He also had muscle tension headaches after this accident, different, obviously, from the migraines that he had suffered from prior to the accident; the pain in the back of his head and at the top of his neck, noted even in the October 2005 records, both migraine and tension-type headaches.

March of 2006, before his initial evaluation with Dr. McNulty, a note of episodic tension headaches, as well as migraine headaches. Again, in May of 2006, October of 2006, June of 2007, all the way through June of 2010, notes of both episodic tension-types of headaches, as well as migraines.

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And of course the injury to his neck; the C3-4 and C4-5 disc disruption, requiring an anterior cervical discetomoy and a two-level fusion at C3-4 and C4-5.

You know, by now, that there was no evidence of any prior neck pain, none before the accident. All the treating physicians testified that there were no -- there were no prior neck pain documented anywhere. Even both Dr. Fish and Dr. Wong agree that there was no evidence of neck pain before the April 15th, 2005 collision. It was their ultimate conclusion, though, at times they tried to indicate that they just weren't aware and obviously that was one of the Court orders.

His neck injuries were more than just the soft tissue sprain or strain injury in the accident. Southwest Medical initially diagnosed him with a cervical strain and the physicians assistants at Southwest Medical thought that his neck injury would resolve with time and told him to return in six months. You know from all the doctors' testimonies that soft tissue injuries like a cervical sprain or strain typically resolve in a short period of time. But his neck injury persisted, as you know. He returned in four-and-a-half months since the symptoms and pain hadn't gone away.

Dr. Fish's testimony is also consistent with William sustaining more than just a cervical sprain or straining.

[Video Played in Courtroom]

MR. WALL: Dr. McNulty, Dr. Grover, and Dr. Rosler all

testified that he sustained a traumatic, internal disc disruption.

And, of course, after the collision he continued to complain of neck or occipital pain at the back of his head and top of his neck. He complained of it immediately after the collision. It didn't resolve after a few weeks. And from the day of the crash forward, he's continued to experience pain in his neck or his occiput region noted by the records on the day of the crash: Neck, back, and left shoulder pain. Contusion of the scalp. Three weeks after the crash: Recurrent occipital pain. Patient complains of occipital head pain, again, three weeks after the crash, tenderness to palpation over the occipital scalp.

Five-and-a-half months after the crash, a check up for his neck and shoulder pain and headaches. Occasionally they start as tightness and pain in his shoulder, which then radiates up into his neck.

Six months after the crash, they're still taking x-rays of his neck and left shoulder because of a history of migraine tension-type headaches and neck pain. They did six different views of the cervical spine in October of 2005 because of continuous neck pain eight months after the crash; refer to physical therapy because of continuous neck and shoulder pain as a result of the accident.

Nine months after the crash, an injury to his neck

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and upper trapezius region as a result of the motor vehicle accident, pain in the back of his neck and his upper trapezius.

Eleven months after the crash, no described as chronic neck pain because it's been there for eleven months.

Twelve months and three days after the crash, his initial evaluation with Dr. McNulty, the patient has a primary issue of axial cervical pain, again, since the date of the accident. You know, by now, that he's had 14 separate invasive surgical procedures from the transforaminal steroid injections to the selective nerve root blocks to the pulsed radio frequency that Dr. Arita performed, to the nerve root blocks, discography in August of 2008, more injections, even by Dr. McNulty, ultimately the surgery in March of 2009 to fuse his vertebrae together and remove two discs, and continued injections in 2010 when the pain came back. You know that Dr. McNulty performed a two-level cervical fusion. He's the only physician in this case that actually observed the injured discs at the time of surgery; not Dr. Fish and not Dr. Wong.

You know from the x-rays that he still has that plate in his neck with six screws holding it to the vertebrae. He's obviously continued to complain of pain in his neck, or occipital region, since the crash. Even though it's not -- sometimes it's not specifically in the Southwest Medical

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records, it is clear that he continued to have symptoms. Some of the records do not state neck pain, something that's been brought up by Mr. Rogers. In the records, however, they continue to provide treatment for his neck injury. the medications that they give him; Flexeril, Soma, Ibuprofen are all to treat musculoskeletal injuries, the cervical sprain or strain that they say they first treated, not his migraines.

They did x-rays, obviously, not of his cervical spine during that period, where the defense claimed Mr. Simao wasn't complaining of neck pain. And Dr. Grover's testimony on cross-examination, perhaps better than any testimony in the whole case, confirms that William continued to have neck symptoms and how that is medically an appropriate conclusion.

[Video Played in Courtroom]

MR. WALL: Dr. Grover outlines it better than I could and in contrast to what the defense presented to this jury. Doctors McNulty, Rosler, Grover, and Arita each testified that the cost of the medical treatment they provided was reasonable and customary. There is no evidence that refutes the medical expenses in the fact that they were reasonable and customary. In fact, before trial, the defense even stipulated that the past medical expenses were reasonable and customary, they challenged causation. The amount on Exhibit 1 was agreed, $194,380.96 in past medical specials for Mr. Simao.

Doctors McNulty, Rosler, Grover, and Arita, all of

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the treating physicians who testified in this case, each said that the medical treatment they provided was necessary and causally related to the motor vehicle collision on April 15th, 2005.

So when the judgment that this Court ultimately enters, it would be our request that past medically and related expenses in the amount $194,380.96 be awarded.

What the Court must deal with next is the issue of pain and suffering. The sixth year anniversary of this crash is two weeks from now; six years of past pain and suffering. We allocated approximately fifteen cents per minute, which comes out to about $9 an hour if it was a job. And, of course, the Court, how it instructs juries on pain and suffering, would take into consideration, certainly how bad the pain was, whether it was just an annoyance, whether it's all encompassing. You know that Mr. Simao's pain threshold, at times, was ten-out-of-ten, often seven or eight-out-of-ten, as described by the doctors. You heard from him and his wife that it changed both of their lives.

I would ask the Court to, not only factor in that, but also the pain of surgery, the pain of the recovery, and event eh ten-out-of-ten that they create during the discography. You also should consider, of course, how long the pain lasts: Is it fleeting; is it for an hour; is if for a month; or even just a year? The evidence here is, that it

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will last for the rest of his life, significantly every day, since the motor vehicle accident.

For past pain and suffering, we would ask the Court to award an amount of $473,040.

The Court must also take into consideration the fact that this pain has not gone away and will not go away.

The issue of future pain and suffering is before the Court and, of course, Bill is expected to live until age 78, based on the statistical averages. That's 31 more years based on the government's statistics, the life expectancy table, for which the Court took judicial notice; 31 more years of the pain.

We would ask the Court, conservatively, to consider seven cents per minute for that pain. That comes out to an amount of $1,140,552 in future pain and suffering over the next 31 years.

We would ask the Court to, also, consider the issue of loss of enjoyment of life, the hedonic damages accepted by the Nevada Supreme Court in Banks versus Sunrise Hospital, as testified to by Dr. Smith. He discussed a range of values for the loss of enjoyment of life. He said, well, if there's one number -- and this was Exhibit 68 -- if he's lost thirty percent of his lost -- of his enjoyment of life, there's one number; if he's lost fifteen percent, here's another number.

We would ask the Court to split the difference to

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award at the middle value, which is $905,169.

You heard from him and from his wife how this injury has affected him, and how the pain has affected him, how it has indirectly affected her, and how it has affected their relationship. And so a median range, I would submit to the Court, is conservative and reasonable.

And then of course, there is Cheryl Simao's claim; her claim for loss of consortium; her loss of society and relationship with her husband based on the pain and the injuries from the accident. Of course, in this default prove up, she's also entitled to attorney's fees and costs under 55(b) and the case law that supports that.

Exhibit 68 is from Dr. Stan Smith's testimony, based on his calculations, and he used the conservative number of fifteen percent for her of the loss of society on relationship. And we would ask the Court to award that: $681,286 in the category of Cheryl Simao's loss of consortia.

What is left, then, is the issue of this prove up of attorney's fees. As the Court is aware, whether to award attorney's fees is left to the sound discretion of the Court under Laforge, under the Uniroyal case. Here the contingency fee agreement that the plaintiff signed with their counsel is forty percent of the amounts recovered, which is standard. And that obviously recognizes the validity of contingent fee agreements in such cases. District courts within this

building, including the Court, I believe have awarded attorney's fees based on a contingent fee amount.

Ultimately, the method upon which attorney's fees are determined is left to the sound discretion of the Court and it is certainly within your discretion to not be limited to one specific approach, but rather to award the fees based upon the contingent fee agreement.

There is, of course, a long line of precedent establishing an award of attorney's fees at the time of a default judgment, most recently the Goodyear Tire case, going back almost 50 years to the Bromberg case. And the Court is obviously on solid ground in awarding attorney's fees and the costs at the time of a default judgment.

The total damages that we've outlined so far, for the Court, are $3,394,427.96, that's merely adding up the numbers that we had suggested to the Court in closed judgment thus far. The forty percent attorney's fees based on the contingent fee agreement, in doing the math, would be $1,357,771.18. We would ask that that be awarded. That takes into account both Bill and Cheryl Simao combined.

There is also an entitlement to the costs that have been incurred in the case. We are still, frankly, Judge, accruing those and adding them together. We will provide the Court, pursuant to the local rule, with a memorandum of costs within seven days, and we would include that in a proposed

judgment.

The total amount ultimately to be awarded, based on our requests on all of the foregoing, is $4,752,199.14 plus costs to be determined. We would submit it to the court.

THE COURT: Thank you, Mr. Wall.

Okay. Mr. Rogers.

MR. ROGERS: Thank you, Your Honor.

With that said, Your Honor, this is our truncated closing. I'm going to quote only the plaintiff's medical providers, nothing at all, then, from the defense experts. Each one of the plaintiff's own medical providers have testified, with regard to past specials, the conditions with which they diagnosed the plaintiff can be caused with or without trauma; that none of the extensive diagnostic tests done in this case ever imaged or evidenced a traumatic injury. The only condition observed in the cervical spine was a preexisting condition, the C4 facet hypertrophy.

Each one of the providers testified that their causation opinion is based on patient history and nothing more. They've each admitted, on the stand, that there is no scientific or medical peer-review study to verify the reliability of determining cause, based on patient history. They've also testified that the likelihood that this accident caused injury is diminished if the plaintiff did not have ongoing neck symptoms during his many gaps in treatment

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immediately following the accident.

The plaintiff claims that the PAs, the mid-level providers as they've characterized them, somehow missed these neck complaints; however, the deposition transcript that the parties agreed to read into evidence, because this PA was unavailable and out of the country, establishes that the PAs always do report complaints. There's no evidence that any PA missed a complaint here. The plaintiff suggests that he continued complaining of medical -- or pardon me -- of neck pain, but none of the medical records verify that.

The surgery that was ultimately performed, tellingly, has an eighty-five to ninety percent success rate, an overwhelming majority of success, unless there was no injury to the discs which were fused. And, in this case, the plaintiff claims that he has ongoing symptoms. That surgery was not a success, we get back to the original question: Was injury caused to the cervical spinal, particularly level C3-4 and C4-5, as a result of this accident. None of the medical evidence provided, establishes that it did.

Dr. Arita testified that, in his opinion, the plaintiff's complaints were inconsistent with the physical findings and that he had concerns that there were non-physiologic basis for his complaints.

In short, just from the plaintiff's medical providers' own testimony, it appears that this accident

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probably caused only one condition, and that was an aggravation of his preexisting headaches. He complained of occipital headaches afterwards and migraines before; however, as Dr. Arita testified, the occipital headaches were relieved by the time the plaintiff presented to him, which was roughly a year to a year-and-a-half after the accident.

The accident may have, also, potentially caused a neck sprain, although, Dr. McNulty testified that that diagnosis is a more or less a diagnosis of exclusion. It's a word used interchangeably with pain. If he presented with neck pain on the date of the incident, Dr. McNulty that there was no diagnosis of it. What the diagnostic evidence establishes is that, there was no injury requiring surgery.

Next, it appears, from the specials, that the plaintiff has abandoned his claim for future specials. That would include the spinal cord stimulator, which was an issue of great debate here in court, as well as the adjacent-level fusion, which was also disputed. So we will pass on arguing on those points.

Now, if what we have, then, is a claim for past medical specials, no future treatment, that brings us to, what would generally be the general damages discussion, but now is tied into Mr. Smith's hedonic damages testimony. Hedonic damages are not a separate category from general damages. Mr. Smith testified that, in his opinion, there are benchmarks to

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be employed. He testified that he incorporated the plaintiff's claim for future specials into these -- into this analysis and that the jury could consider it; however, he also testified that he has no basis, factual or statistical or any other basis within his expertise, that would establish that there's a fifteen percent or a thirty percent loss. That these numbers are simply benchmarks.

The evidence establishes that he relies on psychologists to help establish these benchmarks; what is the loss, in other words, of enjoyment. That's something that a psychologist will supply. He doesn't have a vocational rehabilitation specialist to quantify a given loss. He simply supplies these numbers.

The plaintiff suggests that the Court should split the difference between fifteen and thirty percent. The defense submits that the evidence, particularly if the futures are being waived, would not amount anywhere near fifteen percent.

Remember, when the plaintiff took the stand and testified, he said that there's nothing he can't do anymore, he continues doing everything he did before, with one exception and that's ride motorcycles. That's the only thing that he's given up.

Mr. Smith repeatedly referred to hobbies or activities that give fulfillment to one's life as the measure

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of a loss. In this case, we have only the example of motorcycle riding.

Next in the loss of society, Mr. Smith extrapolates a loss of enjoyment from a death to arrive at a hedonic damages number. He, then, extrapolates again to extend that number to a third party, the spouse. This has a questionable undertaking. We understand that the Court is already recognized the authority that permits hedonic damages, but taking this number and extending it to loss of consortium is a different matter. Both plaintiffs have testified that they have not undergone any counseling or treatment of any kind for loss of consortium or problems within the relationship. They have testified that there have been problems occasioned by the surgery which failed, but nothing that comes close to the number that they've asked the Court for. In this case, I believe it was $680,000.

Now, that brings us to fees. This is something that is generally taken up in a separate hearing, this did come as a surprise. I spoke with plaintiff's counsel earlier today, there was no mention of it. It was our understanding that there would be no power point today, that this would be a truncated, an abbreviated close, and the defense would ask for a separate hearing on the motion for fees and costs. I guess costs will be brought separately.

One of the authorities that the plaintiffs cited in

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their request for fees was Goodyear, a case in which no fees were awarded.

In conclusion, nothing short of proof establishing that this car accident caused the injuries alleged would support an award of -- or a finding of probability that this accident resulted in this surgery that the plaintiff underwent. As I've outlined, none of the evidence establishes a condition at the levels that were fused.

The plaintiff has not met his burden of proof. Mrs. Rish asks that you return a verdict finding that she is not responsible for the neck treatment that followed this accident and to the extent that she might be -- it would be limited to the sprain, with which the plaintiff was diagnosed on the date of the incident and of which he did not complain for the following six months.

The specials that would be compensable under that analysis would approximate $16,000, the general damages should be an award commensurate with that.

And with that, Your Honor, we will leave it to your discretion.

THE COURT: Thank you, Mr. Rogers.

MR. ROGERS: Thank you.

MR. WALL: May I respond --

THE COURT: Mr. Wall.

MR. WALL: -- briefly, Your Honor.

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THE COURT: Yes.

MR. WALL: First of all, with respect to this truncated closing, just a reminder of where we are procedurally. This is a prove up under N.R.C.P 55, there's basically a defacto default in place based on the Court striking the defendant's answer. You've heard from the defense, based on a very limited right under Hamlet to be heard before the Court assess damage, but this is not the same as a closing argument. Rule 55(b) sub (2) says that, in determining damages in such cases when there's a default, and I quote, "If, in order to enable the Court to enter judgment or to carry it into effect, it is necessary to take an account, or to determine the amount of damages, or to establish the truth of any averment by evidence, the Court may conduct such hearings or orders such reference as it deems necessary and proper." And that's essentially what today is.

Now, I feel compelled to respond to this sort of repetitious claim of surprise by Mr. Rogers. He did call me at 11:30 this morning and he asked me, do you understand that I get to still address the Court about whether the accident caused the damages. That was the subject of the conversation. I told him, yeah, I think you can under Hamlet, based on that limited exception that we didn't oppose, but that I'm going to go for about 20 or 25 minutes on what the damages ought to be; that my understanding is, that you would, then, get 10 or 15

minutes and I would get a brief rebuttal. There wasn't any question to me about what we were going to ask for, including pain and suffering, including hedonic damages, and including attorney's fees.

I keep hearing this causation argument as the Court has. Obviously, you heard from Dr. McNulty, Dr. Rosler, Dr. Arita, Dr. Grover; they say that the conditions are caused without trauma, but the treating physicians render their opinions based, not only on the history, the diagnostic test, the medical records, not just the history.

You saw Dr. Grover's testimony about what the condition would be and how we diagnose it based on the fact that there were a -- there was a continuing complaint of neck pain from Mr. Simao.

This gap in treatment that they've talked about, even Dr. Wong, the defense expert, said that if the pain persisted and there wasn't a gap in pain, then his opinion on causation would be different.

[Video Played in Courtroom]

MR. WALL: What evidence is there, or was there, or could there have been to show that this gap in treatment is the same as a gap in the pain? There was none, Your Honor, and there wouldn't have been any if this trial had proceeded to its conclusion. A gap in treatment isn't the same as a gap in pain. He had pain throughout. He was told at the end May of

2005, based on the tests they did initially, it'll resolve on its own, go home, and come back and see us in six months.

You know that none of the tests that they did, before that period of time, would have diagnosed the actual injury that he suffered. You heard that he's a -- I think Dr. McNulty said, he's a man's man, Mr. Simao. He believes the physicians' assistants when they tell him that it'll go away on its own. And this claim that the first five weeks doesn't show that he suffered a neck injury is belied by all the medical records that we showed the first time I was before you.

They continued to claim that there isn't any evidence to support the treatment that he had. First of all, there is no evidence to support, including from Dr. Fish and Dr. Wong, that there was any intervening event during this supposed gap that would have caused his pain. They continued to pursue this theory that he wasn't injured; that if he suffered an injury, it was a soft tissue injury only and resolved by May 26th despite all of the occipital complaints, all of the ongoing systems -- symptoms.

For this to even be remotely true, it would mean that he had no neck pain before the accident; suffered a neck injury at the time of the accident; they treated it for five weeks, had occipital complaints during that time, had never had them before; it magically goes away; and the exact same

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pain reappears in September or so of 2005 without any intervening event, in the exact same spot as the pain after the motor vehicle accident with most, if not all, of the same symptoms resulting in the following five years of treatment. Obviously, there's zero evidence of that particular scenario.

And they persist in this theory that he was treated unnecessarily and that all of his treatment beyond May 26th, 2005 is unnecessary; that the discs that were removed weren't damaged. I just have to ask the Court to think with what this means. This means that all of the doctors, all of the board certified, fellowship trained surgeons, pain management doctors, neurologists, RNs, PAs, nurse's assistants, Mr. Simao apparently fooled them all. He pretended he had an injury. There was apparently no injury. His discs were removed even though he wasn't injured. He fooled the MRI machine, the CT after the discography, the injection needles, the fluoroscopy images. He had 14, apparently, false positives in all of his surgical procedures. He fooled the surgeons who recommended surgery, two independent ones, by the way. He fooled the surgeon who was actually inside his neck and saw the damaged discs.

And I would just submit that there's a certain audacity of Dr. Fish, Dr. Wong, and even Mr. Rogers to say that he hadn't suffered any injury in the motor vehicle accident. They're saying he has no pain without understanding

what he's been through.

This statement by Mr. Rogers that we abandoned, or he even used the word "waived," certain future medical treatments is incorrect. With respect to the stimulator, unfortunately, Dr. Sible didn't get to testify as to the original genesis of that notice to the defense of that particular treatment.

With respect to the future fusion surgery that Dr. Wong testified, because he couldn't come back, pursuant to his own schedule rather than the Court's, he wasn't able to come back and within cross, say that his opinions were to a reasonable degree of medical probability, as the law would require under more staccato. So instead, we try and be as fair, and as conservative, and as reasonable as we could, and to follow the law in the case, a novel approach, but we decided to follow the law of the case.

They go on to say that there's no pain and suffering, no loss of enjoyment of life. I would ask the Court and submit it to the Court, based on the testimony you heard of Mr. and Mrs. Simao, that Mr. Simao lived by the rules. He -- you've seen the kind of person he is. He's a hard working guy, he's a simple guy, he's a family man, and he did nothing to cause this accident, nothing. And what they've done to him is to systematically try to tear him down. They've tried to discredit every opinion of every doctor he

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saw. They've even challenged whether he was really in pain. They hired their usual experts from UCLA to attack him and his doctors. The expert witnesses who disregarded whatever Mr. Simao told them and who disregarded whatever all of the treating doctors said, all to make you or the jury, ultimately the Trier of fact, either dislike Bill and Cheryl, reject them, reject the facts that support their case, or somehow establish that they are not truthful. And, of course, they have violated nearly every order that this Court entered before the trial began and as it continued.

MR. ROGERS: Your Honor, I'm going to object to argument on this front when today's meeting is simply to establish compensable damages. There are damages that emanate from --

MR. WALL: First of all --

MR. ROGERS: conduct that he's complaining of at this time. The only question is whether the accident caused the damages that are being presented to the Court.

MR. WALL: He is exactly right. I don't think he has standing to object, frankly, but he is exactly right. And what I'm asking the Court to do, despite what they've done in this case, is to set all of that aside for purposes of establishing what the appropriate damages are; set aside every violation of every order and approach this case, as I know the Court will, to determine damages only on the evidence that's been presented so far and what's been presented factually in

this summation.

MR. ROGERS: But, Your Honor, it's presumed that those things are set aside. I'm not sure why counsel is invoking it. It seems like it's meant to aggravate the Court and we don't want that to enter into the Court's analysis.

THE COURT: Objection is noted for the record. I hope you will consider the fact that I will carefully consider everything that was argued and everything that was heard in this court.

MR. ROGERS: Thank you.

THE COURT: Mr. Wall.

MR. WALL: I admit that for some who have sat where you sit that it may be difficult to disregard the conduct of one party during the course of a case when it comes time to do that. I'm confident the Court can do that.

What we've asked for is, reasonable, conservative, and fair in view of the law, in view of the facts, in view of the evidence. We asked that we be allowed to prepare for the Court a proper judgment for the amounts we've set forward and of course the order on the motion to strike the answer to prepare for the Court. Thank you very much.

THE COURT: Thank you, Mr. Wall.

What I would appreciate, frankly, is for counsel to prepare a proposed judgment, but to leave these categories blank so the Court can fill them in, and I want an opportunity

to review the evidence, I also would like an opportunity to review the cases as cited by counsel. I wasn't able to write down all of the citations as quickly as they flashed up on the screen, particularly those relating to attorney fee issues.

MR. WALL: We will provide that to the Court.

MR. POLSENBERG: Your Honor, if I may, on fees, could -- I don't see where 55 provides for fees.

THE COURT: One of the reasons why, Mr. Polsenberg, I asked for a copy of those case citation is, because I'd like read and each of those cases that plaintiff's cited.

MR. POLSENBERG: Well, and I think -- well, I think they should make a motion for fees just as Mr. Rogers argued in his argument. I don't think they are necessarily a part of this and to have them bring it in for the first time in this closing argument and give you a list of cases, I think we need -- due process would required that we have the right to respond.

Mr. Rogers is right, Goodyear didn't award fees. The fees under Foster versus Dingwall were under rule 37 for discovery and under 18, because the defenses were brought in bad faith. They didn't have to do with the default itself, and 55 doesn't mention the word fees. It mentions costs only in (b)(1) and we're under (b)(2). Now, I'm not saying they don't get costs, but I don't see where they get fees. I think they need to bring a separate motion for fees.

THE COURT: Mr. Wall.

MR. WALL: We'll bring it if you wish, Your Honor, but having stricken the answer, I'm not sure that they have an opportunity to file an opposition.

MR. POLSENBERG: No, we do.

MR. WALL: I'm not sure that that's correct. So it is -- I'm sure the Court has awarded fees and costs in dozens of default judgments over the years. That is what is routinely allowed in such cases and we'll provide you the case law that we have.

MR. POLSENBERG: And they're routinely allowed under 1801.02(a), when the plaintiff recovers $20,000 or less. They're not allowed over $20,000.

THE COURT: Does defense wish to brief this issue regarding attorney fees?

MR. POLSENBERG: Yes, I would. Thank you, Your Honor.

THE COURT: How much time do you need?

MR. POLSENBERG: I think they would need to go first, unless you just want one brief from us?

MR. EGLET: Two briefs equally submitted at the same time.

THE COURT: No, I would like to see -- yeah.

MR. POLSENBERG: I can't do it at the same time, because that denies due process where I don't get to see what they're arguing that their basis for fees are on. I think they should

make a motion and we'll do in opposition in ten days.

THE COURT: Mr. Wall.

MR. WALL: Well, the Court order blind briefs or the Court can order us to do it first, it really -- we'll do it either way the Court -- we will submit it.

THE COURT: How much time do you need to prepare an order -- or a motion with respect to fees?

MR. WALL: Two weeks; does that work?

THE COURT: Two weeks for the parties to submit their briefs simultaneously.

MR. POLSENBERG: But, Your Honor, I won't know what their basis is.

THE COURT: That's right and they won't know what yours is.

MR. POLSENBERG: They won't know what my basis is that they don't get fees? I think due process requires that we be allowed to know what their basis for the briefs are -- for the fees are.

MR. EGLET: We're giving up the right to file a reply brief --

MR. POLSENBERG: Well --

MR. EGLET: -- by doing them simultaneously.

THE COURT: I think the Court can review the briefs that are submitted to the Court blind and if the Court feels that it needs further briefing the Court can request some of the

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parties.

MR. POLSENBERG: All right. But if they rely on anything other than rule 55 and that list of cases, which I would also like to see, I think everybody in this room knows that I will scream bloody-murder.

THE COURT: No doubt. If counsel will be so kind as to provide us a list of those cases to Mr. Polsenberg, as well as a list to the Court --

MR. EGLET: All right.

THE COURT: -- I would appreciate it. So two weeks for counsel to file their respective briefs and --

THE CLERK: April 15.

THE COURT: April 15.

MR. WALL: Well, that's -- so April 15 for the briefs? All right.

THE COURT: Okay.

MR. POLSENBERG: Thank you, Your Honor.

MR. WALL: Do you want to set a hearing date, Judge, or just do it -- just do it in chambers?

THE COURT: I'm just inclined to put it on the chambers' calendar two weeks after the April 15th date; where does that tae us to? I need an opportunity to review and --

THE CLERK: April 19th.

THE COURT: April 29 on the chambers' calendar for the Court to review.

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MR. WALL: Well, is your chamber calendar on Friday or Thursday?

THE COURT: No, it's generally on Thursday.

MR. WALL: Thursday, so the 28th?

THE CLERK: Thursday the 28th.

MR. POLSENBERG: Your Honor, if you're going to have a hearing, my May is very messy. So if you want to do it in April, that would work better for me.

THE COURT: Not planning to hold a hearing, unless I think it's necessary, Mr. Polsenberg.

MR. POLSENBERG: Very good, Your Honor. Thank you much.

THE COURT: In which case, I'll do my best to work around counsel's schedule.

MR. POLSENBERG: Thank you.

THE COURT: You're welcome.

MR. ROGERS: Your Honor, at this time, defense requests the plaintiff's 727 briefs, we haven't seen them.

THE COURT: Very well, Mr. Wall.

MR. EGLET: I actually didn't bring them.

MR. WALL: We didn't bring them with us, but we can have them sent over.

THE COURT: All right.

MR. ROGERS: Could we get an order that they be produced within a given time?

THE COURT: Yes, how soon can you get those briefs to Mr.

Rogers, Mr. Wall?

MR. EGLET: Next week -- what brief, Your Honor.

THE COURT: Those briefs that he's requesting.

MR. ROGERS: 727, your --

MR. EGLET: As soon as I walk back, I'll send them right over.

THE COURT: Okay.

MR. EGLET: And I'll bring them --

THE COURT: Thank you.

MR. ROGERS: Thank you, Your Honor.

MR. EGLET: Unless the Court wants to take a recess, I can send a member of my staff right now to get them and file them in open court, however you wish.

MR. POLSENBERG: That's fine.

THE COURT: What about that, Mr. Rogers?

MR. EGLET: Well, Mr. Polsenberg says it's fine, he trusts that I'm going to get them to Mr. Rogers.

THE COURT: Did you say that, Mr. Polsenberg?

MR. POLSENBERG: I did.

THE COURT: Okay. Good, then.

[Proceedings Concluded at 1:48 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

ERIN PERKINS, Transcriber

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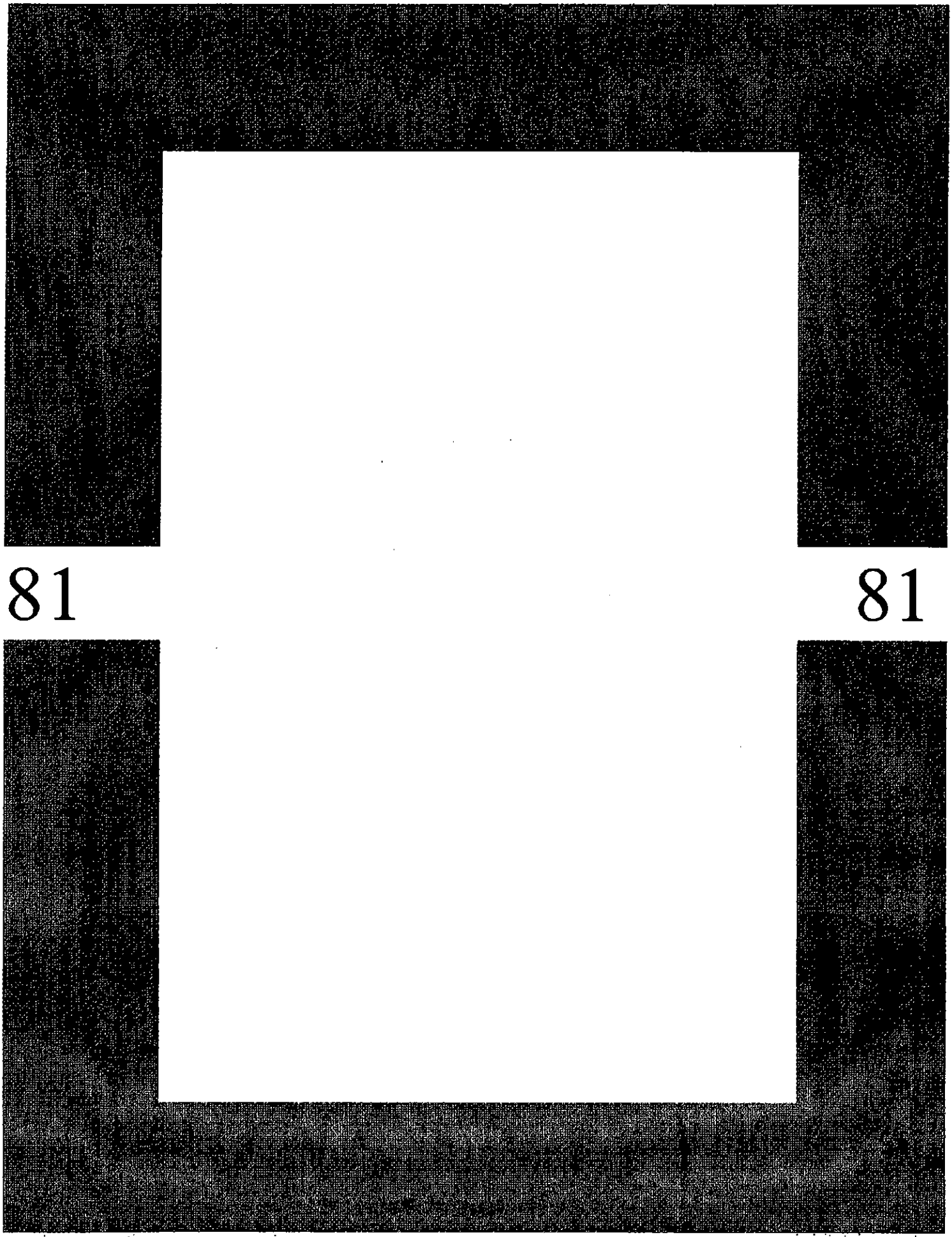

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REGISTER OF ACTIONS
CASE NO. 07A539455

William Simao, Cheryl Simao vs Jenny Rish

Case Type:	**Negligence - Auto**
Date Filed:	**04/13/2007**
Location:	**Department 10**
Conversion Case Number:	**A539455**
Supreme Court No.:	**58504**
	59208
	59423

PARTY INFORMATION

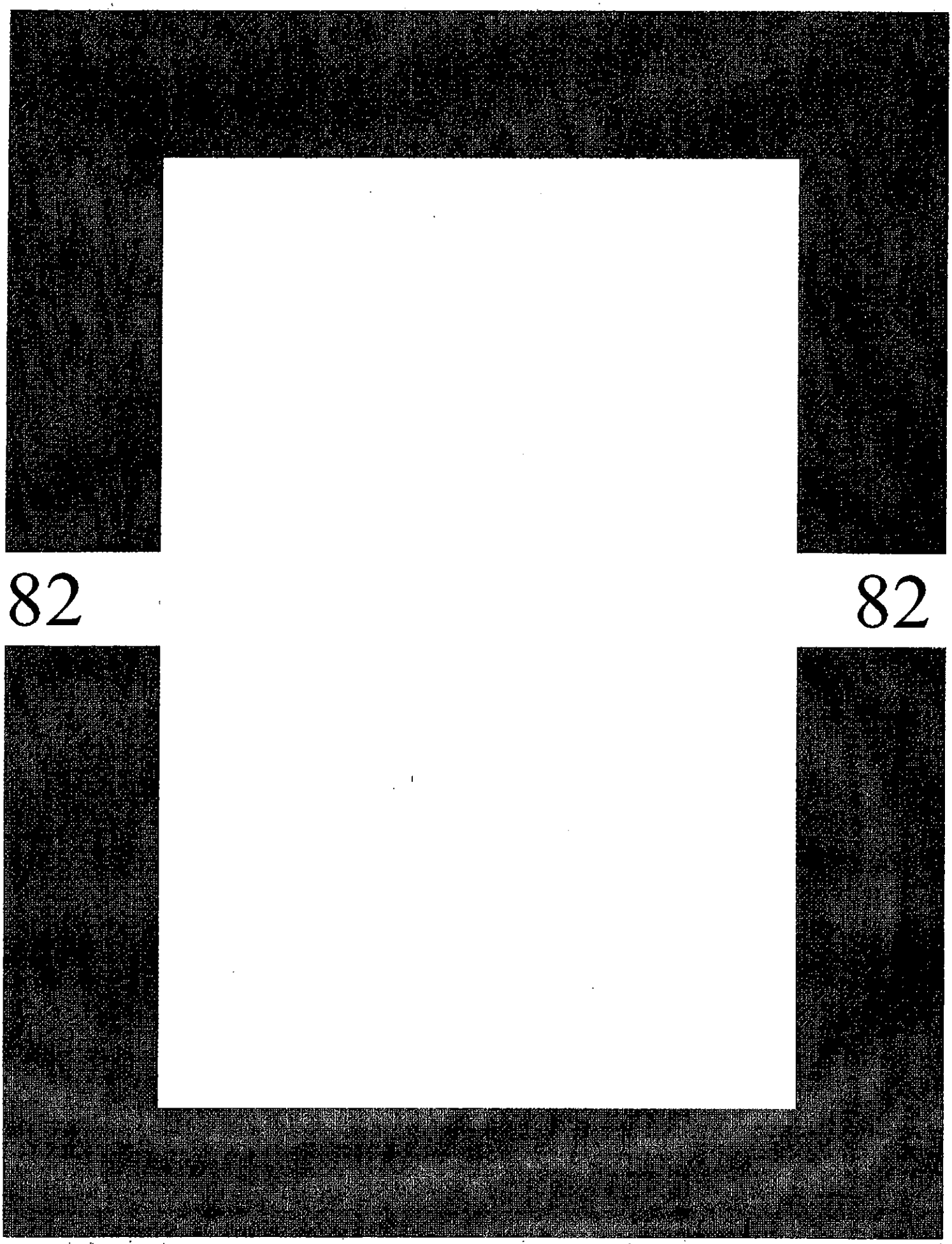
		Lead Attorneys
Defendant	**Rish, Jenny**	**Stephen H Rogers** *Retained* 702-383-3400(W)
Plaintiff	**Simao, Cheryl A**	**David T Wall** *Retained* 702-450-5400(W)
Plaintiff	**Simao, William J**	**David T Wall** *Retained* 702-450-5400(W)

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
Return to Register of Actions



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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:

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

which have resulted in past medical damages in excess of $190.000.00 and will result in special and general damages which will more likely than not total in the millions of dollars.

III.

LEGAL ARGUMENT

A. PLAINTIFFS' COUNSEL HAS A SUBSTANTIVE RIGHT TO LIBERAL VOIR DIRE OF THE PROSPECTIVE JURORS IN ORDER TO GATHER INFORMATION TO INTELLIGENTLY EXERCISE PEREMPTORY CHALLENGES AS WELL AS FOR CAUSE CHALLENGES

The purpose of voir dire is to facilitate the identification and removal of potential jurors "who, because of bias or prejudice, cannot serve as fair and impartial jurors." *Silver State v. Shelley*, 105 Nev. 309, 774 P.2d 1044 (1989). The Nevada Supreme Court has specifically held that an attorney has a substantive right to participate in voir dire. *See Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210 (1988). In *Whitlock*, Appellants, Phyllis and J.T. Whitlock, brought an action against Donald Salmon, M.D. for injuries received by Mrs. Whitlock during surgery for removal of a brain tumor. *Id.* at 25. The Whitlocks' counsel specifically requested permission of the trial judge to voir dire the jury. *Id.* However, voir dire was conducted exclusively by the judge. *Id.* The Supreme Court found the trial judge's failure to permit counsel to voir dire the jury to be reversible error. *Id.*

NRS 16.030(6) provides:

> The judge shall conduct the initial examination of the prospective jurors and **the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted.**

[Emphasis Added]. The Court in *Whitlock* held that "the statute confers a substantive right to reasonable participation in voir dire by counsel; and this court will not attempt to abridge or modify a substantive right." *Id.* at 26. In so holding, the Court explained:

> 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

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> a possibility of prejudice. Moreover, while we do not doubt the ability of trial judges to conduct voir dire, there is concern that on occasion jurors may be less candid when responding with personal disclosures to a presiding judicial officer. Finally, many trial attorneys develop a sense of discernment from participation in voir dire that often reveals favor or antagonism among prospective jurors. The 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.

Id. at 28.

The Supreme Court further explained the importance of trial counsel's substantive right to participate in voir dire by emphasizing that this right was specifically safeguarded by the legislature via a statutory enactment:

> NRCP 47(a) contemplated a healthy respect on the part of trial judges for appropriate supplemental participation by trial counsel in voir dire. Historically, in most of Nevada's courts of general jurisdiction, counsel have been accorded meaningful opportunities for involvement in the voir dire of prospective jurors. 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 intendment of N.R.C.P. 47(a).

Whitlock, supra, at 26.

The constitutional guarantee of the right to be represented by counsel includes the right to have counsel interrogate the members of the jury panel. *Whitlock, supra* at 26. "The importance of a truly impartial jury, . . . is so basic to our notion of jurisprudence that its necessity has never really been questioned in this country." *Id.* citing *United States v. Bear Runner*, 502 F.2d 908, 911 (8th Cir. 1974). Trial counsel's participation is integral to the preservation of this right. "The voir dire process is designed to ensure -- to the fullest extent possible -- that an intelligent, alert and impartial jury which will perform the important duty assigned to it by our judicial system is obtained." *Id.*, citing *De La Rosa v. State*, 414 S.W.2d 668, 671 (Tex.Crim.App. 1967). "The purpose of voir dire examination is to determine whether a prospective juror can

and will render a fair and impartial verdict on the evidence presented and apply the facts, as he or she finds them, to the law given." *Id.*, citing *Oliver v. State*, 85 Nev. 418, 422, 456 P.2d 431, 434 (1969).

The Supreme Court pointed out that "one study suggests that the judge's presence evokes considerable pressure among jurors toward conforming to a set of perceived judicial standards and that this is minimized when an attorney conducts voir dire." *Whitlock*, at 28, citing Jones, Judge-Versus Attorney-Conducted Voir Dire; and Emperical Investigation of Juror Candor, 11 Law and Human Behavior 131, 143-44 (1987).

In the instant matter, William Simao has suffered severe life-altering injuries as a result of Defendant's carelessness and, as such, William will be requesting from the jury millions of dollars to compensate him for his injuries. Moreover, William's wife, Cheryl Ann Simao, will be requested monetary damages for the losses she has sustained as a result of William's injuries. Therefore, Plaintiffs' counsel is entitled to conduct voir dire of the jury panel which should not be unreasonably restricted. "The voir dire examination of jurors . . . [is] to enable counsel to exercise intelligently the peremptory challenges allowed by the law." *State v. Brown*, 53 N.C. App. 82, 280 S.E. 2d 31, Cert Denied, 304 N.C. 197, 285 S.E. 2d 102 (1981). Therefore, the purpose of voir dire is for counsel to gather information for peremptory as well as for cause challenges. However, "[p]eremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes." *Id.* at 27, citing *United States v. Ible*, 630 F.2d 389, 395 (5th Cir. 1980).

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B. ANY PROSPECTIVE JUROR WHOSE VIEWS MIGHT IMPAIR THEIR ABILITY TO BE FAIR AND IMPARTIAL IS DISQUALIFIED AS A MATTER OF LAW; THE PROSPECTIVE JUROR CANNOT BE REHABILITATED; THE PROSPECTIVE JUROR'S IMPAIRMENT DOES NOT NEED TO BE SHOWN WITH UNMISTAKABLE CLARITY; AND, ANY DOUBT MUST BE WEIGHED BY THE TRIAL JUDGE IN FAVOR OF DISQUALIFICATION

The United States Supreme Court has recognized the fundamental importance of empanelling a fair and impartial jury, stating: "[i]t is difficult to conceive of a more effective obstruction to the judicial process than a juror who has prejudged the case." *In re Michael*, 326, U.S. 224, 228, (1945). "The test for evaluating whether a juror should [be] removed for cause is 'whether a prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath.'" *Weber v. State*, 121 Nev. Adv. Rep. 57, 119 P.3d 107, 125 (2005), citing *Leonard v. State*, 117 Nev. 53, 65, 17 P.3d 397, 405 (2001); See also *Wainwright v. Witt*, 496 U.S. 412 (1985).

The United States Supreme Court in *Wainwright* held that prospective jurors must be excused if their views could substantially impair their ability to perform their function as jurors, and the impairment need not be shown with unmistakable clarity. The Supreme Court of Nevada has provided guidance for the District Court and trial counsel in determining whether a juror should be removed for cause. The Court explained, "[i]t is not enough to be able to point to detached language which, alone considered, would seem to meet the statute requirement, if, on construing the whole declaration together, it is apparent that the juror is not able to express an absolute belief that his opinion will not influence his verdict." *Thompson vs. State of Nevada*, 111 Nev. 439, 443, 894 P.2d 375, 377 (1995), citing *Bryant v. State*, 72 Nev. 330, 305 P.2d 360 (1956). This rule was recently affirmed by our Supreme Court, wherein the court stated: "[d]etached language considered alone is not sufficient to establish that a juror can be fair when the juror's declaration as a whole indicates that she could not state unequivocally that a

preconception would not influence her verdict." *Weber v. The State of Nevada*, 119 P.3d 107, 126, 121 Nev. Adv. Rep. 57 (2005), citing *Thompson, supra*.

Consequently, the views expressed by a prospective juror, which evidence the juror's partial beliefs should not be subsequently obviated by a simple "yes" response to voir dire questions such as "can you follow the law?" or "can you be fair and impartial?" Such questions are coercive and, thus, gather no reliable information. In fact, these kinds of questions border on bullying. They intimidate even self-assured jurors into giving false answers such as "yes, I can follow the law" or "yes, I can be fair and impartial," which are insufficient under the law, if the court truly wants to discover prospective jurors whose biases or prejudices may affect their ability to fairly serve. Thus, if a juror expresses views during voir dire which might substantially impair the performance of his or her duties as a juror the juror should be removed for cause, even if the juror answers "yes" to the generic question, "can you follow the law?" Such "detached language," without more, should not allow an otherwise partial juror to remain on the panel. Moreover, a juror's impairment does not need to be shown with "unmistakable clarity." *Wainwright, supra*. Any doubt should be weighed in favor of being excused in order to remove even the possibility of bias or prejudice infecting the deliberations. See *Walls v. Kim*, 549 S.E.2d 797, 250 Ga.App. 259 (Ga. 2001).

The Nevada Supreme Court emphasized this point in *Thompson*, and found that, "...[s]imply because the district court was able to point to detached language that prospective juror eighty-nine could be impartial does not eradicate the fact that he previously demonstrated partial beliefs, capped by an unequivocal statement that [the Defendant] was guilty." *Thompson, supra* at 443. The Court further explained: "It may be true that on examination [the prospective juror's] answers tended to contradict his previous statements, but we believe that his very self-contradictions do not increase his fitness as a juryman." *Id.* citing *Bryant*, 72 Nev. at 334. The

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Thompson court ultimately concluded that ". . . it was prejudicial error that [the] prospective juror was not excused for cause. At the conclusion of voir dire, the defense had exhausted all four of its peremptory challenges. Therefore, if the defense had used one of its peremptory challenges to excuse [the] prospective juror, then a juror that was unacceptable to the defense would have remained on the jury" *Id.*

This principle is echoed in Courts throughout our country. Notably, the Georgia Court of Appeals in *Walls, supra* discussed the fallacy of the "rehabilitation question" often relied upon by judges to justify retention of biased jurors. The *Walls* Court discussed the fact that in too many cases, judges confronted with clearly biased jurors use their significant discretion by asking a version of the following question, which the *Walls* Court characterized as a "loaded question":

> After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law?

Id. at 799. The *Walls* Court further explained, "[n]ot so remarkably, jurors confronted with this question from the bench almost inevitably say, 'yes.'"

The *Walls* case is a classic example of a trial Judge's misuse of the "rehabilitation question." The Georgia Court of Appeals found that the Judge erred in not dismissing the juror for cause and reversed the judgment and remanded for a new trial. *Id.* The Court explained that the mere fact the juror told the court she could decide the case on the law and facts did not eliminate the reality of her potential bias. The Court further explained that a trial judge should err on the side of caution by dismissing biased jurors, rather than trying to rehabilitate them, because in reality, the judge is the only person in the courtroom whose primary concern, and primary duty, is to ensure the selection of a fair and impartial jury. *Id.* at 799.

A decision from the Supreme Court of Appeals of West Virginia is also illustrative of the

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commonplace fallacy of a judge's attempt to rehabilitate jurors who already demonstrate potential bias and prejudice. See *O'Dell v. Miller*, 565 S.E.2d 407, 211 W.Va. 285 (Va. 2002). The trial judge refused to strike a prospective juror for cause who made statements that cast doubt on his ability to be fair and impartial, and the Plaintiff was forced to use a preemptory strike to remove the challenged juror. *Id.*

The *O'Dell* Court reiterated what the *Walls* Court and what the majority of Courts have stated, namely, that "[t]rial judges must resist the temptation to 'rehabilitate' prospective jurors simply by asking the 'magic question' to which jurors respond by promising to be fair when all the facts and circumstances show that the fairness of that juror could reasonably be questioned." *Id.* at 412. The court explained that "[o]nce a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair." *Id.* The Court held that the trial court is required to consider the totality of the circumstances and grounds relating to potential request to excuse a prospective juror, rather than reliance upon a simple "yes" in response to the "magic question" from a judge in an attempt to rehabilitate the juror. *Id.* at 413.

C. IN PERSONAL INJURY CASES THERE ARE A NUMBER OF COMMON BIASES AND PREJUDICES WHICH IMPAIR SOME PROSPECTIVE JURORS ABILITY TO BE FAIR AND IMPARTIAL. THUS, COUNSEL MUST BE PERMITTED TO EXPLORE THESE AREAS DURING VOIR DIRE

There are a number of common troubling beliefs, or attitudes, held by prospective jurors in personal injury cases which "substantially impair" their ability to follow the law. These beliefs and attitudes must be discovered during voir dire to ensure a fair trial. Thus, there are specific topics trial counsel must be permitted to openly discuss with the prospective jurors to ensure they can follow the law. They include:

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1. Damages For Pain And Suffering

The Nevada Supreme Court has made it clear that if the jury finds that William suffered injury as a result of the subject car crash, they must award damages for pain and suffering. *Shere v. Davis*, 95 Nev. 491 (1979); *Drummand v. Mid-West Growers*, 91 Nev. 698 (1975). It is unquestionable that some people in our society today don not believe in giving money for pain and suffering. In order for William to receive a fair trial counsel must be permitted to assess this issue during voir dire. Any prospective juror who states they do not believe in compensating personal injury victims for pain and suffering and would have trouble doing that if they were on the jury must be excused for cause.

2. Personal Injury Lawsuits, Tort Reform And Damages Caps

Tort reform and anti-lawsuit campaigns are part of our political and media driven climate. There is no doubt that many people have very strong views on these subjects that may substantially impair their ability to follow the law. Trial counsel must be permitted to address these issues during jury selection.

3. Plaintiffs' Counsel Is Allowed To Ask The Venire Whether They Have Any Biases Or Prejudices That Would Prevent Them From Returning A Multi-Million Dollar Verdict in any Personal Injury Case Even If such a Verdict was Justified by the Evidence

Any method of questioning during voir dire is sufficient provided it is probative on the issue of impartiality. *United States v. Brown*, 938 F.2d 1482, 1485 (1st Cir.), cert. denied, 116 L. Ed. 2d 633, 112 S. Ct. 611 (1991); *Ristaino v. Ross*, 424 U.S. 589, 47 L. Ed. 2d 258, 96 S. Ct. 1017 (1976). See *Rosales-Lopez v. United States*, 451 U.S. 182, 189, 68 L. Ed. 2d 22, 101 S. Ct. 1629 (1991). In this regard, Plaintiffs' counsel is permitted to ask the venire questions relating to whether the jurors have any biases or prejudices that would prevent them from returning a multi-million dollar verdict in any personal injury case even if such a verdict was justified by the evidence. Such questions specifically relate to the jurors' ability to be fair and impartial.

Further, these questions fully comply with EDCR 7.70(c) as they are **NOT** questions which touch upon a verdict a jury would return based on hypothetical facts. Trial counsel will **NOT** be posing questions such as: "If the evidence shows that this plaintiff has special damages of two (2) millions dollars and general damages of two (2) million dollars would you be willing to return a verdict of four (4) million dollars in this case if that is what the evidence shows?" Nor does Plaintiff's counsel expect that defense counsel will be posing questions such as" If the evidence shows that this plaintiff is who caused the motor vehicle accident will you return a defense verdict? Or, if the evidence shows that this plaintiff's damages are only three hundred thousand ($300,000.00) dollars would you return that verdict?" However, trial counsel may ask the general question about any kind of general personal injury case posed above just as defense counsel should be permitted to ask prospective jurors if they have any biases or prejudices that would prevent them from returning a defense verdict in any personal injury case.

In *National Bank of Commerce v. HCA Health Services of Midwest, Inc.*, 304 Ark. 55, 59 (Ark. 1990), during voir dire, plaintiff's counsel was allowed to ask the following question over objection:

> Do any of you have a feeling that you would not be able to award as much as ten million dollars or in that neighborhood under any circumstances, no matter what the proof has shown, no matter what the process of law is, does anybody have any 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...

Similarly, in *Gragg v. Neurological Associates*, 176 Ga. App. 516 , 517 (Ga Ct. App. 1985), the trial judge permitted Plaintiff's counsel to ask the following question to the venire:

> Assume that the evidence in this case justifies a very large verdict, say in excess of a million dollars, just hypothetically. Would any of you have difficulty in 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?

The Georgia Court of Appeals affirmed the decision of the trial court and found that

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questions relating to the juror's ability to award a large verdict if justified by the evidence was relevant to the juror's ability to be fair and neutral *Id.* at 518.

Most notably, in *De Young v. Alpha Constr. Co.*, 186 Ill. App. 3d 758, 764-65, the court took it upon itself to ask the venire whether they would be willing to award a verdict "in the millions." The Illinois Court of Appeals specifically found that this was not an attempt to indoctrinate the jury, that the Judge has discretion in determining what questions to pose to the jury and that it is proper to inquire whether potential jurors have fixed ideas about awards of specific sums of money. *Id.* citing *Kinsey v. Kolber*, 103 Ill. App. 3d 933, 431 N.E.2d 1316 (1982).

Finally, consider *North Carolina Mut. Life Ins. Co. v. Holley*, 533 So. 2d 497, 506 (Ala 1987), in which a lone dissenting justice of the Supreme Court of Alabama thought the majority should have addressed "the propriety of trial counsel's statement, in closing argument, that the jurors' prior assurance, expressed on voir dire, that they would not be hesitant or reluctant to return a one million dollar ($1,000,000) verdict against an insurance company and its agent merely because it was a large sum of money, mandated that the jury return a substantial verdict for the plaintiff under the facts in this case." It is clear from reading the dissenting opinion, that the trial Judge permitted plaintiff's counsel to specifically ask the jurors whether they would be hesitant or reluctant to return a $1 million verdict against an insurance company simply because it was a large sum of money. The majority of the Supreme Court Justices found no issue with this question posed to the venire.

Questions to the prospective jurors relating to whether they would be hesitant or reluctant to award a multimillion dollar verdict in a personal injury case are extremely important to ferret out potential juror bias. If a juror is unable to award a large sum of money simply because of the juror's preconceived notions as to what would be an "unreasonable award," the juror would not

be able to be impartial. The jurisdictions that have addressed this issue hold that questions relating to whether the jurors have any biases or prejudices that would prevent them from awarding millions of dollars if justified by the evidence are related to the jurors' ability to be fair and impartial. Further, if a prospective juror indicates that he/she cannot vote for a verdict in excess of a certain sum of money, does not believe in pain and suffering damages, or believes there should be caps on pain and suffering damages or jury verdicts, regardless of what the evidence shows, that prospective juror must be excused for cause. This would be a clear indication of bias preventing the juror from being fair and impartial in a case such as the one at bar.

4. The Jury's Determination Of Plaintiffs' Damages Must Be Based Only On The Harms And Losses To Them And Nothing Else

As a direct result of the Tort Reform, Anti-Lawsuit and so called Anti-Judicial Activism campaigns many jurors want to infuse into their decision process about money damages consideration of factors other than the harms and losses suffered by the Plaintiffs. Some of these common factors include, but are not limited to the following:

- Whether the money would do any good;
- Whether it might harm the Defendant;
- Whether the Defendant can afford it ;
- Whether there is insurance; and
- Whether it might make prices go up.

Trial counsel is permitted to make sure the jurors can base their damages verdict only on the harms and losses to the Plaintiffs and not consider other factors. If a prospective juror says he or she will consider other factors then they should be excused for cause.

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5. In Civil Cases Jurors Must Decide the Issues Based Upon A Preponderance of the Evidence (More Likely than Not), and Not Impose A Higher Standard

Many prospective jurors do not feel that a plaintiff's burden of proof should only be by a preponderance (more likely than not) and feel that plaintiffs should be required to prove the elements of their case by a higher standard of proof. Many prospective jurors believe that the more likely than not standard is unfair to the Defendant. Many feel that they cannot make decisions on that basis – and, possibly, that the Courts should not either. Therefore, trial counsel must be able, during voir dire, to have any prospective jurors who cannot make their decisions as a juror using the "more likely than not" standard excused for cause. These prospective jurors would be "substantially impaired" from following the law.

D. RESTRICTIONS ON EXERCISE OF RACE-BASED PEREMPTORY CHALLENGES TO JURORS APPLY IN *CIVIL* LITIGATION

A private litigant in a ***civil*** case may not use peremptory challenges to exclude jurors on account of race. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991); *Davis v. Baltimore Gas and Elec. Co.*, 160 F.3d 1023 (4th Cir. 1998); *Robinson v. Birmingham-Jefferson County Transit Authority*, 555 So. 2d 173 (Ala. 1989); *Hicks v. Westinghouse Materials Co.*, 78 Ohio St. 3d 95, 1997-Ohio-227, 676 N.E.2d 872 (1997).

Such a race-based exclusion through the use of peremptory challenges violates the equal protection rights of the excluded jurors, because discrimination on the basis of race in selecting a jury in a ***civil*** proceeding harms the excluded juror no less than such discrimination in a criminal trial, since, in either case, race is the sole reason for denying the excluded venireperson the honor and privilege of participating in the nation's system of justice. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991).

It is discriminatory state action for the government to establish and maintain a system of jury selection permitting blatant racial discrimination by any litigants, ***civil or criminal***, using the

court supported by and paid for by the government. 58 Antitrust & Trade Reg. Rep. (BNA) 422. The party who exercises a challenge invokes the formal authority of the court. **This is true whether the party is a civil defendant or a criminal defendant**. *United States v. De Gross*, 960 F.2d 1433, 1440 (9th Cir. Cal. 1992)

In *Edmonson v. Leesville Concrete Co., Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660, 674 (1991), the Supreme Court extended the applicability of *Batson* to civil trials. Describing the statutory scheme responsible for the establishment of the jury trial system in general, and the peremptory challenge procedure in particular, the *Edmonson* Court observed that "without overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could notexist." *Id.* at 622. The Court's finding of state action led it to apply the *Batson* prohibition against the discriminatory exercise of peremptory challenges to ***civil*** as well as criminal trials.

In *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), another decision expanding the rule announced in *Batson*, the Supreme Court held that a defendant has standing to object to race-based exclusion of jurors by peremptory challenge whether or not the defendant and the excluded jurors are members of the same race. Reasoning that racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of a proceeding in doubt, the *Powers* Court concluded the race of a litigant challenging the discriminatory exercise of a peremptory challenge was "irrelevant to a defendant's standing to object to discriminatory use of peremptory challenges." *Id.* at 415-416.

In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994), a paternity suit in which the defendant challenged the state's use of peremptory challenges to exclude men from the jury, the Supreme Court extended the reach of *Batson* to claims of gender

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discrimination in the exercise of peremptory challenges, holding that "gender, like race, is an unconstitutional proxy for jury competence and impartiality." *Id.* at 146 (challenge based on gender in paternity suit disallowed).

A party can establish a prima facie *Batson* challenge in a civil case by demonstrating that: (1) the party is a member of a cognizable racial group; (2) the juror is of the same group; and (3) the relevant circumstances of the voir dire support an inference of discriminatory purpose. *U.S. Xpress Enters. v. J.B. Hunt Transp., Inc.*, 320 F.3d 809, 812-813 (8th Cir. 2003) (party made prima facie showing of discriminatory use of peremptory challenge).

If a prima facie showing of discriminatory use of a peremptory challenge has been made, the burden shifts to the party who has exercised the challenge "to come forward with a neutral explanation for challenging" the prospective juror. *Batson v. Kentucky*, 476 U.S. 79, 97, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). A race-neutral explanation is one that is based on something other than the race of the juror and is free of "discriminatory animus." *Forrest v. Beloit Corp.*, 424 F.3d 344, 350 (3d Cir. 2005). The objector then has an opportunity to present rebuttal evidence. *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989).

See e.g. Shaw v. Hahn, 56 F.3d 1128 (9th Cir. Cal. 1995), wherein the court affirmed the district court's dismissal of plaintiff venireperson's action because a *Batson* claim was fully and fairly litigated by the plaintiffs in the *civil* litigation in which the peremptory challenge was exercised.

E. PLAINTIFFS' EXHIBITS SHOULD BE PRE-ADMITTED INTO EVIDENCE PRIOR TO COMMENCEMENT OF TRIAL

Defendant has agreed not to object to Plaintiffs' medical records, billing records, or diagnostic imaging studies on the basis of foundation or authenticity.

On March 10, 2011, counsel for the parties' attended the mandatory EDCR 2.67 pre-trial conference and exchange their respective exhibits. During said conference, Plaintiffs' exhibits

were discussed individually and Defendant agreed that she would not be objecting to the admission of Plaintiff's medical and billing records, or his diagnostic imaging studies, at trial on the basis of foundation or authenticity but reserved the right to object on the basis of reasonableness and necessity of the treatment and the costs therefrom. (*See* Transcript of EDCR 2.67 Conference attached hereto as **Exhibit "1"** at p.6:9-25 and pg.7:1-2). Consequently, Plaintiff's medical records, billing records, and diagnostic imaging studies should be pre-admitted pursuant to the Defendants' representation during the EDCR 2.67 conference. (*See Id.*).

F. THE DEPOSITION OF DEFENDANT MAY BE USED FOR ANY PURPOSE

NRCP 32 governs the manner in which depositions may be used in court proceedings. Subsection (a)(2) provides:

> *Use of depositions.* (a) Use of depositions. At the trial or upon the hearing or a motion of an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
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> . . .
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> (2) **The deposition of a party** or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party **may be used by an adverse party for any purpose.**

[Emphasis Added].

During opening statement, and his case in chief, Plaintiffs' counsel intends to display and refer to portions of the deposition transcript of Defendant. The use of this deposition is clearly provided for pursuant to the aforementioned rule.

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G. PLAINTIFFS' COUNSEL MAY USE AN OVERHEAD PROJECTOR, POWER POINT PRESENTATION, MODELS, CHARTS AND/OR OTHER DEMONSTRATIVE EXHIBITS DURING OPENING STATEMENT

Counsel for Plaintiffs anticipates using an overhead projector, PowerPoint presentation, models, charts, animations, story boards and/or other demonstrative aids during opening statement to lay out the facts in a coherent way to help the jury better understand the case. In the last twenty-two (22) years Plaintiffs' counsel has successfully used demonstrative aids in nearly every case tried in the Eighth Judicial District Court. In fact, several District Court Judges (Honorable Cherry, Saitta, Gibbons, Huffaker, Bell, Gonzalez, Adair, Porter, Loehrer, Leavitt, Denton, Cory, Gates, Mosley, Johnson, Barker, Wall, Williams, Glass and even Your Honor, Judge Jessie Walsh) have even encouraged and thus allowed the use of PowerPoint presentations to assist the jury throughout trial and have been laudatory thereafter as to the effectiveness and time saving nature of such presentations.

In *4 County Electric Power Ass'n v. Clard*, 72 So.2d 144 (Miss. 1954), the Court allowed use of a chart in opening statement to outline damages.

> Plaintiff's counsel has a right to state his case orally and to outline the evidence by which he expects to sustain it. He would have a right to state orally and in detail what damages he expected to prove, and he would have the right to take a pencil, list those items of damages, and show that sheet of paper to the jury in the opening statement and arguments. So we cannot see any reason why counsel should be denied the equivalent right to prepare in advance a chart outlining what he expects to prove, and to use it in the opening statement and in the arguments.

Id. at 151.

Plaintiffs' counsel has a right to state what facts he expects to prove during the course of trial. This will serve to assist the jury when viewing this outline in visual form. In *Young Mines Co., Ltd. V. Blackburn*, 196 P.167 (1921), for instance, counsel used a diagram of the scene of 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

purposes. *Id.* at 170. In *Deveny v. Rheem Mfg. Co.*, 319 F.2d 134 (Vt. 1963), the Court even allowed the use of a blackboard during opening statement to demonstrate damages.

Here, counsel for Plaintiffs wishes to use visual aids (PowerPoint and blow-ups) to assist in presentation of the facts and to display how each fact will be proved during the course of trial. These visual aids will assist the jury in understanding the evidence, facts and issues presented, all in an effort to bring the case to a just verdict.

H. PLAINTIFFS' COUNSEL IS PERMITTED TO USE ANY EXHIBITS DURING OPENING STATEMENT IN WHICH THERE IS A GOOD FAITH BELIEF THAT THEY WILL BE ADMITTED DURING TRIAL

"The purpose of an opening statement is to relate the facts that will be offered in evidence, so that the court and jury may better and more readily understand the testimony when it is introduced. It behooves all attorneys...to limit their opening remarks **to the facts they in good faith expect to prove.**" *State v. Williams*, 28 Nev. 395, 411 (Nev. 1905). [Emphasis Added]. It is proper for counsel to outline his theory of the case and to propose those facts he intends to prove. *State v. Olivieri*, 49 Nev. 75, 236 P. 1100 (Nev. 1925). However, it is his duty to state such facts fairly, and to refrain from stating facts which he will not be permitted to prove. *State v. Olivieri, supra*; *Sefton v. State*, 72 Nev. 106. 295 P.2d 385; *State v. Erwin*, 101 Utah 365, 120 P.2d 285. *Garner v. State*, 78 Nev. 366, 371 (Nev. 1962). Counsel's opening address is a statement of what he expects to prove. **"If made in good faith, it cannot constitute error."** *State v. Olivieri*, 49 Nev. 75 (Nev. 1925). [Emphasis Added].

There are restrictions however; for example, the discussion of inadmissible evidence or evidence of doubtful admissibility during the opening statement is precluded. *See* Ronald Carlson & Edward Imwinkelreid, Dynamics of Trial Practice: Problems and Materials 5.5, at 88 (2d ed. 1995). **Importantly, counsel <u>can</u> discuss evidence during opening statement when there is a "good faith belief" that the evidence will be admitted during trial.** *State v. Smith*,

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).
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> 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

light of the small window of time in which a plaintiff is given to plead his case. Thus, demonstrative photographs and other such evidence like video will assist a jury's understanding of one's pain and suffering.

It is anticipated that Defendant will raise an objection to the use of these forms of demonstrative evidence on the basis of relevance arguing that the offered evidence is more prejudicial than probative and will only serve to inflame the jury's senses.[1]

Quite the contrary, photographs, video, and diagnostic films offer significant probative information as a means of conveying an otherwise difficult element of damages, pain and suffering, to the jury. This form of demonstrative evidence provides the jury, a panel of laypersons, with a clearer understanding of the medical issues in this case, the medical treatment provided, as well as the condition William suffered as a result of the subject accident. The photographs, video, and/or diagnostic films to be offered at the time of trial very importantly illustrate what William has had to endure and will endure in the future, as a result of Defendant's negligence. When courts have excluded footage, video or photographs, it has been when the offered evidence is more prejudicial than probative; for instance, body parts of a plaintiff who was killed. This is not the case here.

Here, Defendant's anticipated argument would exclude the only objective evidence that depicts William's pain and suffering claim. To not allow William to tell his tail of physical hardships as a result of this accident would greatly prejudice his case. Again, the photographs, video, and/or diagnostic films of William should be permitted as demonstrative evidence as they are highly probative of his claims. There is not a single prejudice that Defendant would suffer from the introduction of this evidence at the time of trial. Indeed, Plaintiffs' counsel has spoken with many jurors following completion of a number of other unrelated trials involving significant

[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).

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back, neck and other spinal injuries. Those jurors confirmed that the photographs, video, and/or diagnostic films, offered during the course of the trial, assisted them in understanding the surgical procedures as well as the plaintiff's pain and suffering explaining that they lacked the knowledge regarding the invasiveness of such procedures as well as what a person's body goes through in such procedures.

Of course, Defendant does not want the jury to see what William has had to go through as a result of Defendant's carelessness. It has been awful, and will be awful in the future, for him having to have his body poked, prodded, cut open, sewn up and invaded by numerous surgical instruments. This is a large part of William's damages claims. As such, the jury needs to be educated about what he has had to endure and visually understand what he will need to endure in the future. It would be unfair prejudice to William to not allow him to present his damages to the jury.

J. PLAINTIFFS HAVE THE RIGHT TO SUBPOENA DEFENDANT, JENNY RISH, AT DEFENSE COUNSEL'S OFFICE AS THIS IS THE ADDRESS DEFENDANT HAS PROVIDED

With respect to effectuating service, NRCP 5(b)(1) provides as follows:

> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless the court orders that service be made upon the party.

Consequently, Plaintiffs may subpoena Defendant, Jenny Rish, at defense counsel Stephen H. Rogers, Esq.'s office because (1) she is a party; and, (2) this is the address provided with the designation of Ms. Rish by defense counsel.

K. DEFENDANT'S MEDICAL EXPERT, DR. JEFFREY WANG, OR ANY OTHER WITNESS, MUST BE PRECLUDED FROM REFERENCING THE SUB ROSA VIDEO DURING HIS TRIAL TESTIMONY

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

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Court. The basis for said Motion is the fact that the surveillance footage simply presents William conducting activities of daily living; activities in which he has never represented that he absolutely could not do. In fact, at his deposition, Defense specifically asked, "So are there any activities that you used to do that you cannot do at all," to which William responded, "No." *See* William's Deposition Transcript at **Exhibit "2,"** p. 92, ll:20-22. Furthermore, William's treating physicians have not restricted him from continuing his employment and routine activities within his daily life. **The surveillance video is devoid of any footage showing that William was not telling the truth. Therefore, because the video does not in any way discredit William's testimony, it would be improper to use this video to impeach William.**

Based upon the above, this Court ruled that evidence of the Sub Rosa video would be excluded until after William's direct examination in order to gauge whether or not the door had been opened to entitle Defendant to use the Sub Rosa video as impeachment evidence against him. Since this ruling, however, Defendant has informed Plaintiffs' counsel that one of Defendant's medical expert witnesses, Jeffrey Wang, M.D., is only available to testify on Monday, March 21, 2011, which is during Plaintiffs' case in chief. In the spirit of cooperation, Plaintiffs have agreed to allow Dr. Wang testify out of order to accommodate his busy schedule. The circumstances of Dr. Wang's availability, however, present an interesting dynamic with regard to this Court's order to exclude (at least for the time being) the Sub Rosa video because Dr. Wang will be called to testify before William takes the stand. It is anticipated that the defense will attempt to elicit testimony from Dr. Wang regarding the Sub Rosa video during direct examination, forcing Plaintiffs' counsel to object. Once testimony regarding the Sub Rosa video has been elicited, however, the bell cannot be unrung and Plaintiffs' will be forever prejudiced by the same throughout the remainder of trial, despite this Court's prior ruling.

By way of background, Dr. Wang has been retained by Defendant as a medical expert

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witness to dispute Plaintiff's medical causation claims. After reviewing literal volumes of medical records and performing a Defense Medical Examination, Dr. Wang has authored three (3) separate reports dated February 10, 2009, October 1, 2009, and July 4, 2010, which are attached hereto as **Exhibits "3," "4,"** and **"5,"** respectively. In each of these three (3) reports, Dr. Wang offers the opinion that only 25 % of William's medical conditions are attributable to the subject motor vehicle collision. (*See Id.*). Notwithstanding this long survived opinion (since February 10, 2009), Dr. Wang was recently deposed on February 15, 2011 and testified (without warning) that his apportionment opinion has changed, in part, because he has had an opportunity to view the Sub Rosa video taken of William between the dates of June 4, 2008 and July 18, 2008. It is NOW Dr. Wang's opinion that he would apportion "much less than 25%" of the medical conditions William suffers currently from to the subject motor vehicle collision and testified that it would be hard to relate any of the current symptomatology to the incident. (*See* Deposition of Dr. Wang, attached hereto as **Exhibit "6,"** at 70:8-25; 72:1-3).

Notably, the Sub Rosa video that Dr. Wang reviewed and relied upon in changing his apportionment opinions was taken approximately seven (7) months before Dr. Wang authored his first written report on February 10, 2009 and approximately (2) years before he authored his last written report on July 4, 2010. Moreover, Defendant produced said Sub Rosa video to Plaintiffs on September 10, 2008. (*See* Defendant Jenny Rish's First Supplement to the 16.1 Early Case Conference Production of Document and/or Witnesses attached hereto as **Exhibit "7"**). Inexplicably, however, the defense chose not to provide Dr. Wang with the Sub Rosa video until sometime after he had authored his latest report in July 2010 and when he was deposed in February 2011. There is simply no justifiable excuse for Defendants' delay in supplying their own expert with the Sub Rosa video and springing brand new apportionment opinions upon Plaintiffs just weeks before the commencement of trial. Moreover, should Dr.

Wang be permitted to mention the Sub Rosa video at trial, it would run afoul of this Court's previous Order to exclude the Sub Rosa video until after William has testified on direct.

Defendant will likely argue that Dr. Wang should be permitted to testify regarding the Sub Rosa video because it is information relied upon by him in coming to his final apportionment opinions and prejudice will result should he be disallowed to express the same. Such an argument, should it be made, amounts to nothing more than a red herring as Dr. Wang has made it clear that based upon other information he has reviewed, excluding the Sub Rosa video, his opinions regarding apportionment have changed to attribute "much less than 25%" to the subject incident. (*See* **Exhibit "6,"** at 21:19-25; 22-11). In other words, with or without relying upon the Sub Rosa video, Dr. Wang's apportionment opinion is that much less than 25% of William's medical condition is attributable to the subject motor vehicle collision. Specifically, Dr. Wang testified:

> Q. ....Based on the physical therapy records, the Southwest Medical records, and the records of Dr. Winkler that you reviewed since your last report, has that changed your conclusions in any way?
> A Well, it's hard to answer that question because I've reviewed these records along with the surveillance video. So are you asking me to hypothesize sort of a theoretical situation where I just totally forget about the surveillance video and then look only at these records and see whether that changes my opinion?
> Q Correct.
> A So without the surveillance video, in my prior reports I apportioned no more than 25 percent of the patient's symptomology to the motor vehicle accident in question on April 15th, 2005. Looking at these new records and discounting the surveillance video, I think it's reinforced my opinions that 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.*).

Based upon Dr. Wang's deposition testimony, it is clear that his opinion regarding apportionment can be expressed without mentioning the Sub Rosa video and no prejudice to the Defendant will stem from the exclusion of this evidence until after William has testified on direct, pursuant to this Court's previous order.

Consequently, Plaintiffs request that Dr. Wang be precluded from relying upon and referencing the Sub Rosa video during his trial testimony, and, that prior to Dr. Wang taking the stand, defense counsel and Dr. Wang be advised by this Court, outside the presence of the jury, to abide by this Court's previous ruling regarding the mention of the Sub Rosa video.

b. Dr. Wang's recently changed opinion regarding apportionment should be excluded because of Defendant's violations of NRCP 16.1 and 26.

Because of the improper and egregious late disclosure of the surveillance video to Dr. Wang, this Court would be well within its rights to preclude Dr. Wang from relying upon the Sub Rosa video in its entirety regardless of whether or not the Sub Rosa video is determined to be admissible after the direct examination of William.

NRCP 16.1 (a)(2)(B) requires a retained expert to provide all opinions and the bases therefore in a written report. *See Id.* The purpose of the rule is to put the adverse party on notice of the opinions expected to be expressed at trial so that there is no surprise or "trial by ambush." Rule 26 (e)(1) provides that a party is under a duty to supplement its expert's opinions "at appropriate intervals" and specifically provides that an expert's opinions are to be provided, at the latest, by the time that a party's pre-trial disclosures are due under Rule 16.1(a)(3), which is no later than thirty (30) days before trial. *See Id.* NRCP 37 (c)(1) permits this Court to strike evidence not properly disclosed in compliance with Rule 16.1. *See Id.* Dr. Wang's recently changed opinion should be excluded on the grounds that Dr. Wang did not make Plaintiffs aware of the same until February 15, 2011, during Dr. Wang's deposition, which was twenty-seven (27) days before the March 14, 2011 trial date. As a result, Dr. Wang's changed opinion regarding

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apportionment should be excluded in its entirety pursuant to NRCP 26 (e)(1), NRCP 16.1(a)(3) and NRCP 37 (c)(1). *See Id. See also Writ of Mandamus in the matter of Kinstel v. The Eighth Judicial District Court of Nevada*, attached hereto as **Exhibit "8"**).

There is absolutely no justification for the two (2) full year delay in supplying the Suh Rosa video to Defendant's medical expert. The only explanation for such a delay is to prejudice Plaintiffs in an attempt to gain a tactical advantage at trial. Defendant must not gain an advantage in such a manner and must not be awarded for their failure to comply with the Nevada Rules of Civil Procedure. Thus, Dr. Wang's trial testimony should be limited as requested above.

L. PLAINTIFFS' COUNSEL MAY USE LEADING QUESTIONS TO EXAMINE ANY ADVERSE WITNESS DURING HIS CASE IN CHIEF DURING CROSS-EXAMINATION

Plaintiffs may lead an adverse witness during his case in chief. Whether leading questions should be allowed or not is a matter largely within the discretion of the trial court. *Anderson v. Berrum*, 36 Nev. 463, 136 Pac. 973 (1913), cited, *Lloyd v. State*, 85 Nev. 576, at 578, 460 P.2d 111 (1969); *Barcus v. State*, 92 Nev. 289, at 291, 550 P.2d 411 (1976), see also, *Leonard v. State*, 117 Nev. 53, at 70, 17 P.3d 397 (2001). Regarding the issue, NRS 50.115 allows a party to utilize leading questions when examining an adverse party, or a witness identified with an adverse party.

Here, the Court should exercise its discretion and, pursuant to statute, allow Plaintiffs to utilize leading questions to examine any adverse witness during his case and chief in order to make the interrogation and presentation effective for the ascertainment of the truth and avoid needless consumption of time. NRS 50.115(1)(a) and (b).

It is also Plaintiffs' right to ask leading questions on cross-examination and for the Court to require the witness to respond only with a "Yes" or "No" to those questions without

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explanation. NRS 50.115. The purpose of this is to elicit testimony supporting the Plaintiffs' case and to impeach the witness. Once the cross-examination has concluded it is then the Defendants' right to attempt rehabilitation on re-redirect examination.

Plaintiffs' counsel has specific experience with witnesses who refuse to answer leading questions and insist on attempting to engage opposing counsel in argument instead of simply answering the questions that are posed. During trial, counsel could have to request the Trial Court to instruct Defendant's witnesses to answer counsel's leading questions and that the witnesses can explain his answers on re-direct. Plaintiffs' trial counsel will also be requesting the Court to strike non-responsive answers by any of Defendant's witnesses.

It is always appropriate for a witness to rehabilitate his testimony, where an attempt is made on cross-examination to impeach his credibility. *Klas v. Goetz*, 505 P.2d 726, 211 Kan. 126 (Kan. 1973). On re-direct examination, a witness may explain matters made subject to cross-examination testimony and to correct any wrong impression which may have been created. *Wood v. Dwyer*, 515 P.2d 1291, 85 N.M. 687 (N.M. App. 1973). It is usually a basic function of re-direct examination to allow a witness to explain his testimony elicited on cross-examination. *Sandville v. State*, 593 P.2d 1340 (Wyo. 1979), including "yes" and "no" answers.

Plaintiffs have a right to ask only leading questions on cross-examination of an adverse witness and to restrict the witness's answer to responding to the questions without explanation. This is the only tool a party has to effectively examine an adverse witness and present the theory of their case through that witness. If counsel is not permitted to limit the responses of any adverse witness to "yes" or "no" on cross-examination this right is seriously diminished. It is the purpose of re-direct examination to allow the witness to explain.

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

a "minor impact" or "low impact" collision, and not significant enough to cause Plaintiff's injuries." (*See* Motion in Limine at 7, attached hereto as **Exhibit "9"**). Moreover, the Motion asked that all expert witnesses be precluded from arguing the same and that any and all property damage photographs and repair estimates ne excluded. (*See Id., generally).* This Court Granted the subject Motion **in its entirety**. Notwithstanding, it is anticipated that the defense will attempt to elicit information from the Defendant herself and other witnesses that the collision was "minor," which would be a blatant violation of this Court's Order.

As discussed in Plaintiffs' Motion, only a qualified expert in the area of biomechanical engineering may offer opinions regarding the nature and extent of the forces imparted to a body and how those forces may or may not cause trauma. The defense, however, will likely attempt to argue that whether or not an impact is "minor" is a common sense issue that a lay witness is permitted to explain. Despite this anticipated argument, accident reconstruction and biomechanical issues **are not common sense issues within the common knowledge of lay persons**. In fact, the Nevada Supreme Court has set forth stringent foundational requirements with respect to expert testimony relating to these areas of expertise. *See Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008); *Levine v. Remolif*, 80 Nev. 168, 390 P.2d 718 (1964) and *Choat v. McDorman*, 86 Nev. 332, 468 P.2d 354 (1970). These cases hold that expert testimony cannot be based upon speculation. *Id.* Rather, such testimony must come from a qualified expert and must be based upon hard data, such as the speed of the vehicles, the depth of the crush damage based upon a visual inspection of the vehicles, and the weight and height of the vehicles, to name a few. *Id.*

Defense counsel's only purpose to introduce testimony from the Defendant, and or other lay witnesses, as to the actual impact that occurred is to create speculation regarding whether or not the subject impact could have caused the medical conditions being claimed in this case.

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Because of the rank speculation that would occur should a "minor impact defense" be introduced, this Court has specifically excluded the same from trial and has prohibited Defendant medical expert witnesses from testifying regarding the impact. If Defendant's medical experts (who arguably have some understanding of the affect a minor impact can have on the human body) are prohibited from testifying or suggesting that the subject impact was "minor" given the prejudice that would befall Plaintiffs, then certainly all lay witnesses, including the Defendant herself, should be precluded from testifying to the same.

O. JUDICAL NOTICE SHOULD BE TAKEN OF THE LIFE EXPECTANCY TABLE

This Court may take judicial notice of "facts in issue or facts from which they may be inferred." NRS § 47.130. "A judicially noticed fact must be (a) Generally known within the territorial jurisdiction of the trial court; or (b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." *Id.*

The Life Expectancy Table is published by the United States Census Bureau and is a statistical abstract of the United States population. The data as set forth in the Life Expectancy Table is generally known in Nevada and is capable of accurate and ready determination by simple reference to reliable federal governmental sources. Moreover, the Life Expectancy Table is often relied upon by experts in Nevada District Courts. As such, the Court in this matter should take Judicial Notice of the Life Expectancy Table so the parties may readily refer to the data as set forth in the table during the trial of this matter. A true and correct copy of the Life Expectancy Table is attached hereto as **Exhibit "10"**.

P. WILLIAM'S PHYSICIANS WILL BE PROVIDING TESTIMONY ABOUT HIS ONGOING MEDICAL TREATMENT

Over the course of this litigation, William's treating physicians have reviewed additional

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medical information, performed additional procedures, physical examinations and diagnostic testing upon William, and may be offering opinions regarding this additional information. William's medical problems are ongoing and he has continued to treat with his physicians up to the time of and during trial. As such, his physicians will be providing testimony regarding his additional examinations, diagnosis, and recommendations for future treatment and prognosis of William. His medical conditions and treatment do not exist in a vacuum. Injured plaintiffs are not required to cease all ongoing medical treatment between the close of discovery and trial. It is respectfully requested that this court consider the same when William's doctors testify regarding his current and future condition.

Compensation for future medical expenses is a recoverable category of damages. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233 (1998). Additionally, a plaintiff may recover damages for future pain and suffering as well. *Sierra Pac. Power v. Anderson*, 77 Nev. 68, 75-76 (1961) (finding that in order to recover for future pain and suffering, there must be sufficient evidence from which the jury can arrive at the conclusion that the party will probably suffer such damages in the future). "An award of future medical expenses must be supported by sufficient and competent evidence." *Yamaha*, at 249, citing *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1196 (1993).

In *Yamaha*, the Nevada Supreme Court was faced with the issue of whether a jury award for future medical expenses in the amount of $500,000 was excessive. The Court held that the award was supported by substantial evidence in the record. *Id.* at 249-50. In so holding, the court found that plaintiff had presented competent medical testimony as to the accrued medical costs ***sustained as of the date of trial and that her injuries would require recurrent medical attention***. *Id.* Thus, the Nevada Supreme Court found it appropriate for the plaintiff to present evidence of medical costs as of the date of trial.

Just as the plaintiff in *Yamaha* was permitted to present evidence of his ongoing medical care, including the cost of treatment through trial, William should be permitted to present evidence of his ongoing medical care. Further, William should also be entitled to present evidence pertaining to his future medical needs as well.

Q. WILLIAM'S EXPERTS AND TREATING PHYSICIANS/EXPERTS SHOULD BE PERMITTED TO TESTIFY DESPITE THE ANTICIPATED ARGUMENT THAT THEIR TESTIMONY WILL CONSTITUTE THE PRESENTATION OF CUMULATIVE EVIDENCE.

It is anticipated that the defense will attempt to argue that William's treating physicians' and experts' testimony will constitute the needless presentation of cumulative evidence. Despite this argument, however, all the experts and physicians that will be called at trial have different fields of expertise and all offer unique perspectives as to William's care and condition. Courts will not exclude expert testimony where each expert, although testifying to similar topics, offer a unique perspective to the issue being addressed. In *Stone v. Stoker*, 1992 U.S. App. LEXIS 10417 (4th Cir. 1992), the court examined the application of FRE 403, which is identical to NRS 48.035, and held that:

> We cannot say on the record before us that the district court abused its discretion in deciding that the relevance of three doctors' testimony regarding causation was not "substantially outweighed by . . . prejudice . . . or needless presentation of cumulative evidence." *See* Fed.R.Evid. 403. **Causation was the crucial element of the case and, in the district court's view, each witness offered a distinct insight to the question**.

See also *Coleman v. Home Depot, Inc.*, 306 F.3d 1333 (3rd Cir. 2002), holding that, "**there is a strong presumption that relevant evidence should be admitted, and thus for exclusion under Rule 403 to be justified, the probative value of evidence must be "substantially outweighed" by the problems in admitting it. As a result, evidence that is highly probative is exceptionally difficult to exclude**."

"Cumulative evidence is not bad per se; it is the 'needless presentation' that is to be

avoided." 22A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5220 (1978). District courts have broad discretion to place reasonable limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence. *United States and Cas. Co. v. Historic Preservation Trust*, 265 F.3d 722, 727-28 (8th Cir. 2001) (citing *First Nat'l Bank and Trust Co. v. Holingsworth*, 931 F.2d 1295, 1304 (8th Cir. 1991)).

As stated above, each treating physician and/or expert is designated for a unique purpose and their testimony will not be cumulative regardless of whether they touch on similar topics. A surgeon's insight differs from that of a physiatrist, from that of a pain management physician, from that of a life care planner, from that of a neuropsychologist, and so on. Each expert is entitled to testify to matters within the scopes of their expertise in spite of that their opinions may apply to the same issue (for instance, damages or causation). This is not "needless presentation of evidence" such that it is "cumulative" within the meaning of the Nevada Rules of Civil Procedure.

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R. DEFENDANT IS LIABLE FOR ANY DAMAGES ASSOCIATED WITH THE MEDICAL CARE WILLIAM SOUGHT FOR HIS INJURIES

It is anticipated that Defendant will attempt to argue that she is not liable for William's injuries, medical procedures, or need for future surgeries because there was no need for such intervention and/or the intervention was inappropriate. However, William's medical providers will testify that he needed the medical interventions, and other treatment as a result of the subject accident.

Furthermore, William is entitled to rely on his physicians' opinions as to the necessary course of his treatment. **Even if those physicians' opinions are incorrect, Defendant is still chargeable with those damages because subsequent medical malpractice is a foreseeable consequence of Defendant's negligence**. *Nelson v. 1683 UNICO, Inc.*, 246 A.2d 447, 448

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(N.Y. 1998). The courts deem the original tortfeasor liable for any harmful consequences of medical or surgical treatment of the original injury which are normal or reasonably foreseeable risks incident to the original injury. 100 A.L.R. 2d 808.

Since William has had invasive medical procedures, Defendant should not be allowed to argue such medical treatment was unnecessary because that argument is tantamount to alleging medical malpractice. If William's physicians recommended or performed medical procedures that were unnecessary, then their care fell below the standard of care. Defendant would thus still be liable for the costs of these procedures and any resultant injury therefrom.

In addition, Defendant is not permitted to make such an argument unless they do so through competent medical expert testimony. *See* NRS 50.275; *See also Layton v. Yankee Caithness Joint Venture*, 774 F.Supp. 576 (1991); *Fernandez v. Admirand*, 108 Nev. 963, 973, 843 P.2d 354 (1993); *Brown v. Capanna*, 105 Nev. 665, 671-72, 782 P.2d 1299 (1989).

S. PLAINTIFFS MAY NOT BE CROSS-EXAMINED REGARDING ANY ISSUE NOT TESTIFIED TO ON DIRECT, MEDICAL CONDITIONS NOT CLAIMED TO BE CAUSED BY DEFENDANT'S NEGLIGENCE OR MEDICAL CONDITIONS NOT SUPPORTED BY QUALIFIED MEDICAL EXPERT OPINION

Despite this Court's clear orders precluding William's unrelated injuries, Plaintiffs anticipate that Defendant will attempt to discredit him by interjecting William's unrelated medical history into the instant case. Defendant should not be permitted to elicit any testimony from William or his medical witnesses regarding any medical conditions that William does not pursue on direct examination unless Defendant can show through competent medical evidence that the condition about which he is inquiring is what is causing William's present symptoms. *See* NRS 50.115, Mode and order of interrogation, which provides in pertinent part that:

> 2. **Cross-examination is limited to the subject matter of the 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.

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(Emphasis Added).

In addition, any testimony regarding William's unrelated medical history is irrelevant to the claims at issue in the case and is therefore inadmissible under 48.025(2). *See also Sokolowski v. Medi Mart, Inc.*, 24 Conn.App. 276, 587 A.2d 1056 (1991), ("[a]bsent competent and relevant evidence of a causal connection between the pre-existing condition and the injury complained of, evidence of the pre-existing condition is inadmissible."). Even if relevant, the testimony is inadmissible under NRS 48.035, entitled "Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time," which holds in pertinent part:

> 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
>
> 2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

The Court is authorized to exclude even relevant evidence if its probative value is substantially outweighed by the danger that it will confuse the issues, mislead the jury, or result in undue delay. *Southern Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 243, 577 P.2d 1234, 1235 (1978).

It is anticipated that the defense will attempt to introduce testimony at trial with regard to a minor motorcycle accident in 2003 wherein William sustained soft tissue injuries and abrasions to his right elbow, William having high blood pressure and/or high cholesterol. Importantly, this Court has ruled that all evidence regarding these matters is excluded. Accordingly, Defendant is precluded from cross-examining William, or any other witness with regard to the above referenced matters, or any other matter which was not addressed during direct examination.

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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.

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Plaintiffs' Motion to Exclude Sub Rosa Video is deferred until after Plaintiff's direct testimony, so that Defendant can establish how it impeaches the Plaintiff. Defendant is precluded from showing the sub rosa video or referring to it until that time.

The Court ruled on Plaintiffs' Second Omnibus Motion in Limine as follows:

1) Plaintiffs' request to exclude Plaintiffs' prior and subsequent unrelated accidents, injuries and medical conditions and prior and subsequent claims or lawsuits was GRANTED in part and DENIED in part. Any and all evidence relating to Plaintiffs' lawsuit concerning their home is excluded. However, William's diagnosis of a non-cancerous tumor may be admitted for the limited purpose to show emotional distress.

2) Plaintiffs' request to exclude hypothetical medical conditions was GRANTED as written.

3) Plaintiffs' request to exclude evidence of the absence of medical records for any period of time prior to the accident was GRANTED.

4) Plaintiffs' request to exclude any reference to an alleged federal grand jury investigation into doctors and lawyers in Las Vegas was GRANTED.

5) Plaintiffs' request to exclude reference to attorney advertising was GRANTED. However, if during voir dire members of the venire volunteer information on the subject of attorney advertising based upon questions in the Jury Questionnaire, the subject of attorney advertising may be inquired into during voir dire.

The Court has ruled on Defendant's Motions in Limine as follows:

1) Defendant's Motion in Limine Enforcing the Abolition of the Treating Physician Rule was GRANTED;

2) Defendant's Motion in Limine to Exclude the Traffic Accident Report and the Investigating Officer's Conclusions was GRANTED.

3) Defendant's Motion in Limine to Preclude Questions Regarding Verdict Amounts 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

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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, PA.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.

MAINOR EGLET

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