

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

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**APPELLANT'S APPENDIX**  
**VOLUME 16**

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DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

ENRIQUE RODRIGUEZ, . CASE NO. A-531538  
Plaintiffs, . DEPT. NO. X  
vs. .  
FIESTA PALMS, LLC, . **TRANSCRIPT OF**  
Defendant. . **PROCEEDINGS**  
. . . . . **\*\*\*PARTIAL TRANSCRIPT\*\*\***

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

**BENCH TRIAL  
(CLOSING ARGUMENTS)**

WEDNESDAY, NOVEMBER 10, 2010

APPEARANCES:

FOR THE PLAINTIFF: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
*Benson, Bertoldo & Baker*

FOR THE DEFENDANT: KENNETH C. WARD, ESQ.  
*Archer Norris*

COURT RECORDER: VICTORIA BOYD  
District Court

TRANSCRIPTION BY: VERBATIM DIGITAL REPORTING, LLC  
Englewood, CO 80110  
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

1 LAS VEGAS, NEVADA, WEDNESDAY, NOVEMBER 10, 2010, 1:22 P.M.

2 (This is a partial transcript, containing the closing  
3 arguments, only.)

4 \* \* \* \* \*

5 THE COURT: All right. Whenever you're ready, Mr.  
6 Baker.

7 CLOSING ARGUMENT BY PLAINTIFF

8 MR. BAKER: Your Honor, I'm not going to be very  
9 long, because I have watched you watch, and I hear your  
10 recollection as you spit it back at me.

11 And I just, first, also haven't seen a three-week  
12 bench trial and I wanted to thank counsel, and the Court in  
13 particular, and the court staff for just a cordial,  
14 experienced trial in a -- in a very orderly and mannerly way  
15 and it was really appreciated.

16 I have put together a computation of plaintiff's  
17 damages, if I may approach.

18 THE COURT: By the way, it's nice to hear that. And  
19 I appreciate the fact that counsel has a cordial, professional  
20 relationship as well.

21 MR. BAKER: He's a good guy.

22 THE COURT: It's been a pleasure.

23 MR. WARD: I think we both done our best.

24 THE COURT: I think you have.

25 MR. BAKER: So saying that, I do have to say a

1 couple of things that K.C. had talked about during his  
2 opening.

3           And, Your Honor, when I came into the Court and I  
4 opened for you, I suggested that this was a case that  
5 liability was clear, and I believe that that's established.  
6 It's a case that Enrique Rodriguez was fundamentally ruined.  
7 I mean, his foundation was taken out and he was injured in a  
8 very profound way with a constellation of arguments.

9           And I promised that I would bring people into this  
10 court, and according to scientific methodologies, and known  
11 scientific protocol, and known medical protocol, show you how  
12 this perhaps seemingly separated-in-time constellation of  
13 injuries was very much related to having the foundation taken  
14 out and the structure just kind of crumbles afterwards.

15           And that's a fundamental rule of any kind of  
16 constructive reality. If you take out the foundation, the  
17 structure is going to crumble. And what K.C. basically said,  
18 and we've made up and had accord since then, is that Mr.  
19 Rodriguez was fat and was a liar, and that I manipulated the  
20 medical evidence, and that these doctors were not going to  
21 link up this case for you in a manner that was credible and  
22 believable.

23           And I'm not even speaking to a preponderance, I'm  
24 speaking in a matter that just rings true in the face of a  
25 mountain of scientific testimony in front of you.

1           So let me talk just briefly about the liability,  
2 because I kind of just did it twice with respect to my  
3 motions.

4           But this Court is aware that it used to be this  
5 promotional event, the Monday night football with Brandy  
6 Beavers, it used to be in a room called the Key West room.  
7 And it was taken from the Key West room and it was put into  
8 the Sports Book to help profit the casino and there's no  
9 worries with that. I want Las Vegas casinos to be profitable,  
10 I live here. But certainly not in a way that it endangers  
11 people.

12           And Sherry Long, who was the all business lady who  
13 was sitting up there, very specifically said that she heard  
14 about these objects being thrown, thought it was  
15 inappropriate, foreseeably could harm somebody, was risk to  
16 her patrons, was just not the thing that she was going to have  
17 on her property and had a meeting with her staff, including  
18 Denise Demuncus (phonetic) and told them these promotional  
19 items are not going to be thrown into the audience for just  
20 the reasons that I told you, because someone's going to get  
21 hurt.

22           Brandy Beavers and Denise got together and they  
23 constructed actual goal posts, and erected them in the middle  
24 of the sports bar and had promotional events where these  
25 promotional objects were being thrown through the goal posts

1 and she was riling up the audience and lo and behold, look  
2 what happens.

3 Both Vicki and Sherry testified that the injury that  
4 occurred to Enrique was exactly the type of injury that they  
5 had hoped to prevent by instating this procedure that  
6 promotional items not be thrown. It was their rule. They  
7 adopted it. I asked if it was a safety rule. It was a safety  
8 rule. It governed the safety and the health and the welfare  
9 of the people on the premises and they violated it.

10 And then Mr. Franklin came into court and he very  
11 honestly had to say that it was a conscious disregard of a  
12 known safety procedure. Now, with that very strong triad of  
13 -- of evidence and that very strong triad of foreseeability  
14 aspect to the exact injury that occurred, it's respectfully  
15 suggested to the Court that the liability door is closed.

16 Any argument that Enrique should have walked out is  
17 completely specious. It was a sports bar where they invited  
18 patrons into the sports bar for the purpose of promoting a  
19 Monday night football event. And they have a duty to do it  
20 safely and they admitted that they violated that duty to do it  
21 safely in a conscious manner.

22 It's really rather abhorring if you think about it,  
23 because exactly the injury that occurred -- and I'm sorry to  
24 repeat this, but it just keeps ringing through my head. I  
25 mean, just what happened to Enrique could have been prevented.

1 This wasn't something that was a Pfaltzgraff. You know,  
2 somebody didn't throw a water bottle and something exploded on  
3 the other side of the casino. Precisely what they envisioned  
4 happening, happened, and it really shouldn't have been allowed  
5 to do that.

6 And so K.C. is saying it's not their fault, and then  
7 bringing an expert in to say it was a conscious disregard, I  
8 mean, that shows me an inconsistency, which has been Mr.  
9 Ward's theme throughout the trial, is the inconsistency of the  
10 testimony of Enrique Rodriguez.

11 So, Your Honor, in this forum it's been really  
12 interesting, because I've been allowed to introduce evidence,  
13 I've been completely truthful. And it was lawyering without  
14 showmanship, there was no jury to have to puff to,  
15 misdirection is impossible, we're not going to fool you. And  
16 it was -- it was really interesting watching how the case kind  
17 of changed from the perspective of how defendant presented it.

18 When we first came into the courtroom, Mr. Ward  
19 informed the Court that he wasn't injured. He had a sprained  
20 knee. That's what happens Enrique Rodriguez [inaudible]. And  
21 as the evidence developed, and as the doctors began to testify  
22 -- his doctor, Dr. Becker, came in and said no, no, no, we'll  
23 give him the right knee.

24 And I suggest to you that's because he read the  
25 deposition testimony of Dr. Shannon and other doctors and knew

1 that it was convincing and that he was going to look really  
2 biased if he came in here and testified that that first knee  
3 surgery wasn't related.

4           On his direct they threw in the carpel tunnel  
5 syndrome and they said, oh, okay, so that's related, too.  
6 They did that even though in his report he said it would be a  
7 long stretch of the imagination, if you remember, to hook up  
8 this carpel tunnel syndrome.

9           And what happened is, we're lawyers, we know what  
10 happened. He looked at it and he said, oh, you know there's  
11 strong evidence. Let's throw these guys a bone with the  
12 carpel tunnel syndrome and with the knee and maybe the Judge  
13 will just stick to the carpel tunnel and knee and think that  
14 nothing else will be related. It's called a damage control  
15 mode at this point in time. And Mr. Ward was brilliant, went  
16 into damage control.

17           Well, Dr. Becker then testified on cross-examination  
18 that the second knee was also related, okay. So now we have  
19 the carpel tunnel surgery, two knee surgeries, both related.  
20 But now what we need to do is we need to desperately try  
21 damage control at this point in time.

22           And we'll have Dr. Becker, who incidently is the  
23 only orthopedic surgeon apparently in the whole world that  
24 thinks torn meniscus is not a pain generating mechanism, you  
25 heard Dr. Tauber testify about that, it's really

1 unconscionable, and has the professional acumen to be able to  
2 take and sense sympathetically mediated pain changes and  
3 differences with his bare hands, while other doctors use a  
4 laser thermometer, sat on that stand and said, his lumbar  
5 spine and his cervical spine are not related, because these  
6 are the big damage items.

7           And his RSD isn't related. And that's the biggest  
8 damage item, because the Court has sat here and heard that  
9 he's going to need a permanent spinal cord stimulator. The  
10 Court has heard about the agonizing, relentless, permanent  
11 quality of RSD pain. These doctors testify, ooh, I can't  
12 remember the exact words, oh, that's not something you want.  
13 And, oh, you know, that's a nightmare. And we've heard that  
14 from seven doctors, about, in this case. Just what an awful  
15 disease it is.

16           So let's see about how the evidence, then, kind of  
17 grew because, you know, it's a house, you build a firm  
18 structure on a foundation of bricks. This isn't something I'd  
19 say to a jury, but I need to show you, I need to prove it to  
20 you. That's my job.

21           So who do we hear from first? We hear from Dr.  
22 Shannon, and she talks about the knee and she says, did a  
23 beautiful surgery and we looked at pictures. And everyone is  
24 really, really excited with Dr. Shannon. Their expert, you  
25 know, spoke about great surgery, and clean surgery, and I

1 really like Dr. Shannon. And her testimony was bright and  
2 energetic and vigorous and she was into it, for lack of a  
3 better word.

4           And, you know, I just wanted to talk to her about  
5 his knee. And then on cross-examination, when K.C. was  
6 speaking, Mr. Ward was speaking with her, she just -- she just  
7 spoke out about the postural changes, about how that would  
8 cause lumbar problems, how that would cause cervical problems.  
9 I didn't elucidate that testimony. I didn't, you know,  
10 manipulate the medical evidence. It -- she -- she ranged on  
11 her topics very knowledgeably, and this was one of the topics  
12 that she testified to.

13           They have the understanding that that -- that that  
14 is part of the [inaudible]. Now you also understand that  
15 three months into his treatment he was having tingling in his  
16 fingers. And so nothing that he's saying isn't credible. Mr.  
17 Ward has spent so many times trying to say, Enrique said that  
18 his pain started with the accident.

19           It did start with the accident. Anybody who  
20 understands and deals professionally, like we do, with the  
21 concept of causation, knows that causation means that it's  
22 reasonably foreseeable as a consequence of the action.  
23 Different than one of their experts testified, but we can talk  
24 about that later.

25           So what do we have? We have Enrique using assistive

1 devices. We have postural changes. We have a great amount of  
2 weight that's gained. Nick, his friend, was trying to be nice  
3 about it when he said, oh, no, no, he saw the major weight  
4 gain come after this accident.

5           That's a nice man, your Clerk knows him. I mean,  
6 he's a pillar of the community in Riverside. He is involved  
7 in an enormous range of honest, community-minded, non-selfish,  
8 non-money grubbing endeavors. And he testified to you from  
9 that stand that his friend has changed, will never be the same  
10 again, is a completely different person.

11           He still loves him, because he's not the type of  
12 person that would abandon his friend. That testimony was  
13 honest. And it was not controverted by any video, and it was  
14 not controverted by any evidence of pre-existing conditions  
15 and it was not controverted by the evidence that Enrique put  
16 on to -- into evidence with you.

17           They had a good life. They had a nice life. He had  
18 a nice family life, he had nice friends, he had a nice  
19 community. He had all of those things that we're searching  
20 for so desperately in life and he had them, okay.

21           So who comes next onto the stand that we're talking  
22 to? Well -- well, it's not in chronological order for who  
23 testifies, but Dr. Tauber. Dr. Tauber flew all the way in  
24 from L.A. and Dr. Tauber sat with you and talked about the  
25 loose body and talked about the fact that that's a pain

1 generating mechanism, and was really unconscionably surprised  
2 by any testimony that purported to be legitimate that said a  
3 torn meniscus is not a painful event and spoke to you about  
4 his surgery.

5           And then he spoke to you about the fact that  
6 something was just going on. He wasn't getting better,  
7 Enrique wasn't getting better. Another theme. You know why  
8 sometimes you don't get better? Sometimes you don't get  
9 better because you have an event that topples you, and when  
10 you watch something fall, it falls in pieces from the bottom  
11 down. Or up, from the bottom up.

12           And sometimes you don't get better because your  
13 disease mechanism is either permanent, or untreatable, or you  
14 can't afford to treat it, and that's just not being made  
15 available to you. And you heard evidence of all of this. Dr.  
16 Tauber explained to you that what he saw was his pain changed  
17 from a mechanical nature of pain, which would be the meniscus  
18 tear, or the synovitis or the chondromalacia, or the loose  
19 body into a burning, horrible sensation.

20           And it rung a bell, it triggered him. And he sent  
21 him out for an examination; one, to see if it was a  
22 mechanically based pain, so he received injection, didn't get  
23 rid of the pain. So it's not mechanical, right? You rule  
24 things out. That's what doctors do. That's what a scientific  
25 methodology employs, you rule things out.

1           He goes to see Dr. Ferrante. Dr. Ferrante, by the  
2 way, is in L.A. He's outside of this manipulation network  
3 that perhaps was at one time suggested. He thinks it's a  
4 mechanical pain, probably, but possibly RSD. Let's go ahead  
5 and rule out the RSD with a lumbar sympathetic block. That's  
6 how you do it. That's what you do.

7           It's a specifically a block that hits those nerves  
8 which are sympathetic, that all the doctors have described to  
9 you. That -- that fight or flight reaction, the pupils  
10 dilating, the color changes, the temperature changes, the hair  
11 growth, all sympathetic responses.

12           So they send him to Dr. Miller, an expert and very  
13 apparently, I don't know him, but well acclaimed doctor in  
14 L.A. who performs a lumbar sympathetic block, all right. And  
15 it works. That's how you know that there's sympathetically  
16 mediated pain. The fact that Enrique never gets better is not  
17 true. At that time, his sympathetically mediated pain went  
18 away. And then he had a second shot, and it went away. And  
19 Dr. Miller noted and came up with a conclusive diagnosis of  
20 RSD.

21           And this isn't a fantasy ailment. This is a  
22 horrible, painful ailment that came into existence after the  
23 Confederate War, when people were getting their legs blown off  
24 in great numbers. And people were like very quizzical about  
25 why the fact that somebody with no leg could feel pain in his

1 foot. And it began the study of causality that we talked  
2 about, went to Walt Canyon. Walt Canyon was an amazing doctor  
3 in the 1850s and he began the study of this syndrome. And RSD  
4 has a sympathetic component.

5           So he comes back to Nevada. Finally, thank God,  
6 there's something that's working for him, are these lumbar  
7 sympathetic blocks. And they're painful. You've heard him  
8 describe the pain, big needle stuck into your sympathetic  
9 nervous system. I don't like needles, so for me, I'm kind of  
10 already -- but not a nice thing. Three series of lumbar  
11 sympathetic blocks that Enrique is undergoing -- well,  
12 apparently and we'll talk about that later because he needs  
13 attention, all right.

14           So he goes for the lumbar sympathetic with Dr.  
15 Shifini and it doesn't work. And now all hell breaks out. I  
16 mean, he is in intractable pain, he's in excruciating pain. I  
17 mean, it's been commented on so many times how much he said it  
18 hurt. You know why he said it hurt that much? Because it  
19 hurt that much. And he's telling his doctors it hurts that  
20 much and he's becoming desperate. He's desperately crying out  
21 for pain.

22           Now, this pain is nothing knew to him. Now, it's  
23 been suggested that early on in September when he first saw  
24 Dr. Mortillaro, he already had a chronic pain syndrome, and he  
25 was already banging his head against the wall. He had been

1 walking around on a ripped meniscus with chondromalacia for  
2 six months. That hurts. That's frustrating. And the only  
3 reason he couldn't get it fixed, the evidence has shown you,  
4 is because his lawyer couldn't get the job done. And that's  
5 not his fault either.

6           So if it's starting to seem like things are working  
7 really badly against Enrique, they are. And they are because  
8 the Palms Hotel was careless. And that's been established to  
9 you as well.

10           So, now what can they do? They put in a spinal cord  
11 stimulator. Look again, it works. The two methodologies to  
12 get rid of sympathetically mediated pain worked. Enrique  
13 never gets better? Yeah, he does get better. He gets better  
14 when the problem is addressed, and an RSD, which is now a  
15 complex regional pain syndrome because the sympathetic  
16 component, as all the doctors testified to, dropped out during  
17 the lumbar sympathetic blocks. That's what they expected to  
18 see. That's what occurred.

19           So he has the pain stimulator, and it works. And  
20 he's still waiting and waiting and waiting to get that pain  
21 stimulator.

22           So let's talk about what the doctors said. Shannon,  
23 knee caused in the accident, postural changes, he's going to  
24 have lumbar and he's going to have cervical problems.

25           Tauber. Tauber said the same thing, that the knee

1 surgeries were caused by the accident, that he had postural  
2 changes and was using assistive devices, he's going to get  
3 lumbar problems, he's going to get cervical problems.

4 Dr. Shaw was -- Dr. Shaw was moving to me, I don't  
5 know. I know people react to emotion in different ways. But  
6 Dr. Shaw, back in 11 of '06, said he was going to need lumbar  
7 surgery, that there were postural changes that occurred to  
8 him.

9 Dr. Shaw, obviously, very much was concerned for  
10 Enrique Rodriguez. And I'm supposed to apologize to the Court  
11 because he's embarrassed that he cried. But can you imagine  
12 the frustration of a doctor who has an oath like we, to  
13 protect and to serve and to heal his patients. That's like a  
14 mixture of a cop and a doctor, huh.

15 But knowing that there's a cure, seeing that there  
16 was a cure, it's consistent with his diagnosis. Remember that  
17 Dr. Shaw saw Dr. Miller's records which said he had  
18 hyperesthesia, allodynia, modeling of his leg, temperature  
19 changes measured scientifically of his leg, color changes,  
20 nail changes. All of these things that were five out of six  
21 on the guideline for RSD.

22 So Shaw's looking at this, and he can see the kind  
23 of pain that Enrique's in. It was a horrible pain and he's  
24 sensitive to it. He was a loving guy and he's committed to  
25 helping his patients. And he actually teared up on the stand

1 at the frustration he felt that Enrique Rodriguez could not  
2 get the pain stimulator to heal his pain.

3 I just ask the Court -- I'm sorry, Enrique -- but I  
4 just ask the Court to please try to imagine the frustration  
5 Enrique Rodriguez is feeling that he can't -- if it makes this  
6 doctor cry, that he can't get the pain stimulator.

7 So, now we hear from Dr. Shifini. Dr. Shifini is a  
8 really impressive guy. I found his depth of medical  
9 knowledge, even for doctors, to be somewhat extraordinary.

10 And Dr. Shifini conclusively told you he has RSD  
11 based upon his examinations, based upon -- and I'm calling it  
12 RSD now and I shouldn't. Complex regional pain syndrome.

13 Based upon the whole host of findings that he had,  
14 including the fact that the temporary stimulator worked, which  
15 is exactly what Dr. Shifini thought would happen.

16 And then Dr. Shifini went through and also explained  
17 that there were postural changes and that the assistive  
18 devices and that his lumbar pathology was not only  
19 foreseeable, but was just going to happen. He concurred with  
20 Dr. Shaw, who concurred with Dr. Tauber, who concurred with  
21 Dr. Shannon that this was going to happen to Enrique  
22 Rodriguez.

23 And Dr. Shifini spoke to you about the costs  
24 associated with the future surgeries that he was going to  
25 require, helped explain to the Court the medicine in a very

1 scientific way, and really spoke about the fact that Enrique  
2 was permanently, horribly injured.

3           Now, think about what's going to happen. If we fix  
4 the foundation, if we get the pain stimulator, then he's going  
5 to be happier, he's going to move better, he's going to be  
6 less restrictive, more active and then we're just going to  
7 have to kind of build up.

8           You heard that he's going to need a single layer of  
9 fusion to a reasonable degree of probability, and that his  
10 neck is going to require shocks to a reasonable degree of  
11 probability, and hopefully someday what we can do, and  
12 probably someday what we can do, is make him a man again. A  
13 happy, productive, associated with other people type of man.

14           So they heard all this evidence, and so they bring  
15 in Dr. Becker at this point in time. And Dr. Becker says, no,  
16 no, I know I'm in a minority, but because I'm an orthopedic  
17 psychiatrist, he said he's better qualified than this host of  
18 other doctors, not including the doctors in the medical  
19 records. Some of the finest doctors in our community.

20           Dr. Kidwell, a pain specialist from the military.  
21 Dr. Shifini, a very bright person there. Dr. Shannon, I think  
22 she might be a genius, but don't tell anyone that I said that,  
23 you know, educating the Court on the issues. Dr. Shaw, the  
24 caring doctor who had the dynamic, dynamic relationship with  
25 Enrique.

1           And I didn't even know what to say to that and I  
2 didn't respond to it. Dr. Becker said, I'm better qualified  
3 than every other doctor in this case, including Dr. Miller, to  
4 diagnose RSD.

5           Well, he heard Dr. Tauber, the other [indiscernible]  
6 he said, [indiscernible] don't treat RSD, it's a pain  
7 management issue, and it is. If you're part of the school of  
8 doctors that refers out to professionals and board  
9 certifications -- and let's remember, I like Dr. Becker. I  
10 think he's a great guy. I want to go see him play the organ.

11           But he was a doctor at a time that none of these  
12 other subspecialites existed. He treated like a country  
13 doctor with a bag where he treated a whole range and  
14 constellation of problems. And, you know, we've seen stuff  
15 like that before. Remember, he testified that board  
16 management -- that board certification and pain management  
17 even existed.

18           Board management and pain -- board certification and  
19 pain management exists because we've learned. We've  
20 developed, we've -- we've increased the profession and where  
21 we're going with it. And those are the guys that treat and  
22 diagnose RSD, not a orthopedic psychiatrist, which incidently,  
23 I've never [indiscernible].

24           Okay. So what's their last chance, all right? Dr.  
25 Becker, with all respect, had to admit on the stand that his

1 emotional ability was part of the chronic pain syndrome. You  
2 heard that from everybody. That his tendency to focus on  
3 pain, that somatization, which is not the DSM, but which is  
4 part of chronic pain syndrome, that that -- that that's part  
5 of the chronic pain syndrome and was entirely consistent.

6           That each and every one of Enrique Rodriguez's  
7 complaints was entirely consistent with the medicine, entirely  
8 consistent with the diagnoses that the doctors came up with.

9           You know, they came up with a diagnosis of RSD,  
10 because he had all the signs of RSD. They spoke about the  
11 fact that a bone scan is one of many, many different things  
12 that you look at, but is not diagnostic of RSD. So if you  
13 have six signs, and one not there, there's a diagnosis of RSD.  
14 Your hypothesis is supported by the scientific evidence.

15           Now, they must have jumped when they saw in Dr.  
16 Mortillaro's report, where they talked in the Behavioral Study  
17 2, that it was either a desperate cry for pain, that it was  
18 maybe secondary gain motives, pain magnification, and put to  
19 credibility questions with respect to Enrique Rodriguez. You  
20 know why? It's because they don't understand the test.

21           The test itself, as Dr. Mortillaro talked about and  
22 even Dr. Becker talked about with his red flags, raised his  
23 red flags. And so then you go and look for clinical  
24 correlation.

25 //

1           So let's see what the clinical correlation was at  
2 that time. He might be someone desperately crying out for  
3 pain. Well, hell yeah. Anyone would be, okay?

4           He started with two knee surgeries, a bunch of shots  
5 to his back, some of which worked, that didn't work. A  
6 procedure, a pain procedure to put in a stimulator which he  
7 was being checked for at the time of Mr. Mortillaro's report.

8           Had been limping around in pain for three years,  
9 nobody's giving him any answers. The lawyers aren't getting  
10 this stuff done. He's not getting the treatment that he needs  
11 and he is desperately crying out for help. And all those  
12 other things, as Dr. Mortillaro told you, were ruled out with  
13 the objective findings, the findings from Dr. Miller, the  
14 findings from Dr. Shannon.

15           I didn't understand what Mr. Ward was trying to say  
16 when he was cross-examining Dr. Mortillaro and asked, "And  
17 those pain complaints didn't go away, didn't go away, after he  
18 had that very pristine, great surgery from Dr. Shannon."

19           Come on. I mean, if -- things need to be looked at  
20 in context and in a truthful, scientific matter. The pain  
21 didn't go away, because there are loose bodies in his knees,  
22 the torn meniscus, synovitis and chondromalacia. Would you  
23 expect pain to go away under those circumstances?

24           So these -- these are what his themes have been.  
25 First, Enrique Rodriguez wasn't hurt in this accident. Well,

1 that's blown out of the water by his own doctors and by  
2 everyone else. Enrique Rodriguez's pain just doesn't go away.  
3 Sure it does, when he gets a pain stimulator. That's when his  
4 pain goes away.

5 Enrique Rodriguez is inconsistent in his -- in his  
6 reporting. Enrique Rodriguez has the most consistent  
7 reporting that I've ever seen in medical records. There's  
8 thousands of pages of medical records in front of you and  
9 there's like, what, three inconsistencies, four  
10 inconsistencies that have been pointed out over six years?  
11 That is not inconsistent reporting. That's something that you  
12 talk about and point to when you're trying to hide the ball  
13 and misdirect and not attack something face on honestly and  
14 truthfully by looking at the science and the people who are  
15 supporting the science and the conclusions that the scientists  
16 have reached.

17 And I'm going on about it, and I'll stop. But all  
18 the scientists who are involved in his treatment, people in  
19 two different states, people who knew each other and didn't  
20 know each other have concluded a few things. And I'll just  
21 enumerate them.

22 One is, Enrique's knee was hurt mechanically in this  
23 accident. Two, that Enrique's knee was hurt neurogenically in  
24 this accident. Three, that that neurogenic injury resulted in  
25 a regional pain syndrome that was sympathetic, that then

1 became a regional pain syndrome that was not sympathetic.  
2 Four, stimulators work on that. Five, because of the  
3 assistive devices, the weight gain and the postural changes  
4 supported by that whole big X-ray that was such a big deal,  
5 where the doctors talked about biomechanical changes due to  
6 postural changes, are going to make his back hurt, and are  
7 going to make his neck hurt. And then very consistent  
8 testimony, again, by doctors on a broad range that we can fix  
9 it. We can fix it if given the opportunity.

10           So let me go over the computation of damages with  
11 you and have I brought that to the bench already?

12           THE COURT: Yes.

13           MR. BAKER: This -- what we did, Your Honor, is --  
14 and I might attach this as an exhibit with the Court's  
15 permission. It's not typically an exhibit, but I think it  
16 will help you do a faster -- not faster for us, but then you  
17 don't have to dig through every exhibit.

18           The past medical expenses that we put in evidence,  
19 what we did is, we backed out the C-Pap and the respiratory  
20 type of things which -- I don't know. And the total amount of  
21 medicals in evidence are \$376,773.38.

22           The future medical expenses, each of which were  
23 discounted to present dollar value by Terry Dinneen are \$9,059  
24 -- \$959,227. And I put below on the footnotes the exhibits  
25 that those were admitted for the Court's -- should I say Rob

1 put them there for the Court's convenience.

2 The fusion, pre-fusion diagnostics and the knee  
3 replacement is \$686,392. The discography that was put in  
4 through -- I think it was one --

5 MR. CARDENAS: Dr. Kidwell.

6 MR. BAKER: Dr. Tauber --

7 MR. CARDENAS: Kidwell.

8 MR. BAKER: Kidwell? Was \$10,000. Medications and  
9 supply needs, was the \$199,119.

10 And let's talk about the future loss of earnings for  
11 a second because I skipped over that.

12 Terry Dinneen was a vocational rehabilitation expert  
13 and a forensic economist, came in to you. And it was such  
14 honest testimony. Again, it was nice to see.

15 And he said, yeah, I do have not so much paperwork  
16 to go on. Enrique is not a paperwork guy. There are people  
17 who are like that. I'm not a paperwork guy. If it wasn't for  
18 my wife and my cousin Andy, I'd never file my taxes, okay.

19 And he said, okay, I looked at this, and then I  
20 averaged this. Okay, now averages are recognized in the  
21 scientific community and the mathematical community, all over  
22 the place. And I came up with a number. But, you know, I  
23 couldn't be so sure of the number because there was not enough  
24 information in front of me to be sure about the number.

25 And you know what? He could have come in and

1 testified on the Weid Steel Doctrine [phonetic], that your  
2 last year of employment and income is what you use to project  
3 future income, but I'm not going to come into your court with  
4 that. That's not real, and that's not true, and it's not fair  
5 and you'd have seen right through it.

6           So he took an average and then he cross-validated  
7 it, twice, okay. Two times cross-validation. He went into  
8 the ERI, which is the database that he told you about, for  
9 people with employment abilities from different levels. And  
10 he went into the Department of Labor records with respect --  
11 and his number was the medium. He gave you a number that was  
12 a little above the medium of \$47,000 a year.

13           Now, I don't know how you do a more valid,  
14 scientific methodology than to do an average, and then do two  
15 layers. And remember, each of those was -- it's a different  
16 story, but each of those validators serves as a separate whole  
17 set of validators, and then it's cross-validated with each  
18 other.

19           So it goes A to B, A to C, C to B, in that kind of  
20 way. And it's a cross-validation. That's very much within  
21 any accepted scientific methodology, and so he can opine to a  
22 reasonable degree of probability about what Enrique  
23 Rodriguez's damages are.

24           And let's look about what he based his testimony on.  
25 Enrique Rodriguez, although Dr. Becker who didn't know it

1 until the day he was sitting there, was permanently disabled  
2 by the Social Security Department, based upon a series of  
3 interviews -- well, perhaps not a series of interviews, but  
4 based upon a review of the medical records and the interview  
5 process to meet a definition of disability that is extremely  
6 hard to meet.

7           You want a good piece of evidence? The Federal  
8 Government that doesn't want to pay for anybody found Enrique  
9 Rodriguez to be disabled. Really, at a certain point, it  
10 becomes mountainous.

11           And so Dr. Mortillaro explained to you that he did  
12 not look at Enrique as somebody who was looking for attention,  
13 that wasn't really disabled, that had a fictitious complaint,  
14 that had a somatization disorder. That he's a guy who's hurt  
15 and he was crying out for help.

16           And so how -- how do you calculate his general  
17 damages? I always have trouble with that, because there are  
18 examples that I would use with a jury that I don't think hold  
19 here.

20           This is what I do know, is that the evidence that  
21 was presented said that Enrique was happy before this  
22 accident, had a great relationship with a great woman before  
23 this accident, was involved in his community, enjoyed children  
24 throughout his life, played with his friends, for lack of a  
25 better way of saying it and he had balance.

1           And he had balance. And he just worked kind of to  
2 have enough money to ride for a while, and then worked and got  
3 more money, and was able to do that because he was successful  
4 in the labor market and knew what he was doing.

5           And that sort of balance, it balanced with his  
6 family. I mean, seven, nine brothers and sisters, still hung  
7 out with his parents. And to suggest at any point in time  
8 that this is a guy who has undergone six years of needles and  
9 surgeries and doctors and lawyers, to abstract from that  
10 environment is absurd. It's ridiculous, it's not truthful,  
11 it's not fair and shouldn't be said.

12           There is a philosopher that I liked a lot when I was  
13 growing up. His name is Mortimer Adler. And he described as  
14 part of his philosophy that the good is pleasure in the  
15 absence of pain. And the Court's probably familiar enough to  
16 know that I ascribe to that kind of philosophy. That's what's  
17 good. And before this incident at the Palms, Enrique had a  
18 good life. That's what all the testimony is. You haven't  
19 seen one bit of testimony that would suggest anything better.  
20 So what do you pay -- what do you pay to replace that?

21           I mean, the Court has a lot of experience with it.  
22 And, again, I have no real basis to say, but is \$5 million too  
23 much to pay for the life of a man? Is \$5 million too much to  
24 take something that was essentially just good and making it  
25 not only nightmarishly awful, but where it requires a

1 desperate cry for pain -- or for help? It's hard for me, and  
2 I think what I'll do is I'll leave that to the Court's  
3 determination.

4           So I would suggest that maybe the total damages that  
5 exist in the case are those that we put in for you with  
6 plaintiff's computation of damages. Your Honor, I'd actually  
7 ask that it be marked and admitted as an exhibit for your  
8 consideration.

9           THE COURT: Very well.

10           MR. BAKER: Rob, do we know what these total add up  
11 to? All of the past special damages?

12                           (Pause in the proceedings)

13           MR. BAKER: No? If I were to look at it, Your  
14 Honor, it's about a million three there, two million -- it's  
15 about \$3.1 million, it looks like, Your Honor, of total past  
16 special damages.

17           And with pain and suffering in this case, not to  
18 mention any other types of damages that the Court might  
19 address, you know, I'd respectfully ask the Court for 7 or \$8  
20 million dollars to compensate Enrique Rodriguez for what he's  
21 gone through, for the pain he's suffered in the past, for the  
22 surgeries he's going to have to have in the future which  
23 include the spinal cord stimulator, a lumbar fusion,  
24 injections to his lumbar spine and his neck. It's even been  
25 suggested that he should have a gastric bypass.

1 I don't think this case was ever taken very  
2 seriously. And I suggest to you it's the most serious type of  
3 case, because the injuries not only are horrible, but the  
4 consequence on a good man are beyond repair.

5 Let me ask Rob if I've forgotten anything, Your  
6 Honor.

7 (Pause in the proceedings)

8 MR. BAKER: Thank you, Your Honor.

9 THE COURT: Okay, thank you, Mr. Baker.

10 Oh, is this -- do we only have the one copy?

11 MR. BAKER: I'm sorry, Your Honor?

12 THE COURT: Do you have another copy of this item,  
13 Mr. Baker?

14 MR. BAKER: Did I forget about that one?

15 THE COURT: Okay, Mr. Ward, whenever you're ready,  
16 sir.

17 MR. WARD: Thank you, Your Honor. We had a chance  
18 to try to see if things would go up --

19 Okay. I'm going to want to show some things and I  
20 don't know if we've got things working. So if we can figure  
21 that out while I get started?

22 THE COURT: Let's take about a five-minute break and  
23 allow you to do that then, Mr. Ward.

24 MR. WARD: Sure, sure.

25 (Recess from 1:59 p.m. to 2:10 p.m.)

1 THE COURT: Please be seated.

2 MR. WARD: Your Honor, I would like to ask as a  
3 matter of court protocol, I have several references to  
4 testimony that was offered during this trial that I would  
5 propose to intersperse in my final argument. With the Court's  
6 agreement, I want to make sure that I cleared that ahead of  
7 time, if that's acceptable or not acceptable protocol.

8 THE COURT: Mr. Baker?

9 MR. BAKER: I'm not understanding. You're just --  
10 you want to talk sometimes and show movies sometimes?

11 MR. WARD: Yeah.

12 THE COURT: Oh, I see. You mean, run clips of the  
13 actual trial testimony?

14 MR. WARD: Right.

15 THE COURT: Yeah, I think that's acceptable.

16 MR. WARD: Okay.

17 MR. BAKER: Your Honor, before -- and not to  
18 interrupt, could I attach with my last exhibit -- what we did,  
19 as well, is we put the exhibit number where the medical bills  
20 could be found. And I think that I did not give you that. I  
21 just gave you the computation with damages. Is that right?

22 THE COURT: Yes.

23 MR. BAKER: May I attach that as part of that  
24 exhibit?

25 THE COURT: Yes.

1 MR. BAKER: K.C., it's just this.

2 MR. WARD: Right. Your Honor, what I'm assuming  
3 here is that it would be perfectly acceptable for Mr. Baker to  
4 get up and write it on a piece of paper, and instead of doing  
5 that, he's put it on a small piece of paper in a legible  
6 format. And so it would have that same effect.

7 I just want to note, I don't have any objection to  
8 it. That's fine.

9 THE COURT: Very well.

10 MR. BAKER: Thank you.

11 THE CLERK: Is she -- does Judge have a copy?

12 THE COURT: No, I don't.

13 MR. BAKER: Can I get that for you?

14 THE COURT: If you have one. Otherwise -- oh, thank  
15 you, Mr. Cardenas.

16 MR. CARDENAS: Hey, no problem, Judge.

17 THE COURT: Thank you.

18 Okay. Whenever you're ready, Mr. Ward.

19 MR. WARD: Yes, Your Honor. Thank you.

20 DEFENDANT'S CLOSING ARGUMENT

21 MR. WARD: If it please the Court, and we appreciate  
22 Your Honor's attention to this case that we've been here. And  
23 I will try to make this reasonably short and reasonably  
24 succinct.

25 //

1 I'm not going to spend my time addressing those  
2 issues that were raised in Mr. Baker's argument, about what he  
3 claims that I said. We know how this works, and so I'm not  
4 going to spend a lot of time addressing the fact that he says  
5 that I called his client, fat, which I did not.

6 But we are here, clearly, as a result of an incident  
7 that occurred on the evening of November 22, 2004. With  
8 respect to the events of that evening, Mr. Rodriguez has told  
9 us that the event happened something like this.

10 He said he was watching the football game and there  
11 were people there who were periodically throwing items into  
12 the crowd. He said that it happened five or six times over  
13 the period of an hour that he was there.

14 I submit to the Court that Mr. Rodriguez has made  
15 two statements about that and both have been here in the court  
16 and admitted into evidence from other people. One statement  
17 was he thought it was really dangerous and he was upset about  
18 the fact that it wasn't stopped. The other statement was that  
19 he was watching the football game and he didn't even notice  
20 what was going on.

21 I submit to the Court the statement that he gave to  
22 Dr. Mortillaro, that he thought it was dangerous and that it  
23 should be stopped, that if in fact that's what he really  
24 thought, I don't understand why he didn't, either, number one,  
25 try to get somebody to stop it or simply leave.

1           He apparently stopped in to watch a football game.  
2 There were lots of televisions in Las Vegas, in particular,  
3 they have televisions at Harrah's where his wife was staying  
4 that night.

5           When Mr. Franklin was here, Mr. Franklin was asked a  
6 question on cross-examination in a hypothetical context and  
7 essentially said, if there's a rule and somebody knows about  
8 the rule and they violate it, aren't they -- isn't that  
9 intentional disregard of the rule.

10           And Mr. Franklin agreed under those circumstances  
11 that that would be intentional disregard of the rule, but Mr.  
12 Franklin did not say that -- that this would be intentional  
13 disregard of safety of people. He did not say that.

14           What Mr. Franklin said was that something that  
15 everybody knows, because one of the things that -- one of the  
16 things that experts are here to offer, is they are here to  
17 offer things to assist the Court, to assist the finder of  
18 fact, in things that are not everyday knowledge.

19           And where the line crosses, and perhaps there's no  
20 need for the expert of Mr. Franklin, is that everybody knows  
21 that throwing items, promotional items into the crowd goes on  
22 all the time everywhere. That it's not an unusual situation  
23 and it's something that still goes on today. We see it at  
24 basketball games, we see it at football games and we see it  
25 all kinds of places, and it's accepted by people. And

1 presumably if the people don't like it, they leave. I don't  
2 think that there's anything that is highly unusual about that  
3 conduct.

4 I submit to Your Honor that the common knowledge  
5 also is -- and this is something that we will address later --  
6 the common knowledge is just because you set up a higher  
7 standard for yourself or for your employees does not in and of  
8 itself, while it certainly is evidence and can be considered  
9 in and of itself, doesn't set the bar.

10 On the evening in question, Mr. Rodriguez testified  
11 that the item that was being thrown was already on the floor.  
12 He testified that after the item was on the floor, something  
13 which came as a surprise to him, and presumably a surprise to  
14 everyone else that was there, a woman who had been seated got  
15 up out of her chair and then took a headlong dive to try to  
16 get this bottle that was lying on the floor.

17 Why she did that, who knows. Mr. Rodriguez  
18 explained that he couldn't anticipate it, and it came as a  
19 surprise to him and presumably a surprise to everybody else.  
20 And she wasn't trying to catch it because it was already on  
21 the floor.

22 Now, Your Honor, the -- most of the time of this  
23 trial has been spent talking about injuries and damages. It  
24 is not been spent talking about liability. And so I want to  
25 spend most of my time that I have here today talking about

1 injuries and damages. And the reason I want to talk about  
2 injuries and damages is that I want to point out that most of  
3 the injuries and damages have the connectivity to the incident  
4 of November 22, through the testimony of the plaintiff.  
5 That's the connection between the Palms, which is over here,  
6 and the damages which are over there.

7 Now, Dr. Becker's report is in evidence, and it is  
8 clear from Dr. Becker's report that he's not saying he didn't  
9 get hurt. He is testifying -- he wrote his report and he's  
10 testifying about the injuries that, in his opinion, may be  
11 related to the event, and injuries that may not be related to  
12 the event.

13 One of the things I talked about in my opening  
14 statement, and is still in evidence, the people referred to  
15 it, was an MRI. And that was an MRI of the knee, and that MRI  
16 of the knee said that there was no torn meniscus.

17 Now, Dr. Shannon, I think, was the first live  
18 witness, talked about the fact that when she looked inside the  
19 knee, she could see a torn meniscus. I certainly do not in  
20 any way question the credibility of Dr. Shannon, nor does Dr.  
21 Becker. So when Dr. Shannon says there's a torn meniscus,  
22 there's a torn meniscus.

23 The one consideration here is that the MRI was taken  
24 January 28th, '05, and the surgery, when Dr. Shannon was  
25 looking at this meniscus, was approximately October, maybe it

1 was September, I think it was October. I don't have all these  
2 dates in my mind.

3 MR. BAKER: October.

4 MR. WARD: Thank you. And so when she was looking  
5 at the knee, she was not looking at the knee in the same time  
6 frame as the MRI. The MRI was substantially before that. So  
7 it's not necessarily a conflict.

8 However, Dr. Shannon said in her opinion she thought  
9 it was related to -- related to the accident. And that was --  
10 that was her testimony and that was her opinion from the  
11 witness stand and so we didn't question it.

12 What she did say, however, though, is she said you  
13 cannot date the meniscus. In other words, when you're in  
14 there looking inside the knee and you see a tear, you can't  
15 tell, did it happen yesterday, did it happen the day before,  
16 did it happen the day before that, did it happen 10 months  
17 before, whenever did it happen because at the time she's  
18 operating on him, she is approximately 11 months after this  
19 accident happened.

20 Now, the significance of that, Your Honor, is that  
21 what she says is, it's history. She makes the causal  
22 diagnosis based on history. She said, I was told that there  
23 was no event other than 11/22/05. I'm looking at a torn  
24 meniscus in October -- 11/22/04. At least I didn't say '74.  
25 11/22/04. She's looking at it in October of '05, and she

1 says, I was told this was the only event, I see a tear, and  
2 therefore it's related. In my opinion, it's related.

3 We accept that. That's her opinion. What she also  
4 said, however, if Your Honor remembers is, she said there were  
5 a number of other knee issues that were not related, that were  
6 not traumatic, that were degenerative, pre-existing  
7 degenerative.

8 Now, there are a couple of issues here -- and I'll  
9 try not to jump around too much, but I want to go back to this  
10 issue of the relationship of the injury and all of those  
11 things. Because what Dr. Shannon says, is that in her  
12 opinion, because there is no other -- no other explanation for  
13 it, that the torn meniscus that she saw in October is related  
14 to the accident.

15 Now, what you heard from both, Dr. Shannon and Dr.  
16 Becker, is that you could look in the photographs, you could  
17 see what a good job she did. What Dr. Becker said was that  
18 when she was done with the surgery, his knee was better than  
19 it was before the accident. But his knee was not hardly  
20 perfect before the accident. His -- he had -- he had a number  
21 of degenerative changes that pre-existed the accident.

22 Now, he didn't get any relief. He had pain  
23 immediately thereafter. Now, the argument is, well, he had  
24 pain immediately thereafter because he had a torn meniscus and  
25 because he had a loose body and he had a bunch of things.

1           He didn't have a torn meniscus and he didn't have a  
2 loose body and he didn't have a bunch of things on the day  
3 after the surgery. On the day after the surgery, he had a  
4 nice clean knee. He did have surgical wounds that needed some  
5 time to repair, but the testimony of Dr. Becker specifically  
6 -- and I don't remember if Dr. Shannon dealt with this  
7 specifically, but certainly if she did, I didn't hear anything  
8 that was contradictory -- is that in this kind of instance  
9 where you have an arthroscopic knee surgery, that you expect  
10 that the patient is going to be, in a few days, because  
11 there's some swelling, there's some invasion, there's a bunch  
12 of stuff, but within a few days, they're going to begin to  
13 recover. And they're going to begin to get better. And it  
14 may be a three, four, five or six week process. They may need  
15 more physical therapy, but they're going to begin to get  
16 better.

17           Dr. Shannon said, and Dr. Becker said, there may  
18 come a time when a few -- a relatively small percentage of  
19 these people need another surgery, but that's not until later.  
20 That's something that develops.

21           First of all, there's some healing. And in this  
22 case, there wasn't any. There -- when I say there wasn't  
23 healing, there was healing, but there wasn't any cessation of  
24 the pain complaints. The complaints were the same as they had  
25 always been, to the extent that Dr. Shannon was concerned

1 enough about it that she said, in effect, I don't know why  
2 he's complaining of pain.

3           Now, she's an experience orthopedic surgeon. She's  
4 dealt with a lot of knee surgeries, and she's done the  
5 surgery, and she's looked at the inside of his knee and she  
6 can't figure out why he's complaining, why he has pain, why he  
7 is still complaining of pain of 8 out of 10 on a scale of --  
8 8 on a scale of 10.

9           And so what she does, essentially, because he's  
10 complaining so much about the pain -- and she doesn't say  
11 anything about chronic pain syndrome at this point. He's  
12 dealing with a meniscus. He's dealing with a meniscus that's  
13 been torn and needs to be surgically repaired.

14           And so she undertakes an MRI. Now, her complaint --  
15 and I accept her complaint, that the original MRI she said was  
16 a low resolution, in her estimation, and you can't read it  
17 very well, and therefore, her opinion about what she saw in  
18 the surgery is more -- is in her opinion carries a greater  
19 weight than this -- than this low resolution MRI. I accept  
20 that. She's the doctor. If that's what she says and that's  
21 what she believes, and I certainly have faith in her judgment,  
22 then I accept that.

23           But this MRI was not a low resolution. This MRI was  
24 an MRI that she ordered from the place that she thinks is  
25 appropriate to send them to. And it wasn't just an MRI, it

1 was an MRI with contrast. So now we have a high resolution  
2 MRI, with contrast, that if there's a problem in there, it  
3 should show up, and it doesn't show up. It doesn't show up.

4 And so she says, I don't understand. I can't figure  
5 out, I don't -- I look at this and I see that there's -- that  
6 the pain complaints are just as much as they always were. I  
7 don't find anything here, I don't understand.

8 Well, what happens is, Mr. Rodriguez never goes  
9 back. Mr. Rodriguez now goes to another orthopedist, and ends  
10 up this time with Dr. Tauber.

11 Now, Dr. Tauber, once again, offers the opinion that  
12 when he does surgery, that he finds a meniscal tear and he  
13 finds a loose body. Now, we know that the meniscal tear was  
14 repaired by Dr. Shannon. So, I'm not sure what we're to  
15 believe here. If we're to believe that Dr. Shannon did a  
16 really poor job, I'm not prepared to believe that.

17 I think Dr. Shannon didn't do a really poor job. I  
18 think what happens here and I -- Dr. Tauber was a surgeon. If  
19 he found a meniscal tear, I accept the fact that he found a  
20 meniscal tear. But once again, he's not looking at this the  
21 same day that she's looking at the MRI. He's looking at it  
22 six months later.

23 Now, here's the problem, Your Honor, that comes up  
24 in this case. And I want to do an aside here, because there  
25 are a number of issues that come up -- that have come up with

1 respect to this case, and the damages, and the linkup of those  
2 damages from the accident, to the damages.

3           Now, I submit to Your Honor that proof is a -- proof  
4 is a very interesting thing. People -- people are always  
5 asking about proof. And when I was in law school, I was  
6 trying to figure out what proof was, and lots of people talk  
7 about it. And it's -- I think it's probably one of those  
8 things you can see it when you see it.

9           But I've always felt about proof is kind of like if  
10 somebody tells you something and you believe it, then you  
11 prove it. And if somebody tells you something and you don't  
12 believe it, then you didn't prove it. And I'm not sure that  
13 there's anything that's much more quantifiable than that.

14           Now, I'd like to give an example. The example  
15 happened yesterday. When I was introducing my -- or trying to  
16 introduce my expert's supplemental report, Mr. Baker got up  
17 and said it was never served on him. So here we have a  
18 situation where I'm trying to introduce a supplemental report,  
19 he says it was never served on him. I say, I think it was.

20           Now, if we stop there, what's the proof? Well, if I  
21 simply said to Your Honor, I served it on Mr. Baker, my  
22 expectation is, you'd probably believe that; until Mr. Baker  
23 gets up and says, I never got it. Now, there's a question  
24 raised and my simply saying I served it on him. It needs  
25 more, in terms of proof, needs more.

1           Now, fortunately, we were able to pull up and print  
2 out and show a copy of our service signed by me on October 5,  
3 and showed the proof of service which answered that question  
4 that it had, in fact, been served on Mr. Baker. And Mr. Baker  
5 then accepted the fact that it had been served on him, and  
6 despite the fact that he had never seen it -- I'm not  
7 suggesting any ill will.

8           MR. BAKER: [Indiscernible].

9           MR. WARD: He got up and said he hadn't seen it.  
10 I'm not accusing him of anything nefarious. I'm just trying  
11 to use this as an example.

12           And -- but so we went from something that would be  
13 relatively complicated, to something that is relatively easy,  
14 in that, in a manner of minutes we sort of answered this  
15 issue, was it served on Mr. Baker? Yes, it was served on Mr.  
16 Baker. We're done, we can go on to that -- we can go on to  
17 other kinds of things.

18           But that's -- to me, that's an example of the kind  
19 of things that comes up, and came up consistently in this  
20 case, except what happened oftentimes in this case is that no  
21 one produced the document. No one produced the information to  
22 answer the question. Instead, what we got was quite a bit of  
23 well, let's just ignore it. Let's just -- let's just forget  
24 about that.

25 //

1           So we have Dr. Tauber, who sees a tear. And where  
2 did we start with? We started in this case with a whole bunch  
3 of statements. And they are statements that are replete in  
4 the records. And the statement -- one of the statements that  
5 is replete in the records is that Mr. Rodriguez told a number  
6 of people that before this accident, he weighed 180 pounds.

7           He was in great shape and he was a bodybuilder. He  
8 was -- he ran, he weighed 180 pounds. And now, as a result of  
9 this accident and all the horrible things had happened to him  
10 in this accident, that one of the things that had happened is  
11 he gained a lot of weight.

12           We all have differing weight challenges. And for  
13 some people it's really hard to lose weight. And I'm  
14 certainly aware of that problem, and I'm sympathetic to that  
15 problem, and I'm not trying to say that Mr. Rodriguez is fat  
16 like counsel suggested I said.

17           What I'm trying to raise, Your Honor, is that this  
18 -- this is a situation in which not only was he overweight at  
19 225 pounds, but he was -- he had been at that weight for many  
20 years.

21           And so we have two situations here. This weight is  
22 approximately 75 pounds -- even at that weight, is  
23 approximately 75 pounds too heavy. As essentially all of the  
24 doctors who were asked have testified, that is really hard on  
25 your knees. That is really hard on your back. And so there's

1 been a suggestion that every single complaint that he's had,  
2 not the asthma, but every complaint related to his back and a  
3 whole bunch of other things, must be all a result of this  
4 accident.

5 Well, we know -- we know this tear that Dr. Tauber  
6 found wasn't present when Dr. Shannon did her surgery, and  
7 certainly wasn't present the year before. So we know that  
8 that's a tear that happened after this first surgery.

9 What else did Dr. Tauber say? Dr. Tauber said he  
10 found a loose foreign body. Now, what did Dr. Tauber say  
11 about loose foreign bodies? But first, before I tell you what  
12 Dr. -- or remind you what Dr. Tauber said, I would like to --  
13 I think we have what Dr. Becker said about that? Do we have  
14 that? Most of these clips are very short, Your Honor.

15 THE COURT: That's fine.

16 MR. BAKER: I like clips.

17 MR. WARD: And for the record, before we play it,  
18 Dr. Becker's is from November 5, 2010 at 11:09 a.m.

19 (Videotape played)

20 MR. WARD: And Dr. Tauber said at -- that same day  
21 at 3:12 p.m.

22 (Videotape played)

23 MR. BAKER: But that's in the middle of a sentence.

24 MR. WARD: That's true [inaudible].

25 So both -- both Dr. Becker and Dr. Tauber said that

1 a loose body in and of itself doesn't cause pain. And so the  
2 loose body would not be the explanation for why the patient  
3 continued to have pain after Dr. Shannon did the surgery on  
4 him.

5           The other thing Dr. Tauber said is that -- is that  
6 this loose body, in his opinion, would be something that broke  
7 off from the -- from inside the knee, somewhere along the  
8 line, he didn't know exactly when, but he said it would start  
9 very small.

10           And then it would -- as it picked up fluid, it would  
11 get bigger. Well, he's seeing the patient six months after  
12 this surgery. So it makes perfect sense that on the day he  
13 saw the patient and looked inside the knee, that he saw this  
14 loose body that was fairly significant in size on that day as  
15 he testified that it would get bigger.

16           But that -- that isn't even -- that was the size of  
17 it -- and clearly, by his testimony, that wasn't the size of  
18 it after Dr. Shannon did the surgery.

19           Now, one of the things that happens is, we have --  
20 in this case, we have had the -- the -- an opportunity for the  
21 plaintiff to make some pain drawings. And the very first pain  
22 drawing we have goes back to -- okay, this is -- this actually  
23 is not from the patient, but this is a pain drawing or chart  
24 from Dr. Heaps on the night of the accident.

25 //

1           And, as Your Honor can see from here, the diagram  
2 shows pain on the inner aspect of the left knee and that's the  
3 only notation.

4           Now, the next time we have a pain drawing is -- this  
5 one is from Rancho Physical Therapy. Now, Rancho Physical  
6 Therapy is where he went after he was seen by Dr. Nork. He  
7 was seen by Dr. Nork on December 6th, and started seeing  
8 Rancho Physical Therapy on December 8.

9           And this, in fact, is the patient's pain drawing  
10 that the patient actually put on there and was asked to list  
11 the areas where he has pain and he put his knee.

12           I would like to contrast that to a pain drawing that  
13 he did about a year later. Whoops, let's go -- if we've got  
14 these in order. Do we have a date on that? Okay, this is  
15 1/24/05, and we still have a knee is the only thing that's put  
16 on there. So at this point, we are two months and two days  
17 post-accident and the only complaint that's being made is the  
18 knee.

19           And the date on that is what? This is 2/14/05, it's  
20 a little bit small, but you can see that the only -- the only  
21 notation on there is the left knee.

22           And this is 3/28/05, and the only notation is the  
23 left knee. So we are now four months post-accident, and the  
24 only notation being made here is the left knee.

25 //



1 surgeon. Interestingly, here, that Dr. Thalgott, who said  
2 unequivocally he would not operate on this person's back, and  
3 did not come to testify. Instead the anesthesiologist, the  
4 testimony about surgery came from two anesthesiologists and a  
5 neurologist.

6           And Dr. Thalgott said, and it's in his records which  
7 are in evidence, Dr. Thalgott saw the patient approximately a  
8 year and a half post-accident. And he wrote in his report  
9 that all of the things that he was seeing the patient for were  
10 causally related to the accident.

11           And as several doctors testified, if you're going to  
12 determine that something is causally related to the accident,  
13 you have to know what it is. I mean, for example, if you --  
14 if somebody says, well, I -- when I -- I drove -- I was  
15 driving into my garage at home, and I ran into my kid's  
16 bicycle as I was pulling my car forward, and the dent is in  
17 the trunk. You're going to say, wait a minute, that doesn't  
18 make sense.

19           So you have to know what happened to be able to  
20 accurately form a conclusion as to whether there is a causal  
21 relationship.

22           And so if you take a look Dr. Thalgott's records and  
23 see what information he was given, upon which he based his  
24 opinion, he talks about that the patient has neck and back and  
25 knee symptoms and that the patient had had these symptoms for

1 a year and a half.

2 Well, we know from the record that he hadn't had  
3 them for a year and a half. And yet, that information was  
4 never provided to Dr. Thalgott. So we have a whole bunch of  
5 information here that relates to causation between the  
6 accident and the injury, that is within the testimony of the  
7 plaintiff, because that's where Dr. Thalgott got his  
8 information. That's where all these doctors got the  
9 information.

10 The ones who appeared and testified said they don't  
11 get all the records. Mr. Mortillaro said if he does a  
12 forensic analysis, that he would get all the records and he  
13 would look at all these things and see if they all fit  
14 together, but he doesn't do that for his regular patients.  
15 And so we have a situation in which Dr. Thalgott is forming  
16 opinions based on things that he's been told that aren't  
17 accurate.

18 We have Dr. Kidwell doing exactly the same thing.  
19 And if you look at all of these doctors, every one of these  
20 doctors was told that the symptoms of the neck and the back  
21 had been there from the day of the accident.

22 So when we -- when they're confronted with that, the  
23 response is simply, well, we'll just ignore that. We'll just  
24 ignore that. We won't explain that away, we'll just ignore  
25 the fact that the -- oh, by the way, I know what, the

1 symptoms, they must have -- they must have come from the gait  
2 problems. That must be what it is. It must be gait problems  
3 that are causing this. The gait problems in the patient who  
4 Dr. Shannon said at length and everybody else has testified,  
5 is very inactive. This patient is very inactive.

6           Now, some of these things may well have caused --  
7 come from the gait problems. However, that's not what Dr.  
8 Thalgott is saying in his analysis. He's saying, these  
9 symptoms started the day of the accident. And these symptoms  
10 didn't start the day of the accident. And the argument has  
11 been, well, but my knee hurts so bad, I didn't know about any  
12 of the other things.

13           Dr. Shannon makes it clear that there is a  
14 phenomenon that exists that when someone has a traumatic  
15 injury, that one particular symptom may take priority over the  
16 other. We don't question that that is a valid situation, that  
17 that -- that can happen.

18           But she didn't say, you wouldn't figure it out until  
19 a year later. She didn't say that. She said that if a good  
20 doctor was doing an examination, that they would listen to  
21 those kind of -- those kinds of issues.

22           But more importantly, if we look at all of these  
23 pain drawings, these are -- most of them are in the hands of  
24 the patient. Some of them are in the hands of the doctor  
25 asking about these issues.

1           So, what else do we know? What we know is, and we  
2 know this from Dr. Becker, and we know this from the other  
3 people that looked at his back, and I don't think Dr. Shannon  
4 was one of those. What we know is that this is a person with  
5 a degenerative back condition.

6           He has multiple levels of degenerative conditions  
7 that are of long standing, that are not traumatic, and are  
8 part of the process that none of us like to admit that we're  
9 getting a little older and that we are -- our back may be  
10 beginning to give us problems, but it is especially aggravated  
11 by being 75 pounds overweight. And that causes stresses and  
12 continuation of problems and beginning of problems in the  
13 back.

14           We haven't heard anything about that. We haven't  
15 heard anything that's attributable to these things. All we've  
16 heard is, well, he didn't have it before, and he had it  
17 afterward, and therefore it must be related. But it simply  
18 doesn't fit with the symptoms.

19           Now, it has always been my feeling that -- that the  
20 trier of fact should not have to be Sherlock Holmes. The  
21 trier of fact should have an opportunity to have evidence  
22 presented and not have to be -- try to decode things and try  
23 to figure out what's there.

24           And in Dr. -- Dr. Becker's report, you will see a  
25 reference to the records from Magnolia Clinic. And Dr. Becker

1 says in his report, which is in evidence, that the patient was  
2 seen at Magnolia Clinic before the accident for sleep apnea.

3 And so I asked Mr. Rodriguez didn't he have sleep  
4 apnea before this accident because he was saying that sleep  
5 apnea was one of the things that he had as a result of this  
6 accident. And I asked him on October 26 at 3:25 p.m. and  
7 here's what he said.

8 (Videotape played)

9 MR. WARD: And so then I asked him about his  
10 treatment at Magnolia where the record show that he was  
11 diagnosed with sleep apnea and here's what he said about that  
12 on October 26 at 3:25.

13 (Videotape played)

14 MR. WARD: Now, we were talking about some of the  
15 issues and I asked these questions because there is so much  
16 that's related to accepting the representations that have been  
17 made.

18 And one of the things that Dr. Shannon talked about  
19 is that when she did -- when she did her surgery on him, that  
20 she did special precautions, because he had had a prior  
21 pulmonary embolus. And she wanted to make sure that she did  
22 what needed to be done about the pulmonary embolus. And  
23 here's what Dr. Shannon said on October 24 at 4:44 p.m.

24 (Videotape played)

25 //

1 MR. WARD: And so I asked Mr. Rodriguez about the  
2 pulmonary embolism and on October 26 at 3:28, here's what he  
3 said.

4 (Videotape played)

5 MR. WARD: Now, it seems to me that the issues that  
6 come up when we're looking at injuries and damages, when we're  
7 looking at proof is that we have this basic question. And  
8 this basic question is, do you believe it, or are there  
9 unanswered questions? Is there something that hasn't been  
10 answered that doesn't seem to fit together? And is there any  
11 reason to go back?

12 And we have, in light of what we have seen in the  
13 records, that there has been a claim over and over again to  
14 many, I believe, there were 52 different treaters in this  
15 case. And the claim over and over, and the representation was  
16 made to essentially all of those people that were seen after  
17 about ten months or a year, that's about the time the story  
18 changed, to now say that the neck and back symptoms all  
19 started with the accident.

20 It raises the question of, when Dr. Mortillaro says  
21 that he did his brief battery for health improvement, and he  
22 says that the scoring -- not his opinion, but the scoring --  
23 includes, example, exaggeration of symptoms for secondary  
24 gain, and that it includes the statement "this strong bias  
25 raises questions about the credibility of the patient's self-

1 reports which may be inflated." That in light of this, in  
2 light of what we've seen, in light of these various things  
3 that don't seem to quite fit together, that Dr. Mortillaro  
4 could simply dismiss this as, no, this doesn't raise any  
5 questions whatsoever.

6           As Dr. Becker talked about the Lees Haley Scale, the  
7 Lees Haley Scale which Dr. Mortillaro said had been used by a  
8 number of people for 15 or so years, and had been tested on  
9 millions of patients, and showed a scale that fell within the  
10 range of 99 point something percent of symptom exaggeration,  
11 that the response to that was Dr. Mortillaro said, well, he  
12 doesn't like that scale. Doesn't like that scale, and he  
13 thinks that scale is -- should be testing something else, that  
14 in his opinion it really -- it really doesn't fit.

15           And the explanation, every time we have a situation  
16 in which someone looks at why there are no neck and back  
17 complaints for an extensive period of time, the answer is  
18 always, well, his knee hurt so bad, he didn't know about the  
19 rest of these.

20           Now, one of the doctors that we talked about at  
21 length was Dr. Ferrante. Dr. Ferrante, I thought, was sort of  
22 interesting, because Dr. Ferrante was requested to examine  
23 this patient. And Dr. Ferrante was -- was hailed as the head  
24 of the department of anesthesiology and pain management at  
25 UCLA, and he was this great doctor who had -- who had all of

1 these great credentials. I don't know Dr. Ferrante, but I  
2 don't dispute that. But Dr. Ferrante wrote a report, and Dr.  
3 Ferrante made it very clear in his report, and it's in  
4 evidence, and he said, well, it's possible he's got RSD, but,  
5 actually, I think he's got this.

6           And Dr. -- Dr. -- I'm losing my doctors' names here,  
7 there are so many. Shifini -- Dr. Shifini said -- well, he  
8 first said, Dr. Ferrante diagnosed Mr. Rodriguez with RSD.  
9 And then when we played back his testimony after he said he  
10 didn't diagnose it, and we played back his testimony where he  
11 said that Dr. Ferrante did, at that point, then he said, well,  
12 he misspoke.

13           Well, whether he misspoke or whether he didn't, if  
14 he said he misspoke, he misspoke, I accept that. But the  
15 point is, Dr. Ferrante didn't diagnose RSD. And Dr. Shifini  
16 suggested, well, if he had completed what he planned on doing,  
17 he would have diagnosed RSD, and it was one more of those,  
18 well, this is what this doctor would have said if he'd had an  
19 opportunity.

20           But the interesting thing about it is, Dr. Shifini  
21 -- or Dr. Ferrante, by the way, did not refer this patient to  
22 Dr. Miller. If you take a look in his report, there's no  
23 mention to Dr. Miller's name in there. What -- but what there  
24 is, is Dr. Ferrante says, "It's my recommendation, if you  
25 would continue to have symptoms, that you have" -- I believe

1 he includes three different tests; maybe he had more than  
2 that, I'm not sure. Two of those tests were completely  
3 objective. One of those tests was subjective. So those two  
4 tests that were completely objective as to whether he had RSD  
5 were negative. And so the answer was, well, then, we'll just  
6 ignore that, we don't need that. We'll just ignore that.

7           And you may recall that -- that several people  
8 suggested that the fungus toenail growth that Mr. -- Mr.  
9 Rodriguez has, was related to RSD and related to the accident.  
10 Dr. Shannon referred Mr. Rodriguez to a dermatologist for the  
11 fungus toenail growth. And Dr. Shannon was asked, was that  
12 related to the accident, and she laughed, and said no. No, it  
13 -- fungus in the toenails is not related to the accident.

14           Now, we have the situation with RSD. Dr. Tauber,  
15 who says he doesn't diagnose RSD, but said he did diagnose RSD  
16 in this patient, explained that the reason for his diagnosis  
17 is that the patient had burning in his knees, and he had  
18 abnormal increase in pain.

19           Well, if that's what Dr. Tauber thinks is sufficient  
20 for an RSD diagnosis, I understand why he doesn't diagnose  
21 RSD, because you heard from all the other people here, there  
22 are a whole bunch of other things that are involved in a  
23 diagnosis of RSD.

24           Now, the interesting thing about this, Your Honor,  
25 is Dr. Ferrante said that he doesn't think he had RSD.

1           Now, Dr. Ferrante tells you in his report what he  
2 was confronted with. He was told by the patient, I've got toe  
3 problems, which Dr. Ferrante says is on something or other,  
4 that is toenail fungus, that the patient told Dr. Ferrante  
5 that one limb was different temperature than the other, that  
6 the patient told Dr. Ferrante that there was abnormal hair  
7 growth, that the patient told Dr. Ferrante that he had burning  
8 pain. That the patient told Dr. Ferrante about all of these  
9 things that he had, and Dr. Ferrante looked at him and formed  
10 the opinion that he didn't have RSD.

11           And so it's interesting to me when Dr. Ferrante  
12 looks at all of these things and he says, I don't think he's  
13 got RSD, but do a couple more tests and we'll see, that other  
14 people can look at the exact same thing and make a different  
15 diagnosis.

16           Dr. Becker lays out in his -- in his report the  
17 items that he specifically looked for, and to determine --  
18 make an RSD determination. If we can bring that up a little  
19 bit.

20           And this is what Dr. Becker says, at page 14, in  
21 part 1 of his report, that the things that he specifically  
22 looked at and formulated the opinion, he said, "No increased  
23 or decreased nail growth."

24           Now, the interesting thing about that is -- is both  
25 with respect to no increased and decreased nail growth, and no

1 increased and decreased hair growth is that the explanation  
2 we've heard, that the reason some doctors can't diagnose RSD  
3 is that the -- that the -- all the complaints change. One day  
4 they're there and one day they're not. Well, I'm not sure how  
5 increased or decreased nail growth is there one day and not --  
6 not another.

7           We have hair growth, we have -- we have allodynia.  
8 The discussion was about Dr. Miller diagnosed him with RSD and  
9 allodynia. Allodynia means, it hurts so much that if you're  
10 standing in front of a fan, you're going to have pain.

11           The concept of doing a pinwheel test on somebody  
12 like that, which Dr. Miller says he did, and says was normal,  
13 I just don't see how those fit together. The rest of them are  
14 here in the report. Muscle wasting, contractor stiffness,  
15 there's a whole bunch of things. Dr. Becker looked at all of  
16 them and made a diagnosis that he did not have RSD.

17           Now, I know I'm talking a long time, so I'll try to  
18 close this up as quickly as I can, but I do want to talk a  
19 little bit about damages and -- and there's a couple of things  
20 that I want to talk specifically about.

21           Your Honor has this listing of computation of  
22 damages. And it's been one of the issues that -- that we have  
23 felt has been problematic, Your Honor, is that as Dr. Dinneen  
24 told you, when -- when the person from his office did a -- did  
25 a life care plan in this case, and the person who Dr. Dinneen

1 says is well-qualified, and does by checking all the prices,  
2 and that life care plan was shown -- and shown here, that she  
3 had down for her cost of a spinal cord stimulator, by the  
4 doctor who was listed as the doctor who was going to do it,  
5 his name begins with a "V", I think it was Dr. Vaughter  
6 (phonetic). That she had four different items that totaled  
7 294,000.

8 All of a sudden, Dr. Shifini comes in and says  
9 pretty much off the cuff, oh, well, yeah, you know, this is  
10 about this, and batteries are about 22,000, and this is about  
11 how much that would be, and whatever, and added it all up and  
12 all of a sudden we've gone from 294,000 to 959,000, just based  
13 on what the anesthesiologist has testified from the witness  
14 stand about a procedure that was going to be done by somebody  
15 else?

16 Then they talked about the things related to fusion,  
17 pre-fusion diagnostics. There was no fusion in the original  
18 life care plan. And, in fact, the records are full of Dr.  
19 Thalgott, the spine surgeon, saying. I wouldn't operate on  
20 him. I wouldn't do it. And as Dr. Becker says, he wouldn't  
21 operate on him, because it's not going to make him any better.

22 And so we have in the life care plan that was  
23 submitted by their life care planner, I'm not talking about  
24 our life care planner, their life care planner, they had costs  
25 of 80 to 160,000 for a knee replacement, and all of a sudden

1 those jump up to \$686,392, and no explanation.

2 I want to talk about income. And we have a couple  
3 of things about income. We have Mr. Rodriguez, who said that  
4 he had provided all of his information to -- to Mr. Dinneen.  
5 I'd ask -- I'd asked Mr. Rodriguez about the information. We  
6 went over in his direct examination that if you're going to be  
7 profitable as a real estate investor, you need to know some  
8 very basic information. You need to know how much you sold it  
9 for, how much you paid for it, and what it cost you in  
10 between. And that's -- that's the basic part of it.

11 And so we had a question about how much information  
12 was available. And so I asked Mr. Rodriguez about this and  
13 here's what he said at 4/25.

14 (Videotape played)

15 MR. WARD: Now, Mr. Dinneen testified that he was  
16 not given the sufficient information to do the backup  
17 calculations. Mr. Dinneen also testified that he asked for a  
18 social security statement. Mr. Dinneen testified that he met  
19 with Mr. Rodriguez in 2008, which would be over two years ago,  
20 which would be plenty of time to get the social security  
21 statement. It would be plenty of time to get tax records.

22 The issue on the tax records is unlike the typical  
23 situation where we're dealing with an employee, there aren't  
24 any W-2s, there isn't any personnel file, there isn't anything  
25 to suggest that any of these things did or did not take place.

1 So there is a question.

2           There raises in my mind a question of are these  
3 something that could be reliable? And I think to myself --  
4 and the example that I used is that if I wanted to prove to  
5 someone that my income was \$400,000 a year, which is what he  
6 told the chiropractor that he saw in the end of January 2005,  
7 said that he was a real estate investor, and his present  
8 salary was \$400,000.

9           And he testified that the last house that he sold  
10 was in February of 2004, and it was his own residence, and  
11 said that the reason he sold it was because the market was  
12 good. And said that he hadn't done anything financially  
13 between February 15 and the time of the accident and the time  
14 of this injury and didn't have any explanation for that.

15           And that the job that he described, which was mostly  
16 trying to find houses on the internet and various other  
17 listings, and then going out and taking a look at them, and  
18 then buying them and then, if work needed to be done, he would  
19 hire someone else to do the work and he would hire a real  
20 estate expert, a real estate broker to sell it.

21           That description of the kind of work he does sounds  
22 to me like it could be done by someone who was sedentary and  
23 someone who could get around in a limited sort of way. And  
24 yet, we don't have any explanation for why he continued to not  
25 do anything all the way through 2005.

1           And so, the question that's raised is a little bit  
2 to me like the question that was raised yesterday when Mr.  
3 Baker was unaware that I had served him with a document, that  
4 I was able to pull up the document and show it to him and  
5 answer that question.

6           There is a very easy way that all of these questions  
7 about the veracity and the reliability of these documents  
8 could be answered, and that is you just pull up your social  
9 security statement. We all get one once a year. I can't get  
10 yours, you can't get mine, but you can get your own.

11           And yet, they met with their expert two years ago.  
12 They could also have gotten, as he testified to, they could  
13 also have gotten the forms that were filed from the federal  
14 government, but that would have taken longer. But just having  
15 that social security statement would indicate, because of --  
16 since 1993, I believe, medicare payments have been based on an  
17 increasingly higher amount than pure social security, and that  
18 would answer that question.

19           But that question's not been answered. Instead,  
20 what Dr. Dinneen said -- or Mr. Dinneen said was that, after I  
21 took his deposition and raised all these questions, he got a  
22 -- he got a letter, a one-line letter from the accountant,  
23 never talked to him, got a one-line letter that said, yeah,  
24 they were filed and that's all they got.

25           And so we don't have any explanation why someone who

1 is actively involved in the housing market, and has bought and  
2 sold and owned hundreds of homes, has no tax returns for  
3 several years in this period of time and the tax returns that  
4 they do have, at least two of them are dated after the time  
5 that -- that they met with Mr. Dinneen.

6           The third tax return is the one that I find kind of  
7 interesting, Your Honor, and it's the tax return from 2001.  
8 And the reason -- the reason I find the tax return from 2001  
9 interesting, is that it shows a business income on page --  
10 page 1, shows a business income of \$1,700.

11           So this is 2001. There's no return for 2002, and  
12 there's no return for 2003. There's a business income shown  
13 here of \$1,748. I understand that it's a great concept to  
14 have not worked very hard, and make a lot of money by flipping  
15 houses and then you live on it for a period of time, but it  
16 certainly isn't showing up here in the returns.

17           But if you take a look down at the state return, go  
18 down to the end of the state return. What that -- what that  
19 purports to be is a return that is dated 2001, is filed in  
20 2004. Read the bottom of the state return. Maybe it's the  
21 top of the state return. There we are.

22           This return claims a refund of \$7,500. It seems  
23 just a little unusual that we would -- that someone would be  
24 entitled to a \$7,500 return and -- a refund, and not file for  
25 three years.

1           What I'm suggesting is any questions about whether  
2 these are accurate, valid and all the other things could be  
3 very easily answered. As easy as we've shown the document  
4 yesterday to Mr. Baker, it could be answered, but they haven't  
5 been.

6           And so Your Honor is being asked to award, I'm not  
7 sure what the number was, 7 million, 8 million, whatever the  
8 number was, based on this wage loss, which Mr. Dinneen said  
9 that of the six years, somewhere in the neighborhood of 80  
10 percent of the income that is spread over this six years,  
11 comes in the year 2004 and that income comes from the sale of  
12 his personal residence. And that's why the numbers are as big  
13 as they are. And for that, the claim is being made for almost  
14 a million dollars in future loss of earnings.

15           But the issue, Your Honor, is that the -- the issue  
16 of the reliability of all of this -- of all these things isn't  
17 solely related to the income loss. It's what ties in and it's  
18 what connects the neck and back injuries that have all been  
19 alleged to be related to the accident of November 22, '04,  
20 when there were no neck and back complaints for a period of  
21 eight or nine months.

22           And a gentleman who has degenerative back changes  
23 and is 75 pounds overweight, and is continuing to live -- and  
24 it's now been six years since the accident, there are other  
25 explanations for this.

1 Thank you, Your Honor.

2 THE COURT: Thank you, Mr. Ward. Mr. Baker.

3 PLAINTIFF'S REBUTTAL CLOSING ARGUMENT

4 MR. BAKER: Yes, Your Honor. There are other  
5 explanations, but not the true one, not the right one, and not  
6 the correct one. And again, it just seems to me it's come  
7 back to the same thing, and that is he's fat and he's a liar.  
8 That's their case.

9 And let's talk a little bit about the first thing  
10 counsel had said, because I think I might be boring and he  
11 might not be paying attention when -- when testimony is being  
12 evoked.

13 The very first thing that Mr. Ward said when he came  
14 out of this chair, is that Dr. Shannon said that the  
15 degeneration that she saw -- excuse me for the -- in Enrique's  
16 knee was pre-existing degeneration that he had before this  
17 accident, at the time that he was also overweight.

18 First of all, he mentioned something about 180  
19 pounds. I never heard 180 pounds; I heard 200. But the Court  
20 might remember something different.

21 But what Dr. Shannon said, and if an adherence to  
22 the truth of the medicine and the testimony of the scientists  
23 had any place in this courtroom with respect to defendant's  
24 presentation of their case, is she said on page 65 of her  
25 deposition, lines --

1 MR. CARDENAS: Trial transcript.

2 MR. BAKER: -- trial testimony -- thanks, Rob -- at  
3 line 17, "I question -- which indicates to you that meniscal  
4 tear -- is a frank, traumatically related meniscal tear?" And  
5 she answers, "It's causing traumatic degeneration of the  
6 articular surface and that has to come from someplace."

7 So I questioned it, "The degeneration of the  
8 articulated surface is caused by the frank meniscal tear; is  
9 that right?" And she says, "Yes."

10 The chondromalacia is the articular surface. She's  
11 not saying he had pre-existing knee problems that were  
12 exacerbated in this case, or any pre-existing knee problems.  
13 She said the chondromalacia, the change in the articulate  
14 surface is related to the tear in the meniscus. And that just  
15 goes to show a frank misunderstanding of the medicine, and a  
16 frank misunderstanding of what's going on here.

17 The second thing that was said is Enrique claimed  
18 that a water bottle had been thrown and was already lying on  
19 the floor -- do I have Enrique's testimony right there -- for  
20 a period of time.

21 And what Enrique said in his trial testimony in  
22 front of the Court -- and I don't even know why this is  
23 relevant, but it's just one of those pokes at something that  
24 is meaningless in the context of the overwhelming medical  
25 evidence in this case -- is, well, what happened to me, a

1 water bottle was thrown in my direction. And it happened so  
2 fast that there was this lady sitting down in front of me at  
3 the monitor, there was a TV. I'm standing there watching the  
4 big TV and when the ball's in flight, moving the air,  
5 demonstrating, this lady, for whatever reason, she decided to  
6 get up out of her chair, turn around and run. I mean,  
7 literally run where I'm standing and just take a dive.

8 I mean, he's describing an event that happens like  
9 this, not an event where a water bottle lands at his feet and  
10 he's sitting there and looking at it and then, you know,  
11 should I move, should I not move. He described it as  
12 happening almost instantly.

13 And Mr. Ward spent, I don't know, 15 minutes, 20  
14 minutes talking about the MRI, and this date, and the MRI  
15 contrast. Mr. Ward's expert gives us the second surgery. I  
16 don't know why anybody would speak to that. Dr. Shannon  
17 explained why things wouldn't show up on the contrast MRI is  
18 that the loose body was in the super patella pouch, so it  
19 wouldn't be seen at that time.

20 Doesn't the truth of that deserve to be put into a  
21 context and spoken about with this Court? He completely  
22 misrepresents -- well, I don't need to say that. But Dr.  
23 Tauber's testimony that he put on the screen, and I kind of  
24 bridled because I thought he stopped in the middle of a  
25 sentence, because I remember what Dr. Tauber said. And he was

1 asking about a question by you, Your Honor. And he stopped  
2 that film at the point that Dr. Tauber said, the loose body  
3 itself, where it was found wouldn't be painful. I believe  
4 that's what we observed.

5 But Dr. Tauber's testimony was, when you allowed me  
6 to follow up with him, was, "Can I followup with that?" And I  
7 say, Mr. Baker -- I say, Mr. Baker -- Mr. Baker, "So is it  
8 fair that there was one definite pain generating mechanism  
9 which was the torn meniscus?"

10 "Oh," he says, "you had several. You had the loose  
11 body, the torn meniscus and there was some discomfort from the  
12 chondromalacia. It was residual as well."

13 "Okay. And each of those would be contributory to  
14 the pain complaints that were reported by Enrique Rodriguez?"

15 "Yes."

16 Dr. Tauber speaks about the fact that when the loose  
17 bodies float around, they touch areas in the leg that would be  
18 sensitive so that they're a concurrent pain generators.  
19 There's nothing suspicious about this. It's not, there was a  
20 loose body that didn't cause any pain. Again, I don't know  
21 why I'm talking about the knee. Their expert gave it to us.  
22 But if it has to do with his credibility, this is what  
23 happened.

24 Dr. Shannon did a surgery. There's a 10 to 15  
25 percent recurrent rate in meniscal tears. The loose body

1 broke off, as she talked about, as a result of her surgery,  
2 even though she did everything right. Enrique was walking in  
3 physical therapy. She expected post-operative pain for at  
4 least a month. He was in therapy which she testified also  
5 causes pain. His knee continued to hurt. Dr. Tauber did a  
6 surgery, and every doctor, including their own, says it's  
7 related. And we talked about the fact that that's the  
8 foundation.

9           And so much has been made, and another  
10 misrepresentation, that Enrique was telling the doctors that  
11 his pain started at the time of the accident. Well, you might  
12 remember that Maria says she remembers him having neck pain  
13 and back pain.

14           Okay. So all of these doctors who are explaining on  
15 a deep neurotransmitter, neurophysiological level how pain  
16 works, their testimony should all be ignored, the defendant is  
17 contesting, because what was really happening in this case is  
18 Enrique was lying to his doctors about where his pain started.  
19 Well, that's not what we're saying for a second and it's not  
20 what we've ever tried to introduced.

21           He had reported pains at the beginning. Maria  
22 testified to it. Enrique doesn't know. And Enrique, then,  
23 when he sees Dr. Thalgott, he doesn't say his pain started at  
24 the time of the accident. He says, his pain in his neck,  
25 hands and back started with the accident.

1           By January of next year, he noticed he was dropping  
2 things in his hand, completely consistent with the tingling  
3 that was mentioned in the medical records. And his left knee  
4 had such prominent pain, he didn't make much attention to his  
5 cervical and lumbar pain and the pain in his lower extremity.

6           That's exactly what you've heard from every witness  
7 in this case. This isn't Enrique saying, oh, well, I fell  
8 over and my back and my neck hurt at the time of the injury.  
9 This is a consistency, not an inconsistency, and it shouldn't  
10 be said otherwise.

11           Dr. Ferrante. I think that what defendants really  
12 want us to is ignore a scientific methodology. And that's  
13 just painful, because the scientific methodology is the basis  
14 of truth. You believe things when you have tested them and  
15 found them to be true.

16           And you saw I went through with the doctors what a  
17 scientific methodology is. It's having a hypothesis,  
18 meticulously gathering data, testing the data against the  
19 hypothesis and then dismissing the hypotheses that aren't  
20 supported by the data.

21           Okay. Well, let's look at the scientific  
22 methodology. Dr. Ferrante looks, and he doesn't say he  
23 probably doesn't have RSD. He doesn't say, I am not  
24 diagnosing RSD. He doesn't rule out RSD. What he said, it is  
25 possible that the patient has a complex regional pain syndrome

1 or a reflex sympathetic dystrophy because even he knows how to  
2 -- well, especially he knows, how to distinguish between those  
3 things.

4           However, his physical exam is more consistent with  
5 chronic knee pain of a mechanical nature. Okay. So, RSD or  
6 chronic regional pain syndrome, is included in his  
7 differential diagnosis. Every time doctors see a pain  
8 complainant, if you go in, Your Honor, God forbid, to a doctor  
9 with pain in this quadrant right here, they're going to have  
10 potential differential diagnoses.

11           It's going to say appendicitis, it's going to say  
12 potentially gall stones. It might include a hernia, it might  
13 include a host of things. And then do you know what you do?  
14 You test each of those host of things until you find the one  
15 that's supported by the tests, and that's your diagnosis.

16           So what were the objective findings for Dr. Miller?  
17 Allodynia -- we've been through it to death. Well, a lumbar  
18 sympathetic block is the test, one of the tests spoken about,  
19 for RSD. When the lumbar sympathetic block works, there's no  
20 need to do anything else. You have diagnosed RSD and when you  
21 measure it up against the other five criterion he had.

22           What -- what -- okay, I didn't call him a liar. How  
23 about this for calling him a liar. When Dr. Becker spoke  
24 about the fact when I was, like, he had all of these objective  
25 findings, do you remember when Dr. Becker said? Well, I know

1 about people who paint their legs, shave them, put heating  
2 pads on one leg and ice packs on the other. You know, that  
3 really does happen out there. And I asked the question, "Are  
4 you assuming he's psychotic?" He's not psychotic, he's in  
5 pain and this is what happens to people who are in pain.

6           So what we're looking at right now is, you can't  
7 believe Enrique Rodriguez because he forgot that he went to  
8 get a sleep apnea test. Are you kidding me? There's eight  
9 doctors who we sat and listened to their testimony about his  
10 pain.

11           There's two actual knee surgeries, two lumbar  
12 sympathectomies. The pain stimulator that worked, the  
13 findings of his doctors upon examination, the testimony of lay  
14 witnesses in this case that talk about the changes in his  
15 physical condition, his mental health and his happiness  
16 [inaudible].

17           I mean, in terms of we like to talk to juries about,  
18 you know, the preponderance of the evidence thing. This Court  
19 is extremely aware of preponderance of the evidence. This  
20 isn't preponderance of evidence, this is overwhelming  
21 evidence, which is the oldest defense tactic in the world  
22 being used is try to find little inconsistencies in six years  
23 of medical records. It's like a telephone game in some  
24 aspect. And then say that you can't believe him, because of  
25 different notations in the record. It's -- it's just wrong.

1           And if we talked about the life care plan, the life  
2 care plan that, you know, it's pulled out of evidence. Do you  
3 know that that life care had a lessor value than the one that  
4 was put into evidence? I put less meds into evidence than  
5 would have been contained in the life care plan.

6           And with respect to Kathleen Hartman, Kathleen  
7 Hartman had a bad day. She got it wrong. I -- the life care  
8 plan was prepared for someone, and even I, when I was looking  
9 at the life care plan, I was like, what's this? This is just  
10 -- these aren't the numbers for spinal cord stimulators.

11           And I know some of the attorneys that have had  
12 trials in your courtroom, and I know that some of the  
13 testimony that's come in with respect to spinal cord  
14 stimulators. In this community, we know what they cost, and  
15 they cost what Dr. Shifini said they cost.

16           And something is really irritating me with respect  
17 to how Dr. Shifini is being addressed. Dr. Shifini is not the  
18 anesthesiologist that, you know, looked at Enrique Rodriguez.  
19 Dr. Shifini is a board certified pain management specialist in  
20 interventional pain management. Okay?

21           He puts things in people. He puts leads and wires.  
22 He's not, quote, "an anesthesiologist". And he's an  
23 anesthesiologist only in the sense that he's dedicated to  
24 taking away people's pain. And he did that with Enrique with  
25 the spinal cord stimulator and is desperately waiting to see

1 him have a permanent stimulator, as is Dr. Shaw who cried,  
2 desperately waiting to have him have the spinal cord  
3 stimulator.

4           And why didn't we call Dr. Thalgott? Well, other  
5 than 15,000 bucks, and another day or so in trial. One of the  
6 reasons that we did it is, it's been suggested by defendants  
7 that a forensic evaluation is a great evaluation. Okay?

8           Dr. Shifini and Dr. Kidwell looked at every medical  
9 record in this case. They talked about it. And Dr. Shifini  
10 and Dr. Kidwell testified that they believed because of  
11 postural changes, Enrique Rodriguez is having lumbar and  
12 cervical pain.

13           I asked Dr. Becker on the stand, have you had  
14 patients with potentially pre-existing lumbar discogenic  
15 pathology, not the radicular, who have had posture changes and  
16 gait changes and have resultedly had lower back pain and  
17 spinal problems? And he said, yeah, of course. He might not  
18 have said of course, he might have said reluctantly, yeah.  
19 That's what he testified to.

20           And there's nothing as annoying in a scientific  
21 methodology because, come on, the truth has to have a value,  
22 then to take things out of context, either negligently or  
23 deliberately, say statements were made, but they were not  
24 made. Pre-existing degenerative knee condition? That's  
25 completely the opposite of what she said. And then to turn

1 around and say certain things just don't fit, certain things  
2 just don't fit.

3 Well, you know, sometimes in life everything doesn't  
4 fit. And sometimes in life the story needs a little bit of  
5 deduction, a little bit of Sri Lankean wisdom, and  
6 intelligence, rather than just a rote response to reject  
7 everything because a tax return wasn't filed. Or because  
8 Enrique didn't realize that he didn't go to a sleep apnea  
9 doctor.

10 He still thinks he [indiscernible]. He still thinks  
11 this is not him. But that doesn't affect the credibility of  
12 every reported pain complaint that you've seen. So sometimes  
13 the truth is a web. Sometimes it's not a [indiscernible]. We  
14 have shown you a web of truth, of reliable expert testimony,  
15 of reliable treating physician testimony.

16 And to criticize Terry Dinneen for using an average,  
17 well, let's talk about that. It was his primary physical  
18 residence. But what was not brought back up to you is he was  
19 only in it for about six months, and then he flipped it  
20 because that's what he does, he flips houses when the houses  
21 are worth something.

22 So he was living in it, he flipped it, he made money  
23 off of it and he went on. That seems like a pretty good way  
24 to live to me, if your wife will let you get away with it.

25 But when you look at all of these things and see

1 that the entire approach to this case would be suggestive of,  
2 oh, you know, the MRI, the first one didn't show anything. It  
3 was taken on an old [indiscernible] MRI machine with .5  
4 [indiscernible]. That machine wouldn't show -- it wouldn't  
5 show anything. And with respect -- and the tests don't show  
6 and it just isn't here.

7           When you put it together, the best observance of  
8 something is the observance of it from an internal  
9 perspective. When they opened up Enrique's knee, they found  
10 it was internally disarranged. When they opened up his body  
11 and implanted a spinal cord stimulator, it took away his pain.

12           When you open up the situation and really look at  
13 the medical records, the testimony of the witnesses from two  
14 different states, both lay witnesses and expert witnesses, you  
15 open it up and you look at it, you can tell Enrique's not  
16 lying. You can tell he's not here to put anything over on  
17 you. You can tell he's not one of these people who get  
18 injured and think that there's a jackpot in it. All he wants  
19 to do, all anyone told you he wants to do is be out of pain.

20           And, Your Honor, I'm going to look at my notes in a  
21 second. But please, I ask you, help him get out of pain.

22                           (Pause in the proceedings)

23           MR. BAKER: Nothing further, Your Honor. Thank you.

24           THE COURT: Thank you, Mr. Baker.

25 (Requested portion of proceedings were concluded at 3:45 p.m.)

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\* \* \* \* \*

EXHIBITS

<u>DESCRIPTION:</u>	<u>ADMITTED</u>
<u>PLAINTIFF'S EXHIBITS:</u>	
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**CERTIFICATION**

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

**AFFIRMATION**

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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DATE



DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

ENRIQUE RODRIGUEZ, . CASE NO. A-531538  
Plaintiffs, . DEPT. NO. X  
vs. .  
FIESTA PALMS, LLC, . **TRANSCRIPT OF**  
Defendant. . **PROCEEDINGS**  
. . . . .

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

**DEFENDANT'S MOTION FOR JURY TRIAL**

WEDNESDAY, OCTOBER 20, 2010

APPEARANCES:

FOR THE PLAINTIFF: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
*Benson, Bertoldo & Baker*

FOR THE DEFENDANT: MARSHA L. STEPHENSON, ESQ.  
*Stephenson & Dickinson*

COURT RECORDER:

VICTORIA BOYD  
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC  
Englewood, CO 80110  
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

1        LAS VEGAS, NEVADA, WEDNESDAY, OCTOBER 20, 2010, 9:31 A.M.

2                THE CLERK: Enrique Rodriguez v. Fiesta Palms, Case  
3 No. A-531538.

4                MR. BAKER: Good morning, Your Honor. Steve Baker,  
5 4522, representing Mr. Rodriguez.

6                MS. STEPHENSON: Good morning, Your Honor. Marsha  
7 Stephenson for the defendant.

8                THE COURT: Good morning to both of you.

9                MR. CARDENAS: Rob Cardenas on behalf of the  
10 plaintiff as well, 7301.

11                MR. BAKER: Sorry about that.

12                THE COURT: Yes, good morning. All right. This was  
13 Defendant's Motion to set the matter jury trial. I thought it  
14 had been unopposed. I found out yesterday that there was an  
15 opposition filed. I haven't had a chance to read the  
16 opposition. I don't know, Ms. Stephenson, if you have had?

17                MS. STEPHENSON: Yes, I have, Your Honor.

18                THE COURT: Okay. Very well, it was your motion.

19                MS. STEPHENSON: Your Honor, I think basically I'm  
20 not going to repeat what's in the motion, but a trial by jury  
21 is preferred. And Your Honor had brought this up apparently  
22 at a -- during a telephonic conference call with counsel and  
23 that's why the Motion was filed. But since actually this  
24 counsel and the Archer Norris firm has been in the case, they  
25 preferred having a jury trial.

1           There was the letter apparently that was attached to  
2 plaintiff's counsel's opposition which referenced that the  
3 jury trial was being waived or something like that. Actually,  
4 that was in reference to something that the clerk had  
5 requested in light of the fact that there was the joint case  
6 conference report referenced to jury trial, but there had been  
7 no jury demand.

8           So at no time has the defense ever wanted to waive a  
9 jury trial. And we think it's in the Court's discretion to  
10 allow the jury trial at this time, because clearly this is a  
11 case that's appropriate for a jury.

12           THE COURT: Okay, Mr. Baker.

13           MR. BAKER: I'm probably the only one here who's  
14 been involved in it the whole time. I can probably give you  
15 the most accurate historical representation of what occurred.

16           And, you know, originally an order setting a non-  
17 jury was sent out by this Court in February. There had been  
18 no request for a jury trial pursuant to Rule 38.

19           That order did not result then in any motion on the  
20 part of the defendant to set aside that order and set for jury  
21 trial. The trial was then reset two more times on a non-jury  
22 trial basis and no opposition was filed to that.

23           What happened with respect to the call to your  
24 office was that a request for jury trial was filed, but wasn't  
25 served upon me. I called, and I don't think any deposit of

1 jury fees was made at that time, which would also make it  
2 deficient under Rule 38. Marsha might feel differently.

3 I had a conversation with Keith. Keith agree that  
4 it should be a non-jury trial. He contacted your department  
5 with a letter that was cc'd. And, I'm sorry, you know that we  
6 just got the Motion at 4:00 o'clock yesterday afternoon, so  
7 this wasn't attached. And if I may approach, Your Honor.

8 THE COURT: Sure.

9 MR. BAKER: I actually wrote back to your department  
10 and indicated that I agreed with Mr. Gillette, that it should  
11 be set for a non-jury trial and cc'd that over to your  
12 department as well. And it was set then on a new order  
13 setting a non-jury trial for now, I think, the third time.

14 With respect to whether I believed that they wanted  
15 a non-jury trial, it's been discussed throughout this case  
16 that it was a non-jury trial.

17 I conducted every deposition in the most streamline  
18 fashion so I could get the information to you quickly. I  
19 didn't do a focus group which I would normally do on this type  
20 of case.

21 I prepped my experts in a certain way. I did not  
22 take their expert's deposition because the cross-examination  
23 in a bench trial is very different, as you know, when you're  
24 trying to convey things to a jury.

25 And the whole time I have structured this in a

1 streamlined fashion to present to this Court as a non-jury  
2 trial. And for five days before the trial is to begin, to  
3 request a jury trial is amazing prejudice.

4           There was one case Rob found last night or yesterday  
5 afternoon after I had submitted my opposition and if I may  
6 approach the bench with it now?

7           THE COURT: Yes.

8           MR. BAKER: And for the Court's record, this is  
9 Hardy v. First National Bank of Nevada which is 48 P.2d 581.  
10 And I've highlighted the keynote for you, which is Keynote 1,  
11 Your Honor.

12           THE COURT: Thank you.

13           MR. BAKER: And in this case --

14           MS. STEPHENSON: Steve, is this Walton?

15           MR. BAKER: -- in the Keynote 1, you can see that a  
16 defendant who's demand for a jury trial was first made a year  
17 after the matter was first set for trial and after it was  
18 reset for trial several times, waived his right to demand a  
19 jury trial under the rule providing that such demand be made  
20 no later than the time of the enter of the first order setting  
21 a case for trial, and is compelled to proceed either by trial  
22 to the Court, by advisory jury, I don't even know what that  
23 is, or by jury by mutual consent.

24           And it's clear that we're not mutually consenting to  
25 the case.

1           Counsel has referenced the constitutional right to a  
2 jury trial. A constitutional right is a record that needs to  
3 be protected. I've cited for you the O'Connor case, which  
4 it's not a federal constitutional right pursuant to the 14th  
5 Amendment application to the States, it's completely a state  
6 issue.

7           And our state has adopted Rule 38, which states in  
8 subsection (d) that if a timely demand for a jury trial is not  
9 waived -- is not raised, it's waived.

10           And in this particular case, it's been waived three  
11 times passively; once by not filing a timely request, and  
12 twice by not opposing or filing some sort of motion with  
13 respect to the standing of non-jury trial, and one time  
14 actively, when again, imperfect jury request was filed by  
15 Archer Norris law firm, then withdrawn, and we both  
16 memorialized that fact to your office.

17           To make me go to a jury trial on five days notice on  
18 a case with this many doctors, this much evidence to be  
19 presented to the Court, I think I've submitted a couple  
20 hundred exhibits to you, is extremely prejudicial, Your Honor.

21           THE COURT: Ms. Stephenson?

22           MS. STEPHENSON: Your Honor, in spite of all that, I  
23 think the Court does have the discretion to allow the jury  
24 trial. And in light of counsel's claims of prejudice, the  
25 defense would have no issue with continuing the discovery for

1 additional time if counsel would like to take some additional  
2 depositions or whatever he needs to do to prepare for a jury  
3 trial.

4           With respect to -- and I'm not sure exactly about  
5 this new case, I didn't have a chance to look at it. But I  
6 know the Walton case does, and the Walton case is a much more  
7 recent case, does still confirm that the Court does have the  
8 discretion to allow a jury trial.

9           MR. BAKER: And if I may, very briefly?

10          THE COURT: Yes.

11          MR. BAKER: The Walton case is very distinguishable,  
12 and that is a mandamus action to compel a jury trial in the  
13 lower court. The court said that it did not have jurisdiction  
14 over mandamus and remanded it to the lower court with  
15 instructions to permit a motion to enlarge time for jury  
16 trial. There's no shepardized following case law that even  
17 says what happens on that.

18           But specifically what Walton did say, and I'll quote  
19 to you, is only when a timely and proper demand for a jury  
20 trial has been made, may the trial court to be found to have  
21 exceeded the limits of its discretion under the mandatory  
22 language of NRC 39.

23           And that's going to require a balancing test. And  
24 the prejudice against the plaintiff is -- I can't even express  
25 it to you. And that's in terms of the difference between

1 preparing instructions for a jury trial and for a non-jury  
2 trial. I don't even have a Power Point done, Your Honor. The  
3 trial starts Monday.

4 THE COURT: Yeah, I'm aware of that. Anything  
5 further.

6 MS. STEPHENSON: Well, first of all, and one thing I  
7 forgot to mention is, we -- you don't deposit jury fees  
8 anymore. So that's really not an issue. And like I said, the  
9 defense is willing to continue the trial to allow counsel to  
10 be prepared for a jury trial.

11 THE COURT: Don't counsel still have to make deposit  
12 for a jury demand?

13 MS. STEPHENSON: No, we don't. Actually, we got all  
14 them back. Apparently, I didn't know it was an issue with  
15 respect to the money, but we've gotten them back and we don't  
16 deposit those anymore as I recall.

17 MR. BAKER: I don't know.

18 THE COURT: Did you know that, Mr. Baker?

19 MR. BAKER: No. Every stipulation I've ever signed  
20 to dismiss a case includes a refund of the jury fees. But  
21 I've never --

22 MS. STEPHENSON: Those [inaudible] are [inaudible]  
23 as I recall.

24 MR. BAKER: I don't know, Your Honor.

25 THE COURT: It's probably a financial nightmare for

1 the court.

2 MS. STEPHENSON: It has been, because we get some of  
3 those back two, three years later.

4 THE COURT: Well, you know, let me say this.  
5 Frankly, the Court prefers these jury trials. I think,  
6 however, Mr. Baker makes some very compelling points, both in  
7 his written brief and orally today.

8 But aside from that, this case is right on point.  
9 I've never seen this case. I'm glad to see this case. I  
10 thank Mr. Cardenas for getting it for me.

11 MR. BAKER: Thank you, Mr. Cardenas.

12 THE COURT: And I think it's right on point. So I  
13 think this Motion has to be denied. Mr. Baker, I'll ask you  
14 to draft an order for the Court's signature. Please run the  
15 proposed order past Ms. Stephenson before you submit it to me.

16 MR. BAKER: Thank you, Your Honor.

17 MS. STEPHENSON: Thank you, Your Honor.

18 MR. CARDENAS: Thank you, Your Honor.

19 MS. STEPHENSON: Will defense be ready for a trial  
20 then, I guess, on Monday?

21 THE COURT: Be ready for trial on Monday. We start  
22 at 9:00 o'clock.

23 Since it's a bench trial, I don't anticipate going  
24 real late. Do you know what our schedule is like Tuesday,  
25 Wednesday, Thursday, that we only have half days?

1 MR. BAKER: I thought it was full days, Monday,  
2 Tuesday, Wednesday and Thursday, and you're dark on Friday.  
3 Is that not true?

4 THE COURT: I wish it were so. We're dark on Friday  
5 only because it's a holiday.

6 MR. BAKER: What's the holiday?

7 THE COURT: Nevada Day.

8 MR. BAKER: Oh, I mean, my favorite holiday.

9 THE COURT: Yeah. So we have -- we normally would  
10 have full days Monday and Friday and only half days Tuesday,  
11 Wednesday and Thursday because this court is court sharing  
12 with another judge on Tuesdays, Thursdays. So that means  
13 we'll be starting at 1:00 o'clock on Tuesday, Wednesday,  
14 Thursday. You might want to know that for purposes of  
15 scheduling your witnesses.

16 How many witnesses do you anticipate, Mr. Baker?

17 MR. BAKER: A lot less now that it's a bench trial,  
18 Your Honor. And it's going to depend a little bit upon how  
19 you allow me to introduce medical evidence through other  
20 doctors.

21 I can do it with as little as two doctors, two,  
22 three experts, two percipient witnesses, and the plaintiff.  
23 Or if there becomes some problem with respect to referring  
24 doctors and doctors opining to other doctors' treatment, then  
25 it will be a lot more.

1 THE COURT: Ms. Stephenson, what about you?

2 MS. STEPHENSON: Yeah. I'm not sure if Steve was  
3 calling [inaudible] case from the defendant. And quite  
4 frankly, Your Honor, I haven't been really involved with the  
5 case.

6 MR. BAKER: You know what?

7 MS. STEPHENSON: So he may know better how many  
8 witness we have.

9 MR. BAKER: True. And their witnesses -- okay,  
10 there is an objection lodged, but there will be one deposition  
11 that's read into evidence, because we can't subpoena the  
12 witness and that's Brandy Beavers [inaudible] who's coming in,  
13 defendant was defaulted.

14 Probably there's going to be Dr. Shifini [phonetic]  
15 who is a pain management doctor who will be called. Either  
16 Dr. Shannon or Dr. Trevety [phonetic] or are orthopedic  
17 surgeons who would be called. Potentially, Russell Shaw  
18 [phonetic], who is a neurologist who would be called to speak  
19 about the issue of RSD.

20 The plaintiff, the plaintiff's significant other,  
21 two of the plaintiff's friends, and two or three of the  
22 employees, either through deposition or via subpoena of the  
23 defendants. So it looking like about 11 witnesses, 11 or 12.

24 THE COURT: Total?

25 MR. BAKER: For me.

1 THE COURT: For you.

2 MR. BAKER: Did I mention a economist, a life care  
3 planner?

4 MS. STEPHENSON: No.

5 MR. BAKER: And a -- so let's call it an even 15.

6 MS. STEPHENSON: I must say we -- then we probably  
7 have at least five, but I don't really know, and I apologize,  
8 Your Honor.

9 THE COURT: So are we looking at giving that  
10 schedule two weeks?

11 MR. BAKER: Um-hum.

12 THE COURT: Was that a yes?

13 MR. BAKER: Yes, Your Honor, sorry.

14 THE COURT: All right. That's what I was thinking.  
15 All right. Thank you.

16 MS. STEPHENSON: Thank you, Your Honor.

17 MR. BAKER: Thank you.

18 MR. CARDENAS: Thank you, Your Honor.

19 THE COURT: See you Monday.

20 MR. BAKER: Oh, and did I forget -- no. Thanks,  
21 Your Honor.

22 THE COURT: You're welcome.

23 (Proceeding concluded at 9:43 a.m.)

24

25

**CERTIFICATION**

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

ENRIQUE RODRIGUEZ, . CASE NO. A-531538  
Plaintiffs, . DEPT. NO. X  
vs. .  
FIESTA PALMS, LLC, . **TRANSCRIPT OF**  
Defendant. . **PROCEEDINGS**  
. . . . .

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

**DEFENDANT'S MOTION FOR MISTRIAL OR ALTERNATIVELY  
MOTION TO STRIKE PLAINTIFF'S CONFIDENTIAL  
PRETRIAL AND TRIAL BRIEFS; PLAINTIFF'S  
MOTION TO STRIKE DEFENDANT'S POST-TRIAL BRIEF  
MOTION TO STRIKE EXPERT WITNESS TESTIMONY AND  
PLAINTIFF'S RULE 50 MOTION RE: LIABILITY**

THURSDAY, JANUARY 27, 2011

APPEARANCES:

FOR THE PLAINTIFF: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
*Benson, Bertoldo & Baker*

FOR THE DEFENDANT: KEITH GILLETTE, ESQ.  
*Archer Norris*

COURT RECORDER:

TRANSCRIPTION BY:

VICTORIA BOYD  
District Court

VERBATIM DIGITAL REPORTING, LLC  
Englewood, CO 80110  
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

1 LAS VEGAS, NEVADA, THURSDAY, JANUARY 27, 2011, 9:45 A.M.

2 (Court called to order)

3 THE CLERK: Case number A-531538, Enrique Rodriguez  
4 v. Fiesta Palms, LLC.

5 MR. BAKER: Good morning, Your Honor. Steve Baker,  
6 4522, and Robert Cardenas.

7 THE COURT: Good morning.

8 MR. CARDENAS: 7301.

9 MR. BAKER: Representing the plaintiff.

10 THE COURT: Good morning to both of you.

11 MR. GILLETTE: Good morning, Your Honor. Keith  
12 Gillette.

13 THE COURT: Okay.

14 MR. GILLETTE: Bar number 11140 for the Palms.

15 THE COURT: It's G-i-l-l-e-t-t-e?

16 MR. GILLETTE: Yes, ma'am. Just like the razor  
17 blade.

18 THE COURT: Okay, thank you.

19 MR. BAKER: He's a walking razor, stepping razor.

20 THE COURT: There are, I think, four motions on  
21 calendar here. Let's take -- well, Mr. Baker, do you have a  
22 preference on where we start? Three of these motions are  
23 yours.

24 MR. BAKER: Well, if he gets a mistrial, Your Honor,  
25 I guess the other motions are moot, so.

1 THE COURT: Do you want to take Defendant's Motion  
2 for Mistrial first?

3 MR. BAKER: I think so, Your Honor.

4 THE COURT: That's fine.

5 MR. GILLETTE: Your Honor, we're happy to submit  
6 that on the pleadings.

7 THE COURT: Okay. What about you, Mr. Baker?

8 MR. BAKER: I mean, I really wanted to talk about a  
9 lot of these issues and I wanted to speak about it with K.C.  
10 in particular, because as this Court's aware, through the  
11 trial was accused of manipulating evidence. And after the  
12 trial -- or during the trial, actually, I've been accused with  
13 ex parte communication with the bench. And it's really  
14 startling.

15 I think I do need to make a record and have the  
16 Court acknowledge that there were no supplemental,  
17 confidential trial briefs that were submitted to the Court,  
18 that no ex parte communication occurred between myself and the  
19 Court and I never made any attempts at ex parte communication  
20 to the Court.

21 That the allegation that I made, ex parte  
22 applications, and ex parte communications to the Court, is  
23 untrue and unfounded. And I have a real issue with somebody  
24 coming and saying to me and to this Court that we acted  
25 complicitly and had ex parte communication back and forth when

1 that never, never occurred. And Mr. Gillette's going to  
2 object and state, well, we never said that the Court was  
3 complicit with that. But specifically, the judicial cannons  
4 which required you to -- to contact them in the event I did  
5 contact you on an ex parte basis, were cited.

6           So either they're saying that you and I were  
7 complicit, and had ex parte communications, and I did brief  
8 you throughout the trial, and that's the basis for mistrial;  
9 or they'll come forward and say, we're mistaken, that never  
10 happened, hopefully, I'm sorry, and then there is no basis for  
11 the mistrial, because then there would be no irregularity in  
12 the proceedings, no of the specter of impropriety that they're  
13 saying would fall upon you in the event that you and I had  
14 engaged in this type of ex parte communication.

15           So I would request for this Court to ask of the  
16 defendant whether or not those allegations are actually being  
17 withdrawn, or have an evidentiary hearing or other hearing, or  
18 a findings of facts and conclusions of law by this Court that  
19 it never occurred, because if it didn't occur, there's no  
20 basis for mistrial. And if it did occur, we need to make a  
21 record of it.

22           THE COURT: There was no supplemental brief that I'm  
23 aware of. I didn't even hear about a supplemental brief until  
24 I read it in defendant's pleadings. And there was certainly  
25 no ex parte communications.

1           And frankly, I was surprised to be accused of such a  
2 thing. Mr. Gillette?

3           MR. GILLETTE: Your Honor, the basis of this Motion  
4 is actually found within plaintiff's own Motion to Strike,  
5 within a footnote item, footnote 1 on page 7 of Plaintiff's  
6 Motion to Strike Defendant's Post-Trial Brief. There's a  
7 reference to a supplemental trial brief. That's the entire  
8 basis of the Motion, Your Honor. That's why we're submitting  
9 this on the record. No -- I'm not asserting any arguments.  
10 I'm certainly not making any accusation as to the Court.

11           With respect to Mr. Baker, my point that is raised  
12 in the pleadings is simple and straightforward. It appeared,  
13 from the records submitted to this Court, that there were  
14 briefs that were submitted, that we were entitled as a matter  
15 of law and fairness, to see.

16           If Mr. Baker is saying that those were not, in fact,  
17 submitted to the Court, I'm happy to submit this. And that's  
18 certainly reflected in his own affidavit that he filed in  
19 response to the opposition, which, again, is why I'm happy to  
20 submit this on the record that's already submitted.

21           THE COURT: Mr. Baker?

22           MR. BAKER: I'm just making the record here, Your  
23 Honor. And as the Court recalls, I submitted a confidential  
24 pre-trial brief according to 7.27. We had prepared a  
25 supplement to the confidential trial brief, because we

1 anticipated a Rule 50 Motion to Dismiss the punitive damages  
2 at the close of evidence as required by Rule 50.

3           When I saw that Mr. Ward didn't do a Rule 50 Motion,  
4 there was no basis to present the bench with our confidential  
5 trial brief which, for the record, has never been given to  
6 this Court, has never been filed, and has never been served on  
7 the defendants. It simply wasn't used. We just stuck it back  
8 in the envelope and went on our way.

9           But the appropriate thing to do in the event that  
10 Mr. Ward, and Mr. Gillette is no way involved with it. He's  
11 one of the best lawyers and nicest guys that I know. But the  
12 appropriate thing to do is to call me, or to call this Court  
13 and request a conference with respect to the appearance of ex  
14 parte communication, and for the Judge to inform him or for me  
15 to inform him that there was no ex parte communication.

16           Rule 11 requires that you have a good basis for  
17 filing your pleadings. And a mention in a brief of a  
18 supplemental, confidential trial brief without any follow up  
19 doesn't comport with Rule 11.

20           And I'm -- and I know this Court has never seen me  
21 upset, but in one trial I've been accused of manipulating  
22 medical records and engaging in systematic ex parte  
23 communication with the Court. And I want the best record made  
24 possible, and I don't really know how to make it, that I  
25 didn't do it. That's the type of thing that can affect

1 reputation and affect my ability to appear in this court and  
2 represent my clients.

3           Now, I know that the Court has made a record that it  
4 never happened. But in the event that they don't have any  
5 evidence that it occurred, I'm requesting that this Court  
6 either order that that Motion and those allegations be  
7 withdrawn, or we have an evidentiary hearing on it, with a  
8 penalty of sanctions against Mr. Ward's firm in the event that  
9 they can't prove their allegations against me. I mean, it's a  
10 really nasty thing to say about a lawyer and a judge and the  
11 court system.

12           THE COURT: Well, it is, particularly when one's  
13 reputation is really all one has. That's really all one has.  
14 I mean, we all have skills, but the only thing that really  
15 matters is a person's reputation.

16           MR. GILLETTE: I don't disagree with anything that's  
17 being said here, Your Honor. Again, I just want to reiterate  
18 that the basis of this motion is simple and straightforward,  
19 and it's a reference to the record that's already been created  
20 by plaintiff's counsel in this case.

21           There's a specific reference to this Court for -- a  
22 reference to plaintiff's supplemental, confidential branch  
23 brief. Now it's -- subsequent to the filing of this motion,  
24 Mr. Baker has made the record abundantly clear that this  
25 document was never filed, never lies with the Court, it was

1 never served on us. We're satisfied with that.

2 MR. BAKER: Okay.

3 THE COURT: Defendant's Motion for Mistrial is  
4 denied. Defendant's Alternative Motion to Strike Plaintiff's  
5 Confidential Pre-Trial and Trial Briefs, is denied.

6 MR. BAKER: For the record, Your Honor, I withdraw  
7 my Motion for Sanctions.

8 THE COURT: Very well. So where does that bring us  
9 to?

10 MR. BAKER: That leaves my motions, Your Honor. And  
11 if we could just go in order. As long as we're talking about  
12 briefs, we might as well speak about my Motion to Strike their  
13 post-trial brief.

14 I think we've really spelled out our argument in  
15 terms of the -- our Motion to Strike, Your Honor. What this  
16 really is, is this is either a Motion for Judgment NOB, or  
17 this is an appellate brief. There is no allowance in our  
18 rules for briefing after the close of evidence to the Judge on  
19 issues that she's ruled at during the trial, and evidence  
20 which has already been submitted to the Court.

21 And I've really have never seen something like this.  
22 Normally, if the Judge wants an issue briefed during the  
23 evidence itself, she'll ask that the issue be briefed by the  
24 parties, we'll brief the issue, and then the Judge will make a  
25 ruling based upon the briefing and upon her determination of

1 the appropriate law.

2 I don't know what this document purports to do,  
3 because all it's doing is telling you [indiscernible]. And  
4 your decisions were valid and well-founded in Nevada law, and  
5 if there was any real type of objection to your determinations  
6 during the course of the trial, they should have requested a  
7 briefing schedule and briefed it during the trial.

8 Now, the other way to go and see if there was any  
9 error committed by this Court during the course of the trial,  
10 like with the punitive damages, and like otherwise, would have  
11 been to do directed verdict motions on those issues after the  
12 close of evidence and before closing argument.

13 That's what Rule 50 requires. That wasn't done.  
14 And because of that, they've waived any argument with respect  
15 to punitive damages and that in the event the Court finds  
16 general damages for us, we'd be entitled to a hearing on those  
17 punitive damages and they've waived their objections to any  
18 other of these evidentiary issues.

19 I don't understand -- mostly I don't understand the  
20 means in which Mr. Ward tried this case, which was to come  
21 into the jurisdiction, accuse lawyers of manipulating medical  
22 records, accuse them of ex parte communication with the Court,  
23 and then submit to the Court, post-evidentiary, a large brief  
24 saying how you were wrong on almost every ruling that you made  
25 during the course of the trial.

1           This document is spurious, it's specious, it does  
2 not have any place within our NRCP or the statutes which  
3 regulate the occurrence of a trial. The Court didn't ask for  
4 this information. It shouldn't be part of the record on  
5 appeal with respect to what occurred during this trial,  
6 because this trial is still on. We don't have a verdict.

7           So this document should be stricken. In the event  
8 that they want to raise this argument, they can raise it in  
9 post-trial briefs, as is appropriate. We'll then assert our  
10 arguments that they had waived certain of these defenses and  
11 certain of these allegations by failing to bring a Rule 50  
12 motion and move on in the ordinary course.

13           And this is going to sound strange to the Supreme  
14 when and if they hear this. But what's going on is just too  
15 weird. And this document has no place in the proceedings that  
16 we had carried forth pursuant to NRCP and the NRS.

17           THE COURT: Mr. Gillette?

18           MR. GILLETTE: Well, Your Honor, I think Nevada law  
19 and decisions clearly recognize post-trial briefs. This  
20 post-trial brief is succinct, straightforward. It articulates  
21 defendants' positions with respect to pertinent facts that go  
22 to issues surrounding liability, damages and punitive damages.  
23 It goes to what the substantive law is on all of these points.  
24 It's a document that's -- yes, it persuasive, but its key  
25 function is to provide the finder of fact in this case some

1 guidance in rendering its decision. There's nothing within  
2 the NRCP or any of the decisional laws that say that the type  
3 of document that's been submitted to this Court in the form of  
4 a post-trial brief is inappropriate or otherwise precluded  
5 under the statute.

6 THE COURT: Mr. Baker.

7 MR. BAKER: Your Honor, it's not a post-trial brief.  
8 I mean, I'm not the smartest lawyer that there's ever been,  
9 but I understand that a trial means you pick a jury, then you  
10 give your openings and you do your case-in-chief, then you  
11 rest, then you do your motions and then you get a verdict.  
12 And when you get a verdict, the trial is over. And then  
13 anything that happens after the verdict would be a post-trial  
14 brief.

15 This is an evidentiary trial brief on issues that  
16 the Judge did not ask for and that was not given during the  
17 case-in-chief when the evidence was open. It's -- this  
18 doesn't exist in Nevada law. And for that reason I would ask  
19 that it be stricken.

20 THE COURT: The Motion's granted.

21 MR. BAKER: Thank you, Your Honor.

22 Our next motion is one that I've never brought  
23 before, and it has to do with their expert witness, Dr. -- Mr.  
24 Franklin and Dr. Cargill. And as this Court remembers, I'd  
25 stipulated in a rather general fashion, but with some

1 reservations, to the qualifications of both Mr. Franklin and  
2 Dr. Cargill to testify in their respective areas of security  
3 and economics.

4           And by allowing, or stipulating to their  
5 qualifications, I stipulated that these were individuals who  
6 have an expertise in the area that could be helpful to the  
7 trier of fact which would be you in that case. I don't think  
8 they were so helpful, but it's a different issue.

9           By stipulating to that, what I said is, is they  
10 would no longer testify as percipient or lay witnesses, they  
11 would be expert witnesses. And expert witnesses are not  
12 allowed to testify in a speculative manner. They can't say it  
13 might be, it could be or otherwise, and that's well settled in  
14 all of the law all around the country, whether we're using 702  
15 and 704 or if we've adopted the Dobbler [phonetic] standard or  
16 even in [indiscernible], which would be the highest type of  
17 standard, they have to testify in a manner that's not  
18 speculative.

19           In our Nevada courts, in cases that you're familiar  
20 with, and in the thousands and thousands of times that you've  
21 seen expert witnesses be directed, requires that they testify  
22 to a reasonable degree of professional probability. And what  
23 that does is that takes it from the realm of presumptive or  
24 speculative and puts it into the area where they're testifying  
25 as an expert to a reasonable degree of probability.

1           And with respect to Dr. Cargill and Mr. Franklin,  
2 that simply didn't happen. The question was never asked.  
3 That magic question that we've all put at the end of our paper  
4 when we're done with our witnesses, so we remember to ask them  
5 if their opinion was to a reasonable degree of probability,  
6 wasn't asked. And if they didn't testify to a reasonable  
7 degree of probability, this Court has no basis and no  
8 understanding to understand to what degree they testified to.

9           It could be, it could have been, it could be, it  
10 might have been, but what we know that they didn't testify to,  
11 was to a reasonable degree of professional probability. And  
12 because they didn't do that, their opinion is speculative,  
13 it's of no use to the trier of fact, does not comport with  
14 Nevada statutory law and common law, and their testimony  
15 doesn't belong here again, and it should be stricken.

16           THE COURT: Mr. Gillette.

17           MR. GILLETTE: Your Honor, I think it goes to the  
18 essence of what's the substance of the testimony from both of  
19 these experts after an extensive body of testimony that was  
20 presented by each of them in the course of this trial.

21           The concept of reasonable degree of professional  
22 certainty, that concept, if it is applied to the substance of  
23 the testimony in its entirety from both of these experts is  
24 well met and well founded. The foundations for each of their  
25 opinions was delved into, both in direct and cross-examination

1 at length. The opinions that were expressed as the basis of  
2 the facts and opinions that both of them identified,  
3 articulated and testified to in this case is undisputed.

4           The concept that a reasonable degree of professional  
5 certainty is -- is somehow significant to the Court's  
6 determination of whether they should -- the Court should  
7 consider and weigh those two experts testimony is, at a  
8 certain level, somewhat absurd. Mr. Franklin, for example,  
9 testified that it's a common event, especially in any sort of  
10 sporting venue, for promotional items to be thrown into  
11 crowds. He pointed to the Blue Man Group, he pointed to any  
12 number of other venues here in the Las Vegas area that  
13 routinely throw items into the crowd.

14           Now, the fact that Mr. Franklin may not have said  
15 the, quote, "magic words" does not somehow invalidate his  
16 testimony or render it capable of being completely disregarded  
17 by the Court, simply because he didn't say the words, "this is  
18 my -- these are my opinions and they're rendered to a degree  
19 of professional probability".

20           The essence of the case is that the plaintiff's  
21 counsel rely on and Mr. Baker is point to, all point to one  
22 thing, which talks about the plausible, the possible, the  
23 maybes, and it doesn't speak to the more likely than not,  
24 here's established facts, here's what my opinions are that are  
25 expressed in a analytical nature.

1 I don't -- I'll leave it at that, Your Honor.

2 THE COURT: Okay. Mr. Baker.

3 MR. BAKER: I respectfully couldn't disagree more,  
4 Your Honor. The reason they're called, that we all call them  
5 the magic words, is because they're magic. What they do is  
6 they take inadmissible speculation and they make it admissible  
7 evidence to help the trier of fact. And in order to have that  
8 magical transformation, you need to use the words in the  
9 manner that they were intended to be used.

10 The fact that he, again, was qualified as an expert,  
11 that just lets him work his magic. That lets him say, it is  
12 my opinion to a reasonable degree of professional probability,  
13 which then gives me the chance to cross-examine him as to  
14 those opinions.

15 With respect to any of the percipient observations  
16 that he had, they're not relevant. They're just stuff that  
17 was thrown out there as a foundation for his opinion which  
18 needs to be made to a reasonable degree of professional  
19 probability.

20 And being irrelevant in that context, and without  
21 having laid that degree of probability that he needs to  
22 testify to, it's junk testimony. It's not going to help the  
23 Court. The Court can take no guidance from it, because he  
24 didn't tell you, I believe that this is reasonably probable.  
25 And you don't know to what standard he was actually

1 testifying.

2           And on that basis, I ask that it be stricken, Your  
3 Honor.

4           THE COURT: That's consistent with my read of the  
5 law. The Motion is granted.

6           MR. BAKER: Thank you, Your Honor.

7           And, Your Honor, our last motion was a motion for  
8 directed verdict on the issue of liability. And as this Court  
9 recalls, I put the defendants' employees on the stand. And  
10 I've had trouble through that whole trial saying their names,  
11 so is it okay with the Court if I just called them the  
12 defendants' employees?

13           THE COURT: Yes.

14           MR. BAKER: And consistent with their deposition  
15 testimony, they testified to this Court as follows. There was  
16 a meeting held between the manager of -- well, it was her  
17 position, Your Honor. Is that Vicki Coenga [phonetic]?

18           MR. CARDENAS: Yeah.

19           MR. BAKER: We'll call it Vicki Coenga, Your Honor.  
20 That she held a meeting with Brandy Beavers and other  
21 individuals of the casino and said, "We will not throw  
22 promotional objects during promotional events." And that was  
23 based upon the fact that she knew that Brandy Beavers had done  
24 it previously. She then held that meeting and said, "This  
25 can't happen," and this Court will remember, I asked her, is

1 that because there was a reasonable, foreseeability of injury  
2 to patrons? And she said, "Yes. The reason I told them they  
3 couldn't throw things is it was reasonably foreseeable that  
4 people could be injured."

5 She had that meeting, made a policy to say, that's  
6 not going to happen any longer and then afterward, the second  
7 defendants' employee that I called said she actually met with  
8 Brandy Beavers and constructed a goalpost, of all things, if  
9 the Court remembers. And that goalpost was for the purpose of  
10 launching things across the promotional areas and to have  
11 their patrons gather in whatever fashion it was, those  
12 promotional items.

13 And I asked her, too, was it your understanding that  
14 that could create a reasonable probability of harm to patients  
15 -- to patrons, and she said, "Yes." And I asked specifically,  
16 is it the exact sort of harm, as the Court probably recalls,  
17 that happened to the plaintiff? And she testified, yeah,  
18 that was the exact type of injury or event that I was going to  
19 try to prohibit by making a policy to say that we cannot throw  
20 promotional devices.

21 Now, that is obvious negligence. And even if you  
22 remember, Mr. Franklin said it was a conscious disregard of  
23 known safety procedures. Their own expert -- and I wasn't  
24 sure if I wanted his testimony stricken because of that very  
25 issue -- stated it was a conscious disregard of known safety

1 procedures.

2           And we've cited to you from many authorities, some  
3 of the in treatises, as well, that when you adopt a duty, when  
4 you voluntarily accept a duty, you have a duty to do it  
5 reasonably. And there is no argument and no testimony that  
6 contravenes the fact that they made a policy to say we won't  
7 throw promotional items, we're not going to throw promotional  
8 items because it's a foreseeable risk of harm.

9           They then violated that policy. The harm that  
10 occurred was exactly the type of harm that was anticipated in  
11 creating the policy. It was testified to by two of the  
12 defendants' employees and their own expert witness who  
13 testified that it was a conscious disregard of known safety  
14 procedures. There's no evidence in this case otherwise.

15           And that specifically, in terms of that -- that Mr.  
16 Franklin's testimony has now been stricken, which means not  
17 one witness testified that that wasn't negligent, that it  
18 wasn't a violation of policy, that it wasn't a foreseeable  
19 injury that occurred and that it wasn't a conscious disregard  
20 of their own safety procedures.

21           And because there is no evidence in contravention of  
22 what this Court heard, it's our opinion, our position that a  
23 directed verdict, which is exactly in place for this type of  
24 situation, should be granted in this matter.

25           THE COURT: Mr. Gillette.

1 MR. GILLETTE: Your Honor, I -- as a threshold  
2 issue, I don't know that a directed verdict is an appropriate  
3 request to be placed for the finder of fact in a bench trial.

4 That said, one important and a foundational  
5 consideration is the Court examines the witness testimony of  
6 defendants' employees. It may be relevant to determining what  
7 an appropriate standard of care is, but no law in the State of  
8 Nevada has ever articulated that an internal policy sets the  
9 standard of care for that party, and it does not determine  
10 what the negligence standard should be as against them.

11 THE COURT: Mr. Baker.

12 MR. BAKER: Well, one thing I somewhat agree with  
13 Keith is, I've never done a directed verdict in a bench trial.  
14 And if this Court remembers when I brought the directed  
15 verdict, I said, in the event that the Court was to rule on my  
16 ability in our favor absent the directed verdict, then the  
17 directed verdict would be moot and -- and, you know, maybe the  
18 Court would proceed in that fashion.

19 The fact that the Court hasn't for that period of  
20 time, of course, has created some nervousness in us. But what  
21 I have assumed is, is that the Court wanted to make a very  
22 good record on these trial motions that we're hearing to  
23 strike the experts and otherwise before making a ruling on my  
24 ability and eventually on damages.

25 //

1 I've never seen any law that says direct verdict is  
2 not appropriate. And I think that a directed verdict in the  
3 context of the fact that their expert on the issue has been  
4 stricken for failure to lay a foundation for his testimony  
5 makes it appropriate in this particular instance, because  
6 there's now nothing else for the Court to consider and they  
7 can just simply do it as a matter of law.

8 THE COURT: I agree. The Motion's granted.

9 MR. BAKER: Thank you, Your Honor. I would also  
10 like to make a record that the 7.273 brief, the confidential  
11 trial brief, was filed and was served prior to a verdict being  
12 reached in this case. And I think that that pretty much sums  
13 up my appellate record, Your Honor.

14 THE COURT: I think it was. I think the record  
15 reflects that.

16 MR. BAKER: Thank you, Your Honor. The only other  
17 thing that I would ask, Your Honor, and I don't even know how  
18 to ask this of the Court, is, his client and my client, we've  
19 both think kind of clenched at what's going to happen with  
20 respect to your verdict.

21 Does this Court want to set a hearing on the verdict  
22 or call us or I don't know how it works.

23 THE COURT: Well, the only issue that's really left  
24 are the issues of damages.

25 MR. BAKER: Correct, Your Honor.

1 THE COURT: And counsel presented those issues to  
2 the Court a couple of months ago now. You probably would have  
3 had your verdict before now, but for all of this post-trial  
4 briefing.

5 MR. BAKER: And I --

6 THE COURT: And the fact that the Court's been in a  
7 three-month long -- three-week long, feels like three months,  
8 trial. So I don't have that -- I don't have that for you  
9 today. And it's probably going to take me a couple of weeks  
10 to go back through my notes and review again in order to get  
11 that information.

12 MR. BAKER: So an order will just be issued? Or a  
13 judgment, or a verdict or -- do you want me to submit a  
14 verdict form?

15 THE COURT: I think -- I think that would be a good  
16 idea, because I need to re-review those -- those numbers that  
17 were submitted.

18 MR. BAKER: Okay, Your Honor. So you would like me  
19 to do a verdict form only on the damages issue, as liability  
20 has already been determined, and run that past defense counsel  
21 as to the appropriateness of the verdict form, and then submit  
22 it to you as a joint verdict form? Or in the event it's a  
23 contested verdict form, we would have to do some sort of  
24 hearing on the verdict form?

25 THE COURT: Mr. Gillette.

1 MR. GILLETTE: I think that's an appropriate course  
2 of action.

3 THE COURT: All right.

4 MR. BAKER: And I can tell the Court, all I'm going  
5 to put in is past pain and suffering, future pain and  
6 suffering, past loss of income, future loss of income, past  
7 medical and future medical. And it will be that simple.

8 THE COURT: All right.

9 MR. GILLETTE: Well, if that's the form of the  
10 verdict, then why is it necessary for us to even do that?

11 MR. BAKER: To make it easier on the Court. I don't  
12 know, I just want to help.

13 THE COURT: All right. We also need a proposed  
14 order on the rulings today.

15 MR. BAKER: Yes, Your Honor.

16 THE COURT: Please run the proposed order past Mr.  
17 Gillette before you submit it to me.

18 MR. BAKER: Yes, Your Honor.

19 THE COURT: Thank you.

20 MR. BAKER: Thank you, Your Honor.

21 MR. CARDENAS: Thank you, Your Honor.

22 (Proceedings concluded at 10:11 a.m.)  
23  
24  
25

**CERTIFICATION**

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

ENRIQUE RODRIGUEZ, . CASE NO. A-531538  
Plaintiffs, . DEPT. NO. X  
vs. .  
FIESTA PALMS, LLC, . **TRANSCRIPT OF**  
Defendant. . **PROCEEDINGS**  
. . . . .

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

**DEFENDANT'S MOTION FOR A NEW TRIAL,  
DEFENDANT'S MOTION TO AMEND JUDGMENT ON THE VERDICT  
AND DEFENDANT'S MOTION TO TAX COSTS**

TUESDAY, JULY 5, 2011

APPEARANCES:

FOR THE PLAINTIFF: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
*Benson, Bertoldo & Baker*

FOR THE DEFENDANT: KEITH GILLETTE, ESQ.  
*Archer Norris*  
*(Via Telephone)*

COURT RECORDER:

VICTORIA BOYD  
District Court

TRANSCRIPTION BY:

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Englewood, CO 80110  
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

1           LAS VEGAS, NEVADA, TUESDAY, JULY 5, 2011, 11:10 A.M.

2           THE CLERK: Case Number A-531538, Enrique Rodriguez  
3 v. Fiesta Palms, LLC.

4           MR. BAKER: Good morning, Your Honor.

5           THE COURT: Good morning.

6           MR. BAKER: Made it.

7           THE COURT: Yes. I'm glad you did.

8           MR. BAKER: Little worse for the wear. I think  
9 Keith's appearing by phone.

10          THE COURT: Yes. And so I think what we should do  
11 is probably make a call to Court Call, see if we can get him  
12 on the line. It's Mr. Gillette, right?

13          MR. BAKER: Yeah.

14          THE COURT: Okay. Will he be doing the arguing?

15          MR. BAKER: I think he is actually going to submit  
16 it on the pleadings and maybe I'll just have one or two  
17 follow-up words depending upon --

18          THE COURT: Okay, very good. Let me see if I can  
19 get him on line.

20                           (Court makes phone call)

21          THE COURT: Good morning. Is it Mr. Gillette?

22          MR. GILLETTE: Good morning, Your Honor.

23          THE COURT: How are you, sir?

24          MR. GILLETTE: Fine. How are you, ma'am?

25          THE COURT: I'm fine. Mr. Baker is present in the

1 courtroom.

2 MR. BAKER: And, Mr. Cardenas.

3 MR. GILLETTE: Okay. Good morning, Mr. Baker.

4 MR. BAKER: Hi, Keith.

5 THE COURT: And Mr. Cardenas is also present.

6 MR. GILLETTE: Oh, I'm outnumbered.

7 THE COURT: You are, sir. Would you please say  
8 something, Mr. Baker, Mr. Cardenas, so I can see if Mr.  
9 Gillette can hear you?

10 MR. BAKER: Good morning.

11 THE COURT: Could you hear that, Mr. Gillette?

12 MR. GILLETTE: I could, I could.

13 THE COURT: Okay. There are three things on  
14 calendar that I'm -- that I'm aware of. First of all, there  
15 was no opposition filed to Defendant's Motion to Amend the  
16 Judgment on the Verdict.

17 MR. BAKER: Well, I believe we agree with their  
18 position that we did use the incorrect calculation on the  
19 post-judgment interest. And we've been trying to get together  
20 and shoot a proposed amended judgment for you and we just  
21 haven't gotten the ability to do that yet.

22 THE COURT: Did you hear that, Mr. Gillette.

23 MR. GILLETTE: I heard the start of it, Your Honor,  
24 but Mr. Baker's voice trails off.

25 MR. BAKER: Yeah, I'm sorry, Keith. I said that we

1 were agreeing with your position.

2 MR. GILLETTE: Yeah. Your Honor, we've exchanged  
3 voice mails and whatnot over the past several business days.  
4 I just have not had a chance to sit down with Mr. Baker and  
5 discuss or propose form of an amended judgment. I anticipate  
6 we'll be doing that right after this hearing.

7 THE COURT: Very well. This Motion is granted.

8 The next item I had was Defendant's Motion to Tax  
9 Costs?

10 MR. GILLETTE: Yes, Your Honor. The -- we've  
11 outlined our position within our briefs. The point that I  
12 would just make briefly on this, Your Honor, is that no  
13 documentation or itemization or substantiation of any number  
14 of costs that are articulated within the costs that Mr. Baker  
15 is attempting to recover on behalf of his client. And for  
16 that reason I believe that our motion is appropriate in the  
17 circumstances.

18 The biggest issue as I see it is substantiation of  
19 the claimed amounts that are submitted on behalf of various  
20 experts that are being sought as elements of claimed damages.  
21 Or, excuse me, as claimed costs.

22 So with that said, Your Honor, I'm willing to  
23 entertain any argument that Mr. Baker might present on this.

24 THE COURT: Mr. Baker.

25 MR. BAKER: I think Mr. Cardenas is going

1 [indiscernible] the issue with the Court's permission.

2 THE COURT: Very well, Mr. Cardenas.

3 MR. CARDENAS: Yes, Your Honor. We've set forth our  
4 position pretty extensively in our opposition. We anticipated  
5 the major point of contention was going to be with respect to  
6 the expert fees, because we understand what the statute  
7 references with respect to those.

8 But as the Court's aware and what we have indicated  
9 in our moving papers, the Court is permitted under certain  
10 circumstances to award costs in excess of the \$1,500.

11 And as this Court is well aware, we spent nearly  
12 three weeks together, there were no depositions that were  
13 conducted by the defendants. We had to bring certain  
14 providers in here live to testify. And I think under the  
15 circumstances of this case, the costs that we've sought  
16 relative to the experts are certainly warranted under the  
17 circumstances of the case.

18 With respect to the itemization, Your Honor, all the  
19 costs that we set forth in the Memorandum of Costs, they were  
20 attested to under oath by Mr. Baker. Presumably, maybe by  
21 myself as well, but they were all actual costs. They weren't  
22 an estimation of costs. And I'm not quite sure how much more  
23 specific the Court would need us to be in light of the  
24 circumstances of this case. And again, you know, you were the  
25 -- it was a bench trial and we spent a lot of time together

1 and I'm sure that the Court is aware that the costs that we've  
2 set forth are reasonable and actual costs.

3 THE COURT: Mr. Gillette.

4 MR. GILLETTE: Well, Your Honor, I understand that  
5 Mr. Baker submitted a declaration, but there's not a single  
6 invoice from any expert that they claim were necessary. I'm  
7 not disputing the necessity of the experts, I'm talking about  
8 specifically the substantiation of the amounts claimed.

9 There's not a single invoice, there's not a single  
10 expert who's submitted any documentation supporting the  
11 claims. And I believe that's substantial under the  
12 circumstances, it's unusual. And I'm not claiming any  
13 impropriety on the part, I'm just talking about a burden of  
14 proof.

15 And I believe for that reason, Your Honor, assuming  
16 for a moment that it is necessary and that statutory limit of  
17 \$1,500 per expert is something that the Court agrees is  
18 something that should be considered, I believe, Your Honor,  
19 that there's an absence of any substantiating evidence that  
20 speaks to the valuation of the amounts that are being asserted  
21 here.

22 THE COURT: I think the law is in your favor, Mr.  
23 Gillette, the Village Builders case is pretty clear. And in  
24 this particular instance, no supporting documentation  
25 whatsoever was attached to either the Memorandum of Costs and

1 Disbursements or the Opposition to this Motion. So I'm  
2 inclined to agree that this motion ought to be granted with  
3 respect to the expert witnesses.

4 I just want to weigh in briefly on that. I think at  
5 some point the Legislature is going to have to take a look at  
6 this \$1,500 limit per witness. But in the meantime, it does  
7 seem clear to me that plaintiff has to at least argue why the  
8 statutory limit should be exceeded in these particular  
9 instances.

10 Can we move on to Defendant's Motion for a New  
11 Trial?

12 MR. BAKER: If -- if, Your Honor, if the Court -- I  
13 mean, I would be more than happy to submit every invoice that  
14 we have. We've just never been asked to submit invoices  
15 before. Our declaration has always been considered by the  
16 Court and accepted by the Court. But if this Court would see  
17 fit to just continue this motion briefly, I'd be happy to give  
18 you ever piece of paper we have in the office.

19 THE COURT: What about -- I don't know, Mr.  
20 Gillette, if you could hear everything Mr. Baker said.

21 MR. GILLETTE: I heard some of it, and if I may just  
22 paraphrase his -- his comment is that he'd be happy to supply  
23 that material.

24 THE COURT: Yes.

25 MR. GILLETTE: Your Honor, I would object to it at

1 this point. This is a motion that's been months in the  
2 making. He was aware of his obligations at the time he filed  
3 the Memorandum. He was aware of his obligations as we raised  
4 the issue within our moving papers. And in his opposition, he  
5 had an opportunity to do that.

6 I would submit, Your Honor, that plaintiff's  
7 suggestion to now file some sort of supplementary  
8 substantiation be denied.

9 THE COURT: Well, I've made my ruling on the issue.  
10 I don't suppose there's anything that prevents Mr. Baker from  
11 filing a Motion to Reconsider if he thinks that's appropriate.

12 My view is that the Supreme Court looks very, very  
13 carefully at these particular issues, not only the costs and  
14 the substantiation of those documents, but also requests for  
15 attorneys' fees. They look at those issues very, very  
16 carefully. So, I try to follow the law to the best of my  
17 ability; that's the ruling.

18 Let's move on to the Motion for a New Trial.

19 MR. BAKER: Your Honor, would I leave a blank on the  
20 judgment, how much -- I'm not sure what number we're being  
21 awarded in costs. Is it --

22 MR. GILLETTE: If I may comment, Your Honor?

23 THE COURT: Yes, because I don't have any of those  
24 other pleadings before me. The only thing I have before me is  
25 the matters that are going to be argued today.

1 MR. GILLETTE: The -- I would submit for purposes of  
2 just moving the matter along, there were four -- there were  
3 four experts that plaintiff may statutorily recover costs in  
4 the amount of \$1,500 each on.

5 I would suggest that the figure within the -- within  
6 Defendant's Order on the Motion, and reflected in the amended  
7 judgment be \$6,000, which represents \$1,500 -- or excuse me,  
8 I'm misspeaking. Were there 14 expert witnesses? Whatever  
9 the number is, Your Honor, we'd be happy to -- I think we can  
10 address it in that fashion. My apologies. I believe it is 14  
11 experts. Whatever the number is at \$1,500, we can work  
12 through that.

13 THE COURT: Or the order could be crafted such that  
14 the Court is inclined to grant your motion based on the fact  
15 that the invoices and documents substantiating the costs were  
16 not submitted with -- together with the motion, or with the  
17 Opposition.

18 MR. GILLETTE: Understood, Your Honor, I'll take  
19 that tact.

20 THE COURT: Mr. Baker? I mean, I anticipate this  
21 issue coming back before me again, because, frankly, you know,  
22 it was a bench trial, and the Court did hear from these  
23 various expert witnesses. But that doesn't alter the fact  
24 that plaintiff has to meet a certain burden in order for the  
25 Court to consider awarding more than the \$1,500 per expert

1 witness, which again, I think is something that will have to  
2 be revisited by the Legislature at some date in the future.

3 MR. BAKER: I'm sorry, Your Honor, I'm confused. It  
4 might just be July 5th.

5 THE COURT: Okay.

6 MR. BAKER: We submitted a Memorandum of Costs --  
7 Rob, would you give me -- approximately \$150,000; is that  
8 right? Is Mr. Gillette suggesting that we been awarded \$6,000  
9 in total costs on this case?

10 THE COURT: That's what I understood him to say.

11 MR. BAKER: I've just never been in this situation  
12 before. I don't -- I don't know --

13 MR. CARDENAS: If I may, Your Honor. Is the basis  
14 of the ruling that we didn't provide invoices? Because --

15 MR. BAKER: I've never attached --

16 MR. CARDENAS: -- I've never attached invoices to a  
17 Memorandum of Costs. And the way we understood the Rule, and  
18 even the moving papers, the Motion to Retax was less than  
19 clear as far as the basis being we didn't attach invoices,  
20 because certainly if he had said we needed invoices, that  
21 would have been the first thing we would have provided this  
22 Court.

23 And if what he's suggesting is that those aren't  
24 actual costs, our -- the affidavit that we provided in support  
25 of it clearly demonstrates that those are the actual costs

1 that we were billed. And if we are going to be required to  
2 come back before this Court with a Motion to Reconsider to  
3 just simply demonstrate that, here are the invoices, that's --  
4 we can do that. But the case law and the case authority  
5 allows you to award in excess of \$1,500 per expert if the  
6 circumstances warrant them.

7 So we'll be right back in front of Your Honor with  
8 the invoices, and under the circumstances of this case, we  
9 should get our costs that we've asked for.

10 MR. BAKER: And I'm just confused, Your Honor,  
11 because I've just simply never have attached invoices. I'm  
12 unaware of any law regarding it and I'm just going to defer to  
13 Mr. Cardenas, what he says on it [inaudible].

14 THE COURT: Your points are well taken, Mr.  
15 Cardenas. In other words, I'm not going to be surprised to  
16 see a Motion to Reconsider with -- attached with it,  
17 documentation of all the costs.

18 MR. CARDENAS: Okay.

19 MR. BAKER: Thank you, Your Honor.

20 MR. CARDENAS: Thank you, Your Honor.

21 MR. BAKER: And I'm sorry if we disappointed the  
22 Court in that regard.

23 THE COURT: Oh, Mr. Baker, you know, I roll with the  
24 punches.

25 MR. BAKER: Right, right.

1 THE COURT: All right. Can we move on to  
2 Defendant's Motion for a New Trial, please? Mr. Gillette?

3 MR. GILLETTE: Yes, Your Honor.

4 THE COURT: Whenever you're ready. You know I --  
5 you know I -- you know I read everything, sir.

6 MR. GILLETTE: Understood. Let me be brief. There  
7 are two aspects of this case, Your Honor, that I would like to  
8 draw to the Court's attention that I believe are significant  
9 for the purposes of framing the Motion.

10 The first involves the pretrial disclosure process  
11 and the implications of what didn't happen on defendants'  
12 ability to properly defend the case.

13 In a nutshell, there was a supplemental disclosure  
14 that was served back in June of last year that identified a  
15 disclosed expert by the name of Faruz Mashud [phonetic], that  
16 plaintiff identified would be providing expert opinions at  
17 trial, and would be providing a written report.

18 We learned at the close of discovery that Mr. -- or  
19 Dr. Mashud had been withdrawn as an expert and that plaintiff  
20 would be relying upon the testimony of various healthcare  
21 providers to substantiate the damages that plaintiff claimed  
22 to have suffered in this incident, which is fine.

23 But there is two considerations that becomes  
24 significant for our purposes. The first is involving the  
25 records of Dr. Shifini. As you know, Dr. Shifini introduced

1 trial testimony, orthopedic issues and medical costs issues  
2 that go far, far beyond what a anesthesiologist qualified in  
3 the field of medicine to, in that specialty, would be  
4 anticipated to provide.

5           We subpoenaed Dr. Shifini's records; 20 pages of  
6 treatment history were provided. From that review of those  
7 records, there's nothing that would indicate to us that  
8 perhaps Dr. Shifini's deposition should be taken, or some  
9 attempt to determine whether Dr. Shifini would be providing  
10 opinion testimony beyond the parameters that would be  
11 established and one would expect from someone who's licensed  
12 as an anesthesiologist.

13           The significance of additional 117 pages of  
14 documents that we were not provided until the time of trial,  
15 during the time that Dr. Shifini actually testified, is  
16 significant here, because had defendant been aware of the fact  
17 that Dr. Shifini's records contained something beyond the 20  
18 pages of his own treatment, would have provided us with some  
19 indication that he was an individual with whom plaintiff's  
20 counsel intended to bring in additional information,  
21 additional evidence, additional opinion testimony that the  
22 Court would rely upon and consider in the case.

23           I believe that that in itself, Your Honor, is a  
24 significant enough issue, because from Dr. Shifini's opinion  
25 testimony, any number of issues that relate to future medical

1 treatment, and by implication, future medical damages, were  
2 awarded by the Court. The issue of fundamental fairness comes  
3 into play here. We had no idea that Dr. Shifini was going to  
4 be a vehicle through which all of this information and  
5 evidence would be introduced. We were provided no -- no  
6 disclosure to that effect as required under NRCP 16.1.

7           And to the extent that there are decisional laws  
8 that provide caveats to that, those are very distinguishable.  
9 And as you know from our moving papers, we've distinguished  
10 them. I believe that that's a significant issue that by  
11 itself, standing alone, would be sufficient for the Court to  
12 grant a new trial in the circumstances, because had we known  
13 that Dr. Shifini was going to be this vehicle, we would have  
14 taken the time to depose him.

15           Now, I know that plaintiff's counsel has raised a  
16 number of issues surrounding the depositions that weren't take  
17 in this case, but I think that that also bears brief comment.  
18 There were 30 distinct healthcare providers, and a total of  
19 some 50 healthcare providers identified, who provided  
20 meaningful treatment to Mr. Rodriguez.

21           But there's was no real spoke in the wheel, so to  
22 speak, or no hub in the spokes of the wheel, that you can  
23 point back to and find a referring physician or a consulting  
24 physician. These were a -- an array of different types of  
25 healthcare providers in different geographic regions that

1 provided a healthcare treatment, and each one of these  
2 healthcare providers provided discreet types of treatment to  
3 this individual.

4           Had we any indication that Dr. Shifini was going to,  
5 in fact, be a hub from which opinion testimony would flow, we  
6 certainly would have taken his deposition, and we certainly  
7 would have moved the Court to consider his qualifications in  
8 limiting the nature of his expert opinion testimony. That's  
9 the first point.

10           The second point goes to the same types of issues as  
11 it relates to economist Terrance Dinneen. Mr. Dinneen was  
12 deposed, his entire records were produced to us. We  
13 approached this trial with the impression that there was no  
14 substantiation of several tax returns that were purportedly  
15 filed by the plaintiff, but there was no substantiation of  
16 those tax returns themselves.

17           Plaintiff's wage claim rests entirely upon three tax  
18 returns that were filed between 1999 and 2004. That at the  
19 time of his deposition, Mr. Dinneen admitted that he didn't  
20 know that they were, in fact, ever filed. And that's  
21 significant, because we had been requesting economic loss  
22 documents, not only through disclosures, but through specific  
23 discovery requests and we received nothing.

24           So it boils down to these three reports and the  
25 question becomes, do these three reports accurately reflect

1 the income of this individual at the time. And that becomes  
2 very questionable in light of the fact that they were -- there  
3 was a great deal of uncertainty whether they were ever filed.

4           And on October 20th, Mr. Dinneen, the economist,  
5 receives a letter from an individual who says, oh, yeah, these  
6 were filed. Had we seen that document, had it been produced  
7 at some sort of a pre-trial disclosure, which plaintiff was  
8 obligated to do, or provided to us from -- by Mr. Dinneen at  
9 the time that we deposed him or requested his records, we  
10 would have approached the issue very differently and we would  
11 have sought leave from the Court to take this tax preparer's  
12 deposition on the issues that surround his one line assertion  
13 that, yeah, these were -- these documents were filed.

14           The circumstances under which that document was  
15 introduced and relied upon worked to defendants' tremendous  
16 disfavor here. And for those two reasons, among all the  
17 reasons that are already outlined in our moving papers and  
18 reply, Your Honor, we would ask for a new trial in this case.

19           THE COURT: Mr. Baker.

20           MR. BAKER: This has been a very frustrating trial  
21 in its own way, Your Honor. And, you know, the reason they  
22 want a new trial is because they weren't prepared for the old  
23 trial, and that's really what it comes down to.

24           Under -- I guess --

25           MR. GILLETTE: I can't hear you, Mr. Baker, I

1 apologize for interrupting.

2 THE COURT: Yeah, you may have --

3 MR. BAKER: I said the reason that you want a new  
4 trial is that you weren't prepared for this trial. And under  
5 NRCP 59, that's not enough.

6 You had to be surprised by somebody -- or by  
7 something that you could have avoided using reasonable  
8 diligence. And I don't mean you, Keith, I mean the defendant  
9 in this case.

10 And in this case, none of the doctors' deposition  
11 were deposed, in a case of 300 and something thousand dollars  
12 worth of medical bills. None of the primary treating  
13 physicians.

14 And you're talking about not general practitioners,  
15 not that there's something wrong with general practitioners,  
16 but the Court heard from Dr. Shifini, who's being  
17 characterized as an anesthesiologist. He is a board certified  
18 pain management doctor, when the scope and course of that  
19 particular type of treatment always works with things like  
20 pain stimulators and pain pumps who cost -- and laid a full  
21 foundation for his opinion on that point.

22 It's never been my duty and responsibility in this  
23 to provide a hub to the defendant to do their discovery. They  
24 have a duty to do reasonable discovery and if they were  
25 surprised, it's because they didn't do it.

1           And rather than come in prepared, it was just  
2 amazing to me on the first day. If the Court remembers, I  
3 went to call Dr. Shannon. And Dr. Shannon was the orthopedic  
4 surgeon who performed the knee surgery.

5           And Mr. Ward, who was trying the case, came over and  
6 he objected to her speaking outside of the treatment. And I  
7 cited the Fernandez [phonetic] case and the [indiscernible]  
8 versus Levine case to this Court and he stood there -- and  
9 it's in the record -- and he said, "I'm not familiar with  
10 those cases."

11           Well, if your whole strategy in a trial is going to  
12 be to try to block witnesses, be familiar with the case law.  
13 In Nevada, we have held that the doctors who are treating are  
14 experts, and once qualified as experts, they can treat -- they  
15 can testify broadly and widely.

16           And these doctors did, but it was all, all within  
17 the scope of their expertise. And if this Court had  
18 entertained an objection that they weren't qualified to speak  
19 to it, and upheld it, then we would have brought in other  
20 doctors.

21           But on that very first day of trial, we made our  
22 strategy known to the defendants. They didn't, then, brief  
23 you on the issues during the trial if they thought it was  
24 really such a substantial issue. And in their -- in their  
25 Motion for a New Trial, the cases that they cite to you are

1 all cases from out of this jurisdiction. And I didn't see a  
2 single case that held it was an abusive discretion to allow  
3 that testimony.

4 Not one Court of Appeals that I saw overturned the  
5 trial court judge for allowing the testimony. They've upheld  
6 the judge for not allowing the testimony, but you know what,  
7 that's what discretion is. Some judges are going to do some  
8 things, some judges are going to do other things. Nothing  
9 that occurred in this court was inappropriate.

10 What was inappropriate, that we saw on a number  
11 occasions, is the lack of defendant to understand our local  
12 rules. And if this Court remembers being accused of being in  
13 conspiracy with me for complying with the local rules in this  
14 case, did not understand the rules with the scope of under --  
15 of doctors being able to testify, did not understand how our  
16 court has interpreted NRC 50.275, but instead, just time  
17 after time says that I've engaged in misconduct. And I'm  
18 sorry, I sound like I'm upset, I kind of am.

19 The issue of Mr. Dinneen. He's an expert who is  
20 designated as an expert. He could have relied on any  
21 information here in this courtroom. He could have relied on  
22 what he heard out in the hallway. There's no secret letter  
23 that came to him. That's formally and just [indiscernible]  
24 within what he can rely on as an expert. He can rely on  
25 hearsay, okay. So with respect to this letter as the grounds

1 for a new trial, there's absolutely no grounds for a new  
2 trial.

3           What happened, why the defendants were surprised,  
4 began at the beginning of the case. They didn't speak to  
5 anyone, look at anything, or take it serious in any manner.  
6 They basically came into this jurisdiction, again, without  
7 understanding admissibility.

8           And incidently, Your Honor, that all goes to the  
9 weight of it. That's not inadmissible. You're very competent  
10 to sit and listen to witnesses and see if they laid a  
11 foundation for his damages.

12           So, I'm rambling a little. That's because there's  
13 about 30 different things in their motion that they said is  
14 the grounds for a new trial.

15           With respect to the doctors, we've just discussed  
16 that. It was appropriate. And this Court also has a judicial  
17 economy it has to consider. If you had told me, Your Honor,  
18 Steve, I don't -- Mr. Baker, I don't think it's appropriate  
19 for you to put that testimony in through that witness, I would  
20 have paraded 32 doctors through your courtroom and we would  
21 have been here for -- well, we'd still be here.

22           And you have power in your courtroom to make  
23 reasonable decisions within your discretion on what testimony  
24 you're going to hear and through whom you are going to hear  
25 it. And I think that's what I needed to say.

1           THE COURT: Mr. Gillette, it was your motion. Do  
2 you have any concluding argument?

3           MR. GILLETTE: Your Honor, I'm a bit -- I just want  
4 to respond to two aspects of Mr. Baker's argument. One is,  
5 unpreparedness, and second is judicial economy.

6           What we're talking about, Your Honor, is fundamental  
7 fairness. When Dr. Shifini walks into a courtroom with an  
8 additional 100 plus pages of documents that had been provided  
9 to him from some third party source, that are unrelated to his  
10 own treatment, had defendant known about those types of  
11 documents in its file, of course we would have taken an  
12 opportunity to -- to reconsider how we treated that witness.

13           The same with respect to Mr. Dinneen. Again, what  
14 we're talking about is a substantiating document that goes to  
15 one of the core arguments the defendant was raising at trial  
16 that related to the foundations of Mr. Dinneen's opinion. And  
17 I -- we're not talking about unpreparedness, Your Honor. What  
18 we're really talking about is fundamental fairness. And on  
19 that I will submit.

20           THE COURT: Well, Mr. Baker, I want to hear from you  
21 on that one issue, because with respect to your opposition  
22 regarding the docket -- the documents that Dr. Shifini  
23 reviewed, what I understood is that those documents were  
24 previously disclosed.

25 //

1 MR. BAKER: Every document that he had had been  
2 previously disclosed. There was additional documents or  
3 medical records from other doctors. When he -- and who had  
4 also treated Mr. Rodriguez in the case.

5 And if you remember, it was kind of funny when it  
6 happened at trial, because we came down here with the  
7 additional ones, I had a Bate stamp set and a non-Bate stamp  
8 set. Then we couldn't find one. And Mr. Ward allowed us, by  
9 stipulation, to include those medical records with Dr.  
10 Shifini's records, and had no objection to them being put into  
11 the record.

12 There wasn't a single bit of information and what  
13 Dr. Shifini had in his file that the defendants didn't also  
14 have in their file.

15 THE COURT: That's what I recall. And furthermore,  
16 I note that this issue was not particularly addressed by the  
17 defense in their reply.

18 MR. GILLETTE: Your Honor, that -- the significance  
19 is not the existence of the documents, Your Honor. The  
20 significance is the location of the documents. The location  
21 of the documents being in Mr. -- or excuse me, in Dr.  
22 Shifini's file. That is the significance of what we're  
23 talking about here.

24 We're not saying that plaintiff didn't produce under  
25 its 16.1 disclosures that various healthcare providers had

1 created records or that they had been disclosed. What we're  
2 talking about is the presence of those documents in Dr.  
3 Shifini's file. That's the significant consideration here.

4 THE COURT: I'm not sure that you heard what Mr.  
5 Baker said a few moments ago. Did you hear what he had to  
6 say?

7 MR. GILLETTE: I admit, Your Honor, that I only  
8 heard part of it, and I've been trying not just to waste time  
9 here.

10 THE COURT: Because what I understood Mr. Baker to  
11 argue in his -- in the written pleadings, and what I  
12 understood him to say here a moment ago, was that the 100 plus  
13 documents that you referred to in your motion were not only  
14 previously disclosed, but were also nothing more than the  
15 medical records of other physicians.

16 And furthermore, I understood Mr. Baker to say that  
17 Mr. Ward had stipulated admission of those particular  
18 documents during the course of the trial. Did I get that  
19 right, Mr. Baker?

20 MR. BAKER: Yes, Your Honor.

21 MR. GILLETTE: Your Honor, again, it's not the  
22 existence of the records. It's the existence of the records  
23 in Dr. Shifini's file. That is the significance of what we're  
24 talking about here. And had those -- had there been some  
25 indication from plaintiff or plaintiff's experts on that -- on

1 that consideration, we would have approached Dr. Shifini's  
2 anticipated testimony quite differently, because at last we  
3 would have some indication of from whom expert opinion was  
4 going to be solicited.

5           You know, and as I mentioned early on, there was a  
6 Dr. Mashud who was originally designated as an expert on  
7 medical issues that had been disclosed by the plaintiff and we  
8 -- we, for some time, looked at that as the experts they were  
9 going to be using at trial. And instead, we -- it's a bit of  
10 an ambush situation here. And, you know, ambush is not the  
11 right word, but fundamental fairness is. And on that, Your  
12 Honor, I will stop talking.

13           THE COURT: Very well, I'm prepared to make my  
14 ruling.

15           MR. BAKER: Thank you, Your Honor.

16           THE COURT: It's the Court's view that the  
17 defendants fail to demonstrate why they're entitled to a new  
18 trial.

19           Defendants fail to show this Court how the disputed  
20 testimony amounted to irregularity in the proceedings,  
21 misconduct of the prevailing party, accident or surprise which  
22 ordinary prudence would not have guarded against, or newly  
23 discovered evidence.

24           It is very persuasive to the Court the defendant  
25 failed to object in many instances, and it is even more

1 convincing that the defendant did not depose a single treating  
2 physician.

3 Any accident or surprise the defendant did suffer  
4 was just as much the product of his own failure to diligently  
5 conduct discovery as it was the product of any impermissible  
6 expert testimony.

7 Mr. Baker, I'll ask you to prepare an order for the  
8 Court's signature. Please run the proposed order past Mr.  
9 Gillette before you submit it to me.

10 MR. BAKER: Thank you, Your Honor.

11 THE COURT: Thank you.

12 Thank you, Mr. Gillette.

13 MR. GILLETTE: Your Honor, thank you for your time.

14 THE COURT: You're welcome.

15 (Proceeding concluded at 11:43 a.m.)  
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**CERTIFICATION**

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

**AFFIRMATION**

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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\_\_\_\_\_  
JULIE LORD, TRANSCRIBER

\_\_\_\_\_  
DATE

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

\_\_\_\_\_ /

**APPELLANT'S APPENDIX**  
**VOLUME 15**

**ROBERT L. EISENBERG (Bar # 0950)**  
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**ATTORNEYS FOR APPELLANT**

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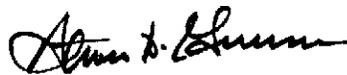
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DISTRICT COURT  
CLARK COUNTY, NEVADA

  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )  
\_\_\_\_\_ )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 9, 2010

**REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. LOUIS MORTILLARO**

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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Defendant's Witness(es):

None

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DEFENDANT'S:

None

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1 TUESDAY, NOVEMBER 9, 2010 AT 2:40 P.M.

2 [Designation of record begins at 2:40 p.m.]

3 THE COURT: Good afternoon, Doctor.

4 MR. BAKER: Sorry, Your Honor.

5 THE COURT: How are you? Please remain standing, raise  
6 your right hand to be sworn.

7 DR. LOUIS MORTILLARO, PLAINTIFF'S WITNESS, SWORN

8 THE CLERK: Please be seated, stating your full name,  
9 spelling your last name for the record.

10 THE WITNESS: Sure. Louis Francis Mortillao,  
11 M-O-R-T-I-L-L-A-R-O.

12 THE COURT: Thank you for accommodating us today, Doctor.

13 THE WITNESS: No problem, Judge. Thank God I'm close.

14 THE COURT: Mr. Baker, whenever you're ready.

15 MR. BAKER: Thank you, Your Honor.

16 DIRECT EXAMINATION

17 BY MR. BAKER:

18 Q That's a Jewish name?

19 A Baker or Mortillaro?

20 Q Mortillaro, Louis.

21 MR. BAKER: Your Honor, the -- our Exhibit 51, which was  
22 Dr. Mortillaro's records, were incomplete. We are using the  
23 Defendant's, and we're going to ask to substitute in Bates  
24 Stamped Mortillaro records that were disclosed and produced  
25 back and forth from us in the course of the case rather than

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1 the incomplete set that I attached to my trial exhibits.

2 THE COURT: Mr. Ward, do you agree?

3 MR. WARD: Your Honor, I haven't gone down and compared  
4 the --

5 MR. BAKER: It was lacking the --

6 MR. WARD: -- document for document. If that's what it  
7 is, then I have no problem with it.

8 MR. BAKER: Yeah. It's attached with an affidavit from  
9 the copying service that was sent by Mr. Ward's office over to  
10 Dr. Mortillaro's office. And in fact, it -- my copy from --  
11 somehow missing some documents that he's going to want for  
12 cross-examination.

13 THE COURT: Do you have the copy, Madame Clerk?

14 THE CLERK: I do.

15 MR. BAKER: There's a copy on your -- I put a copy down  
16 for you too, Your Honor.

17 THE COURT: Oh, okay. Thank you. Very well.

18 BY MR. BAKER:

19 Q Would you --

20 THE WITNESS: I have no notes -- oh, your notes, Judge?

21 THE COURT: Apparently, I have a copy. Does the witness  
22 have a copy too, Mr. Baker? It'd be nice if Dr. Mortillaro  
23 had a copy.

24 MR. BAKER: That would help.

25 THE WITNESS: Thank you.

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1 BY MR. BAKER:

2 Q Would you identify yourself to the Court, describe  
3 your qualifications, training, and experience?

4 A Yes, I have a bachelor's degree in biology and a  
5 minor in chemistry and philosophy from Loyola University of  
6 Los Angeles. And I have two master's degrees from the  
7 University of Southern California. One is in counseling,  
8 psychology, and the other is in public administration.

9 I have a Ph.D. from in professional clinical  
10 psychology from the old United States International  
11 University. Now it's Alliant University in San Diego. And I  
12 have a post-doc certificate in neuro psychology from the  
13 Fielding Institute in Santa Barbara.

14 And my work history, I was hired in 1971 by Judge  
15 Mendoza to be the chief psychologist of the juvenile court.  
16 And I worked with the Judge and other of the district court  
17 judges at that time that were family court, the juvenile court  
18 judges, until 1978. Then I got hired by the State of Nevada  
19 to be the chief psychologist at the Jean Hanna Clark  
20 Rehabilitation Center. If you remember the old Nevada  
21 industrial commissioner, Michael Callahan, built that  
22 building, because he was a disabled vet. He wanted to treat  
23 to injured people, i.e. injured workers. I was at Jean Hanna  
24 as the director of psychology from 1978 to 1989.

25 And then in 1989, I spent a year working with a

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1 psychiatrist, my practice and his practice sharing office  
2 space at the Monte Vista Psychiatric Hospital. And then in  
3 1990 to 1995, Dr. David Tuler [phonetic] and I founded the  
4 Nevada Pain and Rehabilitation Center. It was a CARF  
5 accredited multidisciplinary rehabilitation center working  
6 with injured workers.

7 We had a typical chronic pain program, you know, the  
8 three, four-week program at the time, help people get better.  
9 And in 1995, the Stark Amendments came into play. And so, it  
10 eliminated self-referral in that genre. So we sold the  
11 practice to NovaCare and then worked off and on with NovaCare  
12 and in my own private practice, you know, for a few years.

13 And then NovaCare sold -- I think they left town,  
14 and then I started working with other physical therapy  
15 companies. Well, during that time, I also started doing  
16 family law referrals from the family court. At that time, I  
17 think the family court came into being, Gloria Sanchez, T.  
18 Jones, Terri Marin [phonetic], all those early judges I worked  
19 with in doing child custody evaluations.

20 And then Judge Glass started the competency court  
21 here, and I've been doing competency assessments for her.  
22 Also, Mike Cherry [phonetic] used to run the -- Chief Justice  
23 Mike Cherry used to run the Special Public Defender's Unit  
24 here, and I started working with Mike on death penalty  
25 mitigation cases and continue to work with him.

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1           So my practice, as it is now, is I still see  
2 worker's comp patients. I see personal injury cases, usually  
3 doctor referrals. I work probably mostly for the Plaintiff,  
4 but also I'm getting a lot more defense cases and referrals  
5 from defense lawyers.

6           And like I said, the murder cases, the psychosexual  
7 dangerous cases, working there, family court. That's  
8 basically it.

9           Q     Yeah. Is it fair to say that you've been to be the  
10 partial advisor to the Court, the District Court of Clark  
11 County on just numerous, numerous, numerous occasions?

12          A     Yes. I forget about that. When Stew Bell was the  
13 District Attorney and Judge Thompson was his assistant, I used  
14 to work a lot with them as an AMICAS [phonetic] advisor  
15 relative to women's issues, domestic violence against women,  
16 and also some of the murder cases that the DA has at the time.

17                I used to work with Stew, and Bill Koot, and Chuck  
18 on those cases. So yeah, I've done a lot of --

19          MR. BAKER: Your Honor, I move to qualify Dr. Mortillaro  
20 again as a neuropsychologist and related issues.

21          THE COURT: Uh-huh. Any objection?

22          MR. WARD: I do not object to him being accepted as an  
23 expert as a treater.

24          MR. BAKER: And I'll also offer him as a treating  
25 physician.

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1 MR. WARD: I object to him being anything other than a  
2 treater, because I object to his qualifications. I think he's  
3 very well qualified, but he's not disclosed as an expert in  
4 this case.

5 MR. BAKER: And, Your Honor, that's the same conversation  
6 that we've had.

7 THE COURT: That's the same objection, noted for the  
8 record. The motion is granted. So ordered.

9 Mr. Baker.

10 BY MR. BAKER:

11 Q How many people in your practice?

12 A About five or six of us, yes.

13 Q And do you work conjunctively with another Ph.D. to  
14 provide mental health services to people on the premises?

15 A Yes.

16 Q And who is that?

17 A Dr. Gamazzo [phonetic], Dr. Johnson, Dr. Craft  
18 [phonetic], who is my psychological assistant.

19 Q Is it true that both you and Dr. Gamazzo provided  
20 services to Enrique Rodriguez?

21 A Yes.

22 Q And is that your file sitting in front of you with  
23 respect to Enrique Rodriguez?

24 A Yes.

25 Q And can you please tell us the first time you saw

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1 Enrique and what the purpose for your examination was?

2 A Enrique was initially referred to us -- or our  
3 office by Dr. MaryAnn Shannon and --

4 Q Would you refer the Judge to a Bates Number, please?

5 THE WITNESS: I don't know this record, Judge. It's  
6 going to be a while to find all those.

7 BY MR. BAKER:

8 Q You're not in a hurry.

9 A Okay.

10 Q Is September 1st of '05 the first time you saw him?

11 A Psychological testing was done on August 31st of  
12 '05, and then September 1st was the clinical interview.

13 Q Would it help you to use your file?

14 A Yes, it would.

15 Q You want to go do that, so you don't get all anxious  
16 on me?

17 A Yes.

18 Q All right. We'll try to find the dates of the  
19 services, so that the Judge and I can follow along. Would  
20 that be all right?

21 A Perfect.

22 Q Okay. When you first saw him, did you give him a  
23 battery of diagnostic tests?

24 A We -- I did not. I did the initial interview with  
25 Enrique, and I -- yes. On 8/31, I gave him the MMPI-2, and

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1 then I did a clinical review. He filled out some  
2 questionnaires, and I -- in my clinical interview, I think  
3 went and cross-validated the information that I had received  
4 with him.

5           So -- and that's the standard of practice is one has  
6 objective data, subjective data, that I debriefed him on the  
7 information just to cross-validate it. Because as we know,  
8 the MMPI has a numerous amount of data, and some of the scales  
9 are valid and some are invalid. So it's important to really  
10 cross-validate some of those test findings with the client.  
11 And that's what I did with it.

12           Q     And what were your findings with respect to the  
13 MMPI, your evaluation, at the time of your first meeting with  
14 Enrique?

15           A     Okay. Well, with everything that we did -- and I  
16 also gave him the Beck Anxiety Inventory and the Beck  
17 Depression Inventory II.

18           Q     And we've been through those. But could briefly  
19 explain to the Judge what the Beck Inventory is with respect  
20 to anxiety and depression are?

21           A     Yes. They're just 21 questions each. And the  
22 measure, just generalized anxiety that a patient would have.  
23 And the same thing with the depression inventory. It'll  
24 measure depression. And the two questions on the Beck  
25 Depression Inventory that are the most important are the ones

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1 that have to do with suicide and with pessimism. And then,  
2 like I said, the MMPI has numerous scales. And I debriefed  
3 him on all of those, as well as validity scales.

4 Q And are certain axes or axes come as a result of  
5 your examination, the MMPI, the Beck Inventory, in terms of  
6 both pain and mood?

7 A Yes. The bible that we use, Judge, if you've seen  
8 this one before, the DSM-IV-TR. It's used by psychologist.  
9 And so, you -- we generally will look at all of the data and  
10 attempt to determine whether or not the data, objective and  
11 subjective, meet diagnostic criteria in this book. And the  
12 two criteria that I thought best met his presenting problems,  
13 what we call a pain disorder due to a medical condition with  
14 psychological factors -- I'll explain what these mean. And  
15 also then a mood disorder --

16 Q Can I interrupt you --

17 A Uh-huh.

18 Q -- for just one second?

19 A Sure.

20 Q I've been told I do that a lot. Are we looking at  
21 the same page now? It's your test. It's your examination,  
22 May 31?

23 A Yes.

24 Q Okay.

25 A And I'm on the impressions part now for the Judge.

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1 Q Sure.

2 MR. BAKER: That's 175, Your Honor.

3 THE COURT: Thank you.

4 MR. BAKER: 175, Counsel.

5 THE WITNESS: There are two diagnoses. As I said, the  
6 pain disorder due to his medical condition with psychological  
7 factors and a mood disorder due to his medical condition with  
8 mixed features of anxiety and depression. So the obvious  
9 question is what do they mean.

10 Okay. And well, a pain disorder due to the medical  
11 condition means that he's been diagnosed with a medical  
12 condition that is -- there's a pain generator. So Dr. Shannon  
13 had evaluated him and found that he --

14 BY MR. BAKER:

15 Q And other doctors?

16 A I'm sorry?

17 Q And other doctors?

18 A And other doctors, yes. And so, his medical  
19 condition was severe enough that it was causing him  
20 psychological issues. So he was having concerns, you know,  
21 fear and anxiety about having a new injury or having an  
22 exacerbation of the current injury. And he was physically  
23 inactive, and he wasn't able to work his job. And he was  
24 having, with the significant other, you know, relationship  
25 difficulties. So, all of these issues relative to his

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1 lifestyle were affected. So the idea is that he has a medical  
2 condition, and he has psychological factors. And --

3 Q Is it -- I'm sorry, go ahead.

4 A And the symptoms that he was producing from our  
5 observations weren't fained or weren't malingered. They  
6 appeared to be, you know, relative -- relevant to his  
7 presenting condition.

8 Now the other diagnosis is the mood disorder due to  
9 his medical condition with mixed features of anxiety and  
10 depression. And what that means is he has feelings of anxiety  
11 and depression secondary to a medical condition, because when  
12 someone has a level of pain, suffering, there's biological  
13 things that occur, you know, in the human brain. And there's  
14 a lot of studies that show that there's less serotonin, for  
15 example. And serotonin is one of the chemicals that mediates  
16 your depression.

17 So you've heard about people being biologically  
18 depressed. That's in many thousands of cases over the years  
19 that I've examined. It's almost -- those two things go  
20 together, pain, depression and anxiety, as the biological  
21 reasons for, as well as the psychological reasons. You're not  
22 able to work anymore. You're not able to have sex with your  
23 significant other. You're not able to, you know, recreate.  
24 You're not able to travel much. You're not able to --  
25 whatever it is you were able to do you're not able to do

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1 anymore.

2           So those were the two best diagnoses that I could  
3 come up with with the data that I had. And then I made some  
4 recommendations for treatment.

5           Q     With respect to Bates Stamp Number 178, there's a  
6 discussion center -- section that the Judge is looking at.

7           A     Yes.

8           Q     And I hate to ask you to read something into the  
9 record, but I'm going to ask you to read something into the  
10 record.

11          A     Okay.

12          Q     Is this what you were trying to describe to us is  
13 the methodology involved in coming up with those diagnostic  
14 axes?

15          A     Basically, yes. I take the objective data, the  
16 subjective data, and begin to attempt -- because there's not  
17 -- there's never a perfect fit, but the best that you can to  
18 put together the data that you have into a diagnosis.

19                   And that's what you see under the discussion there,  
20 Judge, if that's what you have.

21          Q     And maybe I can help you out a little bit. It talks  
22 about, at the very last line, the symptoms are not intentional  
23 produced or fained, as in a factitious disorder, or  
24 malingering, is that right?

25          A     Yes.

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1 Q Now factitious orders [sic] and malingering are also  
2 DSM-TR-III/IV diagnoses, is that correct?

3 A Correct, yes.

4 Q And there is a specific description of both a  
5 malingerer and someone with a factitious disorder that did not  
6 come to you in order to describe Enrique Rodriguez, is that  
7 fair?

8 A Yes.

9 MR. WARD: Object, leading.

10 BY MR. BAKER:

11 Q Well, did you --

12 THE COURT: Well, sustained.

13 MR. BAKER: Sure.

14 BY MR. BAKER:

15 Q Did you consider him to have either a factitious  
16 disorder or malingering?

17 A No, I didn't, because I didn't see malingering.  
18 Because when one -- usually, when I see malingering, it's  
19 usually there's not a pain generator present. You know,  
20 there's -- often times, there is a lack of a pain generator,  
21 and physicians will refer those types of patients to me and  
22 say, you know, we're a little confused here. We don't know  
23 what's wrong with these folk. You know, I mean there's not --  
24 we don't see a big pain generator coming here. So why are  
25 they having pain in excess of what would be expected by the

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1 mechanism of injury?

2 Q And --

3 A And the factitious disorder, that's a disorder  
4 that's diagnosed -- there's an absence of external incentives  
5 for the behavior. So if you have a factitious disorder, it's  
6 really not malingering. It's more subconscious. There's a  
7 subconscious need to be sick.

8 So like in malingering, it would be I'm going to  
9 fake symptoms in order to avoid going into the military, which  
10 in my day was what people did during the Vietnam era. They  
11 would fake mental illness and go to a psychiatrist, and they  
12 would say they're obviously malingering. Or a factitious  
13 disorder is you say you have all these symptoms, but it's some  
14 conscious need to be sick. So there's a difference. And I  
15 didn't see either one.

16 Plus, we had the benefit of seeing Enrique many,  
17 many sessions. And over that time, if somebody is  
18 malingering, factitious, or, you know, out of control, we will  
19 be able to identify that. And we didn't identify it. I mean  
20 he has certain personality characteristics about how he is as  
21 a man and a person, but that's his personality style. That  
22 doesn't mean he's malingering, factitious, or symptom  
23 magnifying. That's just him.

24 Q And is there a relationship between a long duration  
25 of pain and mood disorder and anxiety disorders?

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1           A     Yes.

2           Q     And could you describe to the Judge, does that work  
3 on the same limbically medically and sympathetically mediated  
4 neurotransmitter basis that you just described a little while  
5 ago?

6           A     Yes, because what happens, in the nervous system, we  
7 have what's known as the autonomic nervous system or the  
8 automatic nervous system, and there's two divisions.  
9 Actually, there's three. The one division is called the  
10 sympathetic, or fight or flight.

11                     So if you see a dark shadow as you're going out at  
12 night to get in your car, that dark shadow might look like  
13 it's moving. And it's like all of a sudden, you know, you  
14 have a -- you fright or you fear that somebody might be coming  
15 to attack you. And then what happens, automatically, you --  
16 your pupils dilate. Your hands get sweating. Your breathing  
17 changes. The blood moves from the periphery to the trunk,  
18 because in case you were attacked, the body wants to protect  
19 itself from bleeding in terms of, you know, using extremities.

20                     Versus -- the opposite of that is the  
21 parasympathetic or the relaxation response. It's the  
22 opposite. And then third is we have an enteric response in  
23 the gut. Now pain is definitely correlated with that  
24 sympathetic fight or flight. So that's why the neuro  
25 chemicals that go on in the brain and the rest of the body,

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1 that's why you have that stress response. Stress and pain are  
2 very much coequal because of the fight or flight response.

3 Q Are you --

4 A And there's some research to suggest that pain  
5 patients, when -- one of the ways you can tell a patient  
6 that's in pain is his heart rate might be, you know, elevated.  
7 He might be sweaty and perspiring a lot. He might, you know,  
8 be unable to focus, because there's that lost attentional  
9 capacity.

10 And that's one of the reasons why we use biofeedback  
11 therapy as part of our treatment, because biofeedback therapy,  
12 when the patient is hooked up to the different sensors that we  
13 have, we can help them give feedback relative to increasing  
14 their hand temperature, decreasing their sweat, and decreasing  
15 their muscle tension, all which is sympathetic or fight or  
16 flight developed because of the pain.

17 So that's a -- hopefully, I didn't confuse you, but  
18 that's the technology behind all of this. And that's related  
19 to this diagnosis and what happened to him.

20 Q Are you familiar with something called chronic pain  
21 disorder?

22 A Yes.

23 Q Could you explain to the Judge what a chronic pain  
24 disorder is?

25 A When a person is in chronic pain, we know that

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1 there's characteristic ways of behaving, you know, that  
2 people, generally speaking, they're more prone to muscle  
3 spasm. They're more prone to being bothered, you know, by the  
4 pain generator.

5 In my -- one of my fields, neuro psychology, there's  
6 even research that shows that people in chronic pain have a  
7 rewiring of the front lobes of the brain, which is the brain's  
8 executive. And so, people in chronic have characteristic --

9 Q Would you explain what the executive functions are?

10 A I'm sorry?

11 Q The executive functions.

12 A Yeah. Executive functions are planning, problem  
13 solving, decision making, multitasking, you know, paying  
14 attention, concentrating, planning, organizing, all those  
15 kinds of things, you know, trying to live a more effective  
16 life.

17 Q And if an individual suffering from chronic pain  
18 syndrome also reported -- I don't know how to say it medically  
19 -- feeling a little bit scatter brained, would that be  
20 consistent with the DSM diagnosis of chronic pain syndrome?

21 A Absolutely, yes, it would be.

22 Q Okay. You were speaking to the Judge more about the  
23 neuropathology and the workings of chronic pain syndrome.

24 A Right.

25 Q Have you finished?

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1           A     Yes.

2           Q     Okay.  And is it your opinion that Enrique Rodriguez  
3 suffers from chronic pain syndrome?

4           A     Yes.

5           Q     In fact, by the time he saw you, by the very  
6 definition, he had been in chronic pain just because of the  
7 longetivity [sic] of it, is that right?

8           A     Right, because there's different definitions of  
9 what's chronic.  Some people say after three months pain is  
10 chronic, after six months.  I tend to think that probably  
11 after three to six months, if you're not better by then, then  
12 now it's chronic.  I think now there's beginnings of, like I  
13 said, a rewiring of the neural architecture of the brain.

14           A     There's more of an ease for a person to go into muscle spasms.

15                     That's one of the things that we know too is that  
16 when one is in chronic pain, the tension spasm pain cycle, you  
17 start off with tension.  It could be muscle tension.  It could  
18 be mental tension.  That creates spasm in the body.  And spasm  
19 then creates pain.  Then pain creates more tension.  So it's a  
20 cyclical aspect of what's going on.

21                     And we all have it, you know, because we're all  
22 uptight and tense.  We're tense about something.  And where do  
23 you start, you know, rubbing?  You know, you take your glasses  
24 off and you go oh, man, you know, my neck is sore, my back is  
25 tense, because now we're producing chemicals in our body that

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1 are -- that, you know, cause inflammation. And that  
2 inflammation -- then the more you have that inflammation, the  
3 more difficult that it is to resolve it.

4 Q And you were talking to me about your handy bible,  
5 the DSM.

6 A Yes.

7 Q Does the DSM recognize that people suffering from  
8 chronic pain and anxiety and mood disorders have emotional  
9 ability?

10 A Yes.

11 Q Okay. Into tears at times?

12 A Sure.

13 Q They have mood swings. Is that fair to say?

14 A Yes.

15 Q And just kind of act like they're not feeling good?

16 A Yes.

17 Q And are these all things that were recognized and  
18 determined at your office that were true with respect to  
19 Enrique Rodriguez?

20 A Yes.

21 Q And is that consistent with somebody suffering from  
22 a physically trauma caused mood disorder?

23 A Yes.

24 Q And a physical trauma caused anxiety disorder?

25 A Yes.

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1 Q And chronic pain syndrome?

2 A Yes.

3 Q And is it your opinion to a reasonable degree of  
4 professional probability that each of those three different  
5 disorders are directly associated with the trauma sustained by  
6 Enrique Rodriguez at the Palms Hotel in November of 2004?

7 A Yes.

8 Q And is that your opinion to a reasonable degree of  
9 professional probability?

10 A Yes.

11 Q Now Enrique saw you again -- and I'm not going to  
12 know where to find this in your chart.

13 MR. BAKER: But, Your Honor, if I could approach?

14 THE COURT: Sure, why not?

15 MR. BAKER: Thank you. It's Mortillaro 110.

16 BY MR. BAKER:

17 Q Now you have a very thorough -- okay. That'd be  
18 good.

19 MR. BAKER: What's on page 110 is already in evidence.  
20 That was put through Enrique.

21 BY MR. BAKER:

22 Q Are you there?

23 A This page? What page do you have?

24 Q Yeah, I think that that's it.

25 MR. WARD: This is page 110?

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1 MR. BAKER: Yeah.

2 BY MR. BAKER:

3 Q And at the top of that page, does it say medical  
4 issues?

5 A No.

6 Q All right. I'm just going to show you what I have  
7 as 110. Is this part of the questionnaire that Enrique filled  
8 out at your office?

9 A Yes. Let me see what's at the bottom.

10 Q It says opinions about diagnoses. What page --

11 A 105.

12 Q 105 is the beginning of this particular  
13 questionnaire, is that correct?

14 A Yes.

15 Q And it says opinion about diagnoses?

16 A Yes.

17 Q And you see where Enrique has checked off I agree  
18 with my doctor's diagnosis and medical diagnostic test and our  
19 consultations of that -- that I've received, but I think the  
20 following medical tests and consultations should be provided.  
21 And at that section he marks off neck and back, complete test,  
22 head test, and hand test, is --

23 A Yes.

24 Q -- that right?

25 A Correct.

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15 App. 2918

1 MR. WARD: Is that -- is there a date on there?

2 MR. BAKER: It's September 1st of '05.

3 MR. WARD: Ah, September 1st. Thank you.

4 BY MR. BAKER:

5 Q Okay. Why do you ask such information?

6 A Well, I want to know what a patient believes about  
7 their diagnosis because if a patient doesn't accept their  
8 diagnosis, then that has to be reported to the doctor. That  
9 has to be thoroughly discussed with the physician. It's like  
10 if you and I or anybody goes to a doctor and we don't know the  
11 diagnosis, and they're treating us, I mean we're confused.  
12 We're very confused, you know, like what's going on here. So  
13 that's why it was important to know if he agrees or disagrees  
14 with the doctor, you know. And also, does he know or  
15 understand his doctor's diagnosis.

16 I do a lot of pre-surgical psychological evaluations  
17 for physicians that are not only going to do major surgery,  
18 but also spinal cord stimulator and fusion pump, and so forth.  
19 And that's remarkable to me that how many of those patients  
20 don't know what's wrong with them. They have no clue. Like  
21 why are you here? I don't know. My doctor sent me here.  
22 What's wrong with you? Well, I'm really not sure. And that's  
23 a red flag.

24 Q Did Enrique seem pretty sure of why he was there?

25 A Yes, he knew.

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1 Q And this was for diagnostic clearance for surgery  
2 that Dr. Shannon was to perform?

3 A Yes.

4 Q And was the reason that he was sent to you to see  
5 that there weren't comorbidity psychologically that would  
6 contraindicate him having that surgery?

7 A Yes.

8 Q And did you clear him?

9 A Yes.

10 Q And was it true at this time Enrique was saying that  
11 he thinks in September of '05, that more attention needs to be  
12 paid to his pain complaints in his back and his head and other  
13 areas of the spine?

14 A Yes.

15 Q Now did you still have an opinion whether Enrique  
16 was suffering from chronic pain syndrome at this time?

17 A Yes, he still had it.

18 Q And do you still have an opinion whether there was a  
19 mood disorder at this time?

20 A Yes.

21 Q And do you still have an opinion whether he was  
22 suffering from an anxiety disorder at this time?

23 A Well, the anxiety and depression secondary to the  
24 medical condition.

25 Q Sure. And you've treated patients with a

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1 constellation of injuries prior to Enrique and since that  
2 time, is that right?

3 A Yes.

4 And the important thing too, Judge, to remember is  
5 that even though this person may have these diagnoses, when  
6 one is clearing somebody for a surgery, you can still have  
7 these diagnosis. But if they're in treatment and if they're  
8 being followed by somebody, the protocol is it is okay for  
9 them to at least have a trial stimulator. And that's what I  
10 was clearing him for, the trial. And then we could reevaluate  
11 with the physician relative to the permanence of the  
12 placement.

13 But we also had a lot of treatment already done with  
14 Enrique, which is unusual when we get these referrals. Often  
15 times we'll get a referral, and we've never seen the patient  
16 before. So we have no clue about how they typically are. We  
17 had the opportunity to evaluate him and see him for a number  
18 of sessions prior to this particular clearance. So it -- I  
19 was able to, with a greater degree of psychological  
20 probability, clear him for the trial stimulator even though he  
21 still had some of these symptoms operative.

22 Q And --

23 A I have to make that distinction, because, typically,  
24 if I hadn't seen him, didn't know him, I might not have  
25 cleared him, like hey, he needs some help. But we've been

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1 helping him, so we know what his strengths and weaknesses are.  
2 It is a trial, and that's part of the protocol. If you have a  
3 trial, you know, even for humanitarian reasons, see if it  
4 works for them, because at the point that he was coming to us,  
5 and you know, other surgeries and trial stimulator, and so  
6 forth, we want to make sure that they're ready to go as long  
7 as they're being followed.

8 Q And still, at this point, you've never seen any  
9 evidence of malingering?

10 A No.

11 Q Or of a factitious disorder?

12 A No.

13 Q Now you've treated, as we've talked about, a lot of  
14 people in chronic pain with a constellation of injuries, is  
15 that right?

16 A Yes, I have.

17 Q Have you -- what -- have you ever seen or  
18 experienced or observed these individuals suffering from mood  
19 disorder, panic disorder, and particularly chronic pain,  
20 focusing primarily cause of pain?

21 A All the time.

22 Q Tell the Judge something about that.

23 A I mean when you're in a high level of pain, pain is  
24 overwhelming, especially if you're unable to work your job.  
25 And like I said before, if you're able to be intimate, if

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1 you're able to socialize, if you're unable to travel, if  
2 you're unable to, you know, live the kind of life that you  
3 wanted to live, you know, I always say to my clients that I  
4 mean this is probably one of the biggest stressors you're  
5 going to have is this chronic pain, especially with back pain.

6 It's epidemic in our country. There's so many  
7 instances of people, you know, with chronic pain and really  
8 don't know how to cope with it. And it may go away for a  
9 while, but then later on, as one gets older, you know, then  
10 one might be subject to arthritic, you know, type conditions  
11 because of what you've been through. So it's a pervasive type  
12 of problem.

13 Q Are you --

14 A So it's not unusual to have all of the psychological  
15 issues.

16 Q Are you familiar with a neurologically mediated pain  
17 response called masking?

18 A Yes.

19 Q Would you explain to the Judge how that relates to  
20 primarily focusing on your area of worse pain and only  
21 secondarily focusing on other areas?

22 A What happens with that concept, as I understand it  
23 -- I'm not a physician -- but from my understanding as a  
24 psychologist and as a neuropsychologist, is that in the spinal  
25 cord, there are different cells that are selected to convey

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1 the pain response.

2 MR. WARD: I object.

3 THE WITNESS: But with chronic --

4 MR. WARD: I believe this calls for medical testimony.

5 And while this gentleman is very well qualified as a

6 neuropsychologist, he's not an M.D.

7 BY MR. BAKER:

8 Q As part of your education, do you study the nervous  
9 system?

10 A Yes.

11 Q Do you study the spinal cord?

12 A Yes.

13 Q Do you study the relationship between the central  
14 and the peripheral nervous system?

15 A Yes.

16 Q Have you studied the neurophysiologic responses of  
17 both the brain and the spinal cord to pain?

18 A Yes.

19 Q And is that true with respect to the peripheral  
20 nervous system as well?

21 A Yes.

22 Q Have you been educated with respect to  
23 neurotransmitters?

24 A Yes.

25 Q Have you been educated with respect neuroinhibitors?

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15 App. 2924

1 A Yes.

2 Q Have you treated a constellation of patients  
3 suffering from chronic pain who have evidenced masking?

4 A Yes.

5 MR. BAKER: Your Honor.

6 MR. WARD: Same objection.

7 THE COURT: I think he's laid the proper foundation.  
8 Overruled.

9 You may continue.

10 THE WITNESS: Okay. So in terms of the different  
11 neurotransmitters that are in the spinal column of each  
12 segment to transmit the pain stimuli, okay, because there's  
13 different tracks going up and different tracks going down --  
14 and what happens is there's also not only pain receptors.  
15 There's also receptors for touch and for temperature.

16 And for a reason that's unknown, according to the  
17 research, is the pain receptors recruit the receptors for  
18 touch and temperature. So now you have a much greater array  
19 of cells that are dedicated going up and down, you know, the  
20 spinal column for transmitting to the brain. And the chronic  
21 pain, that part of the chronic pain mediates or is synapsis in  
22 the emotional center of the brain, where acute pain goes  
23 directly into the part of the brain that has to do with the  
24 sensation. But chronic pain, no, it takes a little detour.  
25 So you have an emotional response.

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1 Q Is that the limbic system?

2 A Yes, the limbic system is part of it, but the  
3 thalamus, hypothalamus, and so forth in the brain. So there's  
4 a major hormonal aspect that goes on. And so, this particular  
5 concept is a neurochemical response in which certain  
6 sensations may be masked or inhibited, like the touch part or  
7 the temperature.

8 That's why with chronic pain patients, often times  
9 we'll ask them what does your pain feel like. Is it burning?  
10 Is it slicing? Is it -- you know, is it throbbing? Because  
11 it gives us an idea about whether or not this certain pain  
12 modality is what they're feeling and if, in point of fact, it  
13 is chronic.

14 So that's what we're really working for is that we  
15 understand that certain sensations have been inhibited and  
16 other sensations have been, you know, say, like a turning up  
17 the volume on your stereo. So you're having more cells to go  
18 to the brain to have a pain response. And then as the attempt  
19 to cope -- you know, that's why hypnosis and biofeedback and  
20 cognitive behavioral therapy are used in the sense to overcome  
21 or mask over some of those transmissions. It's a very  
22 complicated neurophysiological process.

23 Q What type of treatment was Enrique Rodriguez  
24 receiving at your office?

25 A He received cognitive behavioral therapy and

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1 biofeedback therapy. Biofeedback therapy, as I said before,  
2 is the use of equipment, scientifically developed equipment,  
3 to measure how we use the three aspects. We do your  
4 peripheral hand temperature, because people that have cold  
5 hands are in sympathetic fight or flight, under stress.

6 But people with Raynaud's Syndrome, with the very cold  
7 hands, you know, they'll report significant pain, because  
8 there's not a big blood flow supply. So often times with  
9 chronic pain patients, they have very cold or cooler type  
10 hands. They don't have good peripheral circulation. So we  
11 use that.

12 We also use an EEG. An EEG is a surface electrode  
13 that can measure muscle activity, whether or not that muscle  
14 is in spasm or whether it's calm and relaxed. And the third  
15 one we use is a sweat gland, which is part of a polygraph.  
16 You know, it's the skin conductance level. So if your hands  
17 are sweaty, that's sympathetic activation. If your hands are  
18 dry, then it means you're more in the parasympathetic.

19 So knowing what the measurements are, if you have to  
20 low hand temperature, the goal is to increase your hand  
21 temperature, so you now get into parasympathetic relaxation.  
22 If your EEG is high, which means that you're in spasm, the  
23 goal is to lower that. And if your skin conductance level is  
24 high, which means you're sweating a lot, showing you're  
25 anxious, depressed, in pain, the goal is to decrease that. So

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1 that's what we do in biofeedback.

2 Now cognitive behavioral therapy is one of the best  
3 used modalities with chronic pain. And what cognitive  
4 behavioral therapy does, it basically -- if you were to think  
5 of the word benefits, B-E-F-I-T-S. And the B stands for  
6 behavior. The E stands for your emotions. The F stands for  
7 your feelings. The I stands for what -- your imagery, the T  
8 for thoughts, and the S for speech.

9 So the key here is what you imagine, right brain,  
10 what you think and say out loud, left brain. Basically,  
11 you're -- describing what the imagery is creates an emotion.  
12 Now that emotion creates a feeling. And that feeling  
13 motivates a behavior to do something or not do anything.

14 So we teach our patients to learn to control what  
15 they imagine, what they think, and what they say out loud,  
16 because that creates your emotions. It's like, you know, the  
17 law of attraction. You have an attraction. So what you  
18 think, what you imagine, what you say, that's going to either  
19 make you optimistic or pessimistic. So we attempt to teach  
20 the patients how to have greater self-control, self-mastery.  
21 That's the goal. So that's why we use both of those  
22 modalities.

23 Q And are both of those modalities accepted in the  
24 neuropsychological community with respect to people suffering  
25 from the disorder?

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1           A     Well, yeah. These two modalities have been used.  
2     In fact, when you look at different national guidelines,  
3     they're both -- both of those modalities, cognitive behavioral  
4     therapy and biofeedback therapy, are recommended in chronic  
5     pain, you know, programs and chronic pain treatment. They're  
6     recommended as of choice.

7           Q     And also for anxiety disorders which are caused by a  
8     traumatic event --

9           A     Yes.

10          Q     -- a physically traumatic event?

11          A     Yes.

12          Q     Okay. And those are your opinions to a reasonable  
13     degree of professional probability?

14          A     Yes.

15          Q     And still, by this time, you've never suspected that  
16     Enrique was a malingerer, is that true?

17          A     No.

18          Q     Never suggested that or suspected that there was a  
19     factitious disorder that was occurring?

20          A     No.

21          Q     What was your suspicion at this time?

22          A     I'm sorry?

23          Q     What was your diagnosis at this time, exactly what  
24     we've been talking about?

25          A     Yes.

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1 Q Okay. Now you had a visit with Enrique, again,  
2 12/18/07.

3 MR. BAKER: And that would be, for the Court, Bates  
4 Number 11. If I can approach the witness, Your Honor.

5 THE COURT: Sure.

6 THE WITNESS: Okay. I'll just get mine here, so I can  
7 find it.

8 [Pause]

9 THE WITNESS: I'll just use mine. Okay. 12/18/07 is  
10 when we did the testing, and 12/19 we did the report. Okay.

11 BY MR. BAKER:

12 Q And was that testing associated with receiving  
13 surgical clearance for a temporary spinal cord stimulator?

14 A I believe so, yes.

15 Q And are you aware before this time he received one  
16 set of sympathetic lumbar injections in California, by  
17 Dr. Miller, that resulted in an alleviation of his knee and  
18 back pain?

19 A Yes, that was my understanding. Yes.

20 Q And is it your understanding that he received a  
21 second injection about a month later, which also resulted in a  
22 resolution of his sympathetically mediated knee pain?

23 A Yes.

24 Q And are you of the understanding that Dr. Miller,  
25 based upon findings of hyperesthesia, allodynia, modeling

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1 temperature changes, all of the sympathetic changes that  
2 you've discussed, gave a diagnosis of Reflex Sympathetic  
3 Dystrophy?

4 MR. WARD: Object, leading.

5 MR. BAKER: Are you aware?

6 THE COURT: Overruled.

7 THE WITNESS: Yes.

8 BY MR. BAKER:

9 Q Okay. And are you aware that prior -- about two  
10 weeks before seeing you, Enrique had received a lumbar  
11 sympathetic injection from Dr. Schifini which did not result  
12 in any diminution of his reflex sympathetically mediated pain?

13 A Yes.

14 Q Okay. And then he came to you for clearance of the  
15 spine cord stimulator, is that right?

16 A I believe so, yes.

17 Q And you gave him a battery of test, again, the  
18 Becks, is that right?

19 A Yes.

20 Q And that was consistent with everything that you had  
21 seen throughout your treatment of Enrique Rodriguez?

22 A Yes.

23 Q And you gave him two Becks, one for anxiety and one  
24 for depression, is that right?

25 A Correct.

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1 Q And you also gave a brief battery for health  
2 improvement, the BBHI 2?

3 A Yes.

4 Q Could you explain to the Judge what that particular  
5 test is?

6 A Yes.

7 I've been using, Judge, as most pain management  
8 psychologists, for years, the MMPI-2. And the MMPI-2, I don't  
9 know if you've ever taken it, it's a long test, 567 questions,  
10 true or false. And it's not normed on pain patients. But  
11 certainly, in my training, it's been used with pain patients.

12 But it's very aversive, because it takes a long  
13 time. You sit a long time to take it. And although you have  
14 respect for some of the findings on it, as I said before, I  
15 find that some of the scales on this test are wrong and  
16 erroneous. And so I don't use it.

17 So I was able to discover there were two other  
18 tests, one called the BBHI 2 and the other one was called the  
19 P-3. Both of those tests were normed on community sample  
20 patients -- a community sample that did not have pain, plus  
21 another sample that was in pain. So now you have pain  
22 patients compare to people that are not in pain.

23 And so, research was done with the norming, and the  
24 test publishers, when they publish these tests, say that these  
25 tests are appropriate for use with the pain patients,

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1 pre-surgical screenings, and so forth. And as I said, they're  
2 very short. They don't take, you know, an hour-and-a-half to  
3 take. I think the P-3 you can take in maybe 10, 15 minutes,  
4 and probably the same thing for the Brief Battery for Health  
5 Improvement.

6 And I find that I get good data, because what I'm  
7 looking for, to screen out someone, Judge, is do they have  
8 significant depression, significant anxiety, and that ugly  
9 word we don't like that we screen people out, is called  
10 somatization.

11 Well, somatization in the DSM-IV-2 -- or TR is  
12 different than the somatization on this test. The  
13 somatization on the test has to do with concerns about your  
14 body not the diagnosis of somatization, which indicates that  
15 there probably isn't a pain generator and you have all these  
16 different symptoms in different body areas.

17 So that's why I used these tests, because, also,  
18 they give me a look at whether or not the patient is engaging  
19 in -- possibly engaging in histrionic manner, there's  
20 secondary gain, if it's a cry for help. I get a chance to  
21 rule some of those things in or out, and that's why I've  
22 reverted now to not using the MMPI anymore and using these  
23 tests as part of my screening, because the patients love me  
24 for and they don't have to spend a long time answering all  
25 these questions, many of which have no relevance to the

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1 surgical decision.

2 Q And with respect to the P-3, was Enrique determined  
3 to be in the average range for somatization and depression?

4 A Take a look.

5 Q I could read to you what it says. His depression  
6 and somatization scores are in the average range for pain  
7 patients and unlikely to interfere significantly with his  
8 progress and treatment.

9 A Right.

10 Q Was that your determination?

11 A Yeah, that was what came out. So depression  
12 somatization scores, average for pain patients. The anxiety  
13 scale was minimal and unlikely to interfere with treatment.

14 Q Why is it important that it's normed for a  
15 population of pain patients?

16 A Well, you're comparing apples with apples not apples  
17 with oranges. It's just like with the MMPI-II test, as I said  
18 about some of these questions. Like the questions on the  
19 hypochondriasi scale on the MMPI, most of those have to do  
20 with gastrointestinal upset. People can have gastrointestinal  
21 upset not because they have -- GI upset because there's  
22 something wrong with them, but it could be medication side  
23 effects, because people are always complaining of GI upset and  
24 problems with eliminating and voiding, you know, upset stomach  
25 and nausea, vomiting, and so forth.

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1           So as I said, these tests are better geared to  
2 answer the questions that I need about somatization and about  
3 depression and anxiety. And then I can ask a patient about  
4 schizophrenia, if they're hearing voices or seeing visions.  
5 And usually, people that hear voices and see visions, there's  
6 a history of that in the record. And you know, psychiatrists  
7 diagnose that all the time without reverting to MMPI tests and  
8 those kinds of tests. So by using the clinical interview and  
9 these tests, and actually focusing in on what their  
10 expectations are for surgery, you get I think much better  
11 data.

12           And there's a psychologist named Block that  
13 developed a basic protocol for a pre-surgical screen, and  
14 that's -- I tend to follow Block's methodology. So it  
15 helps --

16           Q     If it was suggested that the results of Enrique's  
17 P-3 exam demonstrated somatization of the type that you would  
18 find in a factitious disorder, would that be right?

19           A     I'm sorry. Say it again.

20           Q     If it was suggested that the somatization that he --  
21 that was in the average range that you found in the P-3 test  
22 was the type of somatization that you had in a factitious  
23 disorder --

24           A     Well, it wouldn't be in a factitious disorder. It  
25 would be in more of what they call a somatization disorder.

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1 Q Yeah.

2 A Yeah.

3 Q It's not saying that he has a somatization disorder,  
4 is it?

5 A Right. It's not saying -- no, because as I said,  
6 those are different.

7 Q How are they different?

8 A The DSM will tell you what the criteria is for  
9 somatization disorder versus the P-3 and others. It's more  
10 about your concern about your pain and your suffering, you  
11 know, and somatic concern versus really not having the pain  
12 generator. And we know he has the pain generator. He's been  
13 treated for it.

14 Q And that's your opinion to a reasonable degree of  
15 neuropsychological probability?

16 A Yes.

17 Q Now let's talk about the BBHI 2.

18 A Okay.

19 Q What is it and what did it show in this instance?

20 A Okay. This is what they -- the BBHI 2, there's a  
21 bigger test called the Battery for Health Improvement. It's  
22 longer --

23 Q This is the Brief Battery, isn't it?

24 A This is the Brief Battery, because, again, I get the  
25 same data, what I need, from the Brief Battery. And we get

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1 computer printouts from both the P-3 and the BBHI 2 that the  
2 authors of those tests have developed.

3 This is an interesting test, because it has a number  
4 of different characteristics that are useful for us when we're  
5 attempting to determine whether or not the client, you know,  
6 has issues or not. It gives us what they call critical items,  
7 and then it gives us defensiveness scale. Then it allows us  
8 to look at their body complaints, pain complaints, functional  
9 complaints. And functional means being able to move. And  
10 then about depression and anxiety.

11 One of the things I like about the defensiveness  
12 scale --

13 Q What is that?

14 A This defensiveness scale, it -- whether or not the  
15 person was over -- highly defensive or average defensiveness  
16 or low defensiveness. Now, typically, in a pain patient,  
17 you're going to see a lowering of defense, because as the  
18 computer printout says, his extreme lowering of defenses could  
19 be seen as part of a desperate cry for help, an exaggeration  
20 of symptoms for secondary gain, or histrionic manner of  
21 complaining. And then it goes on to say this strong bias  
22 raises questions about the credibility of the patient's  
23 self-report, which may be inflated. Now if psychosocial risk  
24 factors are present, the possibility that these difficulties  
25 are associated with symptom magnification could be -- should

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1 be considered.

2 So as a professional, it allows me to look at these  
3 possibilities on a rule out basis, because one does not take a  
4 characterization from a test and say this is the absolute  
5 gospel unless you know your patient, because there's more than  
6 just the testing data. There's observations. And we've had a  
7 lot of observations about Enrique, because he was working with  
8 us as a patient. We also know that he -- his responses on  
9 clinical questionnaires and being able to, you know,  
10 understand his medical condition.

11 So my thought was as I did this assessment, I did  
12 not see it as an exaggeration of symptoms for secondary gain,  
13 because from my understanding, he's had a number of surgeries,  
14 is going to need more surgeries at the time, or is being  
15 worked up by doctors. So he wasn't -- I didn't think it was  
16 secondary gain.

17 Well, could it be a desperate cry for help? Well,  
18 yes. I think that Enrique has asked for help. But because of  
19 fiscal constraints to pay for treatment and so forth, that has  
20 not been what's coming for him. So that's been a real sense  
21 of frustration for him.

22 And then they talk about a histrionic manner of  
23 complaining. Well, he certainly complains, but I don't see it  
24 as being histrionic, because somebody that's histrionic is  
25 somebody that probably doesn't have a lot of things wrong with

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1 them and would tend to complain. Well, his complaints were I  
2 have all these problems. It's called delayed recovery. It's  
3 taking forever to get me the right treatment. And it's my  
4 understanding that he still I don't think has had, you know,  
5 the permanent implantation of the spinal cord stimulator,  
6 which is really problematic, because he's had to suffer more.  
7 So my sense was, at the time, that it wasn't histrionic. I  
8 didn't see secondary gain. It was a cry for help.

9 Q And that's in quotations where they speak about the  
10 extreme lowering of defenses could be seen as a desperate cry  
11 for help. Desperate cry for help is the first thing mention,  
12 is that fair to say?

13 A Yes.

14 Q And you were aware by this time Enrique had two knee  
15 surgeries, is that right?

16 A I believe so, yes. Uh-huh.

17 Q Had two sympathetic lumbar blocks in California that  
18 helped, is that right?

19 A Yes.

20 Q And are you aware that he had one sympathetic lumbar  
21 block just two weeks before he came to see you that didn't  
22 stop the burning pain he was complaining about?

23 A Right.

24 Q Is this the type of person, from a  
25 neuropsychological perspective, you would expect to be

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1 uttering and issuing a desperate cry for help?

2 A Yes.

3 Q And is that your opinion to a reasonable degree of  
4 neuropsychological probability?

5 A Yes.

6 Q Now is what's contained in Exhibit Number 51 your  
7 office bills and records associated with your care and  
8 treatment of Enrique Rodriguez at your facility? It's right  
9 there.

10 A It's this here? If this is the last -- whatever is,  
11 I'm sure it is. Yes.

12 Q Was the treat -- let me ask you a question before --

13 A There it is, yes.

14 Q -- I ask you this. If it was suggested by a defense  
15 expert on the stand that you diagnosed Enrique Rodriguez in  
16 either histrionic or having second gain motives, how would you  
17 respond to that?

18 A I think it's ridiculous. I diagnosed him, as I  
19 said, more of the cry for help. It wasn't secondary gain, and  
20 it wasn't histrionic.

21 Q And was your care and treatment rendered to Enrique  
22 Rodriguez, as evidenced in Exhibit 51, reasonable, necessary,  
23 and caused by the traumatic event at the Palms Hotel and the  
24 result in desperate cry for help occurring in November of  
25 2004?

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1 A Yes.

2 Q And is that your opinion to reasonable degree of  
3 professional probability?

4 A Yes.

5 Q And could you tell the Court, please, what your  
6 billing amount was for the services rendered to Enrique  
7 Rodriguez?

8 Judge, I put down here 19,692, but I believe this  
9 billing stopped at 6/11 of '08. So I think that there's -- I  
10 think -- the last time I looked at it, I think it was closer  
11 to 23,000. I don't know exactly what it was, so this would be  
12 an error.

13 [Counsel Confer]

14 THE WITNESS: We certainly can get that for the Court.

15 BY MR. BAKER:

16 Q Well, I'm seeing a bill of \$23,000. So --

17 A You have it there? Because I have it here in my  
18 file, Mr. Baker.

19 Q If your treatment was in -- you have it in your  
20 file?

21 A Yes.

22 Q Would you read the amount of that treatment into the  
23 record?

24 A Yes, \$23,377.

25 Q And was that billing reasonable, necessary, and

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1 causally related to the traumatic event occurring at the Palms  
2 Hotel in November 2004?

3 A Yes.

4 Q And that's your opinion to a reasonable degree of  
5 professional probability?

6 A Yes.

7 MR. BAKER: Move to admit 51, Your Honor.

8 THE COURT: Any objection?

9 MR. WARD: No, Your Honor.

10 THE COURT: 51 is admitted.

11 [Plaintiff's Exhibit 51 Received]

12 MR. BAKER: I'll pass the witness, Your Honor.

13 THE COURT: Very well.

14 BY MR. BAKER:

15 Q And have all the opinions that you've given today  
16 been to a reasonable degree of professional probability?

17 A Yes.

18 MR. BAKER: Every time I turn around, he's looking at me,  
19 Your Honor.

20 THE COURT: I saw that.

21 MR. CARDENAS: It's my one job.

22 THE COURT: Mr. Ward, whenever you're ready.

23 MR. WARD: Thank you, Your Honor.

24 ///

25 ///

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## CROSS-EXAMINATION

1  
2 BY MR. WARD:

3 Q Doctor, when did you give the BBHI?

4 A 12/18 of 2007.

5 Q Of 2007?

6 A Yes, sir.

7 Q And what were the reported findings?

8 A You need to go through all those, Mr. Ward?

9 Q Yes.

10 A Okay. Just on this test?

11 Q On that test?

12 A Okay. I've already told the Judge what the  
13 defensiveness scale was. Do you want me to repeat that?

14 Q Sure.

15 A Okay.

16 THE WITNESS: Okay. Judge, again, the defensiveness  
17 scale is extremely low, extreme lowering of defenses --

18 BY MR. WARD:

19 Q What was the --

20 A I'm sorry.

21 Q -- defensiveness scale?

22 A What do you mean what was it?

23 Q Well, does the report say extremely low?

24 A That's what it says, Mr. Ward.

25 Q It says extremely low?

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15 App. 2943

1 A Yes.

2 Q Okay.

3 MR. WARD: Do we have a page?

4 MR. BAKER: 12.

5 MR. WARD: Page 12?

6 THE WITNESS: It's this page here, Judge.

7 THE COURT: Thank you.

8 [Pause]

9 BY MR. WARD:

10 Q Okay. And it says the computer -- the computerized  
11 interpretation states this extreme lowering of defenses could  
12 be seen as part of a desperate cry for help, exaggeration of  
13 symptoms for secondary gain, or histrionic manner of  
14 complaint, is that correct?

15 A Yes.

16 Q And it says this strong bias raises questions about  
17 the patient's self-reports, which may be inflated, is that  
18 correct?

19 A No. You said this strong bias raises questions  
20 about the credibility -- you left out credibility -- of the  
21 patient's self-reports, which may be inflated.

22 Q Okay. I thought I read that. But if I didn't, let  
23 me read it again.

24 A Okay.

25 Q This strong bias --

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1 [Coughing]

2 MR. BAKER: Excuse me, I'm sorry. That one hurt.

3 MR. WARD: Tell me when to stop.

4 MR. BAKER: I think I'm okay. Sorry. That was --

5 BY MR. WARD:

6 Q This strong bias raises questions about the  
7 credibility of the patient's self-reports, which may be  
8 inflated, correct?

9 A Yes.

10 Q Okay. So the scoring on the tests says that, number  
11 one, there can be a desperate cry of help, correct?

12 A Yes.

13 Q Number two, it could be an indication of  
14 exaggeration of symptoms for secondary gain, is that correct?

15 A Correct.

16 Q What is secondary gain?

17 A Secondary gain means that if you, like, have an  
18 accident, and there's a chance to receiving remuneration for  
19 the accident, there may be a tendency to fake symptoms, or if  
20 they're real symptoms, to exaggerate the real symptoms in an  
21 attempt to gain financial remuneration for it.

22 Q Okay. Well, secondary gain is actually more than  
23 that.

24 A Well, it could be -- yeah, I just think you're using  
25 -- it also could be a way to avoid doing housework, for

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1 example, avoid having sex with your spouse, avoid having to  
2 work. It could be a lot of different things. You're using  
3 the injury, fabricating the serious of the injury in order to  
4 get something or to avoid something.

5 Q And secondary gain can even include attention, can't  
6 it?

7 A Sure.

8 Q All kinds of -- the patient gets all kinds of  
9 doctors paying a lot of attention to him, lawyers and all  
10 kinds of people paying a lot of attention.

11 A It's possible, yeah, sure.

12 Q People in one's family has a lot of sympathy for the  
13 person and pays a lot more attention to him.

14 A Yes.

15 Q And it's a great opportunity to have an excuse when  
16 your friend calls and asks you if you'll help move him on the  
17 weekend.

18 A Yes.

19 Q Or essentially, to not do just about anything that  
20 you don't want to do.

21 A Okay, yes.

22 Q Okay. Now the exaggeration of symptoms, did you  
23 ever see any indication, in the period of time that you dealt  
24 with Mr. Rodriguez, that he was exaggerating his symptoms?

25 A I'm not aware that we ever observed that. As I

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1 stated before, I thought it was a cry for help, and I think  
2 that he had legitimate concerns. I don't want to call it  
3 complaining, but I want to call it -- he's an expressive man.  
4 And in his expressiveness, you know, he's frustrated, because  
5 he's living in California, trying to get treatment in  
6 California, coming to Nevada, trying to get treatment here,  
7 trying to get this thing resolved, so he can feel better and  
8 go back to his previous lifestyle and to do whatever he was  
9 doing ahead of time.

10 Q And --

11 A So his lifestyle was disrupted.

12 Q And how many times did you actually see  
13 Mr. Rodriguez?

14 A I myself, not that many times. But Dr. Gamazzo, who  
15 is my trusted assistant who has worked for me for years, and  
16 we weekly staff our cases, saw him for the most part.

17 Q But you personally only saw him a couple of times,  
18 is that correct?

19 A Correct.

20 Q Okay. And now, you're aware that the original  
21 referral to you was from Dr. Shannon.

22 A Correct.

23 Q And you're aware that Dr. Shannon performed surgery  
24 on Mr. Rodriguez.

25 A Yes.

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1 Q And you're aware that in spite of the surgery, that  
2 Mr. Rodriguez had complaints after the surgery just as much as  
3 he had before, isn't that true?

4 A Yes.

5 Q And you're aware, I take it, that Dr. Shannon  
6 couldn't figure out why he was having so much complaints of  
7 pain about his condition.

8 A Yes.

9 Q Okay. And you're aware that Dr. Shannon, as a  
10 result of that, conducted an MRI with contrast.

11 A I don't recall that, but I'll accept that as being  
12 true.

13 Q Okay. And you're aware that when she did that, she  
14 couldn't find anything wrong, correct?

15 A Was that before or after the surgery. I can't --

16 Q That was after the surgery.

17 A After the surgery, no.

18 Q You're not aware of that?

19 A No.

20 Q Okay. And so, you had no awareness at all, I take  
21 it, that after Dr. Shannon's surgery, that Mr. Rodriguez  
22 continued to complain of pain of the same level, and in fact,  
23 in spite of Dr. Shannon's efforts, that when he left her care,  
24 that he said that she hadn't helped him at all?

25 A I think he had mentioned that to Dr. Gamazzo, yes.

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1 Q Okay. And you're aware -- I take it you're aware  
2 that Dr. Shannon said she couldn't figure out why he was  
3 having such complaints.

4 A And that happens when a doctor does a surgery. As  
5 we say, it could be technically perfect, but the patient  
6 continues to manifest pain. That's not unusual.

7 Q Well, is that --

8 A I see that a lot.

9 Q Is that true that you're aware of that, that  
10 Dr. Shannon couldn't find any reason?

11 A Not -- I don't think I could say that right now. At  
12 the time -- I think now I could say it, but at the time, I  
13 don't think I could say it.

14 Q Okay. But you don't think that that raises the  
15 prospect of an exaggeration of symptoms?

16 A Yes, but that also raises a prospect of other  
17 explanations.

18 Q Okay. And now you're aware that following the work  
19 with Dr. Shannon, that Mr. Rodriguez went to another doctor  
20 and had, yet, another knee surgery.

21 A Yes.

22 Q And you're aware that that doctor felt that he had  
23 taken care of all of the problems?

24 A Yes.

25 Q And yet, that didn't help Mr. Rodriguez either?

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1 A No, it didn't.

2 Q And he continued to complain of pain after that at  
3 the same rate that he had complained of pain before?

4 A Yes.

5 Q And you didn't see that as an indication of  
6 potential exaggeration of symptoms?

7 A It's possible that it could potential, but I've  
8 dealt with this in my professional career many, many times,  
9 where people could have multiple surgeries, and sometimes  
10 surgery just doesn't work.

11 Q Okay. But the doctors in this instance thought that  
12 they didn't see any reason why the pain continued. Are you  
13 aware of that?

14 MR. BAKER: I'd object to the characterization of  
15 doctors. It was Dr. Shannon.

16 THE COURT: All right.

17 MR. BAKER: And the Court knows what that testimony is.

18 THE COURT: Right. I'd ask you to rephrase, please,  
19 Mr. Ward.

20 MR. WARD: Yeah. It was Dr. Shannon and Dr. Tauber. It  
21 was two doctors.

22 MR. BAKER: Dr. Tauber testified here, Your Honor, and he  
23 didn't say he didn't know why there was continued pain.

24 THE COURT: Right. I just ask for clarification,  
25 Mr. Ward.

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1 MR. WARD: Yes, Your Honor.

2 BY MR. WARD:

3 Q Now -- so this report, the Brief Battery for Health  
4 Improvement, the next sentence says this strong bias. So that  
5 means the scores suggested a strong bias?

6 A Well, again, remember this is boiler plated. It's a  
7 boiler plate description by the test authors that allows the  
8 mental health professionals to rule in or rule out these  
9 issues. And so, the word -- that's their word, the strong  
10 bias raises the credibility about the self-report, which may  
11 be inflated.

12 Q Right.

13 A That's the test author saying that.

14 Q Yeah. They scored the exam, didn't they?

15 A Well, the computer scored the exam.

16 Q Okay.

17 A They put together the protocol for the scoring.

18 Q Okay. They put together the protocol for the  
19 scoring, and they scored it, and they said this strong bias  
20 raises questions about the credibility of the patient's  
21 self-reports, which may be inflated. That's what it says  
22 there, correct?

23 A It does say that, yes.

24 Q Okay. And if psychological risk factors are  
25 present, the possibility that these difficulties are

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1 associated with symptom magnification should be considered.

2 That was their statement, correct?

3 A Yes.

4 Q But you didn't think any of that was true?

5 A No, because, as I told the Judge before, when we do  
6 these evaluations, often we don't have the luxury of having  
7 treated a patient and having made independent observations of  
8 them at all. So if a patient had come to me that I didn't  
9 know, had no clue about whether or not this is true or not  
10 true, and then given some of the other information that we  
11 had, I probably, you know, would have recommended the  
12 treatment that we had recommended earlier in or to determine  
13 if, in point of fact, it was an exaggeration of symptoms for  
14 secondary gain, was histrionic, or if it was a cry for help.

15 But as I said, we already had the luxury of having  
16 many observations of him, both in cognitive behavioral therapy  
17 and bio feedback therapy. So in discussions with Dr. Gamazzo  
18 and myself, we ruled it out, and we saw it as being more of --  
19 again, we said the cry for help.

20 Q Isn't it true that the next sentence says an extreme  
21 level of perceived disability was reported that does not  
22 exceed what would be expected given the objective mental --  
23 medical findings?

24 A Where are you now?

25 Q I'm the next paragraph.

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1           A     Would you show me, Mr. Ward?  What's -- say it  
2     again.  What's the sentence?

3           Q     The next --

4           THE COURT:  I think it's the third paragraph, Doctor.

5     BY MR. WARD:

6           Q     Third paragraph, under Brief Battery Health  
7     Improvements.

8           A     Okay.

9           Q     My question to you, Doctor, is it -- does it say  
10    there an extreme level of perceived disability was reported  
11    that does not exceed what would be expected given the  
12    objective medical findings?  Is that what it says?

13          THE WITNESS:  Where is that, Judge?  I'm not seeing it,  
14    sir.

15          MR. WARD:  May I approach the witness, Your Honor?

16          THE COURT:  Right here, sir.

17          THE WITNESS:  Oh.  He -- I'm sorry.  I was going off of  
18    my -- I was going off the actual report not my report.  Hold  
19    on.

20          MR. BAKER:  Doctor, it says it.

21          THE WITNESS:  Huh?  No, I know it says it.

22          MR. BAKER:  Okay.

23          THE WITNESS:  But I was going off of the actual report,  
24    the test report, the computerized report.

25    ///

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1 BY MR. WARD:

2 Q Do we have that?

3 A You should have it. You have the file. Okay.

4 What --

5 THE COURT: Do you want my copy, Dr. Mortillaro?

6 THE WITNESS: No, I'm fine. I got -- I can't see well.

7 I got cataracts. So I'm not seeing as well as I should here.

8 Okay, I see it.

9 BY MR. WARD:

10 Q You see it?

11 A Yeah.

12 Q My question, Doctor, is is that what it says there?

13 A Right.

14 Q And is that your statement or the test statement?

15 A That'd be my statement.

16 Q Okay. That's your statement. So the objective

17 medical findings -- now isn't it true that the objective

18 medical findings, after Dr. Shannon did her surgery, was that

19 there weren't any objective medical findings, isn't that true?

20 A I said I don't know.

21 Q Okay. Now you have the Beck Depression Inventory

22 Second Edition?

23 A Yes.

24 Q And that simply is a self-report, isn't it?

25 A Correct.

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15 App. 2954

1 Q And so, it's not really a test, is it?

2 A Well, it's a questionnaire that --

3 Q Right.

4 A It's a subjective questionnaire, true.

5 Q Yeah. I mean if somebody says to me what's your  
6 name and occupation, and I put down my name is Casey Ward, I'm  
7 a lawyer, you could call that a test.

8 A In a sense, sure.

9 Q Yeah, but it really --

10 A In terms of like your orientation. You know who you  
11 are. Part of a neuropsychological test.

12 Q Okay. But for informational purposes, it's just a  
13 form that I fill out?

14 A Right.

15 Q And that's essentially what the Beck is, isn't it?

16 A No. It's 21 items. It compares your scores with  
17 symptoms of anxiety or no symptoms of anxiety that would be  
18 reported by adults.

19 Q But doesn't that have questions like are you sad or  
20 you're not sad or --

21 A Well, questions like that, yeah, that's in the Beck  
22 Depression.

23 Q Yeah. And in the Beck Anxiety Inventory, it's the  
24 same thing?

25 A Same thing.

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1 Q Okay. Now you conducted an MMPI on this patient,  
2 did you not?

3 A Yes.

4 Q And that was conducted in the last day in August of  
5 1975 [sic]?

6 A Yes.

7 Q And at the time that that was conducted, did you  
8 fill out -- did you have the patient fill out a form about his  
9 injuries?

10 A Yes.

11 MR. BAKER: I'm sorry, Your Honor. I think I'm about 40  
12 years behind.

13 Did you say 1975?

14 THE COURT: That's what I thought he said.

15 THE WITNESS: Yeah, I'm sorry.

16 THE COURT: And it sort of threw me.

17 MR. WARD: Did I say 1975?

18 THE WITNESS: Yeah, I'm sorry. It's 2005.

19 MR. WARD: Well, wait. 1975, which century was that?

20 THE WITNESS: I can't see and he doesn't know what  
21 century it is. Okay.

22 MR. WARD: I can't do two things at one time, and I was  
23 actually walking. So I can't talk well. So let me try again.

24 THE WITNESS: Okay.

25 ///

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1 BY MR. WARD:

2 Q September 1, 2005, you had the patient fill out a  
3 form, is that correct?

4 A Yes.

5 Q And that was an accident injury<sup>f</sup> questionnaire, is  
6 that correct?

7 A Yes.

8 Q And that told you that the patient had back issues?

9 A Yes.

10 Q Okay.

11 A Knee, back, and neck.

12 Q Right. And how long had he had back issues?

13 A It says at the time of the injury.

14 Q Okay. And that was your understanding?

15 A Yes.

16 Q And you used -- you utilized that understanding when  
17 you offered the opinion that everything that has happened to  
18 him by way of medical treatment and by way of injuries since  
19 the time of this accident was caused by the accident, isn't  
20 that true?

21 MR. BAKER: He's never testified to that, Your Honor.

22 THE COURT: I haven't heard it yet in this courtroom. I  
23 don't know what he may have said in the deposition.

24 MR. WARD: Let me ask it differently.

25 MR. BAKER: I qualified him as a neuropsychologist, to

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1 speak about his presumptive diagnosis and treatment of him on  
2 a neuropsychological basis.

3 THE COURT: Sustain the objection. Allow you to rephrase  
4 it.

5 BY MR. WARD:

6 Q All of the opinions that you have offered today,  
7 that you've said were causally related to the incident at the  
8 Palms --

9 A Psychological.

10 Q -- was based on your assumption that this patient  
11 had a back injury at the Palms at the time of the event,  
12 November 22, 2004, isn't that true?

13 A No. It was not just a back injury. There were  
14 other injuries. The primary injury, I believe, was to the  
15 left knee.

16 Q Okay.

17 A And so, my understanding was that was the most  
18 significant part, because what he said, the medical issues  
19 were -- the MRI revealed meniscus tear, ACL injuries, patella  
20 injuries, et cetera. So the focus wasn't on back. The focus  
21 was on that left knee --

22 Q Well, the focus later --

23 A -- on which Dr. Shannon did surgery.

24 Q The focus later on was on the spinal stimulator,  
25 wasn't it?

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1           A     Yes, but that was allegedly to provide some pain  
2 relief in different areas.

3           Q     And you said that all of the treatment that your  
4 clinic provided was all causally related to the accident of  
5 November 22, 2004.

6           A     Yes, because we weren't looking at any pre-accident  
7 issues --

8           Q     Correct.

9           A     -- because he did not indicate that there were  
10 pre-existing psychological issues. So our treatment was  
11 related to the medical referral.

12          Q     And you assumed that all of the injuries or all of  
13 the medical conditions that he talked to you about, that he  
14 listed on this questionnaire of September 1, 2005, occurred in  
15 the accident of November 22, 2004, isn't that true?

16          A     No, because he also mentioned that he had an  
17 appendectomy, blood clot in the lungs, asthma attacks that all  
18 preexisted. So we didn't offer any treatment for a ruptured  
19 appendix or asthma attacks or any psychological issues,  
20 just --

21          Q     Let me ask it differently. On page 105 of your  
22 documents, which is Bates 110, there is a question -- and I  
23 can't tell if there are numbers and they're cut off. But the  
24 question said opinion about diagnosis, and a box is checked,  
25 and it says I agree with my doctor's diagnosis, et cetera.

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1 And then the patient filled in neck and back -- I can't read  
2 the rest of it. Complete --

3 A Yes.

4 Q Can you read the rest of that?

5 A Neck and back, complete test. The neck and back  
6 tested, the head test, and the hand test.

7 Q Okay.

8 A And when one has a bad knee, you -- often times, one  
9 has -- one complains about bad back pain, because one is not  
10 able to walk correctly. So like I said, I'm not offering any  
11 medical opinions. I'm just -- I was -- this man was sent to  
12 me to be evaluated, and I evaluated him for what I did.

13 Q Didn't you assume that his back injury occurred on  
14 November 22, 2004?

15 MR. BAKER: Objection, asked and answered, Your Honor.

16 THE COURT: Sustained.

17 THE WITNESS: I didn't assume that.

18 THE COURT: Sustained.

19 MR. WARD: Your Honor, may I just note that I did ask the  
20 question. It hasn't been answered.

21 THE COURT: I think he has answered it.

22 BY MR. WARD:

23 Q Now, Doctor, you have a document that appears at  
24 Bates 175, which is -- that is your pre-surgical psychological  
25 evaluation dated -- it has psychological interview 8/31/05,

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1 clinical interview 9/1/05, pre-surgical psychological  
2 evaluation. Have you found that?

3 A Yes, I have. Yes.

4 Q Okay. And now, you have background information  
5 here, correct, on this first page?

6 A Yes.

7 Q And on the second page -- on the first page, you  
8 have, under background information, it says he also struck the  
9 person next to him and -- with the left side of his head,  
10 becoming dazed and confused, is that correct?

11 A Yes.

12 Q And you assumed that to be true, is that correct?

13 A That's what he told me, yes.

14 Q You assumed it to be accurate?

15 A Yes.

16 Q And he told you that the promotion was a dangerous  
17 thing and should have been stopped?

18 A Yes, that's what he said.

19 Q Okay. And he told you that as a result of the  
20 injury, his wife had to do all the work around the house --

21 A Yes.

22 Q -- correct? And he told you that his cervical pain,  
23 that's the neck, was in a range of five to ten on a ten-point  
24 scale, correct?

25 A Yes.

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1 Q And he told you that his mid-back pain was in a  
2 range of three to ten on a ten-point scale, correct?

3 A Yes.

4 Q And he told you this his bilateral arm pain --  
5 bilateral means both sides?

6 A Yes.

7 Q So he had arm pain both sides, pain in a range of  
8 three to five on a ten-point scale?

9 A Yes.

10 Q And he had right hand pain in a range of five to  
11 seven on a ten-point scale, correct?

12 A Yes.

13 Q And he had chest and abdominal pain -- abdomen pain  
14 in a range of seven or eight on a ten-point scale?

15 A Yes.

16 Q And he had low back pain in a range of three to ten  
17 on a ten-point scale?

18 A Yes.

19 Q Three to 10 is a pretty broad, isn't it?

20 A Yes.

21 Q He had bilateral leg pain in a range of three to ten  
22 on a ten-point scale?

23 A Yes.

24 Q And he has left knee pain in a range of eight to ten  
25 on a ten-point scale?

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15 App. 2962

1 A Correct.

2 Q And he has bilateral foot pain in a range of two to  
3 eight on a ten-point scale?

4 A Correct.

5 Q And this is all dated in September of 2005, correct?

6 A Yes.

7 Q And this was all to prepare him for -- your reason  
8 to see him was because of his upcoming knee surgery, is that  
9 correct?

10 A Yes.

11 Q And I take it you never talked to Dr. Shannon about  
12 all of these complaints that he lists with you?

13 A No.

14 Q And you didn't think that that was any indication of  
15 exaggerating, is that true?

16 A Yes.

17 Q And you found it quite -- you found -- I take it  
18 that you didn't have any problem with the idea that one could  
19 have neck pain, mid-back pain, bilateral arm pain, right hand  
20 pain, chest and abdomen pain, low back pain, bilateral leg  
21 pain, left knee pain, and bilateral foot pain all at the same  
22 time? You didn't have a problem with that?

23 A No.

24 Q No. Okay. And so, I take it you don't buy into the  
25 idea that if one pain is real bad that you don't feel the rest

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1 of it?

2 A Well, I think you can -- people can have multiple  
3 pain sites. And if you look at the range, you yourself said  
4 it's quite a range, isn't it?

5 Q Right.

6 A And so, what does that mean. That means that there  
7 are times when the pain is low, and then there are times when  
8 the pain is high. That is, prognostically, a good finding.  
9 It's almost like a psychological polygraph for a pain patient,  
10 because if a pain patient told me my pain is a nine or a ten  
11 all the time, that's bologna. But if the major site of the  
12 injury, which is what his left knee was, an eight to ten, now  
13 that's believable. But you can certainly have pain in a  
14 range, a lower range -- because that's in a low range. You  
15 know, by definition, one, two or three is in a low. Four,  
16 five, six, seven is in moderate. And eight, nine, and ten  
17 would be severe.

18 So I think it's absolutely predictive of the fact  
19 that he wasn't magnifying his symptoms. Now if he would have  
20 had all eight, nines, and tens, and he's just miserable, and I  
21 observe him, you know, to be more functional than a person  
22 that's with an eight, nine, or ten, now we've got a problem.

23 Q Okay.

24 A So we didn't have that problem. See, so I think  
25 what you've convincingly described is the fact that yes, he

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1 had these ranges of pain which is normal given whatever the  
2 mechanism of injury is. It doesn't surprise me.

3 Q Okay. And so, it doesn't surprise you that he will  
4 have pain in all these different areas at the same time?

5 A No.

6 MR. BAKER: Asked and answered, Your Honor.

7 BY MR. WARD:

8 Q And so, but you said, if I'm -- if I understand you  
9 correctly, that if he had pain that was constantly nine or  
10 ten, that would be an indication of a problem, right?

11 A In a spot that wasn't really where the mechanism of  
12 injury was, unless there is pain migration that's been  
13 diagnosed or there's been multiple body part type of pain.  
14 And if -- and as you said, if you look at all the ranges of  
15 pain here, you know, it's -- I think he did have carpal  
16 tunnel. So that was a five to seven on a ten-point scale.  
17 And the chest/abdomen, that doesn't bother me. Low back, you  
18 know, could go real low all the way to high. So I think that  
19 the descriptions are accurate and within what I would expect,  
20 as I stated before.

21 Q When did he first complain of cervical pain?

22 A I don't know.

23 Q You don't know?

24 A Huh-uh.

25 Q You don't care?

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1           A    No, I didn't say I didn't care. I just don't know.

2           I mean, I'm --

3           Q    I know you didn't say you didn't care. I'm asking.

4           A    What?

5           Q    In terms of your analysis, is it significant to you  
6           when the cervical pain started? Is it your assumption that it  
7           started on the day of the accident?

8           A    Not necessarily. It can start -- it could occur  
9           later as somebody is going through treatment, or if they have  
10          to overuse one part of their body. One can then develop pain  
11          in other body parts, because of postural anomalies. But it --  
12          again, that's a medical opinion to be given by a medical  
13          doctor.

14          Q    Well, how much later, if it were caused by the  
15          accident and not a secondary cause, how much later could it  
16          be? Or is that a medical opinion?

17          A    That's a medical opinion. I can't give that.

18          Q    Okay. Okay. So I take it you haven't seen anything  
19          that suggests that he contends that he had cervical pain from  
20          the day of the accident? You haven't seen that?

21          A    No.

22          Q    Okay. And now on the testing, you gave him the MMPI  
23          on August 31, 2005?

24          A    I believe so, yes.

25          Q    Okay. Now the MMPI has a number of scales, does it

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1 not?

2 A Yes, is does.

3 Q And some of those scales are provided by the people  
4 who do -- who provide the test. That's Pearson, I believe.

5 A Yes.

6 Q And now, does Pearson routinely add scales to their  
7 tests?

8 A Yes.

9 Q They do? How often?

10 A Whenever the test authors decide that they want to  
11 add various scales. So it happens at different times.

12 Q Okay. But it isn't very often that it happens, is  
13 it?

14 A No.

15 Q No. It's relatively unusual for Pearson to add more  
16 scales to their tests?

17 A Yes.

18 Q And you are -- you've been a neuropsychologist for  
19 how long, Doctor?

20 A Years.

21 Q And I -- although I didn't have the opportunity to  
22 take your deposition, I've read your deposition. It probably  
23 doesn't surprise you.

24 A No. I hope you did.

25 Q And I've read about your comments on several

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1 occasions about the literature?

2 A Yes.

3 Q That you read the literature and you keep up with  
4 all this? And so --

5 A As much as you can, yes.

6 Q And so, you're aware of what's going on in the  
7 professional scientific field and study with respect to  
8 neuropsychology tests?

9 A Yes.

10 Q You're -- I take -- you're familiar I take it then  
11 with Lees-Haley?

12 A Very familiar with him.

13 Q And you're aware that Lees Haley proposed their  
14 scale in 1991?

15 A Yes.

16 Q And you're aware that it has had countless years of  
17 testing?

18 A Lot of pros and cons. And I'm glad you're going to  
19 talk about Lees-Haley, because I'm prepared to talk about  
20 that.

21 Q But it would -- it was adopted by MMPI as -- by  
22 Pearson as one of their tests in the year 2007, isn't that  
23 true?

24 A I believe so, yes.

25 Q Okay. And the Lees-Haley scale is designed to show

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1 symptom exaggeration, isn't it?

2 A Yes, absolutely.

3 Q And the Lees-Haley scale was actually normed on  
4 people who were exaggerating complaints in real life  
5 situations, isn't that true?

6 A Well, I think the norming of this --

7 Q Can you answer that yes or no?

8 A No, it's -- data, a collection.

9 Q Okay. So we have --

10 A I'm not impressed with what he did.

11 Q It wasn't normed on real --

12 A No.

13 Q -- on actual people making claims.

14 A I'm sorry. It was normed on actual people, but I --  
15 go ahead. Yes.

16 Q Isn't it true that it was normed on actual people  
17 making claims?

18 A It was -- yes.

19 Q And other validity tests for the MMPI had sometimes  
20 been normed on students who were supposed to go in and pretend  
21 they were making exaggerated claims, isn't that true?

22 A Yes.

23 Q But the Lees-Haley was actually on people who were  
24 making exaggerated claims, isn't that true?

25 A Well, allegedly, yes. Uh-huh.

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1 Q Yes, okay. And Lees-Haley was adopted by the MMPI  
2 in -- by Pearson in 2007, isn't that true?

3 A I believe so. We said that before.

4 Q And Lees-Haley had been used by many  
5 neuropsychologists for years before that, isn't that true?

6 A Yes.

7 Q And when the Lees-Haley scale was adopted by  
8 Pearson, Pearson actually went back and took prior tests and  
9 did a normative sample on 2600 people who had taken the test,  
10 isn't that true?

11 A Sure.

12 Q And when they did that, the highest that they found  
13 of any male was 26, isn't that true?

14 A I believe so.

15 Q And Mr. Rodriguez's scale was 34, wasn't it?

16 A I don't know. I didn't compute it and it wasn't  
17 computed for me on this test, I don't believe.

18 Q But you've read, I take it, the report from  
19 Dr. Becker?

20 A Yes.

21 Q That they took the information that you provided  
22 from the test that you gave and made it a scale. You do that  
23 kind of thing all the time, don't you?

24 A Not all the time, but we have done it, yes.

25 Q But you can do it?

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1 A Sure.

2 Q It's -- you're quite capable of doing it?

3 A Absolutely.

4 Q And so 34, when the highest anyone -- any male out  
5 of their 2,600 normative sample, the highest male was 26, 34  
6 would be pretty high, wouldn't it?

7 A Sure.

8 Q And 34 on the Lees-Haley indicates a  
9 99-point-something percent of symptom exaggeration; isn't that  
10 true?

11 A Yes.

12 Q Now, Doctor, I want to go back -- your deposition  
13 was taken on May 24, 2010?

14 A I don't know.

15 Q Correct?

16 A I'm sure it was, if that's what you say.

17 MR. BAKER: It seemed like it was hot.

18 THE COURT: I'm sorry?

19 MR. BAKER: It seemed like it was hot out, so that sounds  
20 about right.

21 BY MR. WARD:

22 Q It was taken earlier this year, right?

23 A Yes.

24 Q Okay. And you noted at that time that Mr. Rodriguez  
25 was being seen by you once a month or so?

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1 A Yes.

2 Q On a maintenance basis?

3 A Yes.

4 Q Now, when you initially saw this patient you made a  
5 diagnosis that he had certain issues, correct?

6 A Yes.

7 Q And you've suggested that you could treat those  
8 issues?

9 A Yes.

10 Q And you suggested a certain number of treatments for  
11 those issues?

12 A Yes.

13 Q And the number that you predicted that -- or that  
14 you projected, and I don't want to put you into a predicament  
15 here, but the number that you suggested that you thought would  
16 be appropriate to resolve those conditions actually did not  
17 resolve those conditions; isn't that true?

18 A Correct.

19 Q So the patient had to continue to treat?

20 A Yes.

21 Q Okay. And now the condition that the patient had so  
22 far as you understand from Dr. Shannon was that he had a torn  
23 meniscus; isn't that correct?

24 A Yes.

25 Q And you're aware that she treated that, she repaired

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1 that, she cleaned up his knee?

2 A Yes.

3 Q Now, I take it you know Dr. Shannon?

4 A Yes.

5 Q And you know she's an excellent orthopedist?

6 A Yes.

7 Q And she does good work?

8 A Yes.

9 Q And you're aware that after the MRI that she  
10 conducted, the arthrogram on his knee?

11 A Yes.

12 Q That Mr. Rodriguez didn't go back to her?

13 A Yes.

14 Q Do you know why?

15 A No.

16 Q Now the Beck Anxiety Inventory is what, 21  
17 questions?

18 A Yes.

19 Q And the depression inventory is how many?

20 A The Beck Depression Inventory?

21 Q Yes.

22 A Twenty-one.

23 Q Okay. And now you said that the MMPI-2 isn't used  
24 as much as it used to be?

25 A I don't use it as much.

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1 Q Okay.

2 A Because of what I told the Judge.

3 Q Okay. What is VRIN?

4 A Verbal response indicators.

5 Q Okay. And now the VRIN scale that you got when you  
6 gave him the MMP told you what?

7 A That it was high. In some instances it would say  
8 that the protocol may -- either interpret it with caution or  
9 you don't interpret it, but the test -- even though you have  
10 VRIN, the variable response indicators are trend the true  
11 response indicators, even though they're at a higher level you  
12 can still use some of the data on the test to give a  
13 generalized description for what I needed for in a clinical  
14 setting.

15 Q Okay. That told you it was reliable, correct?

16 A Yeah, it's on the high end of it, but still yes.

17 Q Okay. That told you essentially that the way that  
18 the -- Mr. Rodriguez portrayed himself on the exam was the way  
19 he wanted to portray himself?

20 A In how he responded, yes.

21 Q Correct. Okay.

22 And if the VRIN wasn't within that range it wouldn't  
23 tell that?

24 A Yes.

25 Q Okay. Now, you said that if you were doing a

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1 forensic analysis, that it would have been different than what  
2 you did in the case of Mr. Rodriguez; isn't that correct?

3 A Yes.

4 Q Okay. Now, you actually were being called upon to  
5 do an analysis, weren't you? Wasn't that why the patient was  
6 sent to you to begin with?

7 A Clinical analysis.

8 Q Okay.

9 A Clinical.

10 Q And that's different from a forensic analysis?

11 A Yes.

12 Q Okay. Now, the difference -- you do forensic  
13 analyses from sometime --

14 A Yes.

15 Q -- from time to time?

16 A Yeah.

17 Q And you do forensic analyses for defendants?

18 A Yes.

19 Q In fact, it's probably the defendants who are asking  
20 more for forensic analysis than plaintiffs?

21 A Yes.

22 Q Because plaintiffs are treaters?

23 A Yes.

24 Q When you're dealing with the plaintiff, you're --  
25 plaintiff's patient, you're dealing as a treater and when

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1 you're dealing with the defendant, you're not the treater, but  
2 you're doing a forensic analysis?

3 A Yes.

4 Q And you said when you do a forensic analysis of a  
5 patient, that it's much more thorough in terms of your  
6 analysis than what you would do for a patient that was being  
7 treated?

8 A Yes, because I would ask for medical records, I  
9 would ask for school records, I would ask for employment  
10 records, all the standard things that I'm sure the Judge and  
11 all of us aware of.

12 Q Right. Because your idea is that when a patient  
13 comes to you, you want them to trust you, correct?

14 A Well, you want to develop rapport --

15 Q Right.

16 A -- and even as a forensic examiner you still have to  
17 give informed consent because it's almost like a Miranda  
18 warning, because you're telling the client, I'm working for  
19 the adverse lawyer, so whatever you say can and will be used  
20 against you.

21 Q Right.

22 A So it's difficult in a forensic capacity to develop  
23 a rapport because you're not the treater, you are working for  
24 the lawyer and the insurance company that hired me, for  
25 example.

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1 Q It isn't always an insurance company?

2 A Well, whatever it is, yeah.

3 Q You just kind of through that in there?

4 A Yeah.

5 Q Okay. And now when the -- when you're actually  
6 treating the patient, you want to develop a relationship with  
7 that patient?

8 A Yes.

9 Q And so there is a tendency for you to want to accept  
10 everything the patient tells you as being valid?

11 A Not everything. Again, we're scientist --

12 Q Most things.

13 A -- we're scientists and we're being -- we're making  
14 behavioral observations.

15 Q Okay.

16 A So I don't accept everything that a patient tells  
17 me. I'm examining, you know, the patient, just like I would  
18 examine everybody that I meet. Looking at facial expressions,  
19 looking at tone of voice, looking at inflection, you know,  
20 does the patient -- you know, are they manifesting excessive  
21 pain behavior that's not -- that doesn't correlate, let's say  
22 with the mechanism of injury or whatever.

23 Q Okay.

24 A Or they're always talking about their case. I mean,  
25 that's a real giveaway in a lot of personal injury cases,

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1 where they're always talking about their case and settlement  
2 and so forth. So that tells you something.

3 Q Did Mister --

4 A What we're observing.

5 Q Did Mr. Rodriguez ever tell you that he was in pain  
6 on a scale of eight or nine or ten out of ten and you looked  
7 at him and you didn't see any indication that he was in pain?

8 A Well, again Dr. Gamazzo saw him most of the time.  
9 When I saw him in the office, when he's getting treatment, I  
10 did observe him to limp. He would come in with a cane and I  
11 would -- he and I would exchange pleasantries because he's a  
12 very affable and pleasant man. He has a nice personality.  
13 And so I -- you could see -- I could see in his face and body  
14 language and movement as he would walk down the hall going  
15 into biofeedback or out of biofeedback, or Dr. Gamazzo's  
16 office is close to mine, and then sometimes I'd be coming out  
17 with a patient, I'd run into him and we'd exchange  
18 pleasantries or talk and ask him. And there were times, yes,  
19 that I saw he was in a lot of pain. You know, you could see  
20 it in his face, you could see it, you know, in his body  
21 language.

22 Q Yeah.

23 A Other times he would come in and he was having a  
24 good day, so -- and that's what happens with chronic pain  
25 patients. You have good days and bad days.

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1           Q     My question, sir, was did he -- did you ever  
2 experience a time when he told you that he was having pain at  
3 a level of eight, nine or ten and it did not appear to you  
4 that he looked like he was in pain or did you simply not see  
5 him often enough to do that?

6           A     Well, I tried to answer with what I said, but I  
7 would never have in the hallway or in my observations say to  
8 him oh, Enrique, is that -- are you having an eight or nine or  
9 ten day today? I wouldn't do that. So to answer your  
10 question, no I can't answer it that way.

11          Q     Okay.

12          A     Sorry.

13          Q     So the answer to the question is you don't have  
14 enough data to be able to answer that?

15          A     Yes.

16          Q     Okay. And that's because you didn't see him on a  
17 regular basis, it was your partner?

18          A     Yes.

19          Q     Okay. Now if you were doing a forensic assessment,  
20 you would want to go back and look at all of the records of  
21 his efforts and his medical condition prior to the accident;  
22 is that correct?

23          A     Yes, that's one of the things we do.

24          Q     And you said you'd like to look at the information  
25 about the accident itself?

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1           A     Yes.

2           Q     Okay.  And I take it if you found in the records  
3           that there were a number of medical entries from a number of  
4           doctors that said he had been complaining about pain in his  
5           neck from the day of the accident, you'd want to be able to go  
6           back and take a look at that?

7           A     Yes, because he did say to us, didn't he, that he  
8           had hit his head against somebody and had -- was -- felt a  
9           little confused or dazed.  So at least in his report to me,  
10          there would be something in that self-report that would be  
11          something to investigate.

12          Q     Right.  So you'd want to -- if he told you that he  
13          hit his head or he told you that his neck snapped back, you'd  
14          want to go back and see if that's actually what he told the  
15          people at the time of the accident?

16          A     Sure.

17          Q     You'd want to go see if that's what he told the  
18          ambulance attendant?

19          A     Well, I don't put great faith in what people tell  
20          ambulance attendants because people oftentimes are in shock  
21          and I know what occurs about Glasgow Coma Scales are not  
22          accurate, there's been studies done with that.  I'm more  
23          concerned about, as a forensic examiner, what was said when  
24          symptoms were first reported and so forth.

25          Q     Okay.  So --

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1           A     Because there can be a delay in the report of  
2 symptoms. That's fair.

3           Q     So -- and that delay might be how long, a couple  
4 days?

5           A     Oh, it could be a couple of weeks.

6           MR. BAKER: Your Honor, this is again asked and answered.

7           THE COURT: Sustained.

8 BY MR. WARD:

9           Q     And you'd want to look and see whether he complained  
10 about dizziness at the time of the accident or shortly  
11 thereafter?

12          A     Sure.

13          Q     And you'd want to see what he told his doctor?

14          A     Yes.

15          Q     When the doctor examined him?

16          A     Yes.

17          Q     And you'd want to see what the doctor found at the  
18 time of the examination?

19          A     Yes.

20          Q     And you're aware that Dr. Shannon said that  
21 sometimes, she gave an example of a racecar driver, that  
22 sometimes people can have a drastic accident and only complain  
23 about their wrist. You're aware of that?

24          A     Yes.

25          Q     But you're aware that she also said that as soon as

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1 she did the examination of the rest of this person, that they  
2 found all of the other conditions? You're aware of that as  
3 well?

4 A And so you would expect that a doctor doing a  
5 thorough examination of this patient on the night of the  
6 injury would be able to elicit all of those parts of his body  
7 to which he sustained injury?

8 MR. BAKER: Objection; it's outside the scope of what  
9 he's been identified for.

10 THE COURT: It is. Sustained.

11 BY MR. WARD:

12 Q Well, do you never look at medical reports?

13 A I look at medical reports, but as a treater you  
14 rarely get medical reports.

15 Q Okay. Well, is it outside your scope of expertise  
16 to look at what a patient told a doctor and what a doctor said  
17 in an examination?

18 A No, I just don't make any opinions about what has  
19 been said.

20 Q Right.

21 A It's a reporting function. I'm not licensed to give  
22 an opinion about what's said or not said.

23 Q Right. And I'm not asking you to give an opinion  
24 about that, but you would look at it and you'd be interested  
25 in knowing what the patient told the doctor and what the

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1 doctor said? You'd be interested in knowing that?

2 MR. BAKER: Objection; asked and answered.

3 THE COURT: It is. Sustained.

4 BY MR. WARD:

5 Q Now you said in your deposition, I believe, that the  
6 standard of practice is to find out how the person is  
7 functioning in the world, what's happened with them that could  
8 be pre-existing and what could be exacerbated or changed as a  
9 result of the accident injury, correct?

10 A If that's what I said, that's what I said.

11 Q Okay. And so you'd want to know what happened to  
12 them at the time of the injury?

13 MR. BAKER: Objection; asked and answered.

14 THE COURT: Sustained.

15 BY MR. WARD:

16 Q And in a forensic assessment, you'd want to get  
17 school records?

18 A Yes.

19 MR. BAKER: Objection; asked and answered.

20 THE COURT: Sustained.

21 BY MR. WARD:

22 Q Now in doing your analysis, you have to rely on the  
23 truthfulness and the accuracy of the statements to you, as  
24 well as the responses to the tests and all the other things;  
25 isn't that true?

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1 MR. BAKER: Objection; asked and answered.

2 THE COURT: Sustained.

3 BY MR. WARD:

4 Q And you have to rely on the treating physician?

5 MR. BAKER: Objection; asked and answered.

6 THE COURT: Sustained.

7 BY MR. WARD:

8 Q Did you make any attempt to look at the mechanics of  
9 the accident?

10 MR. BAKER: Objection; outside the scope of what he's  
11 been identified for.

12 THE COURT: It is. Sustained.

13 BY MR. WARD:

14 Q Is that not something that you normally do?

15 A What's that, Mr. Ward?

16 Q Look at the mechanics of the accident?

17 A Mr. Ward, I'm the referral from a physician. I'm  
18 doing an assessment and I'm doing treatment. I'm not a  
19 biomechanics expert, so I can give no opinion relative to the  
20 mechanism of injury. I have to rely upon the referring  
21 physician and other physicians that have evaluated and treated  
22 the patient relative to those issues.

23 Q Okay.

24 A There have been times when I've been retained by  
25 Defense Counsel where I have read biomechanic reports and

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1 where I've seen pictures of vehicles that have been involved  
2 in accidents, for example, or other such things, but I don't  
3 have the capacity in a clinical role to really get all that  
4 information. It rarely is available, because in a -- as you  
5 know, Mr. Ward, in a clinical situation, it's not a trier of  
6 fact, there's not a judge, there's not a jury, there's not  
7 anything. It's we are attempting to diagnose what's wrong  
8 with the person and provide the treatment. Simple as that.

9 Q What was the purpose of your report of December  
10 2009?

11 MR. BAKER: Objection; asked and answered.

12 MR. WARD: Your Honor, I appreciate the fact that he's  
13 making all these objections, but I haven't asked him any  
14 questions about this --

15 THE COURT: Ask you to rephrase for purposes of  
16 clarification. Your question was pretty vague.

17 BY MR. WARD:

18 Q What was the purpose of your report of December 19,  
19 2007?

20 A The spinal cord stimulator surgery was pending.

21 Q And is that -- was it -- in September of 2005 you  
22 said that the patient had a pain disorder?

23 A Yes.

24 Q Now, this was at a time when he was -- hadn't yet  
25 had his first surgery; isn't that true?

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1           A     I don't know. Yeah, he hadn't had the surgery from  
2 Dr. Shannon.

3           Q     Okay. And you diagnosed at that time, before his  
4 first surgery, that he had a pain disorder due to his medical  
5 condition; is that right?

6           A     Yes.

7           Q     And a mood disorder due to his medical condition  
8 with mixed features of anxiety and depression?

9           A     Yes.

10          Q     Okay. And the patient had a torn meniscus; isn't  
11 that true?

12          A     That's what I understand.

13          Q     Okay. Are you aware that Mr. Rodriguez had a  
14 history of panic attacks?

15          A     I don't think at the time we knew that.

16          Q     Okay. You didn't make a diagnosis of complex  
17 regional pain syndrome, did you?

18          A     No.

19          Q     Now, Page -- you have a psychological treatment  
20 session summary from January 17, '07; is that correct?

21          A     I don't know, Mr. Ward. Let me find it.

22          MR. BAKER: I'm sorry, I missed that.

23          MR. WARD: January 17, '07.

24          MR. BAKER: Do you have a Bates number?

25          MR. WARD: I'm sorry, I don't have a Bates number because

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1 I'm looking at his Exhibit Number 9 from his deposition. If  
2 you want to find it there.

3 THE WITNESS: Mr. Ward, say it again, what date?

4 BY MR. WARD:

5 Q January 17, '07.

6 A Okay. I have that, yes.

7 MR. BAKER: Can I ask the witness to identify it, Your  
8 Honor?

9 THE COURT: Yes.

10 MR. BAKER: Oh, I got it.

11 THE COURT: I think it would be helpful for the record  
12 anyway.

13 MR. BAKER: It's Bates Stamp Number 72, Your Honor. I  
14 believe, is that a handwritten report?

15 THE WITNESS: Yes, Dr. Gamazzo's handwritten note on the  
16 psychological treatment session summary.

17 BY MR. WARD:

18 Q Okay. So that's not your handwriting?

19 A No, it's not.

20 Q Okay. On Page 24, this is October 25, '06, can you  
21 tell me, Doctor, is that your handwriting?

22 A No, Dr. Gamazzo.

23 MR. BAKER: And that's 77, Your Honor.

24 BY MR. WARD:

25 Q Okay. And September 1, '05?

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1           A     I don't have September 1, '05. Oh, hold on, I'm  
2 looking at the wrong year. Sorry.

3           MR. BAKER: Is that September 1 or September 10, Casey?

4           MR. WARD: I've got September 1 -- yeah, September 1.

5 This is -- this was something that was filled out by  
6 Mr. Rodriguez and it's in his writing.

7           THE WITNESS: Mr. Ward, can I see it? I have no idea  
8 what you're talking about.

9           MR. WARD: Sure. May I approach the witness, Your Honor?

10          THE COURT: Sure. Why not?

11          THE WITNESS: Okay. That's the back of a questionnaire.  
12 Let me see if I can find that questionnaire.

13          [Counsel Confer]

14          THE WITNESS: Mr. Ward, you don't know what questionnaire  
15 that came from, do you? It would be down at the bottom?

16 BY MR. WARD:

17          Q     I apologize, I don't.

18          A     Okay. I found it. It's part of the mental status  
19 and personality factors questionnaire, Judge. I found it.

20          Q     Okay.

21          A     Okay.

22          Q     Now that's from September 1, '05; is that correct?

23          A     Yes.

24          Q     And that says that Mr. Rodriguez writes down that he  
25 is -- that his knee is in constant pain and that his neck and

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1 back are in constant pain; is that correct?

2 A Yes.

3 Q And do you know if he'd ever made that complaint  
4 before?

5 A I don't know, Mr. Ward.

6 Q Okay. And --

7 MR. WARD: I don't have any further questions. Thank  
8 you, Doctor.

9 THE WITNESS: Thank you, Mr. Ward.

10 MR. BAKER: I can get him done if we don't take a break.

11 THE COURT: Press on, Mr. Baker.

12 MR. BAKER: Thank you.

13 REDIRECT EXAMINATION

14 BY MR. BAKER:

15 Q Is Lees-Haley test in any way an appropriate test to  
16 give Enrique Rodriguez?

17 A Well, it's not a test that you give. It's a test  
18 that is actually used on the MMPI. There's certain questions  
19 on the MMPI that Lees-Haley put together, but there's a body  
20 of literature that would indicate that it's inappropriate for  
21 people in chronic pain. In fact, there was --

22 Q Explain to the Judge norming really quick and why  
23 Lees-Haley is not --

24 A Well, what he did is he got a sample of people that  
25 were allegedly, you know, fakers, malingerers, or thought to

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1 be because the research on malingerers is not good and when  
2 you ask someone to be a fake malingerer to try to answer that,  
3 even that may not be actually true, you know, how a malingerer  
4 would really be. So this -- and the idea is, with the scale,  
5 does it really measure somatic malingering -- physical  
6 malingering and does it matter -- does it measure what we call  
7 feigned emotion distress. And --

8 Q I'm sorry, he sneezed, what kind of emotional  
9 distress? Somebody sneezed.

10 A Feigned. You know, faking. So are they faking --

11 Q F-E-I-G-N?

12 A Yeah, if they're faking emotional distress. And  
13 there's been some articles that have been published by  
14 credible researchers, in fact Jim Butcher was one of the co-  
15 authors of the MMPI, he doesn't like the Lees-Haley scale, and  
16 so they did literally an evaluation of thousands and thousands  
17 of patients, you know, from the Veterans Administration, from  
18 correctional facilities, you know, chronic pain program,  
19 general medical condition, a number of them. And their  
20 research -- their findings were that it's more likely to  
21 measure general maladjustment in physical complaints rather  
22 than malingering.

23 And there's -- also there's a lawyer, Dorothy Simms,  
24 that did a -- in a magazine I think that goes to the legal  
25 professionals, she indicated in her article talking about all

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15 App. 2990

1 the positives, especially somebody with in -- a lot of chronic  
2 pain, you're going to have a lot of false positives. So if  
3 you have headaches or you have backaches and if you have a lot  
4 of different physical problems, that's what it's going to  
5 measure. So it doesn't accurately measure a malingerer or a  
6 symptom magnifier in somebody that has a medical condition.

7 The Lees-Haley test, in my opinion, is appropriate  
8 if I have a patient that doesn't have a pain generator. Now  
9 they get a score -- cutoff score 21, 22, whatever it may be,  
10 but it's just wrong to use this. And plus, it's a prejudicial  
11 test. It unfairly characterizes woman as malingerers. There  
12 are more woman that are --

13 Q I was going to mention that.

14 A -- false positives with this particular test. And  
15 there's been a real problem in the Veteran's Administration,  
16 there's been some articles written about how our wounded  
17 warriors have come back with multi-level disabilities because  
18 they've been shot up, you know, and so forth, they meet the  
19 faking malingering criteria on this test. And sometimes the  
20 VA -- of course they're addressing that, they've been denied  
21 treatment because of Lees-Haley's test. And that's wrong.  
22 That's bad social policy.

23 So this is not a forum, Your Honor, for me to get on  
24 my soapbox and talk about, you know, my opinion about the  
25 Lees-Haley test and I've had personal conversation with Yossef

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1 Ben-Porath, who is one of the lead authors of the new  
2 MMPI-2RF, the revised form and -- in fact, I see him at  
3 conferences and he goes the other way. He says, "Mortillaro,  
4 what are you doing? You're going to start talking about the  
5 unacceptability of the Lees-Haley test again with me?" I said  
6 "Yeah, Yossef, it's wrong."

7 Have a very high cutoff score for it if you're going  
8 to use it, but also make the caveat there that if you have  
9 orthopedic, neurological injuries, whatever, that it may not  
10 be appropriate for that. It's appropriate for somebody that  
11 doesn't have a physical problem, in my opinion, but if you  
12 have a physical problem it could falsely classify you and I  
13 think that's said and done. I don't know what more I can say  
14 about it.

15 Q Is it surprising to you Enrique Rodriguez would have  
16 false test positives when he's given a test that's not normed  
17 for a client pain population?

18 A No, it's not surprising to me at all because many of  
19 my chronic pain patients meet or exceed the cutoff score on  
20 that particular scale. It's not a test, it's a scale.

21 Q That's what I meant to say.

22 A It's basically a scale and I think Pearson has done  
23 a disservice by putting it in the batteries and I've -- have,  
24 you know, expressed my disapproval of that along with other  
25 people, but hey they're in the business to make money and do

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1 what they go to do, that's fine. I just don't think --

2 Q And you wouldn't apply that test to him if you were  
3 trying to responsibly quantify his psychological issues?

4 A Yeah, I don't think that that scale is appropriate.  
5 I think it's a poor predictor and I think that what the  
6 research shows is that instead of malingering, I think -- I  
7 mean, you don't use it in disability evaluations and I think  
8 it measures your general maladjustment and somatic  
9 preoccupation, so that's what I've -- that's what he has. He  
10 has some emotional maladjustment and somatic preoccupation.  
11 That's what it measures.

12 Q Brought about --

13 A Is it measuring him malingering? No, I don't think  
14 so.

15 Q Brought about by his physical injury?

16 A Yeah, exactly.

17 Q Now Casey spoke -- excuse me, Mr. Ward spoke to you  
18 a little bit about Dr. Shannon did a surgery and Enrique's  
19 pain didn't go away; seems to be a theme. Do you remember  
20 that?

21 A Uh-huh. I sure do.

22 Q And did Casey share with you that after  
23 Dr. Shannon's surgery, about six months later, he was  
24 diagnosed with a torn meniscus recurrent synovitis, a loose  
25 body in his joint --

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1 A Right.

2 Q -- and chondromalacia?

3 A Right.

4 Q Does that refresh your recollection?

5 A Yes.

6 Q Is it consistent with malingering that his pain  
7 didn't go away when he had chondromalacia, a loose body, a  
8 torn meniscus and a synovium -- synovitis, that his doctor  
9 directly related to this accident? And in fact his defense  
10 expert related to this accident?

11 A No, not at all. I mean, it shows that there is  
12 consistency. That in point of fact, he was not malingering  
13 and that Dr. Shannon didn't identify what the problem was and  
14 so -- but another doctor did. And so there was something  
15 physical causing it. It's not to say Dr. Shannon's a bad  
16 surgeon --

17 Q No, that happens.

18 A -- stuff like that happens.

19 Q And I think we said it at the same time. Does that  
20 just happen?

21 A Pardon me?

22 Q That just happens?

23 A Yes, it just happen -- stuff like that happens.

24 Q Okay. I'm going to tell you about some of the  
25 things we've discussed as forensic analysis that we've heard

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1 on the stand. And you've been qualified as an expert in this  
2 case pursuant to N.R.S. 50.285 and this is what we've heard.  
3 That the first accident -- that the first knee surgery was  
4 caused by the accident. We've heard Dr. Shannon and  
5 Dr. Becker, they're orthopedist, say the second knee surgery  
6 was caused by the accident, okay. You can take that into  
7 consideration?

8 A Okay.

9 Q That postural changes and the use of assistive  
10 devices, funny you should mention it, created a carpal tunnel  
11 syndrome, okay.

12 A Okay.

13 Q That those postural changes and weight gain and use  
14 of the assistive devices caused postural changes which led to  
15 his lumbar problems, okay?

16 A That's been put in the record.

17 Q Oh yeah, Doctor -- every doctor in this case,  
18 including Dr. Shannon, has testified to that, except for  
19 Dr. Becker, okay?

20 A Okay.

21 Q That he has lumbar disc pathology, which Dr. Kidwell  
22 testified was discogenic and nonradicular in nature, all  
23 right? He had a spinal cord stimulator implanted after a  
24 failed lumbar sympathetic block after two efficacious lumbar  
25 sympathetic blocks.

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1           A     Okay.

2           Q     That that spinal cord stimulator worked and it gave  
3 him 100 percent reduction of pain in his knee. We've heard  
4 testimony that he can't get the permanent pain stimulator  
5 because of financial reasons and you understand that; is that  
6 true?

7           A     Yes.

8           Q     And so is this an individual that five or six  
9 doctors -- more than that from different states all testified  
10 these injuries are directly and causally related to the  
11 accident, okay?

12          A     Yes.

13          Q     Is that presentation consistent with a malingerer or  
14 someone suffering from a pain and mood disorder and chronic  
15 pain as related to the subject accident?

16          A     Exactly. That's exactly what it is. There's not  
17 malingering, so that makes exactly what I've been talking  
18 about. It shines a spotlight on it.

19          Q     And is that your opinion to a reasonable degree of  
20 professional probability?

21          A     Yes.

22          Q     Casey spoke with you about something that really got  
23 my attention, that some people evidence this type of behavior,  
24 this not getting well, this feigning as a means to get  
25 attention; is that right?

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1 A Yes.

2 Q You did a social psycho history of him; is that  
3 right?

4 A Yes.

5 Q And did you understand that he came from a big,  
6 happy family?

7 A Yes.

8 Q With nine children and parents who are still alive?

9 A Yes.

10 Q Who had picnics together and shared time together?

11 A Yes.

12 Q And that he fostered children in his house?

13 A Yes.

14 Q And had a loving relationship with a beautiful woman  
15 named Maria?

16 A Yes.

17 Q And they enjoyed each other?

18 A Yes.

19 Q I'll tell you the testimony was that they used to  
20 fly to Chicago for pizza just to celebrate, because they were  
21 enjoying each other so much. And his friend, Nick, testified  
22 from the stand that they did athletics together, they played  
23 miniature golf together, basketball -- Nick wasn't so good at  
24 basketball, but is this the type of person with a social  
25 psycho history, according to your understanding as a

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1 neuropsychologist, that has attention-seeking behavior?

2 A No, it's not.

3 Q And is that your opinion to a reasonable degree of  
4 probability?

5 A Yes.

6 Q He has talked about the fact in all his records that  
7 he's sad; is that right?

8 A Yes.

9 Q Is this a sad situation?

10 A Absolutely sad.

11 MR. BAKER: Thank you, Your Honor. No further questions.

12 THE COURT: Any follow up, Mr. Ward?

13 MR. WARD: Yes, Your Honor.

14 RE-CROSS-EXAMINATION

15 BY MR. WARD:

16 Q Doctor, is it true that you don't know what  
17 information the other doctors based their opinions on when  
18 they said that their treatment was caused by the accident?

19 A No, I don't. I wasn't there when they made the  
20 opinion. I don't know what they reviewed.

21 Q Right. And you don't know what they were told;  
22 isn't that right?

23 A Correct.

24 Q And to be able to relate something to the accident,  
25 you'd have to have accurate information about what happened in

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1 the accident?

2 MR. BAKER: Objection; asked and answered.

3 THE COURT: Sustained.

4 MR. WARD: Your Honor, this is an area that he just did  
5 on redirect.

6 THE COURT: Sustain the objection.

7 BY MR. WARD:

8 Q Is it your testimony that he had a constellation of  
9 injuries at the time of this accident?

10 MR. BAKER: Objection; asked and answered also, Your  
11 Honor.

12 THE COURT: Sustained.

13 BY MR. WARD:

14 Q Is it your testimony that at the time he was seen by  
15 you in August -- August 31 of 2005 that he had had a long  
16 duration of the pain in his neck?

17 MR. BAKER: Objection; asked and answered too, Your  
18 Honor.

19 THE COURT: Sustained.

20 BY MR. WARD:

21 Q The Lees-Haley Scale that you don't like -- is that  
22 a fair characterization?

23 A I say I don't like if it's used inappropriately. As  
24 I told the Judge, I think there's an appropriate use for it,  
25 but I think that it's misused -- misapplied.

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1 Q Is that to say you would never use it?

2 A I have used it, but I'm telling you, when it's --  
3 there's appropriate uses for everything.

4 Q Okay. And when you use it, the purpose of it is to  
5 show the potential for symptom exaggeration; is that correct?

6 A Well, I think as I explained to the Judge, we're  
7 looking -- I'm looking more toward, is there a preoccupation  
8 toward somatic issues -- you know, physical issues and is  
9 there a preoccupation towards some emotionality connected with  
10 that. I think that is a good measure, especially when you  
11 look at Butcher's study, you know, in which he studied  
12 thousands of different individuals, which is many more than  
13 Lees-Haley's data ever showed. And I think it's badly used to  
14 classify a malingerer.

15 I think that's wrong, but the other aspect of it,  
16 yes I'm willing to go along with that. In my discussions with  
17 Dr. Ben-Porath, I think we both have an agreement relative to  
18 that issue. I just don't like it to be used to classify  
19 malingering and symptom amplification or magnification. I  
20 think that's a wrong use of that scale.

21 Q Lees-Haley is not the only who worked on this, is  
22 he?

23 A No, there's other people that he worked with --

24 Q Yeah.

25 A -- and other folk that like it, but that's the --

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1 that's why you have peer review journals and they -- that's  
2 why you have arguments at conventions. People will line up  
3 and -- especially when Lees-Haley speaks. He's not speaking  
4 as much anymore.

5 Q And there have been countless peer reviewed articles  
6 on this topic?

7 A I don't know if there's countless, but there have  
8 been. And also too, I think what's unfortunate is that Lees-  
9 Haley, in the literature, it's been spoken about that he  
10 doesn't really -- he testifies more for the defense rather  
11 than the plaintiffs, so there's response bias that's been --  
12 that he's been accused of. So there's a lot of issues and  
13 Dorothy Simms and her group have brought that to light, but  
14 that --

15 Q But it --

16 A -- you know, it is what it is.

17 Q But it was adopted by Pearson?

18 A Yeah.

19 MR. BAKER: Asked and answered, Your Honor.

20 THE WITNESS: And like I said, I'm not going to -- I've  
21 answered that before, yes.

22 BY MR. WARD:

23 Q Officially for use in the MMPI?

24 A Yes.

25 MR. BAKER: Objection; asked and answered, Your Honor.

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1 THE COURT: Sustained.

2 BY MR. WARD:

3 Q And your -- the test that you prefer is what, the  
4 Brief Battery for Health Improvement?

5 A Yeah, I've already answered that and I gave the  
6 reasons why I like to use those other tests, yes.

7 Q Okay.

8 MR. WARD: I have no further questions.

9 MR. BAKER: No questions, Your Honor.

10 THE COURT: With the thanks of the Court --

11 THE WITNESS: Do you have any questions for me?

12 THE COURT: No, I don't have any, Dr. Mortillaro.

13 THE WITNESS: Okay. Thank you.

14 THE COURT: Thank you so much for your time.

15 THE WITNESS: Thanks, Judge. Thank you.

16 THE COURT: Are there any other witnesses?

17 MR. BAKER: There are no other witnesses, Your Honor, but  
18 however I'd like to look over our notes and things before I  
19 rest.

20 THE COURT: Okay. Mr. Ward, do you have any other  
21 witnesses?

22 MR. WARD: Depends on whether they rest.

23 THE COURT: What does that mean, you may have a witness?

24 MR. WARD: I don't think I have anymore witnesses.

25 MR. BAKER: I am not going to call any --

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1 MR. WARD: But if he's not willing to say that he doesn't  
2 have any more witnesses, then I'm not willing to say I don't  
3 have any more witnesses.

4 MR. BAKER: I am willing to say I have no more witnesses.

5 MR. WARD: I thought that was the question that was  
6 asked --

7 MR. BAKER: No, no, I just want to make sure everything's  
8 in and --

9 THE COURT: Sure.

10 MR. BAKER: -- just take some time and make sure I didn't  
11 screw something up. I -- excuse me, Your Honor, make sure  
12 that I didn't omit something.

13 THE COURT: Okay. That's what I thought you meant,  
14 Mr. Baker. What about you, Mr. Ward, any other witnesses?

15 MR. WARD: Yes, if he's not calling any more witnesses,  
16 I'm not calling any more witnesses, Your Honor.

17 THE COURT: That settles that. All right. Can we ask  
18 you to return tomorrow at 1:00 for --

19 MR. BAKER: Yes, Your Honor.

20 MR. WARD: Yes, Your Honor.

21 THE COURT: -- for closing arguments?

22 MR. WARD: Yes, Your Honor.

23 MR. BAKER: Yes, Your Honor. Thank you, Your Honor.

24 THE COURT: Okay. Thanks.

25 [Proceedings Concluded at 4:48 p.m.]

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15 App. 3004



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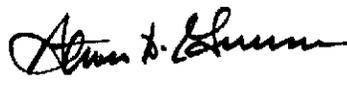
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DISTRICT COURT  
CLARK COUNTY, NEVADA

  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 9, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. THOMAS CARGILL

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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None

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1 TUESDAY - NOVEMBER 9, 2010 - 1:09 P.M.

2 [Designation of record begins at 1:09 p.m.]

3 THE COURT: Who is the next witness?

4 MR. WARD: The next witness is Thomas Cargill, Your  
5 Honor.

6 THE COURT: Mr. Cargill, will you please come forward to  
7 the witness box?

8 Please remain standing and raise your right hand to  
9 be sworn by the Clerk.

10 DR. THOMAS F. CARGILL, DEFENDANT'S WITNESS, SWORN

11 THE CLERK: Please be seated stating your full name,  
12 spelling your last name for the record.

13 THE WITNESS: Thomas F. Cargill, C-A-R-G-I-L-L.

14 MR. WARD: Okay, okay. Your Honor, we're going to offer,  
15 before Mr. Cargill starts testifying, Exhibit 53, 54, and 55  
16 into evidence. That's the tax returns for 1999, for 2001, and  
17 for 2004.

18 THE COURT: What about that? Any objection, Mr. Baker?

19 MR. BAKER: I've already stipulated?

20 THE COURT: 53, 54, and did you say 55, Mr. Ward?

21 MR. WARD: I believe I did. Yeah, 53, 54, and 55, Your  
22 Honor.

23 THE COURT: They're admitted

24 [Defendant's Exhibits 53, 54 and 55 Received]

25 MR. BAKER: Those are just the tax records?

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1 MR. WARD: Yeah.

2 DIRECT EXAMINATION

3 BY MR. WARD:

4 Q Now, Dr. Cargill, tell us what you do.

5 A I'm an economist.

6 Q And your educational background, sir, is what?

7 A I have an associate arts degree in -- from City  
8 College of San Francisco with an emphasis in business,  
9 bachelor of science in economics from the University of San  
10 Francisco, and a master's in economics and a Ph.D. in  
11 economics from the University of California at Davis.

12 Q Okay. And I have the CV, the resume of Dr. Cargill.  
13 I left one on your desk and I left one on the Clerk's desk.

14 THE COURT: Are you asking it be marked or not?

15 MR. WARD: Yes, Your Honor, and we would mark it -- we're  
16 up to --

17 THE COURT: Is it next in order?

18 MR. WARD: Oh, can we add it to 67? There's part of --  
19 part of it is in 67, if we could add this to 67, but I didn't  
20 do a separate one. Is that okay?

21 THE COURT: Very well.

22 THE CLERK: 67 is not admitted.

23 THE COURT: 67 hasn't been moved into admission.

24 MR. WARD: Correct.

25 THE COURT: Okay.

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1 MR. WARD: I will -- I'll lay the foundation for this  
2 before moving the whole thing or asking to move the whole  
3 thing in, Your Honor.

4 THE COURT: Very well. Please proceed.

5 BY MR. WARD:

6 Q Now, Doctor, you have a number of areas of academic  
7 recognition which would include awards from Nevada.

8 A Yes, that's correct.

9 Q And some from the Ford Foundation?

10 A Yes.

11 Q And --

12 A That goes back a long time ago.

13 Q And your areas of research include financial markets  
14 and financial and monetary systems?

15 A That's my primary area of study --

16 Q Okay, and you were --

17 A -- for the last four decades.

18 Q You were a professor -- you are a professor of  
19 economics at the University of Nevada at Reno?

20 A That's correct. I joined UNR in 1973.

21 Q Okay. So you've been there a long time?

22 A A long time.

23 Q And what do you teach there?

24 A Well, I teach mainly monetary and financial courses,  
25 undergraduate, graduate level. I also teach history of

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1 economic thought. And in the past I've taught econometrics  
2 and microeconomics, a wide range of things. But the main  
3 focus of my teaching and research is finance and monetary  
4 issues.

5 Q Okay. And you have been hired as an expert in this  
6 case?

7 A Yes, I was by your law firm.

8 Q And you've been hired as an expert before?

9 A Yes.

10 Q And you've done evaluation of business losses and  
11 wage losses before?

12 A Yes, I've been doing this kind of stuff I think  
13 since 1976.

14 Q And you've been qualified as an expert in courts in  
15 Nevada?

16 A Yes, I have.

17 Q And in other jurisdictions?

18 A Yes, but most of my work is in Nevada.

19 Q Okay. Your Honor, I would offer Dr. Cargill as an  
20 expert in this area.

21 MR. BAKER: In which area?

22 THE COURT: Mr. Baker?

23 MR. BAKER: Your Honor, is he being offered as an expert  
24 in vocational rehabilitation or for educational forensics or  
25 labor market reentry?

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1 THE COURT: I thought economics, but --

2 MR. WARD: He's being offered as an economist in  
3 evaluation of this gentleman's wage earning history and  
4 losses.

5 THE COURT: Any objection?

6 MR. BAKER: That's kind of punctuated. Only if he's  
7 going to offer any testimony about likelihood of returning to  
8 the job market or vocationally related issues.

9 THE COURT: Mr. Ward?

10 MR. WARD: He's not going to testify as to that area.

11 THE COURT: Very well. The motion is granted.

12 MR. BAKER: No objection, Your Honor.

13 THE COURT: Noted for the record, Mr. Baker.

14 MR. BAKER: Thank you.

15 BY MR. WARD:

16 Q Now, Dr. Cargill, you were doing -- with this case,  
17 you were looking at an evaluation of an income loss, is that  
18 correct?

19 A That's right. I was asked to review the economic  
20 loss reports that were offered by Mr. Dinneen and they  
21 consisted of an estimate of a life care plan and an estimate  
22 of loss compensation.

23 Q Okay. And you were not hired to offer opinions  
24 about whether this gentleman will or will not go back to work?

25 A No, no, that's outside of my expertise.

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1 Q Okay. You're there to calculate, to offer  
2 information to be able to calculate a wage loss, and you do  
3 that by figuring out what his income was?

4 A Yeah, that's part of the process one has -- if an  
5 event has occurred that leads to somebody earning less income  
6 than they normally would have, and one of the first things you  
7 have to do is to establish what the pre-earned injury earning  
8 base was.

9 Q Okay. So, in effect what you're doing is you're  
10 using your expertise to calculate what he would have earned  
11 had he continued to work during the period of time after the  
12 accident? Continued to work at the same thing he was doing  
13 before?

14 A That's correct.

15 Q Okay.

16 A You need that pre-earnings base and then you need to  
17 understand the market and so forth into the future of how that  
18 would have materialized, that sort of thing.

19 Q Okay. But before you can project into the future,  
20 you have to be able to analyze the past, is that correct?

21 A That's the first thing that one has to do. You have  
22 to establish that pre-earning capacity.

23 Q Okay.

24 A Or, excuse me, pre-accident earning capacity.

25 Q Okay. Now, this kind of evaluation that you're

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1 doing right now is something that you've done before?

2 A Many times.

3 Q Now, most of the time when you're doing a wage loss,  
4 most of the -- excuse me. Most of the time when you're doing  
5 a wage loss, you're dealing with an employee, is that correct?

6 A I would say the majority of times it's a person  
7 that's employed by somebody.

8 Q Okay.

9 A That's the majority of times.

10 Q Okay. So, now when let's say I were to come to you  
11 and say to you, "I want you to calculate my wage loss." And  
12 so you would ask me for information, is that correct?

13 A That is correct.

14 Q And if I were an employee and I just came in and I  
15 said, "I make 25 cents an hour," you would want more  
16 information than that, wouldn't you?

17 A Yes.

18 Q Okay. And if I were an employee, what kind of  
19 information would you want?

20 A Well, at a minimum, you'd want to see tax returns.  
21 I would also like to see the social security statement of  
22 earnings. And if it were somebody who's working for somebody,  
23 I'd like to see the employment file. And I would like a  
24 complete resume of education, places where you worked.

25 The problem with the tax returns is you can usually

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1 only get them for a few years. Most people don't carry around  
2 the last 20 years of tax returns. Social security statement,  
3 that's easier to get because we get that each year in the  
4 mail.

5 And so at a minimum I'd want the tax returns, social  
6 security statement, and W2's sometimes. I want to see those.  
7 Without the social security statement, you want to also see  
8 W2's.

9 Q Okay. Now, if I were employed by someone, if I were  
10 employed by, for example, I were employed by the State of  
11 Nevada, one of the things I could bring to you would be a W2  
12 and that would demonstrate what my earnings are, at least what  
13 my earnings are right now.

14 A Sure, a W2 would be a reasonable --

15 Q Okay. That would be a reliable kind of thing?

16 A Yes, it would be.

17 Q Would that be more reliable than me just writing  
18 down on a piece of paper, "This is what my earnings are," and  
19 giving them to you?

20 A Yes, much more reliable.

21 Q Okay. And why is that?

22 A Well, because whenever you self-report, there's  
23 always two problems. One, you're making a mistake, but it --  
24 and the mistake could be intentional or unintentional. And  
25 so, well, that's the main problem. You want to see

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1 documentation.

2 Q Okay. And if you're looking at history employment,  
3 one of the things you want to know is how long have I been  
4 doing this?

5 A Absolutely, sure.

6 Q Okay.

7 A You want as long a history as possible.

8 Q Okay. Because is it fair to say that when you're  
9 looking at it that one year may be aberrational?

10 A Well, it depends. If somebody were working for the  
11 State of Nevada and had not received any promotions, one year  
12 actually would be good enough and as long as you had how long  
13 that person had been working, because you understand the wage  
14 structure for normal employees of the State of Nevada. But in  
15 other cases, no, you really need much more history because one  
16 year is only one year. It may be atypical one way or the  
17 other.

18 Q If I were a commodities trader?

19 A Absolutely you would want to see a long history.

20 Q Okay.

21 A In any kind of activity like that.

22 Q Okay.

23 A Sure.

24 Q Now, when you undertook this task, what kind of  
25 information did you expect that you would get? Having done

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1 these kind of evaluations in Nevada and being somewhat  
2 familiar with the legal system in Nevada, what kind of  
3 information did you expect that you would get?

4 A Well, since I knew that an economic loss report had  
5 already been provided, I wanted to see that work because I saw  
6 myself as being hired as a rebuttal witness. I wanted to see  
7 the complaint, the answers to interrogatories, relevant  
8 depositions so I could sort of understand what was going on.

9 But in terms of the specific loss estimate that was  
10 being opined, I wanted to see the documentation on which that  
11 loss estimate was based, which goes back to what we were  
12 talking about earlier. I wanted to see tax returns, social  
13 security, statement of earnings, a job history, something of  
14 that nature.

15 Q Okay. So now the first thing that you were looking  
16 to calculate would have essentially been what was this  
17 person's earnings for the six year period of 1999 through  
18 2004, is that correct?

19 A Well, the six years is sort of defined by the fact  
20 that the tax returns start in 1999. Given that in this  
21 particular activity you've got a person that -- who says he  
22 buys and sells houses, six years is okay, but it would still  
23 be nice to have a longer period, but six years was okay. But  
24 during that period you want to see documentation as to what  
25 kind of earnings this individual was able to generate as a

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1 self-employed investor in real estate.

2 Q Okay. Now did you receive information that told you  
3 what Mr. Rodriguez had said that he had been doing as for  
4 income?

5 A Well, I mean I read his deposition, yes.

6 Q Okay.

7 A Yeah.

8 Q And what did he -- what information did you gather  
9 about what he was doing?

10 A Well, that he did not have a real estate license or  
11 was not a broker, but he was a self-employed investor in  
12 residential structures. He would buy them, sort of get them  
13 ready, not do major repairs, but just sort of clean them up,  
14 do some minor things, and then sell them. And that I think in  
15 deposition he said almost immediately after high school that  
16 he started working in this area in Southern California.

17 Q Okay. And did he say -- did you get information  
18 about how often, how active he was as a trader?

19 A Well, there's a phrase that he said, something like,  
20 "Over 100 houses that he's bought and sold." Now, I don't  
21 know quite what timeframe he was thinking of when he said  
22 that, but my reading of the deposition as well as  
23 Mr. Dinneen's report who interviewed Mr. Rodriguez was that he  
24 was a very active person in buying and selling real estate.

25 Q Now, the information that you were provided, what

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1 did it tell you in terms of your ability to make an analysis?  
2 How did you analyze that information?

3 A Well, the information was insufficient.

4 MR. BAKER: Your Honor --

5 THE WITNESS: First of all --

6 MR. BAKER: I'm sorry. I'm going to object to this line  
7 of questioning. Dr. Cargill presented a report in this case.  
8 He is a retained expert and pursuant to Section 16.1 he has to  
9 set forth all of the opinions that he's going to render in  
10 that report. And nowhere in his report does he comment on the  
11 paucity or scarcity of information and the impact that any of  
12 that would have on calculating wage loss.

13 THE COURT: Huh, Mr. Ward?

14 THE WITNESS: Could I say something?

15 THE COURT: Just a second, sir.

16 MR. BAKER: Permission to have a cough drop, Your Honor.

17 THE COURT: Sure.

18 MR. BAKER: Thanks.

19 MR. WARD: There is a reference in Mister -- in  
20 Dr. Cargill's report about the information that is provided  
21 and says that this report is based on available information  
22 and that any change in that information will require further  
23 consideration of the estimates and opinions presented in the  
24 report.

25 MR. BAKER: I don't know how that relates to my

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1 objection, Your Honor.

2 THE COURT: I don't --

3 MR. BAKER: Dr. Cargill's report put out two bases that  
4 he was critical of Terry Dinneen. One was that he continued  
5 to project a future income based upon a housing market that  
6 has changed and a burst bubble, and the second was that the  
7 discounting rates that he used were today's discounting rates  
8 instead of some other type of thing.

9 He never, ever mentions the information that was  
10 relied on, has no criticism of the information relied on, and  
11 in no way reflects that that information makes it -- any way  
12 impacts the ability for Mr. Dinneen to calculate the wage  
13 loss.

14 THE COURT: Sustain the objection.

15 BY MR. WARD:

16 Q Dr. Cargill, when you -- you first heard this report  
17 of August 17, 2010, is that correct?

18 A Well, I prepared two reports.

19 Q Okay.

20 A The August report and then as a supplemental report  
21 in October.

22 MR. BAKER: I don't have a supplemental report. Did you  
23 say August report?

24 THE WITNESS: Yes, August 17, 2010 was my original report  
25 and then I provided a supplemental report on October 5th.

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1 MR. WARD: We have a supplemental report from October 5,  
2 2010?

3 MR. BAKER: I've never seen it.

4 MR. WARD: Well, it's in our binder which we gave you.  
5 Take a look in your binder. It's there.

6 MR. BAKER: Your Honor, we've been using a joint pretrial  
7 binder that I have his expert reports in. I have the  
8 interrogatories in. I've never seen an October report. I  
9 don't believe anyone was timely served up on it. If they put  
10 it in their binder and handed to me, it was my understanding  
11 we were using joint exhibits, so I've never seen that report.

12 Now, if Counsel can show me where it was  
13 supplemented on me pursuant to Section 16.1, I'll apologize to  
14 the Court and read it real quick, but I know I've never seen  
15 it.

16 THE COURT: Well, that presents a problem.

17 MR. BAKER: Also, my experts never looked at it.

18 MR. WARD: Your Honor, I believe that this was served on  
19 Counsel for Plaintiff, but we will -- I will see if we can  
20 track that down and I will continue to ask him about his first  
21 report. There doesn't appear to be any dispute about that.

22 MR. BAKER: Can I have a copy of it in the meantime?

23 MR. WARD: But this has been in the exhibit binder since  
24 we started this trial and I have reason to believe that it was  
25 delivered to Counsel before the start of this trial.

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1 THE COURT: Well, if it was, then it's appropriate, but  
2 do you have -- can you provide evidence of that?

3 MR. WARD: We're looking for that right now, Your Honor.

4 THE COURT: Okay. So in the meantime you can proceed  
5 with the first report, I believe?

6 MR. WARD: Sure.

7 MR. BAKER: And just for the record, I'm not at all  
8 suggesting anyone is trying to slide anything in. I might  
9 have overlooked something, but I don't know.

10 THE COURT: I understand.

11 FURTHER DIRECT EXAMINATION

12 BY MR. WARD:

13 Q Now, Dr. Cargill, in your August 17 report, you  
14 provide the information that you were given, is that correct?

15 A Yes, I did. On page 1 and 2, I indicate all the  
16 sources of information that I considered in writing a report  
17 and the first part of that is the information I received from  
18 your office, including Mr. Dinneen's report and depositions.

19 Q Okay. And none of the tax reports had been  
20 previously provided, isn't that true?

21 A That is correct.

22 Q None of them were in Plaintiff's disclosures, isn't  
23 that true?

24 A That is correct, and I noted that in my report.

25 Q Right, and you noted that they hadn't been produced,

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1 but they were obtained from Mr. Dinneen, is that correct?

2 A Well, when I read Mr. Dinneen's report, he said that  
3 he reviewed the tax returns from 1999 to 2004, so from that  
4 statement, I assumed that there were six tax returns that were  
5 available.

6 In my report, I indicated -- I raised an issue about  
7 simply taking six years and averaging it because one needs to  
8 see the fluctuations, and I said that I -- I think somewhere  
9 in there I said I reserve the right, you know, to provide  
10 further comments once I see the tax returns and actually see  
11 the year-to-year variation because I --

12 MR. BAKER: Your Honor, that's exactly what I had  
13 objected to. There was no reference in the report that it was  
14 improper to average it, but I can -- if you can tell me where  
15 you're --

16 THE WITNESS: On the top of page 4, it said there -- can  
17 I read it?

18 THE COURT: I think you have to wait until there's a  
19 question.

20 THE WITNESS: Oh, I'm sorry.

21 MR. BAKER: Yeah, Your Honor. My objection was that he  
22 should not be allowed to speak to the paucity or the averaging  
23 with respect to the taxation because it is not contained in  
24 his report. Casey referenced the fact that there may be other  
25 technical issues with regard to his report once the writer has

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1 reviewed same earnings documentation reviewed by Mr. Dinneen  
2 and such. The writer reserves the right to supplement this  
3 report based upon additional discovery.

4 I commented during the course of my objection that  
5 that wasn't relevant to my objection and this Court has  
6 sustained my objection. And now to ask him that exact  
7 question is in contradiction of the Court's order on that  
8 issue.

9 THE COURT: Mr. Ward?

10 MR. WARD: Well, Your Honor, I'd like to point out and we  
11 can demonstrate this, that these tax returns were requested  
12 and should have been provided and were not. We never got them  
13 officially. We got them through taking Mr. Dinneen's  
14 deposition and Mr. Dinneen's deposition was taken after  
15 discovery was closed. That's the first time we got them.

16 They've now been -- not only were they disclosed for  
17 the first time to us at Mr. Dinneen's deposition, and I'll be  
18 more than happy if Counsel for Plaintiff can find his  
19 documentation showing when he produced them, then I'll take  
20 back my suggestion, but they were not produced. They have  
21 been produced in this trial and so I'm asking this witness  
22 about something that has been produced at this trial. And the  
23 Court has allowed that before in this case and I think it's  
24 appropriate here.

25 MR. BAKER: Of course, again, that has nothing to do with

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1 my objection. My objection is that he's speaking to matters  
2 that this Court has ruled he cannot speak to because his  
3 report does not contain a criticism of the methodology with  
4 respect to the taxation employed by Mr. Dinneen in terms of  
5 averaging. And the Court has already sustained that  
6 objection.

7 THE COURT: Then the Court sustains it again.

8 FURTHER DIRECT EXAMINATION

9 BY MR. WARD:

10 Q Now, Dr. Cargill, what did you do in making your  
11 evaluation?

12 A With respect to my first report, I read everything.  
13 In particular, I read Mr. Dinneen's report. And I evaluated  
14 whether the -- two things, whether the estimate of  
15 pre-accident earnings was reliable, which I concluded it was  
16 not; and secondly, you know, then I went on to other issues  
17 about projecting forward and discounting.

18 But one of the main issues in that August report was  
19 Mr. Dinneen said he had six tax returns. I didn't have any of  
20 them and that any kind of an average was --

21 MR. BAKER: Your Honor, this is --

22 THE WITNESS: Well, I'm --

23 MR. BAKER: This is exactly the testimony that you've  
24 just excluded.

25 THE COURT: I think it is. Sustained.

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1 BY MR. WARD:

2 Q Dr. Cargill, let me ask you about your report at the  
3 bottom of page 2, the report that titles, "Estimate of Lost  
4 Compensation." Do you see that?

5 A Yes, I do.

6 Q Now, in your report, you note that Mr. Dinneen has  
7 made some opinions based upon the market, is that correct?

8 A Yes.

9 Q And what he's done is he has averaged the earnings  
10 over the period of 1999 to the year 2004, is that correct?

11 A Well, that was my understanding what he did.

12 Q Okay.

13 A But that's not what he actually did.

14 Q Okay. But that was your understanding at the time?

15 A Yes.

16 Q And you used -- and then he used that as an estimate  
17 of pre-incident future earnings, correct?

18 A Correct.

19 Q And do you think that is appropriate?

20 A Well, no, I did not.

21 Q Right. And in your report, you say what? What's  
22 your criticism of that?

23 A Well, I said that it is inappropriate to average  
24 earnings over the period from 1999 to 2004 and use the average  
25 as an estimate of pre-incident future earnings.

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1 Q Okay. Now, let's take a look at the year 2004 that  
2 you -- that you looked at -- the tax return. And --

3 A Well, that was subsequent to writing my report  
4 because I didn't get these tax returns until October.

5 Q I understand. But you've offered the opinion that  
6 you don't think it's appropriate to use 2004 as the primary  
7 anchor point for this gentleman's lost income, is that  
8 correct?

9 A Oh, of course, no, you would not.

10 Q Okay.

11 A Not one year.

12 Q And looking at the year 2004 shows a larger income  
13 than the others?

14 A Yes.

15 Q And is it your understanding that there's been  
16 testimony before this Court that Mr. Rodriguez didn't sell any  
17 houses after mid-February of the year 2004?

18 A Well, I don't know about testimony, but in  
19 Mr. Rodriguez' deposition he said he sold his last house in  
20 February of 2004.

21 Q And is it your understanding that his testimony was  
22 that that was his personal house?

23 A Yes, he said he was living in it.

24 Q That that was the house that he lived in?

25 A Yes.

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1 Q Okay. Now, what is wrong with using, as you stated  
2 in your report, what is wrong with using the year 2004 in this  
3 instance to make an average of what his income was over that  
4 six year period of time?

5 A Well, the issue with 2004 is was this part of his  
6 buying and his selling houses as an investment or was this his  
7 permanent residence that he just sold.

8 MR. BAKER: Your Honor --

9 THE WITNESS: I don't know.

10 MR. BAKER: -- again, this isn't contained in his report.  
11 And they're going so far outside the scope of his report. In  
12 fact, when he read to you that "it's inappropriate to average  
13 earnings over the period from 1999 to 2004," he forgot to  
14 leave in the first part of the sentence, which was, "First,  
15 given the economic and financial distress in the housing  
16 market, it is inappropriate to use the 2004 number."

17 His report says that because the market fell it's  
18 inappropriate to use -- to calculate lost wages the way that  
19 Terry Dinneen did. And any of the averaging commentaries or  
20 criticisms are outside the scope of that report.

21 THE COURT: You know, I understand that line of reasoning  
22 because I remember very clearly what the market was like in  
23 those years.

24 MR. BAKER: Right.

25 THE COURT: So, sustain the objection.

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1 MR. BAKER: And I can talk to him about that. Thank you,  
2 Your Honor.

3 MR. WARD: Your Honor, I'm reading from his report.

4 THE COURT: And I think he's entitled to testify from his  
5 report, but you should probably give us a clear picture.

6 MR. WARD: Sure.

7 BY MR. WARD:

8 Q Did you use in your report of projected earnings in  
9 the -- influenced by the bubble in housing prices? You're  
10 free to look at your report.

11 A Oh, well, sure, I said that, but the bubble didn't  
12 start in 1999. It's in --

13 Q But in the year 2004, hadn't the bubble began to  
14 build?

15 A That's correct. The bubble started around 2003.

16 Q And isn't that the biggest year of his income as  
17 listed in these tax returns that you've seen is the year 2004?

18 A Oh, that's correct, but I only saw three tax  
19 returns.

20 Q Okay. But in the year 2004, that was the year that  
21 the bubble in the housing market was growing?

22 A It was -- I would say it was sort of -- you know, it  
23 started in 2003, began to accelerate in '04, started reaching  
24 a peak in the latter part of '05.

25 Q And Mr. Dinneen has averaged over that six year

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1 period of time, is that correct?

2 A Yes, I assumed -- at the time I wrote my report, my  
3 August report, I didn't know what any of the numbers were for  
4 the individual years. All I saw was Mr. Dinneen said, "I had  
5 tax returns from '99 to '04. I averaged them and the average  
6 was \$47,000."

7 Q And did you see that Mr. Dinneen offered -- did you  
8 say that Mr. Dinneen offered no explanation as to why you  
9 should use 2004 to project into the future?

10 A I mean, I didn't see an argument.

11 Q Feel free to look at your report, Dr. Cargill.

12 A Well --

13 Q Look at the top of page 3.

14 A Oh, sure. I'm saying that, well, I don't -- since I  
15 didn't have the individual numbers from each year, I don't  
16 know whether there was a big number in '04 and a -- or a small  
17 number in '04 and a huge number in '02. I didn't know that.  
18 So my statement was to just average these numbers without  
19 presenting the individual numbers --

20 MR. BAKER: Your Honor, once again --

21 THE WITNESS: -- and then to use --

22 MR. BAKER: -- this again is the --

23 THE WITNESS: Well, that's what I said.

24 MR. BAKER: -- basis of the objection that we had lodged.  
25 He's talking about the methodology of averaging being

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1 criticized and that is not what his report says -- what he  
2 says in the context of the bursting housing market. And I ask  
3 that any testimony with respect to that averaging methodology  
4 be stricken.

5 THE COURT: Sustain the objection.

6 BY MR. WARD:

7 Q Dr. Cargill, did you not say in your report at the  
8 top of page 3,

9 "Mr. Dinneen offers no rationalization as to  
10 why earnings over a period influenced by the bubble  
11 in housing prices can even come close to projecting  
12 earnings in the burst the bubble phase of the  
13 housing market?"

14 A That's exactly what I said.

15 Q Okay. And did you mean by that to say that it would  
16 be inappropriate to use earnings from this period of time when  
17 the bubble in the housing market was building to project loss  
18 of earnings for the period after the bubble burst?

19 A Absolutely, and it's complicated more because the  
20 bubble didn't really start until after 2002.

21 Q Okay. And that's what you said in your report?

22 A That's exactly what I said.

23 Q And why is that? Can you explain what that means?

24 A Well, there are two issues. Without seeing the  
25 individual numbers for '99 through 2004, I don't know what the

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1 average means. I don't know whether it's being influenced by  
2 one number or whether there's a real stable pattern of  
3 earnings. So, it's inappropriate to use an average from my  
4 perspective unless I see that information, and I state that in  
5 my report. I said that I need to see the --

6 MR. BAKER: I can't --

7 THE WITNESS: -- actual tax returns.

8 MR. BAKER: Your Honor, that's not stated in his report  
9 and it's the exact same thing again.

10 THE WITNESS: That is. I'm sorry. You go to the top of  
11 page 4. It does say that.

12 MR. BAKER: Haven't we read this twice now, Your Honor?

13 THE COURT: I don't know. I don't know that I've seen  
14 it, but Counsel has probably read it.

15 MR. BAKER: He says,

16 "There may be other technical issues with  
17 regard to Mr. Dinneen's report once this writer has  
18 received the same earning documentation reviewed by  
19 Mr. Dinneen and such. The writer reserves the right  
20 to supplement this report based on additional  
21 discovery."

22 It's the same thing we're talking about. And if  
23 they're talking about the burst in the housing market and the  
24 bubble, I understand that that's his testimony. I'm prepared  
25 for his testimony. But if he's issuing criticisms based upon

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1 an averaging technique that Mr. Dinneen utilized and spoke to,  
2 this Court has now three times sustained my objection with  
3 respect to that line of questioning.

4 THE COURT: Well, I'd sustain the objection as previously  
5 sustained.

6 BY MR. WARD:

7 Q The reason why you can't use 2004 data in the same  
8 way as other data is because it's influenced by the bubble in  
9 the housing market. Is that true?

10 A That is correct. And when I make the statement  
11 about the average, I'm talking about '99, 2000, 2001. That  
12 was not a bubble period. It is inappropriate to claim.

13 MR. BAKER: Your Honor, this is five times now.

14 THE WITNESS: Can I finish answering the question?

15 THE COURT: Well, there's nothing in his report at all  
16 that addressed the issue of averaging as I understand it.

17 MR. BAKER: He says that it is inappropriate to average  
18 in the context of the bursting housing market, in the bursting  
19 bubble. Now he's speaking about the methodology of averaging  
20 as being inappropriate.

21 If he wants to talk about the bursting, the Court  
22 understands my objection.

23 THE COURT: I do. Please proceed, Mr. Ward.

24 MR. WARD: Yes.

25 ///

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1 BY MR. WARD:

2 Q Let's take a look at the discussion on page 2.

3 A Yes.

4 Q And the information you were given was that  
5 Mr. Rodriguez was involved in an incident, accident?

6 A That's correct.

7 Q Correct?

8 A An incident, yes.

9 Q Okay. And now you were provided with Mr. Dinneen's  
10 lost compensation report?

11 A Yes.

12 Q And did you read Mr. Dinneen's opinions?

13 A Yes, I did.

14 Q And did he base the work history and calculate, did  
15 he -- did you note in your report at page two that he  
16 calculated the average earnings from 1999 to 2003?

17 A That is correct.

18 Q Okay. So you talked about Mr. Dinneen's calculation  
19 of average earnings in your report?

20 A Yes.

21 Q Right there on page 2?

22 A Yes.

23 Q Okay. And --

24 A In two places.

25 Q And then you're aware that Mr. Dinneen then took

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1 that number and calculated that through projected retirement?

2 A That's correct. That's what he did.

3 Q Okay. And then he did something to reduce that to  
4 present value?

5 A That's correct.

6 Q And did you note that you were not provided with  
7 documentation about the reports?

8 A That's correct. I said that I did not have the same  
9 documentation that Mr. Dinneen did. I did not have the '99  
10 through '04 tax returns.

11 Q Okay. Now when you said the estimate of lost  
12 compensation here in your report on page two, at the bottom of  
13 page two, that there are two fundamental problems with  
14 Mr. Dinneen's assumptions, did you say that?

15 A Yes.

16 Q And you were talking about Mr. Dinneen's assumption  
17 that what you could do is average his pre-incident earnings  
18 from 1999 to 2003 and project that through the rest of his  
19 life?

20 A That's correct.

21 Q Okay. So you were saying in the report that you  
22 disagreed with Mr. Dinneen's calculations of average earnings  
23 over that period of time?

24 A That's correct.

25 Q And you gave two fundamental reasons why you didn't

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1 agree with that, is that correct?

2 A That's correct.

3 Q And the first had to do with the effect on the  
4 housing market, correct?

5 A That's correct because the average period includes a  
6 boom period and a not so boom period. You've got to -- and so  
7 just average that and then project it forward is going to put  
8 too much weight on the boom period.

9 Q And that's why you said in your report at the bottom  
10 of page 2,

11 "First, given the economic and financial  
12 distress in the housing market, it is inappropriate  
13 to average earnings over the period from 1999 to  
14 2004 and use the average as an estimate of  
15 pre-incident future earnings."

16 Correct?

17 A That's exactly what I said.

18 Q In your report?

19 A Yes.

20 Q That report that was provided to Counsel for  
21 Plaintiff?

22 A I assume it was provided, yes.

23 Q Okay. And you've explained that Mr. Dinneen offered  
24 no rationalization as to why earnings over a period influenced  
25 by the bubble in housing prices can even come close to

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1 projecting earnings in the burst the bubble phase of the  
2 housing market, is that correct?

3 A That's exactly what I said.

4 Q And that's what you said in your report that was  
5 produced to this Court?

6 A That's exactly what I said in the report.

7 Q Okay. And why is that, that it's inappropriate in  
8 your estimation to use the average earnings over the period of  
9 1999 to 2004 as a prediction of future earnings to the end of  
10 this gentleman's retirement, expected retirement age?

11 A Well, there are two issues. One is without seeing  
12 the individual numbers, I don't know if the average is being  
13 influenced by one number or whether it's representative of all  
14 the years, so I don't know what that average means. If it's  
15 being influenced by the last couple of years, then it would  
16 clearly be inappropriate given what happened.

17 The other reason is that an average, it doesn't give  
18 you any indication of the variability from year to year, and  
19 that's really important in terms of projecting anybody's loss.

20 MR. BAKER: Your Honor.

21 THE WITNESS: So, without --

22 MR. BAKER: Can I --

23 THE WITNESS: That was my problem with using the average.

24 THE COURT: Mr. Baker?

25 MR. BAKER: That's okay, Your Honor.

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1 THE COURT: Please proceed, Mr. Ward.

2 MR. WARD: Thank you, Your Honor.

3 BY MR. WARD:

4 Q Now, when you said that it was inappropriate to use  
5 earnings during the bubble phase of the housing market, was it  
6 your concern that the earnings would be higher in those years?

7 A Yes, and there were at least two years that would be  
8 influenced by the bubble.

9 Q Okay.

10 A And Southern California was like Nevada, prone to  
11 the bubble.

12 Q Okay. And so the reason why you said that before  
13 you saw the numbers is that you suspected with the housing  
14 bubble that they were going to be higher, is that correct?

15 A No, I suspected that '03 and '04 would be large  
16 numbers, and much larger than '99 through '02. But again,  
17 until I saw it, that was an assumption. That's why I made the  
18 statement that the average would be inappropriate because it  
19 would be influenced by because I knew that at least two of  
20 those years were bubble years.

21 Q Okay. So, even before you saw the numbers, you  
22 opined that there might well be a problem using that straight  
23 average?

24 A That's correct.

25 Q And --

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1 A That was exactly why I made that statement.

2 Q And your expectation as to why there might be a  
3 problem is because you expected those numbers to be abnormally  
4 high compared to the other years?

5 MR. BAKER: Eventually, Your Honor, I have to --

6 THE WITNESS: That's what I expected.

7 THE COURT: Sir. Mr. Baker?

8 MR. BAKER: I said eventually I have to object to  
9 leading.

10 THE COURT: Sustained.

11 BY MR. WARD:

12 Q Is it true that if they were all the same it  
13 wouldn't make any difference?

14 A Well, it wouldn't in terms of the actual number, but  
15 that would be kind of unusual, but --

16 Q Okay.

17 A -- that would certainly eliminate some issues.

18 Q Okay. And so what were you able to say based on the  
19 information that you were provided and based on your knowledge  
20 of the real estate market about this analysis?

21 A Well, since I didn't have the information, there's  
22 not a lot I could say about Mr. Dinneen's estimate of  
23 pre-incident earnings. And I said when I get that information  
24 I can say more.

25 So, I can find my report with respect to the lost

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1 compensation to focusing on the fact that the bubble burst and  
2 that any average that included an influence of bubble would be  
3 inappropriate. And then I focused on some technical issues  
4 dealing with discounting and that was it.

5 Q Okay. I would offer the resume of Thomas Cargill  
6 into evidence, Your Honor.

7 THE COURT: Any objection?

8 MR. BAKER: No objections, Your Honor.

9 THE COURT: Well --

10 MR. WARD: And I would offer the November 17 report --  
11 the August 17 report in evidence.

12 THE COURT: The August report or the November report?

13 MR. WARD: The August report, Your Honor. I misspoke.  
14 There are two reports. One is August. One is October.

15 THE COURT: Any objection?

16 MR. BAKER: No, Your Honor.

17 THE COURT: Are they both to be considered as Exhibit 67,  
18 Mr. Ward?

19 MR. WARD: I'm sorry, Your Honor.

20 THE COURT: They're both included under Exhibit 67,  
21 correct?

22 MR. WARD: Yes, yes, they are.

23 THE COURT: So ordered, 67 is admitted.

24 [Defendant's Exhibit 67 Received]

25 MR. WARD: And, Your Honor, I would offer to the Court my

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1 document that I signed and filed October 5 providing a copy of  
2 Dr. Cargill's supplemental report to --

3 MR. BAKER: Me?

4 MR. WARD: To you.

5 MR. BAKER: Can I see it?

6 MR. WARD: Sure.

7 THE COURT: Take a look at it, Mr. Baker.

8 MR. BAKER: Can I have this?

9 MR. WARD: Yeah.

10 MR. BAKER: Okay. Thank you, Your Honor. Your Honor, my  
11 apologies to Casey.

12 THE COURT: Did you receive that already, Mr. Baker?

13 MR. BAKER: It says -- I have never seen this report and  
14 I'm not in possession of this supplement, Your Honor, but he's  
15 got a signed and dated supplement to 16.1 that references the  
16 report and I can't prove a negative.

17 THE COURT: Okay.

18 MR. BAKER: What's that?

19 MR. WARD: I will as an officer of the Court testify that  
20 I caused this to be served.

21 MR. BAKER: Oh, wait, this is served on October 5, 2010?

22 MR. WARD: Yeah.

23 MR. BAKER: It's untimely.

24 THE COURT: Well, if it's untimely, that's the problem.

25 MR. BAKER: Yeah, that's after the close of discovery.

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1 MR. WARD: That was because of information that was never  
2 provided to us until the time I took Doctor -- Mr. Dinneen's  
3 deposition. The records, which were supposed to have been  
4 provided before that, were never provided. Counsel for  
5 Plaintiff never provided them to us.

6 THE COURT: Mr. Baker?

7 MR. BAKER: I don't know off the top of my head know if  
8 they were ever requested. I do know that that's what the  
9 discovery commissioner is for and that if there's an extension  
10 wanted to file a report or if there's an extension necessary  
11 to provide information, I'd stipulated nine times. Well, that  
12 might be an exaggeration, but many, many times in this case to  
13 extend discovery dates and do other things. But this is an  
14 untimely supplemented report after the discovery cutoff and  
15 that's maybe why I haven't seen it.

16 THE COURT: You know, if it's an untimely report, then it  
17 presents a problem all the way around because that's the whole  
18 point of having discovery rules that both sides have to abide  
19 by, so sustain the objection as to the untimely report.

20 MR. BAKER: I'm sorry, Your Honor.

21 THE COURT: Sustain the objection as to the -- any sort  
22 of untimely reports. The Court has to sustain the objection.  
23 That's the whole point in having discovery rules.

24 MR. BAKER: Thank you, Your Honor.

25 Oh, Your Honor, I need to make sure of something.

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1 MR. WARD: I would simply like to say to the Court, and I  
2 accept the Court's rulings, but the first objection was I  
3 never gave it to them.

4 THE COURT: I do --

5 MR. BAKER: Well, that's correct. Your Honor, I wasn't  
6 absolutely sure as to the discovery cutoff, but October 4th  
7 was our original trial setting, so we're going to assume that  
8 the discovery cutoff was before the date of trial.

9 THE COURT: Right. When was the discovery cutoff, do you  
10 know?

11 MR. BAKER: It was moved so many times, Your Honor, but I  
12 can represent to Court that it wasn't on the day of trial.

13 THE COURT: Right.

14 MR. WARD: The one thing I would offer the Court -- do we  
15 have the date of Mr. Dinneen's deposition?

16 THE COURT: Well, was Mr. Dinneen deposed within the  
17 discovery deadlines?

18 MR. BAKER: I --

19 MR. WARD: I don't think so because of his  
20 unavailability.

21 MR. BAKER: Not exactly, Your Honor. I mean I was  
22 around. It just kind of got pushed back in a way. I believe  
23 that he was deposed by agreement outside of the discovery  
24 cutoff.

25 MR. WARD: He was deposed on the 29th of September and

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1 that information was given for the very first time. And I  
2 agree, that information should have been provided to us in  
3 discovery and it wasn't.

4 MR. BAKER: And once again, Your Honor, I don't know if I  
5 was ever asked for it, but that's what the discovery  
6 commissioner is for. If they requested something that wasn't  
7 provided, then the rules require that they first have an EDCR  
8 meeting with me, then bring a motion to the discovery  
9 commissioner.

10 [Counsel Confer]

11 MR. BAKER: I'm not going to make the representation  
12 then, Your Honor.

13 THE COURT: Okay. So that we're clear and the Clerk, it  
14 looks like --

15 MR. BAKER: Does the Court's calendar show when the  
16 discovery deadline was, Your Honor?

17 THE COURT: Do you know, Madame Clerk?

18 THE CLERK: I'm sorry. What was the question?

19 THE COURT: Does the Court's calendar show when the  
20 discovery deadline was?

21 THE CLERK: I don't have that information.

22 THE COURT: I don't think she's --

23 THE CLERK: I'd have to look at -- open up documents and  
24 search.

25 THE COURT: I don't know that it's an easy question to

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1 answer right on the spot, but what I wanted to be sure of is  
2 that 67, which has been admitted, consists of Mr. Cargill's  
3 resume and qualifications as well as his August 17, 2010  
4 report.

5 MR. BAKER: And I'm going to have Monique call the office  
6 and check on the discovery cutoff. I do not want to represent  
7 anything to the Court.

8 THE COURT: Okay.

9 MR. BAKER: But my understanding is we were ready to go  
10 on October 4th, and I believe Casey was in trial. And I can't  
11 fathom how the discovery cutoff date could be the date set for  
12 bench trial.

13 THE COURT: Yeah, that couldn't be.

14 MR. WARD: It would appear that you served us on October  
15 4th with something, your 29th. So you were doing something  
16 the day before we served the report.

17 MR. BAKER: What was the 29th?

18 UNIDENTIFIED SPEAKER: Prepared 29th supplemental. It  
19 was served on October 4th.

20 MR. BAKER: I don't know what that was, but I'm proud to  
21 have made 29 supplements, Your Honor.

22 THE COURT: Do what, Mr. Baker?

23 MR. BAKER: I said, but I'm proud to have made 29  
24 supplements, Your Honor.

25 THE COURT: Well done, Mr. Baker.

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1 MR. BAKER: Thank you much.

2 MR. WARD: Do we have his report in the exhibit? I'm  
3 trying to answer Your Honor's questions. I know that you want  
4 to make sure that the resume and the report are part of 67 and  
5 I'm trying to figure that out.

6 THE COURT: Well, I'm just trying to help out the Clerk  
7 because she tries to keep me in line, you know. I don't want  
8 to get sideways with my Court Clerk.

9 [Counsel Confer]

10 MR. WARD: So, we are -- their 67 contained his report  
11 from August 17th and we are simply adding his resume to that,  
12 Your Honor.

13 THE COURT: Right, and that's been included, right?

14 THE CLERK: Right. That's it?

15 THE COURT: You want this back?

16 THE CLERK: Sure, if you don't want it now.

17 THE COURT: Okay. I guess I need -- I need your set; by  
18 the time we conclude this, we'll need your set.

19 MR. BAKER: Permission to pass away, Your Honor.

20 MR. WARD: Okay.

21 THE COURT: Okay what?

22 MR. WARD: I will -- in light of the Court's ruling, I  
23 will -- I'm finished.

24 THE COURT: How about you, Mr. Baker? Any questions?

25 MR. BAKER: A couple, Your Honor.

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## 1 CROSS-EXAMINATION

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BY MR. BAKER:

Q Good morning.

A Good morning or afternoon.

Q I'm a late riser. It appears that you're saying that Enrique could not have made as much in the current financial market that he could have back in 2004 because the bubble burst. Is that what you're saying?

A Well, I don't know that. I didn't have the tax returns at the time.

Q So your first opinion then, you do not hold that opinion?

A Would you repeat the question?

Q Sure. It seemed like you were saying Enrique could not make as much today because the housing market has burst, the bubble has burst. Is that right?

MR. WARD: Make as much, it's vague as to what the reference is, make as much as --

THE COURT: Well, it is, sustained.

BY MR. BAKER:

Q As much as he did between 1999 and 2004, is that what you're saying?

A It's unlikely. It was inappropriate because that period was influenced by the bubble. But I didn't have the numbers in front of me to make a definitive statement.

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1 Q Okay. But you understand and you read his  
2 deposition that he was the kind of guy who did transactions,  
3 accumulated a cache, and then kind of sat on it and enjoyed  
4 his life and his family until he needed some more money, is  
5 that right?

6 A No, that's not what I understood.

7 Q You didn't read that in his deposition transcript?

8 A You asked me what I understand, not what I read.

9 Q Oh, okay. Did you read his trial testimony?

10 A Wait, can I answer the question?

11 MR. WARD: Wait, the witness is trying to answer the  
12 question.

13 THE COURT: You'll have a chance to follow-up.

14 BY MR. BAKER:

15 Q Did you read his trial testimony?

16 A No.

17 Q Okay. You didn't read his trial testimony?

18 A No, I read his deposition.

19 Q Do you have an opinion that he's not a good real  
20 estate investor? You don't have that opinion, do you?

21 A I didn't say that.

22 Q Okay. And you understand that this is a market  
23 that's flooded with foreclosures, don't you?

24 A Yes, it is.

25 Q And you heard that Casey left his laptop on the

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1 plane, correct, and that could be scary? Do you get on your  
2 laptop and do you look with respect to the Las Vegas housing  
3 market?

4 A I'm very familiar with the Las Vegas housing market.

5 Q Have you been on [www.ushud.com](http://www.ushud.com)?

6 A I don't recall.

7 Q Have you been on [freeforeclosurelisting.net](http://freeforeclosurelisting.net)?

8 A I don't recall.

9 Q Have you been on [distressedpropertyrealproperty.com](http://distressedpropertyrealproperty.com)?

10 A I don't recall.

11 Q [www.lasvegashomesearch.com](http://www.lasvegashomesearch.com)?

12 A I don't think so, no.

13 Q [Lasvegasforeclosure.com](http://Lasvegasforeclosure.com)?

14 A I don't -- the statistics -- well.

15 Q Do you know that there are people going around right  
16 now flipping these foreclosed distressed properties like hot  
17 pancakes? Do you know that?

18 A No, I do not.

19 Q Do you know Omar Nagy down at Bank of Nevada?

20 A Say that again.

21 Q Do you know Omar Nagy down at Bank of Nevada?

22 A No, I do not.

23 Q Do you know banks right now have whole departments  
24 that are going out to realtors to sell these distressed  
25 properties?

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1           A     Well, I'm very aware that there is a process going  
2 on where people are trying to unload this huge inventory.

3           Q     Do you know --

4           A     I don't have the particulars.

5           Q     Did you read the paper this morning? I was having  
6 my coffee. Did you read the paper this morning?

7           A     What paper?

8           Q     The business section of the "Las Vegas Review  
9 Journal"?

10          A     No.

11          Q     Do you belong to the Greater Las Vegas Association  
12 of Realtors?

13          A     No.

14          Q     Do you know that the paper this morning reported  
15 that 75 percent of existing home sells --

16          MR. WARD: Object, hearsay.

17          MR. BAKER: He's an expert.

18          MR. WARD: He may be an expert, but this is hearsay  
19 reading from the paper.

20          MR. BAKER: An expert can hearsay testimony, Your Honor.

21          THE COURT: Well, that's true. He can consider hearsay  
22 in giving his opinion.

23          MR. BAKER: Then I'll ask him an opinion.

24          ///

25          BY MR. BAKER:

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1 Q Do you have any reason to disagree that roughly 75  
2 percent of existing home sells in Las Vegas are homes in  
3 foreclosure and distressed properties and short sells?

4 A I think that's true across the nation.

5 Q Do you know that that's exactly what Enrique  
6 Rodriguez specialized in?

7 A No, he bought houses in an upward market. This is a  
8 downward market. It's different.

9 Q Do you know he purchased foreclosures and distressed  
10 properties?

11 A That is not what I understood.

12 Q That's what he said in Court.

13 A Well --

14 Q That's what his friend testified to.

15 A I'm telling you I read Mr. Dinneen's deposition, his  
16 report, and Mr. Rodriguez' report, and that is not --

17 Q Okay, but nobody --

18 A -- the understanding.

19 Q -- showed you the trial testimony?

20 A Pardon.

21 Q But nobody showed you the trial testimony?

22 A No, I don't.

23 Q Okay. You also had a problem with Terry Dinneen's  
24 discounting rate, is that right?

25 A Say that again, please.

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1 Q You also had problems with Mr. Dinneen's discounting  
2 rate?

3 A Yes.

4 Q Could you -- and you're using a historical rate?

5 A No.

6 Q What rate did you use?

7 A I'm using a rate that is based on economic theory,  
8 economic evidence, what the U.S. Congressional Budget Office  
9 uses.

10 Q Give me a number.

11 A Would you please let me finish?

12 THE COURT: Yeah, I think you should. Mr. Baker --

13 MR. BAKER: Sorry, Your Honor.

14 THE COURT: -- you keep firing questions. He can't  
15 finish his answer before you fire another one.

16 MR. BAKER: There was caffeine in the cough drop.

17 THE WITNESS: What the trustees of the Social Security  
18 Administration use, and they use a real interest rate of 3  
19 percent. So, whatever inflation rate you assume, the discount  
20 rate automatically is determined.

21 If you assume a 1 percent inflation rate, then the  
22 discount rate is 4 percent. If you assume a 2 percent  
23 inflation rate, then the discount is 5 percent. It's the  
24 ratio that's important. So I use a real interest rate of 3  
25 percent, which is based on economic theory, economic evidence.

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1 In fact, I've contributed to this literature myself.

2 BY MR. BAKER:

3 Q Are you taking a 6 percent historical average and  
4 subtracting a 3 percent growth rate finding?

5 A I did not say that and you're misinterpreting and  
6 misrepresenting what I'm saying.

7 Q Did you do an --

8 A I said a real interest rate of 3 percent.

9 Q Did you do a net discount rate?

10 A Yeah, 3 percent.

11 Q So you have to take a number and you had to subtract  
12 another number from it, right?

13 A That's right, 3 percent.

14 Q And 6 minus 3 is 3, is that right?

15 A So is 5 minus 2.

16 Q Okay.

17 A So is 4 minus 1.

18 Q Can you take me down to one of these banks that I  
19 just talked about and get me an interest rate anywhere near 6  
20 percent?

21 A No, but it's irrelevant.

22 Q Okay.

23 A Because --

24 Q No, I appreciate you saying that.

25 A Well, no you're really misrepresenting to the Court.

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1 Q Well, sir, I didn't ask you to -- that's, well.

2 A Well, you asked me the question. I should be able  
3 to answer it fully.

4 Q I did. Do you know --

5 A And it's the way --

6 Q I'm sorry. If that's --

7 A Would you please let me answer the question?

8 MR. BAKER: Your Honor, he answered the question. He  
9 said no.

10 THE COURT: I think you probably did. Let's move on.

11 BY MR. BAKER:

12 Q Now, with respect to Mr. Dinneen, the criticisms  
13 that you have of Mr. Dinneen, he used a average between 2.21,  
14 3.46, and 4.3 percent?

15 A For what? What are we talking about?

16 Q With respect to his discounting.

17 A Oh, you mean the interest rates?

18 Q Yes.

19 A Yes.

20 Q Did you look at what 30 year T-bills were this  
21 morning?

22 A Not this morning, but I know that they're very low.

23 Q Would it surprise you if it was 4.12?

24 A But you don't understand nobody would go out and  
25 buy --

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1 Q Would it surprise you that it was 4.12?

2 A It is nonsense to use current interest rates.

3 Q Sir, would it surprise you that it's 4.12 today?

4 A No.

5 Q If this Judge granted -- sorry, if our great Judge  
6 granted Enrique Rodriguez money today that's discounted for  
7 present dollar value, it's assumed that he's supposed to  
8 invest that to take for his future medical care, is that  
9 right?

10 A That's correct.

11 Q And do you think he should just hold it in his bank  
12 account or something? Today he could get 4.12, is that right,  
13 on a 30 year T-bill?

14 A But it would be --

15 Q Today, sir, he could get -- yes or no, 4.12 on a 30  
16 year T-bill?

17 A If he bought them for 30 years, but the trouble  
18 is --

19 Q Sir, today could he get it for 4.12 on a 30 year  
20 T-bill?

21 A Yes, and he'd have to let the money sit there for 30  
22 years.

23 Q Correct. Okay, so a ten year treasury he'd get  
24 2.36, right?

25 A That's what the rate is, yeah.

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1 Q And that's what Terry Dinneen wrote down, isn't it?

2 A And he's incorrect in --

3 Q Okay.

4 A -- terms of --

5 Q No further questions, Your Honor.

6 THE COURT: Any follow-up, Mr. Ward?

7 MR. WARD: Yes, Your Honor.

8 THE COURT: I thought so.

9 REDIRECT EXAMINATION

10 BY MR. WARD:

11 Q Dr. Cargill, how did you calculate the projection  
12 into the future in the present value?

13 A I didn't catch the last part. You were walking  
14 away.

15 Q Okay. How did you calculate the -- how did you say  
16 you should do the calculations to present value? What did you  
17 do?

18 A Well, there's two elements, but mathematically, it's  
19 really just one. One is you take the number like \$50,000 and  
20 you grow it into the future and then you discount it by a  
21 nominal interest rate. But what's really important is the  
22 ratio of the growth factor and the discount factor. And  
23 sometimes it's called a net discount factor.

24 There's absolutely nothing in the record to indicate  
25 that there is a productivity factor in Mr. Rodriguez'

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1 compensation because I didn't have the information to  
2 determine that.

3           So, you would assume that his compensation in the  
4 future would grow at the average inflation rate. You could  
5 assume that at 1 percent, 2 percent, or 3 percent, and nobody  
6 really knows because it's very hard to predict inflation.

7           And once you have the inflation rate, then you know  
8 what the discount rate is. And that's based on a real rate of  
9 interest at 3 percent which is well established, well accepted  
10 by virtually everybody.

11           So, if you assume a 1 percent inflation factor, you  
12 would discount by 4 percent. If you assumed a 2 percent  
13 inflation rate, you would discount by 5 percent. If you  
14 assumed a 3 percent inflation rate, you would discount by 6  
15 percent. But that's just the mechanical way of doing it.

16           All three of those approaches would give you pretty  
17 much the same number, whether you assumed a 1 percent  
18 inflation rate and a 4 percent discount factor or a 2 percent  
19 inflation rate and a 5 percent discount factor or a 3 percent  
20 inflation rate and a 6 percent discount factor. They would  
21 all give you numbers pretty darn close to each other.

22           That's why it's a red herring to say, "Show me an  
23 interest rate of 6 percent today." It's not relevant to the  
24 calculation.

25           Q     So, how would one make the calculation for any --

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1 for example, \$100 of future expenses or future income loss?

2 A Well, assuming that that expenditure would grow at  
3 the assumed inflation rate, you could say, "Well, I'm going to  
4 assume it will grow at 3 percent," even though the actual  
5 inflation rate is like 1.5 percent.

6 MR. BAKER: Your Honor, it's outside the scope of the  
7 cross.

8 THE COURT: I'll allow it.

9 THE WITNESS: So, you would assume it would grow at 3  
10 percent. And if you use a real interest rate of 3 percent,  
11 which is what I used, then the discount factor would be 6. If  
12 you assume it would grow at 2 percent, then you would discount  
13 by 5. If you assume it would grow at 1 percent, then you  
14 would discount by 4. And all three numbers would be pretty  
15 close to each other.

16 BY MR. WARD:

17 Q And so the net effect would be the 3 percent?

18 A Yeah, it's that real interest rate. That's what's  
19 critical. And the Congressional Budget Office, you go to  
20 their website, they say that the real interest rate over the  
21 next couple of years will be 3 percent. And after 2014 to  
22 2020, it will be 3.6 percent. So 3 percent is actually on the  
23 low side. And that's because of the deficit. And the real  
24 interest rate is a fairly complicated thing and it comes out  
25 of the financial system.

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1                   But we're -- economists are very, very confident  
2 that that real interest rate ranges between 2 and 4 and 3 is a  
3 good average. And that's what pretty much everybody uses.

4           Q     And is that a conservative number?

5           A     I don't know if I'd call it conservative. You could  
6 certainly make an argument that it could be a little higher,  
7 but I think for a long run real return on government  
8 securities, 3 percent is -- a real return of 3 percent would  
9 be acceptable to almost anybody that really knows the  
10 financial system.

11          Q     Thank you.

12          A     And the problem in focusing on current interest  
13 rates is very low.

14          MR. BAKER: Your Honor. That's all right.

15          THE WITNESS: But if you go out and buy a bunch of bonds  
16 at low interest rates, you're going to have a capital loss in  
17 a couple of years because as interest rates rise and everybody  
18 projects that they're going to rise, the value of bonds will  
19 fall. That's why you can't use current interest rates. It's  
20 economic nonsense.

21          MR. WARD: Thank you, Doctor.

22          THE WITNESS: Okay.

23          MR. BAKER: No questions, Your Honor.

24          THE COURT: No follow-up, Mr. Baker?

25          MR. BAKER: No follow-up, Your Honor.

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1 THE COURT: Thank you, sir. You may be excused.

2 THE WITNESS: Thank you.

3 THE COURT: Let's take a ten minute break, please.

4 MR. BAKER: Your Honor, Doctor --

5 MR. WARD: Thank you.

6 MR. BAKER: -- Mortillaro is going to be here at 3:00.

7 Should I see if I can --

8 THE COURT: 3:00?

9 MR. BAKER: Yeah. Should I see if I can hustle him?

10 THE COURT: If you can, that would be great. Let's see  
11 if he can hustle.

12 [Designation of record concludes at 2:14 p.m.]

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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.

Crystal Thomas  
CRYSTAL THOMAS, Transcriber



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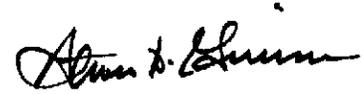
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DISTRICT COURT



CLARK COUNTY, NEVADA

CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 FIESTA PALMS LLC, )  
 )  
 Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 9, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF FRANK SCIULLA

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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None

Defendant's Witness(es):

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1                   TUESDAY - NOVEMBER 9, 2010 AT 1:00 P.M.

2                   [Designation of record begins at 1:00 p.m.]

3                   THE COURT: Please be seated.

4                   MR. BAKER: Good morning, Your Honor.

5                   THE MARSHAL: Please come to order.

6                   MR. WARD: Morning.

7                   THE MARSHAL: Let me officially open this, boss.

8                   THE COURT: Thank you.

9                   THE MARSHAL: Please come to order. Department 10 is now

10                  in session. The Honorable Jessie Walsh, Judge, presiding.

11                  THE COURT: Good afternoon, everybody.

12                  MR. WARD: Good afternoon, Your Honor.

13                  MR. BAKER: Hi, Your Honor.

14                  THE COURT: I have a new witness. Could you please

15                  stand, sir, raise your right hand to be sworn by Madame Clerk?

16                  FRANK SCIULLA, DEFENDANT'S WITNESS, SWORN

17                  THE CLERK: Please be seated, stating your full name,

18                  spelling your last name for the record.

19                  THE WITNESS: Frank Sciulla, S-C-I-U-L-L-A.

20                  THE COURT: Mr. Ward.

21                  MR. WARD: Good afternoon, Your Honor.

22                  THE COURT: How are you?

23                  MR. WARD: I'm doing fine. Thank you. And yourself?

24                  MR. BAKER: Tell her about your laptop, Casey.

25                  THE COURT: What about the laptop, Mr. Ward?

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1 MR. WARD: I left it on the plane, Your Honor.

2 THE COURT: Oh, no. Oh, no.

3 MR. BAKER: I was --

4 MR. WARD: Oh, yes.

5 MR. BAKER: -- explaining the morning that I had, which  
6 you'll probably see in how I comport myself today. And he  
7 says, "I left my laptop on the plane." And I just had to shut  
8 up, because that's about the worst thing I think could happen.

9 THE COURT: Oh, boy. See. We get so attached to those  
10 things and now what happens.

11 MR. WARD: Yes, we do. Yes, we do. And neither my  
12 working partner here nor my spouse were at all surprised.

13 THE COURT: Oh, boy.

14 MR. WARD: So that tells you something about me maybe you  
15 didn't want to know.

16 Anyway. Shall we proceed?

17 THE COURT: Whenever you're ready, sir.

18 MR. WARD: I'm ready.

19 DIRECT EXAMINATION

20 BY MR. WARD:

21 Q Mr. Sciulla.

22 A Yes.

23 Q You work at the Palms?

24 A Yes, I do.

25 Q What do you do?

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1 A I'm the director of surveillance.

2 Q And how many years have you been working in  
3 surveillance-type activities?

4 A In doing surveillance?

5 Q Right.

6 A Since about 1994.

7 Q Okay. So you've had about 16 years of doing  
8 surveillance in casinos?

9 A Correct.

10 Q And how soon in relation to the Palms opening up did  
11 you start working at the Palms?

12 A I've been an employee at the Palms since Day One  
13 that we opened.

14 Q Okay. So you saw it the day it was opened?

15 A Correct.

16 Q Do you remember being in the Sportsbook?

17 A On the day it opened?

18 Q Sometime within the first week or two after it  
19 opened?

20 A Yes.

21 Q Does it look any different today from the way it  
22 looked the day it opened?

23 A The seating arrangements appear to be the same as  
24 they were when we opened.

25 Q Okay. So it's the same configuration as it's always

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1       been?

2           A       Correct.

3           Q       And that would include 2004?

4           A       Correct.

5           Q       Now, tell me, there are how many video cameras at  
6       the Palms?

7           A       Approximately 1300.

8           Q       In general. How many?

9           A       Thirteen hundred.

10          Q       Thirteen hundred cameras at the Palms.

11          A       Yes.

12          Q       Okay. Now, that's more than the typical hotel.

13          A       Hotel or hotel with a casino?

14          Q       Hotel?

15          A       I would imagine.

16          Q       Right. And so the reason there are so many cameras  
17       is because it's a casino. Is that correct?

18          A       Yes.

19          Q       And they're required by the Gaming Commission?

20          A       We have certain surveillance standards for  
21       unrestricted licenses that we must meet those standards.

22          Q       Okay. Which means that there are a lot of cameras  
23       that are aimed at the gaming operations and the money counting  
24       and everything having to do with that?

25          A       Specific locations. Yes, to address the

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1 surveillance standard for unrestricted licenses.

2 Q Okay. Now, let's talk about the Sportsbook. You  
3 are familiar with the layout in the Sportsbook?

4 A Yes.

5 Q And the camera layout in the Sportsbook?

6 A Yes.

7 Q And what is the camera layout in the Sportsbook?

8 A There are cameras that cover each of -- on the race  
9 side and the sports side it's divided up into two halves. You  
10 have a fixed camera that looks down on each betting window so  
11 you can see the counter and the drawer both on the race and  
12 the sports side.

13 And camera shots that would -- for the face IDs if  
14 somebody walks right up to the window. There is also coverage  
15 behind where the tellers -- where they're working at their  
16 station. And the back wall to monitor the activities -- the  
17 employee activities behind their work area.

18 And then there are two PTZ cameras, one on the race  
19 side, one on the sports side to monitor the activities in the  
20 room.

21 Q Okay. And the two PTZ cameras?

22 A Yes. Pan, tilt, zoom. Unlike the other ones, which  
23 are mostly fixed, the pan, tilt, zoom we are able to  
24 proactively control it, move it, zoom it in, pan it left,  
25 right.

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1 Q Now, the pan/zoom cameras are not being zoomed all  
2 of the time, all of the cameras all of the time the casino is  
3 open are they?

4 A No. They are not on an autorotation. When the  
5 camera is not in use, the camera has a location that it's  
6 aimed at when it's not being used.

7 Q Okay. Now, the protocol at the Palms is that when  
8 there is an incident and an incident report there is a request  
9 for a video?

10 A If the security department calls up to us.

11 Q Okay. Did you see the form -- the report form on  
12 this incident?

13 A Not today, but I have seen it in the past.

14 Q Right. And you saw it at the deposition?

15 A Yes.

16 Q And did that indicate that a request was made for a  
17 video?

18 A Yes.

19 Q And did that indicate whether there was or was not a  
20 video?

21 A It was checked that no -- there was no video.

22 Q Okay. Does that surprise you that there was no  
23 video?

24 A No, it does not.

25 Q Okay. And so there was no video for this incident?

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1 A No.

2 MR. WARD: Do you have that deposition with you?

3 MR. CARDENAS: Uh-huh.

4 MR. WARD: Does it have exhibits?

5 MR. CARDENAS: Nope.

6 MR. BAKER: Your missing the item but I really don't  
7 think it matters.

8 BY MR. BAKER:

9 Q Let me just ask you, there are 1300 cameras at the  
10 Palms Casino. Is that right?

11 A Approximately.

12 Q And you had an event going on in the Sportsbook  
13 where beautiful girls were throwing items out into the  
14 audience. And throwing promotional items through field goals  
15 and they might have even been a pair of twins there that day.  
16 Were you aware of that?

17 A No.

18 Q Nobody panned in on this at all at any given time?

19 A I was not there that evening.

20 Q And you reviewed and you didn't find any tapes of  
21 Enrique Rodriguez. Is that true?

22 A Review was -- well, call came up, a review was done  
23 and there was no coverage of that area at that time.

24 Q Thirteen hundred cameras in the Palms Casino. Were  
25 you aware that he was standing in the Sportsbook for

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1 approximately an hour?

2 A No.

3 Q Thirteen hundred cameras and not one picture of  
4 Enrique Rodriguez, huh?

5 A There was no coverage of that area at that time.

6 MR. BAKER: Thank you, Your Honor. No further questions.

7 THE COURT: Mr. Ward?

8 MR. WARD: Excuse the witness, Your Honor?

9 THE COURT: Sure.

10 Thank you, sir. With the thanks of the Court, you may be  
11 excused.

12 [Designation of record concludes at 1:08 p.m.]

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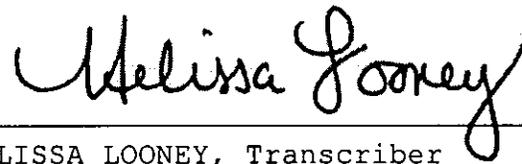
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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.



MELISSA LOONEY, Transcriber

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

\_\_\_\_\_ /

**APPELLANT'S APPENDIX**  
**VOLUME 14**

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**ATTORNEYS FOR APPELLANT**

**CHRONO INDEX**

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1 And it's very rare that I see a score of 36. It's -- I would  
2 say it's alarming in terms of a diagnosis that doesn't include  
3 psychological factors to explain it, you've got to explain it.

4 And you've got to understand, you've got to look at  
5 every single symptom and ask yourself the question, does this  
6 skew the symptom. Is this presentation going to throw me a  
7 curve ball? Am I going to do an operation that isn't  
8 indicated?

9 And there are things that you have to look at before  
10 you undertake to propose surgery to someone, or before you  
11 undertake to do any kind of procedure, invasive, or even  
12 treated with just medications.

13 So that was kind of the last bit of evidence that  
14 convinced me that this is something that we really have to  
15 take very seriously in this case.

16 Q And the issues, the opinions that you've offered  
17 about the knee, the knee condition and the -- the carpal  
18 tunnel that we've talked about, and the need for that being  
19 related to this accident and the recovery periods that you've  
20 talked about, is that your opinion as to what this gentleman  
21 is suffering from as a result of this accident?

22 A Yes, it is. I mean, I think it's reasonably,  
23 medically probable that he injured his knee, he needed the  
24 knee surgery as a result of the accident, and that he may have  
25 needed a second knee surgery as a result of the accident.

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1           And I think that the other things regarding the  
2 neck, the upper extremities, the shoulder, the wrist, except  
3 for the tingling in the hands, which I think it's carpal  
4 tunnel syndrome related to the injury, but the low back, the  
5 two ankles, I think it's reasonably, medically probable that  
6 there's no connection to the accident that happened had the  
7 Palms casino.

8           Q     And how about the ongoing pain in the knee?

9           A     I can't explain that purely on a physical basis, and  
10 I think I'm with Dr. Shannon on that. There are symptoms here  
11 that I can't explain. I don't know why. And I'm -- I also  
12 listed here an important list of things that indicate he does  
13 not have RSD or CRPS, and the findings that I found that --  
14 you know, he doesn't have abnormal skin. He didn't have  
15 change in color, either lying or sitting.

16                     He didn't have allodynia, which is a  
17 hypersensitivity if you just breath on the skin it's  
18 exquisitely painful.

19           Q     Let me interrupt you about the allodynia, one  
20 second. Dr. Miller?

21           A     Yes.

22           Q     Did you read Dr. Miller's records?

23           A     Yes.

24           Q     Did Dr. Miller use a pinwheel?

25           A     Yes.

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1 Q Tell us about that.

2 A That brings up two things about RSD or CRPS. CRPS,  
3 as I say is not a subtle diagnosis, when it -- if it's been  
4 around for awhile, if someone has it, it progresses, unless he  
5 gets better, unless he's cured.

6 Q It can be precipitated by a minor injury, stubbing  
7 your toe. You get up at night you stub your toe and three  
8 weeks later you begin to develop symptoms suggestive of RSD.

9 Someone who has RSD is so sensitive to touch that  
10 you would never, even vaguely consider touching them to test  
11 sensation with a pinwheel. Do you know what a pinwheel is?  
12 It's a little -- it's a testing device that has a handle, and  
13 then it's got a wheel about the diameter of a quarter and  
14 there are pins coming out of that thing, and it's a wheel, and  
15 you roll it down the skin.

16 And pricking the skin every time you turn the wheel,  
17 you know, about 30 times per revolution. You couldn't do  
18 that. You wouldn't do that with someone if you thought they  
19 had RSD. You could seriously worsen the condition.

20 The other issue is that this man had his -- one of  
21 his toenails excised, I think it was his left toenail with the  
22 fungal infection in it. Nobody, no -- no podiatrist in his  
23 right mind would operate on an extremity that had RSD or CRPS.  
24 It's an absolute contraindication for anything except for  
25 emergency surgery.

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1           If you broke a bone and the bone was sticking out  
2 through the skin you'd have to operate it on, that's an  
3 emergency. But absent that kind of an injury you would not do  
4 an elective procedure like that. So that's more evidence that  
5 he doesn't have RSD.

6           I think it -- I can't find anything in this record  
7 that convinces me that this man has RSD. I think it's all  
8 right to consider it as a differential, but you have to rule  
9 it out, and it's -- you rule it out. He simply doesn't have  
10 it.

11           Q     Can you find anything that suggests that he has a  
12 condition that is in any way related to this accident other  
13 than those you've already discussed?

14           A     No, I don't.

15           Q     And that is to a medical certainty?

16           A     Yes. Reasonable --

17           Q     Okay.

18           A     -- medical probability I guess is the buzz phrase.

19           Q     Reasonable medical probability. And you heard --  
20 you're aware of morphine pumps, is that one?

21           A     Yes.

22           Q     And you're aware of spine stimulators?

23           A     Yes.

24           Q     Do you think those have a purpose?

25           A     Yes.

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1 Q Where do you think they have a purpose?

2 A Well, to begin with, I don't insert pain stimulators  
3 or morphine pumps and -- if I felt they were indicated I'd  
4 send the patient to UCSF, University Medical School in San  
5 Francisco.

6 In managing chronic, my own chronic patients I have  
7 not found the necessity for either one of those. I think they  
8 are particularly useful in malignant pain, where someone has a  
9 metastasis into the bones, and it grows, and you don't want  
10 that patient to be overly sedated with high doses of morphine.

11 You give them the pain stimulator and you can  
12 relieve pain without heavy doses of narcotics, you can use  
13 fewer narcotics. So I think they definitely do have a place.  
14 I don't think they have a place in chronic knee pain, which is  
15 basically of a degenerative nature and is being embellished  
16 and colored by functional overlay. And I think that's true of  
17 back pain as well --

18 Q Do you --

19 A -- which were the two considerations I know in this  
20 case.

21 Q Do you think there's anything -- any residual caused  
22 by this accident that would cause, in your opinion, the  
23 medical need for a spinal stimulator?

24 A No, I don't. I don't think that a spinal stimulator  
25 in this man is going to give him any sustained relief. And I

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1 know he had a trial which gave him three or four days of  
2 finally relief of his leg pain, but not of his back pain. I  
3 think that is generally within what I would call a placebo  
4 response. And I do not think that long-term there's anything  
5 to be gained from a spinal cord stimulator. I think it's a  
6 can of worms, I wouldn't go there.

7 Q Thank you, Doctor. Is that all of the opinions that  
8 you --

9 A Well, that's all that come to mind right now.

10 Q -- have for us?

11 A I probably have others, but those are the relevant  
12 ones I think for this situation.

13 Q Thank you, Doctor.

14 THE COURT: Mr. Baker, do you have any questions?

15 MR. BAKER: No, Your Honor -- yeah, one or two.

16 CROSS-EXAMINATION

17 BY MR. BAKER:

18 Q Good afternoon, Doctor.

19 A Good afternoon.

20 Q Doctor, you came into this case in a forensic basis,  
21 not a clinical basis; is that right?

22 A That's correct.

23 Q You were going to look at the records and make some  
24 determinations; is that right?

25 A Yes.

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1 Q And when you --

2 A -- look at the records and examine the patient.

3 Q And when you do that do you attempt to utilize a  
4 scientific methodology; is that right?

5 A I gather data.

6 Q Right.

7 A And try to draw reason, conclusions from all the  
8 data that I gather.

9 Q And you try to meticulously gather your data, is  
10 that fine?

11 A Yes.

12 Q Under the philosophy, garbage-in/garbage-out,  
13 really?

14 A Well, I don't know about that philosophy, but --

15 Q You've never heard that before?

16 A I've heard the term. I would not apply it to my  
17 medical practice.

18 Q Well, I wasn't suggesting garbage, Doctor --

19 A Oh.

20 Q -- but the more accurate you are in your data the  
21 more accurate your conclusions are going to be, correct?

22 A Absolutely.

23 Q And first you determined that Enrique Rodriguez is  
24 not disabled; is that right?

25 A And first I determined that?

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1 Q You have determined that, and first, comma, you have  
2 determined that Enrique Rodriguez is not disabled; is that  
3 right?

4 A After considering all the data I would say that he  
5 is not totally disabled.

6 Q Okay. And "totally disabled" means unable to  
7 sustain any sort of employment; is that right?

8 A Yes.

9 Q Now could you please turn to your June 2nd, 2010  
10 report.

11 A Right.

12 Q Are you there?

13 A Yes.

14 Q If you go down to the third paragraph. You say  
15 there is an undated social security administration document  
16 from Richmond, Virginia; do you see that?

17 THE COURT: What page are you on?

18 THE WITNESS: In the third paragraph?

19 THE COURT: What page are you on, Mr. Baker?

20 MR. BAKER: Two -- three. They're not Bates stamped,  
21 Your Honor.

22 BY MR. BAKER:

23 Q We're at the June 2nd, 2010 report, part 2 of 2.

24 A Oh, part 2. I was looking at part 1.

25 Q That's why we couldn't find each other.

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1 A There's an undated social -- right.

2 Q Okay. And you see, it says -- there is a payment  
3 schedule representing the total payments, dot-dot-dot, that  
4 Mrs. Hoynstein [phonetic] received.

5 A Yes.

6 Q Who is Mrs. Hoynstein?

7 A I have no idea.

8 Q Okay. But that's in your report, isn't it?

9 A Yes.

10 Q And then you say in bold, don't you: "Although  
11 Mr. Rodriguez filed an application for social security and  
12 Medicare benefits, he never received any payments or  
13 coverage;" is that right?

14 A That's a quote from the document, yes.

15 Q And it's your understanding that Enriquez Rodriguez  
16 has never received coverage from social security?

17 A No. That isn't my understanding. My understanding  
18 is what I quoted here, that I said that's written in the  
19 document, and that was written in the document.

20 Q Are you aware he's been declared permanently,  
21 totally, disabled by social security?

22 A I don't know that I've seen the document declaring  
23 that, but I wouldn't be surprised at that.

24 Q Are you aware that he has been declared totally,  
25 permanently disabled? Did you know that before right now?

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1 A No.

2 Q Okay. Did you know that that definition of  
3 disability has been adopted by congress and codified in a  
4 statute what disability means?

5 A Yes. I'm aware of that. And --

6 Q And are you aware that that's a very difficult  
7 definition to meet?

8 A Yes, I am.

9 Q And is it true that today is the first day that you  
10 knew that the social security department, that the federal  
11 government of the United States has determined that Enriquez  
12 Rodriguez is totally, permanently disabled; the first time you  
13 knew that?

14 A The first time I knew that.

15 Q Okay. Now what you're given us, is you're saying,  
16 okay, his first knee surgery is related to this incident; is  
17 that right?

18 A Yes.

19 Q And you're saying the carpal tunnel is related to  
20 this incident; is that right?

21 A Yes.

22 Q Have you ever said anything other than the carpal  
23 tunnel is related to this incident? Did you in your report  
24 say it would be a long stretch of the imagination to relay his  
25 carpal tunnel to this incident?

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1           A     I think -- well, what I think is that the carpal  
2 tunnel was rendered symptomatic when he used the crutches.  
3 I've already said that.

4           Q     Did you say --

5           A     And in -- can I finish?

6           Q     Sure. But my question was --

7           A     And I feel that I feel that once the crutches were  
8 no longer in use that the carpal tunnel would subside.

9                     Now, he may have had a sub-clinical carpal tunnel  
10 syndrome. In other words you can show slowed conduction  
11 through the carpal tunnel in a person who doesn't have any  
12 symptoms. And that slow conduction doesn't define a carpal  
13 tunnel syndrome. A carpal tunnel syndrome is symptoms.

14                    I think that a carpal tunnel syndrome he has now  
15 would not be related to the incident as Dr. Gutierrez --

16           MR. BAKER: Your Honor, this isn't responsive to my  
17 question.

18           THE COURT: Well, I'm not sure that it is. I'll ask you  
19 to rephrase the question. Let's start over.

20           MR. BAKER: And if you'll give me half-a-second to find  
21 something.

22           THE COURT: Uh-huh.

23 BY MR. BAKER:

24           Q     I'd like you to go to that September 7th, 2001  
25 report.

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1                   And my question was, did you ever say it would be a  
2 long stretch of the imagination to relay carpel tunnel to the  
3 injury that he sustained at the Palms Hotel?

4           A     I'll help you.

5           Q     Can you point me a page.

6           A     Sure.

7           Q     If I -- I may well have written that.

8           A     Page 2 of your report, paragraph number 1, 2, 3, 4.

9     You say --

10          Q     Page 2?

11          A     Correct.

12          Q     Okay. Paragraph 4.

13          A     Yes. Enriquez describes that.

14          Q     It starts out, "Psychological test data." Your  
15 September 7th, report.

16          A     September 7th report?

17          Q     Correct.

18          A     I don't think I have that with me.

19          MR. BAKER: Well, can I approach the witness, Your Honor?

20          THE COURT: Sure.

21     BY MR. BAKER:

22                Q     Doctor, do you see here where you say, "A number of  
23 other symptoms, however, require a long stretch of the  
24 imagination in order to connect them causally to the casino  
25 incident"?

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1 A Is this a report of mine?

2 Q Here's the first page. Does it say --

3 A Where are you --

4 Q Right here, Doctor.

5 A Number -- inappropriate --

6 Q It starts here in this paragraph.

7 A Okay.

8 Q It says, "A number of the other symptoms, however,  
9 require a long stretch of the imagination," correct?

10 A Yes.

11 Q "In order to connect him causally to the casino"?

12 A That's correct.

13 Q And then below that, in the paragraph immediately  
14 below that, you include carpal tunnel syndrome; is that right?

15 A Right carpal -- right carpal tunnel syndrome,  
16 possible thoracic -- yes, I do.

17 Q Okay. And today, however, you relate the carpal  
18 tunnel syndrome to the subject accident; is that right?

19 A Yes.

20 Q So it doesn't require such a long stretch of the  
21 imagination; is that fair to say?

22 A I was talking about the carpal tunnel syndrome at  
23 different times, so the answer is, it does require a long  
24 stretch of the imagination.

25 Q Okay, Doctor. Now with respect to the second knee

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1 surgery, you believe that that was caused -- that was  
2 performed by Dr. Tauber. You believe that was caused by a  
3 breaking off, condromalacia that formed the loose body in the  
4 joint?

5 A I think that's one of the possibilities of a loose  
6 body. It is -- you have to make a differential diagnoses when  
7 you have a loose body.

8 Q Dr. Shannon performed the surgery and she cleaned  
9 the condromalacia, she did a chondroplasty; is that right?

10 A That's right.

11 Q And you looked at the nice smooth surfaces that we  
12 looked at, sitting up at the Judge's desk, and you thought  
13 that she did a really good job?

14 A Yes.

15 Q And are you aware --

16 A I still think she did a really good job.

17 Q Me too. Are you aware that Dr. Shannon testified  
18 that she believes that loose body is from cartilage that broke  
19 up that was traumatically insulted and then broke off post-  
20 surgically?

21 A That's what condromalacia is.

22 Q Okay. And do you know that she related that to the  
23 traumatic insult on the knee caused by her surgery?

24 A I don't recall that she did.

25 Q You would defer to Dr. Shannon on that?

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1           A     No. I think it's a honest difference of opinion. I  
2 think that where the -- the nidus comes that makes a loose  
3 body, if she wants to say that it's because of her work -- I  
4 mean, that's a possibility. Something that has to break off  
5 to form a loose body.

6           Q     Correct. And --

7           A     And the question is, did it break off when she did  
8 her surgery. And if it did how come it didn't show up when  
9 she did the MRI with contrast.

10          Q     Well, she explained that. She said it hid, that it  
11 was located in the suprapatellar pouch. Do you recall that  
12 part of her testimony?

13          A     That's -- and that is certainly is a possibility.

14          Q     Okay. Now you had a comment with respect to one of  
15 your red flags that Dr. Shannon talked about the fact that she  
16 wasn't able to figure out what was bothering Enrique's knee,  
17 between her surgery and the time he went to Dr. Tauber; is  
18 that right?

19          A     That's right.

20          Q     Okay. And when Dr. Tauber operated he found a loose  
21 body, correct?

22          A     Yes.

23          Q     Synovitis again, correct?

24          A     Yes.

25          Q     And he also found a torn meniscus, again, correct?

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1           A     Yes.  That's what he describes in his operative  
2 note.

3           Q     And Dr. Shannon testified that between 10 to 15  
4 percent of people who have meniscectomies and chondroplasties,  
5 and the type of clean-up she did, have recurrent tears  
6 regardless of how pristinely you perform the procedure.  You  
7 agree with that, wouldn't you?

8           A     I agree with that.

9           Q     Now, if the first surgery was necessitated by the  
10 accident, like you told us, and the loose body broke off,  
11 because as Dr. Shannon said, of the traumatic insult to the  
12 soft tissue during her surgery, isn't the second surgery also  
13 related to the accident?

14          A     I think it's quite possibly related to the accident.

15          Q     And that's --

16          A     Yes.

17          Q     Okay.  And that's great.  So now we have the first  
18 two surgeries that are related to the accident; is that right?

19          A     Yes.

20          Q     Now, you know that Enriquez Rodriguez, did you read  
21 his deposition, or did you hear his trial testimony?

22          A     I read his deposition and heard his trial testimony.

23          Q     Okay.  Did you hear that he described before  
24 Dr. Tauber's surgery, a pain that was like a screwdriver being  
25 pushed into his knee and wiggled around?

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1 A Yes, I remember that.

2 Q And you saw in the Rancho Physical Therapy records,  
3 that even though he was reporting greater mobility, he was  
4 reporting continued pain, correct?

5 A Yes.

6 Q And that was during the period, again, between Dr.  
7 Shannon's treatment, and Dr. Tauber's treatment, which  
8 resulted in a finding of the loose body, the synovitis and the  
9 torn meniscus; is that right?

10 A That's right.

11 Q Okay. So we're getting the chronology going here.  
12 Now, with respect to Enriquez Rodriguez' knee pain, are you  
13 aware that Dr. Tauber that his knee pain had changed from that  
14 type of stabbing pain into a burning pain?

15 A I noted that Dr. Tauber first used the term "burning  
16 pain," yes.

17 Q After his surgery; is that right?

18 A Yes.

19 Q And RSD and Causalgia, or complex regional pain  
20 syndrome, they're all different things, we'll talk about that.  
21 But burning pain is a sign of a reflex sympathetic dystrophy;  
22 is that fair to say?

23 A Reflex --

24 Q Doesn't the --

25 A -- sympathetic dystrophy is sometimes associated

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1 with burning pain.

2 Q Okay. So there was a change --

3 A It's not the only thing that's associated with  
4 burning pain --

5 Q I get it. But there was a burning pain reported  
6 from the first time in that left extremity, after Dr. Tauber's  
7 surgery; is that right?

8 A Yes.

9 Q And Dr. Tauber's surgery --

10 A As far as I know.

11 Q -- was the second surgery that you said was probably  
12 causally related to the incident at the Palms Hotel; is that  
13 right?

14 A Yes.

15 Q And that burning pain compelled Dr. Tauber to send  
16 Enriquez Rodriguez to Dr. Ferrante; is that right?

17 A Yes.

18 Q And that --

19 A He brought up -- I think that's the first mention,  
20 the burning pain I think he felt he had to consider RSD.

21 Q And then Dr. Ferrante said, that it's possible that  
22 it's RSD, but I think that there's probably a mechanical  
23 component; is that right?

24 A That's right.

25 Q And RSD can be caused by traumatic insults; is that

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1 right?

2 A Yeah. That is right.

3 Q And surgery is a traumatic insult; is that right?

4 A That is right.

5 Q Okay. So can RSD be caused by a surgery?

6 A It certainly can.

7 Q All right. So now we have this surgery. We have  
8 the first mention of burning pain. He sends him to  
9 Dr. Ferrante. Do you know that Dr. Ferrante had Enrique sent  
10 to an orthopedist to give an injection into the knee to see if  
11 it's mechanical?

12 A I believe he did. That's not the only way to find  
13 out if something is mechanical.

14 Q But it's a way to find out, correct?

15 A Well, it finds out something.

16 Q And the shock didn't work; is that right?

17 A I understand the injection didn't work.

18 Q And then Enriquez was sent to see Dr. Miller; is  
19 that right?

20 A I don't know the sequence. But I know he was sent  
21 to see Dr. Miller.

22 Q A pain management doctor; is that right?

23 A Yes. I think he's an anesthesiologist.

24 Q And Dr. Miller saw allodynia; is that right?

25 A Yes, he described it. He just --

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1 Q Hyperesthesia; is that right?

2 A Yes.

3 Q Modeling in the leg; is that right?

4 A Yes.

5 Q Abnormal hair growth; is that right?

6 A Yes.

7 Q And a temperature change which he measured with a  
8 thermometer not his hands, between the two extremities; is  
9 that right?

10 A Yes.

11 Q And on that basis he diagnosed reflex sympathetic  
12 dystrophy; is that right?

13 A That's right. Incorrectly --

14 Q And he said --

15 A -- so, I believe.

16 Q And he said specifically that it met five of the six  
17 criteria that's recognized?

18 A I agree, he said that.

19 Q Now do you think he made this stuff up?

20 A I think that the things that he found could be found  
21 in the absence of RSD, and in and of themselves they do not  
22 define RSD.

23 Q I appreciate that. But he found five of the six  
24 criterion, a pain management doctor of RSD; is that right?

25 A That's what he's reported.

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1 Q And the color changes, the temperature changes, and  
2 the hair growth are all objective, you can't fake it; is that  
3 right?

4 A I didn't want to go there. But I can tell you that  
5 I have seen a patient who has used a depilatory to appear that  
6 there was no hair growth.

7 Q Okay. So next --

8 A I've seen patients who have applied a tourniquet  
9 before they were seen, for long enough to change the  
10 dimensions of the extremity. An extremity that has had recent  
11 surgery can also show changes in color and in temperature.

12 So, yes --

13 Q So Enriquez Rodriguez, does not now only have  
14 functional overlay, but he's a liar and a psychopathic.

15 A I'm not saying that that's why it's happened. I'm  
16 just telling you that that kind of thing can happen.

17 Q Okay.

18 A And one is compelled to consider those things when  
19 one considers the psychological testing of Dr. Mortillaro,  
20 which until I was given this case everyone seems to have  
21 disregarded, they just threw it out.

22 Q Dr. Mortillaro will tell us what he thinks about his  
23 task. And it's in his deposition. Did you read his  
24 deposition?

25 A Yes.

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1 Q Did you see where he said he didn't think he was a  
2 malingerer?

3 A I did.

4 Q Did you see --

5 A And that flies in the fact of the hard data that he  
6 was faced with --

7 Q No, because his --

8 A -- and he ignored.

9 Q -- diagnosis was a pain disorder secondary to an  
10 injury; is that right?

11 A Yes.

12 Q And his diagnosis was a mood disorder secondary to  
13 an injury; is that right?

14 A That was his diagnosis.

15 Q And by this time at least what Enrique had been  
16 reporting to his doctors, he'd been suffering from pain for  
17 years and years; is that right?

18 A That's what is reported in his records.

19 Q Correct. And that by its very definition is a  
20 chronic pain syndrome; is that correct?

21 A Yes.

22 Q And a chronic pain syndrome is actually defined in  
23 the DSM-III NTR; is that right?

24 A Chronic pain syndrome is defined, yes.

25 Q And there's -- part of a chronic pain syndrome is by

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1 its very nature emotional ability; is that right? It's in an  
2 access isn't it?

3 A Emotional liability is part of what can be seen in a  
4 chronic pain syndrome.

5 Q Like weeping, and crying, and things; is that right?

6 A Yes.

7 Q Like Enrique Rodriguez was seen to do the weep and  
8 cry, which you call the Waddell sign; is that right?

9 A Yes. Because weeping and crying is not specific and  
10 does not define one thing. It has to be considered in  
11 clinical context and in terms of the --

12 Q Sure. Let's --

13 A The trouble of Dr. Mortillaro --

14 Q I wasn't asking you the trouble with Dr. Mortillaro.

15 A All right.

16 Q Your lawyer can certainly really ask you about that.

17 A All right.

18 Q Dr. Mortillaro said that his pain and mood and  
19 anxiety disorders were secondary to pain complaints; is that  
20 right?

21 A Yes.

22 Q And we discussed the DSM and its definition of  
23 chronic pain recognizes each of those variables as being part  
24 and parcel of the whole thing; is that right?

25 A Part and parcel of what whole thing?

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1 Q A chronic pain disorder?

2 A Yes.

3 Q Okay. So, let's talk about objectively again now.  
4 Dr. Miller who apparently was fooled the nefarious Enrique who  
5 wrapped a tourniquet around his neck, shaved his hair off and  
6 painted his leg --

7 MR. WARD: That's argumentative.

8 THE COURT: It is, sustained.

9 MR. BAKER: Sorry --

10 THE COURT: A little over the top --

11 MR. BAKER: -- Your Honor.

12 THE COURT: -- Mr. Baker.

13 MR. BAKER: I get it. Your Honor, could I have a sec?

14 THE COURT: Sure.

15 [Pause]

16 BY MR. BAKER:

17 Q Sent Enrique for -- or performed a series of two  
18 lumbar sympathetic blocks; is that right?

19 A Yes.

20 Q And the medical literature recognizes a lumbar  
21 sympathetic block as a means of both diagnosing and treating  
22 an RSD; is that right?

23 A It's one of the diagnostic clues. It, in and of  
24 itself, like any other diagnostic test is useless unless it's  
25 considered in clinical context.

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1 Q Okay. So let's consider --

2 A All of these things have to be considered in terms  
3 of the whole overview. And ideally when viewed  
4 simultaneously --

5 MR. BAKER: Again, Your Honor, this isn't really  
6 responsible to my question.

7 THE COURT: I think he should be allowed to finish his  
8 sentence, and then if you want, just a yes or no answer,  
9 perhaps you'll have to ask for one.

10 BY MR. BAKER:

11 Q Go ahead, Doctor.

12 A Ideally, when viewed simultaneously from both  
13 psychological and physical perspectives, if you tunnel vision  
14 a patient you get a tunnel vision, conclusion, or there's that  
15 danger. And it's the importance of the, considering both of  
16 these things, that can prevent this man from having  
17 unnecessary surgery, and further ruining his life.

18 Q Well, let's talk about tunnel vision for a second.  
19 You saw Enrique one time?

20 A Yes.

21 Q You read his medical records; is that right?

22 A Yes.

23 Q And there had been doctors who had been treating him  
24 for years, and years, and years; is that correct?

25 A Yes.

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1 Q Who have seen him on multiple occasions and then  
2 have the opportunity to react with him and speak with him; is  
3 that right?

4 A Yes.

5 Q And I don't mean to get excited. But you're  
6 obviously a doctor of great experience and who cares for  
7 people, but your relationship with your patients is dynamic,  
8 you communicate with them; is that right?

9 A I try to communicate with them.

10 Q And you see them in different days, and different  
11 states, is that right?

12 A Yes.

13 Q And your care of them is never static. It's not a  
14 one-time flash in a moment thing; it's dynamic, it's  
15 interpersonal; is that fair to say?

16 A That's fair to say.

17 Q So Dr. Shaw who has seen Enrique for years and years  
18 and years says he has RSD based upon that dynamic,  
19 interpersonal relationship with him, and a review of all the  
20 medical records; are you aware of that?

21 A I'm aware that Dr. Shaw says that, and it's in  
22 contra-distinction to what he has written in his records.

23 Q Oh. Dr. Shaw testified here totally. And if you're  
24 speaking about the fact that he was talking about the lower  
25 extremity, didn't have sweat, or didn't have modeling and that

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1 type of thing, is that what you're talking about?

2 A Yeah. He doesn't --

3 Q Yeah.

4 A -- document anything in the records to support a  
5 conclusion of RSD.

6 Q Please explain that to us. And the Judge has heard  
7 it. The temperature he was speaking about, the modeling he  
8 was speaking about, or any colors, was a look at his shin to  
9 determine that there was no popliteal type of thrombosis,  
10 because of his history of pulmonary embolism.

11 He specified specifically he was not commenting on  
12 the condition of the knee, and he specified specifically that  
13 it was collusion that there was RSD; do you understand that?

14 A I understand that you can't make a diagnosis of RSD  
15 if you don't have the -- the data that compel that conclusion.  
16 You have to have a well reason of conclusion.

17 Q Let's talk about --

18 A -- he didn't have any.

19 Q Let's talk about the data. Dr. Miller saw allodynia  
20 hyperesthesia, color changes, temperature changes, sweating,  
21 and met the five out of six criterion for the guidelines for  
22 RSD that we talked about; you'll consider that, right?

23 A Yes.

24 Q Okay. Then Enrique was sent for a lumbar  
25 sympathetic block, which is you had stated both diagnostic and

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1 clinically treating of RSD; is that right?

2 A Yes.

3 Q And it stopped his pain; is that right?

4 A Yes.

5 Q Okay. And then Enrique went for further treatment,  
6 and he went with Dr. Schifini; is that right?

7 A Yes.

8 Q And Dr. Schifini then performed a lumbar sympathetic  
9 block; is that --

10 A Right.

11 Q Did you hear Dr. Schifini's testimony, or read any  
12 of Dr. Schifini's testimony?

13 A Yes.

14 Q And do recall when Dr. Schifini said that he  
15 believed that Dr. Miller had adequately treated the  
16 sympathetic component of the RSD, and that Enrique was no  
17 longer suffering from RSD, but from a complex regional pain  
18 syndrome which was not mediated sympathetically?

19 A Yes.

20 Q And you heard --

21 A I'm aware that.

22 Q -- that testimony?

23 A Yes.

24 Q And he's a board certified pain management doctor  
25 with a fellowship; do you understand that?

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1 A Yes.

2 Q Okay. Now Dr. Schifini then decided to do a spinal  
3 cord stimulator, correct?

4 A Right.

5 Q And a spinal cord stimulator is another means of  
6 getting rid of the pain from neurogenically mediated diseases  
7 and pathologies; is that fair to say?

8 A Yes. It's --

9 Q And what --

10 A -- fair to say.

11 Q -- happened? Enrique's pain --

12 A Well, they put it in trial --

13 Q And Enrique's pain went away, is that right?

14 A Yes.

15 Q So two recognized modalities, both for diagnosing  
16 RSD and for treating RSD worked in this patient; is that  
17 correct?

18 A That's correct.

19 Q Okay. And you're aware that he continues to have  
20 knee pain today; is that right? He claims to have knee pain;  
21 is that fair to say?

22 A You're telling me he claims, I have not talked to  
23 him today. So I --

24 Q The doctor's records indicate that he has knee pain;  
25 is that right?

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1           A     Yes. The records that I've seen indicate ongoing  
2 knee pain.

3           Q     And one of these Waddell signs, or your red flags  
4 that you talked about, said that a Waddell sign is a  
5 disproportionate reaction to an injury in terms of pain; is  
6 that right?

7           A     That's one, yes.

8           Q     And the definition, by the way, of RSD, or one of  
9 the definitions, is a disproportionate reaction to a traumatic  
10 event in terms of pain; is that right?

11          A     No. It's not right. It isn't a reaction. It's a  
12 pain that is disproportionate to what would be anticipated  
13 given the injury.

14          Q     Correct. And what you said is one of the Waddell  
15 sign, is that his pain was disproportionate in severity; is  
16 that right? And you said it was disproportionate in duration;  
17 is that right?

18          A     I quoted another physician as saying that.

19          Q     Correct. And both of those things could be put into  
20 a diagnosis of RSD; is that right?

21          A     There are things that would compel RSD as what I  
22 call a differential diagnosis. But when you add everything up  
23 RSD isn't the diagnosis that you come out with.

24          Q     Well, let's add stuff up, okay. Dr. Miller noted  
25 allodynia, correct?

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1 A Right.

2 Q Hyperesthesia, correct?

3 A Yes.

4 Q Hair growth, correct?

5 A Yes.

6 Q Sweating, correct?

7 A Yes.

8 Q Tub temperature changes taken by a thermometer,  
9 correct?

10 A Yes.

11 Q A lumbar sympathetic block worked on him; is that  
12 correct?

13 A Yes.

14 Q And a pain stimulator which is also efficacious for  
15 getting rid of RSD worked on him; is that correct?

16 A Yes.

17 Q And he is experiencing and demonstrating pain in  
18 both duration and severity which is outside of what you would  
19 expect from the traumatic event, correct?

20 A That's correct.

21 Q What meets the definition of RSD; is that right?

22 A It doesn't define RSD, it consistent with but not  
23 diagnostic of, and --

24 Q So it's --

25 A -- I think that's an important concept --

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1 Q It's consistent, correct?

2 A -- to understand with. Consistent with but not  
3 diagnostic of.

4 Q So now we have in the terms of tunnel vision and  
5 weighing, now we have nine things that can suggest RSD with  
6 respect with Enrique Rodriguez. Is that right, do you want me  
7 to go through them again?

8 A You don't need to.

9 Q Okay.

10 A I remember them.

11 Q Now we have nine things; is that right?

12 A Yes.

13 Q And you're aware that Dr. Schifini diagnosed him  
14 with RSD; is that right?

15 A Yes.

16 Q And you're aware that Dr. Shaw diagnosed him with  
17 RSD; is that right?

18 A Yes.

19 Q And you're aware that Dr. Tauber suspected RSD, so  
20 he sent him to Dr. Miller; is that right?

21 A Yes.

22 Q And then Dr. Miller came up with --

23 A Didn't he send -- didn't Tauber send him first to  
24 Doctor --

25 Q Ferrante

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1           A     -- Ferrante, who thought he had more likely a knee  
2 problem than RSD.

3           Q     Correct? And as we talked about them he went to a  
4 doctor for mechanical need pain and got a shot which did not  
5 diagnose the mechanical need pain; is that right?

6           A     The shot did not rule out mechanical need pain.

7           Q     Correct.

8           A     No shot does.

9           Q     And then he went for the two diagnostics, the spinal  
10 cord stimulator and the lumbar sympathetic block, both which  
11 are efficacious for a neurogenically mediated pain; is that  
12 right.

13          A     That's right.

14          Q     Okay. So those are two tests that were given to him  
15 that did not support Dr. Ferrante's opinion of a mechanical  
16 injury; is that correct? Yeah, I mean --

17          A     They didn't demonstrate a mechanical injury, they're  
18 not designed to demonstrate a mechanical injury.

19          Q     Correct. They're designed to -- they're tests that  
20 were designed to determine neurologically mediated pain. And  
21 both of those tests were positive; is that correct?

22          A     That's correct.

23          Q     All right. Now physical therapy, physical therapy  
24 is the first line for defense against RSD; is that right?

25          A     Physical therapy and pain relief.

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1 Q All right. You know what, let's talk about some of  
2 the stuff that you talked about with Dr. Mortillaro, because  
3 I'm not sure that -- let's turn -- do you have  
4 Dr. Mortillaro's records in front of you? Or you could use  
5 your report. If you'd turn to page 46 of your report, please.

6 A Okay.

7 Q If you go down to paragraph 2.

8 A Right.

9 Q

10 "If there is an objective basis for this  
11 patient's diffuse reports of pain and perceived  
12 disability the reported depression may be a reaction  
13 to this condition. If not the profile may suggest a  
14 somatoform disorder with diffuse unexplained pain  
15 symptoms associated with predominantly depressed  
16 mood. Psychological treatment for pain  
17 magnification and exaggerated perception of  
18 disability and depression should be considered."

19 Is that right?

20 A That's a quote.

21 Q Right.

22 A Yes.

23 Q And it begins, "If there is an objective basis." Is  
24 that correct?

25 A Yes.

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1 Q And that quote signifies one of the red flags that  
2 you're talking about, because the red flag is just part of a  
3 differential diagnosis; is that right?

4 A I was not relating it here to a red flag. What red  
5 flag did you have in mind?

6 Q The red flag that he might symptom magnify, or that  
7 might be secondary gain motif that you spoke to about before,  
8 when you are on direct examination. Those red flags exist  
9 only in the context of a clinical correlation to be ruled in  
10 or ruled out; is that right?

11 A Yes. Yes.

12 Q Okay. Because you're involved in this method again;  
13 is that right?

14 A Right.

15 Q So it said specifically, "If there is an objective  
16 basis," then it should be considered, right?

17 A Yes.

18 Q Okay.

19 A I agree.

20 Q So let's talk again about the objective basis. We  
21 talked about hyperesthesia, allodynia, color changes,  
22 sweating, temperature changes, efficacious lumbar sympathetic  
23 blocks. We talked about efficacious spinal cord stimulators.

24 In each and every one of those instances that's an  
25 objective fact, correct?

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1           A     There were a number of objective symptoms --  
2 findings reported, yes.

3           Q     It seems like that red flag maybe should be lowered,  
4 doesn't it?

5           A     Not at all.

6           Q     Okay.

7           A     I think that as I've said, reflex sympathetic  
8 dystrophy --

9           Q     That's okay, Doctor.

10          A     -- CRPS is grossly over-diagnosed. And all of the  
11 conditions, or all of the findings that are reported here --

12          Q     Uh-huh.

13          A     -- are findings that can be seen in individuals who  
14 don't have RSD and who have had two knee surgeries. Who have  
15 had swelling reported around the knee. And who have nothing  
16 to suggest an RSD. Which is a dramatic thing --

17          Q     Sure.

18          A     -- you don't have to find subtle things. I had to  
19 explain why this man had none of those findings when I saw  
20 him.

21          Q     Well, I'll explain that for you and we'll talk about  
22 that. But are you telling this Court right now that a spinal  
23 cord stimulator or a lumbar sympathetic block would take away  
24 a mechanical pain of the knee? Neither of those things is  
25 made for that, is it?

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1           A     It's not made for that, but there is a -- there is a  
2 placebo response --

3           Q     Doctor --

4           A     -- and given the psychological testing you're  
5 compelled, not required, absolutely compelled to consider  
6 where and in what areas there is misrepresentation of fact for  
7 secondary gain, and that's in the report.

8           Q     I appreciate you sharing that with me. My question  
9 was: a spinal cord stimulator or a lumbar sympathetic block  
10 are not designed to take away mechanical pain; is that right?

11          A     That's right, they're not designed.

12          Q     So just curiously and serendipitously and  
13 coincidentally, the two tasks that could take sympathetically  
14 mediated pain that were given to Enrique Rodriguez in terms of  
15 this entire constellation of treatment he's received those are  
16 the two that just happened to work?

17          A     He got a positive response to two of the techniques  
18 that were used.

19          Q     He got a positive response. The only pain relief  
20 that he got was in the two tasks that were used to relieve  
21 sympathetically mediated pain; is that right?

22          A     That's right. He got a transient positive response.

23          Q     Well, he only got a transient response because they  
24 took the temporary stimulator out, right?

25          A     They took the temporary stimulator out. I'm not

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1 sure that's why he got a transient response.

2 Q Then you're not sure that it's not? You're not sure  
3 that it's not why he got a transient response?

4 A That's right. I'm not sure it's not.

5 Q All right.

6 A A double negative --

7 Q So now let's talk about --

8 A -- confuses me.

9 Q Let's talk about your examination of him --

10 A Yes.

11 Q -- okay? Your examination didn't see the color  
12 changes, the temperature changes, the sweat type of things  
13 that reported in Dr. Miller's report; is that right?

14 A That's exactly right.

15 Q Are you aware that Dr. Schifini had testified that  
16 the lumbar sympathetic blocks that were given to him worked,  
17 so there was no longer a sympathetic component of his disease.  
18 That it was being mediated by other nerves in the autonomic  
19 and outside that nervous system, creating a complex regional  
20 pain syndrome; did you read that?

21 A I know that's his feeling.

22 Q Right. And if the sympathetic aspect, because you  
23 have the sympathetic aspect, and the parasympathetic, correct?

24 A Right.

25 Q Those are also kind of linked into your limbic

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1 system which controls emotion, is that right?

2 A Yes.

3 Q Okay. And that's really why one of the reasons why  
4 a chronic pain syndrome requires the emotional ability, mood  
5 disorder and the rest of it, because it's wired through your  
6 limbic system? Yes?

7 A Yes. Pain is -- certainly they're  
8 cross-connections, multiple cross-connections, and they do  
9 include the limbic system, certainly so.

10 Q Right. So it's not unusual that it would be emotion  
11 in a person suffering from a chronic pain syndrome?

12 A A number of patients who have chronic pain syndromes  
13 do have emotional liability and some degree of depression.

14 Q Isn't it part of the diagnosis to talk about that.  
15 Don't all people who suffer from a chronic pain syndrome have  
16 emotional ability, or else you can't diagnose them of having a  
17 chronic pain syndrome?

18 A No. Not all patient -- all patients who have a  
19 chronic pain syndrome do not have emotional liability,  
20 that's --

21 Q Well, we'll look at the DSM at some point and see  
22 what it says.

23 Now let's talk about your red flags, okay?

24 MR. WARD: Move to strike.

25 MR. BAKER: Why?

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1 MR. WARD: His comment about, "We'll look at the DSM and  
2 see what it says," that's not a question. It's simply  
3 Mr. Baker offering his commentary.

4 THE COURT: I don't think there's any need to strike it,  
5 let's move on.

6 BY MR. BAKER:

7 Q All right. You talked about the red flags who  
8 created this need to speculate and to his -- and to his  
9 motives and his intents. The first one you talked about was  
10 Dr. Shannon, right? And she couldn't explain his weird pain  
11 that was ongoing; is that correct?

12 A That's correct.

13 Q And that was between Dr. Shannon and Dr. Tauber's  
14 surgeries; is that right?

15 A Yes.

16 Q Okay. And let me give you an explanation, would  
17 this be one: the loose body in his knee, the torn meniscus  
18 and the synovitis, that would explain the pain that Enrique  
19 Rodriguez continued to have, wouldn't it?

20 A A loose body in and of itself is not painful. The  
21 inner surfaces of a knee have no nerve endings. The cartilage  
22 has no nerve endings, no blood supply. And loose body itself,  
23 of course, is loose, so it isn't connected to the central  
24 nervous system.

25 The most that a loose body would do would give you a

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1 sense that something was clunking in the knee when you moved  
2 it, or bent your knee you would feel a jog, or something,  
3 clunk.

4 Q I've heard a loose body described as dropping a  
5 marble into a gear system; is that not accurate? Have you  
6 ever said that?

7 A I don't recall having said that. But I think that a  
8 loose body -- if the -- a loose body in and of itself isn't  
9 necessarily symptomatic. It only becomes symptomatic if the  
10 loose body is interposed between articular surfaces. The  
11 femur rubbing against the tibia, and the loose body gets in  
12 between, then that feels strange to the person who has it.

13 Q And that can be a pain generating --

14 A But if the -- but if the loose body is hidden away  
15 in a recess where it isn't visible, and it stays there, it  
16 isn't visible on MRI, then it's not symptomatic.

17 Q Doctor, Dr. Shannon didn't see anything on the MRI  
18 with contrast that suggest a pathology in Enrique's knee; is  
19 that right?

20 A That's correct.

21 Q And she commented that that was curious; is that  
22 right?

23 A Yes.

24 Q And then when his knee was opened up, because intra  
25 operative visualization is the gold standard of determining a

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1 pathology, correct?

2 A It trumps the imaging study, yes.

3 Q Sure it does. And they opened it up what they saw  
4 were loose body, synovitis --

5 A I think there was one loose body.

6 Q -- and a torn meniscus; is that fair to say?

7 A Yes.

8 Q Let's talk about Dr. Spellman who's a red flag,  
9 because his findings were very curious. You said Dr. Spellman  
10 was confounded by the fact that he had pain out of proportion  
11 to the alleged mechanism of injury; is that right?

12 A Let me -- I want to just look at his --

13 Q That's what you testified to?

14 A As for severity and the duration, the severity and  
15 direction of his symptoms was disproportionate and I'm not  
16 sure of what the end of that sentence was, but it was a  
17 discrepancy.

18 Q And with respect to that we've already talked about  
19 the fact that that meets the very definition of RSD; is that  
20 right?

21 A No. It doesn't meet the very -- one thing is not  
22 the very definition of RSD.

23 Q It's part of the definition of RSD?

24 A It's one of the criteria.

25 Q Okay. So perhaps a potential explanation why his

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1 pain -- well, let me -- having a pain and it's out of  
2 proportion and in terms of severity and duration to the  
3 alleged mechanism of injury is consistent with RSD?

4 A Consistent with, yes, it is.

5 Q Let's talk about Dr. Kidwell in July of '06, who  
6 couldn't figure out the pain generating mechanism with respect  
7 to Enrique Rodriguez. That was before Dr. Miller diagnosed  
8 RSD; is that right?

9 A Yes.

10 Q And that was before a lumbar sympathetic block  
11 worked; is that right?

12 A Yes.

13 Q And it was before a spinal cord stimulator was shown  
14 to be efficacious with respect to his pain; is that right?

15 A Yes.

16 Q Okay.

17 A That's right.

18 Q Okay. Let's talk about Dr. Corvete, he could hook  
19 up the pain the complaints. Well, he was sent to Dr. Corvete  
20 to rule out a mechanical pain; is that right?

21 A I believe so.

22 Q Dr. Corvete shot him up and ruled him out a  
23 mechanical pain; is that right?

24 A Well, he injected him and could not explain the  
25 mechanical pain.

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1 Q Now, and Dr. Corvete's treatment was before  
2 Dr. Miller diagnosed RSD; is that right?

3 A I'm not sure of the chronology.

4 Q Well, I represent to you it was.

5 A Okay.

6 Q Okay.

7 A I'll buy that, that's fine.

8 Q And that was before the spine stimulator, and before  
9 the lumbar sympathetic blocks; is that right?

10 A I believe so.

11 Q And let's talk about Dr. Mortillaro. Enrique  
12 Rodriguez was sent to Dr. Mortillaro for clearance for surgery  
13 with Dr. Shannon; is that right?

14 A That's correct.

15 Q To see if there -- for a functional overlay or a  
16 psychological comorbidity which would contra-indicate the  
17 surgery; is that right?

18 A That is right.

19 Q Dr. Mortillaro cleared him for the surgery, didn't  
20 he?

21 A Yes, he did.

22 Q Okay. Now, Doctor, do you now believe in derivative  
23 injuries?

24 A Oh, I believe in derivative injuries. As I've  
25 already said, I think that carpel tunnel, transient carpel

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1 tunnel syndromes would be what you would call a derivative  
2 injury.

3 Q If God forbid one of my legs was longer than the  
4 other, would you expect me to develop back pain over time?

5 A Well, not necessarily.

6 Q How about potentially?

7 A Well, one could, but I would expect -- you know,  
8 people develop back pain over time when they don't leg length  
9 discrepancies. So the mere demonstration of a leg length  
10 discrepancy doesn't mean that your back pain is because of the  
11 leg length discrepancy. That's what we call post hoc ergo  
12 prop to hope reasoning; it doesn't hold.

13 Q I understand, Doctor. If you put a lift into my  
14 shoe, would you expect me to develop back pain over time?

15 A Not necessarily.

16 Q How about potentially?

17 A I'd first have to say that without a lift in your  
18 shoe I would expect you to develop back pain over time. And  
19 you could put a lift in your shoe and you might develop back  
20 pain over time, not because of the lift in the shoe.

21 Q Okay. Doctor, did you read in Dr. Shaw's records  
22 where back in '06, he said because Enrique's knee wasn't  
23 getting fixed, he was going to develop back pain and need back  
24 surgery?

25 A I -- I am aware of that.

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1 Q And did you see a Dr. Shannon who you regard so  
2 much, say that she believed that his back pain was caused by  
3 the limping that occurred after the surgeries; it was  
4 cross-examination?

5 A I don't remember that, but she may have said that.  
6 I wouldn't agree with it, but --

7 Q Are you aware that Dr. Schifini said that there were  
8 -- that there were -- back pain was caused by both postural  
9 and biomechanical changes after this accident?

10 A I'm aware of that, and I also feel Dr. Schifini has  
11 no qualifications with regard to biomechanics.

12 Q Do you see the

13 A That's an orthopedic problem.

14 Q Did you see the strilo [phonetic] radiological x-ray  
15 that said that he was having muscle spasm in his lumbar spine  
16 secondary to postural changes?

17 A I don't -- I don't know who wrote that I don't  
18 remember seeing it. But --

19 Q It's in evidence.

20 A -- you can represent that it's there.

21 Q A radiologist read it, and well actually it was  
22 read, and it talked about muscle spasming and hypertonicity  
23 due to postural changes. In your experience as a doctor you  
24 had never seen back pain caused by postural changes?

25 A This is a very interesting problem, a very

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1 interesting situation. The human being, particularly the one  
2 who's reasonably fit is amazingly resilient. I have a patient  
3 with an artificial leg --

4 Q And Doctor, I appreciate -- Your Honor --

5 A -- who has no back pain.

6 MR. BAKER: Your Honor, this isn't responsive. I asked  
7 him, in his experience has he seen people who had back pain  
8 related to postural problems and changes.

9 THE COURT: If it was a yes or no answer you need too  
10 phrase it that way, Mr. Baker.

11 MR. BAKER: It makes me feel like I'm in the Nuremberg  
12 trials when I do that.

13 BY MR. BAKER:

14 Q Doctor, yes or no, in your experience have you seen  
15 people develop lumbar pain to postural and biomechanical  
16 changes?

17 A Yes.

18 Q Okay. It's not uncommon, is that true?

19 A I'm not sure how you're ask -- what --

20 Q Well, let me ask it this way --

21 A I'd get into a double -- double negative. I want to  
22 answer the question, but I --

23 Q I don't want a double negative.

24 A All right.

25 Q You're aware that between the time of his injury and

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1 when lumbar complaints were first being addressed he was on  
2 walking assisted devices; is that right?

3 A Yes.

4 Q And that creates a postural change; is that right?

5 A Yes.

6 Q You're aware that he was limping, is that right?

7 A Yes.

8 Q You were aware that he was gaining weight; is that  
9 right?

10 A Yes.

11 Q And that all developed into postural changes; is  
12 that right?

13 A Yes.

14 Q And you have seen people who have developed back  
15 problems because of postural changes; is that right?

16 A On occasion, yes.

17 Q Okay. And you're aware that Dr. Shannon,  
18 Dr. Schifini, Dr. Shaw, have all testified that his lumbar  
19 problems are caused by postural changes associated with using  
20 the walking devices with limping and gaining weight; is that  
21 right?

22 A That's right.

23 Q And so you're the only doctor in this case that has  
24 an opinion other than the fact that his lumbar problems are  
25 caused by postural changes after the accident; is that right?

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1 A I don't know that that's right. But --

2 Q Have you seen anyone else?

3 A -- you know, I know how I feel.

4 Q Have you seen anyone else in this case testify to  
5 anything other than his back problems, and his spine problems  
6 are caused by postural changes associated with using assistive  
7 devices to walk, limping and gaining weight?

8 A I don't know that I've seen more than one or two  
9 people qualified to have a biomechanical opinion.

10 Q How about a postural opinion; that's part of what  
11 you were discussion when you speaking about the fact that his  
12 posture was good, even though he has a belly, right?

13 A Yes. That's part of my reason I'm drawing my  
14 conclusion, is that his posture is good. And when I examined  
15 him his spine was amazingly straight and moved quite well.

16 Q And you've seen multi-levels of discogenic injury or  
17 pathology; is that right?

18 A Yes.

19 Q And isn't it fair to say that a preexisting  
20 degeneration can be aggravated when it's asymptomatic by  
21 postural changes, the use of walking assistant devices and  
22 weight gain?

23 A It could be.

24 Q Okay.

25 A Not very likely to be.

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1 Q Could be, correct?

2 A Could be.

3 Q And the walking assistive devices, the limping, the  
4 weight gain, they're all associated with the injuries he  
5 sustained in this accident; is that right?

6 A You gave a list of several things.

7 Q The assistive walking --

8 A The weight gain is not associated with the injury in  
9 this accident.

10 Q You've never seen people gain weight when they  
11 become immobile, or less mobile?

12 A I have seen people gain weight, yes, when --

13 Q Were you told about the testimony of his friend Nick  
14 Tavaglione and Maria, they talked about the fact that he  
15 worked out and was fit before this accident?

16 And Nick described how, yeah, sometimes we all go up  
17 and down, but he had a really noticeable weight gain after  
18 this accident. Did you hear that testimony, or read that  
19 testimony?

20 A I don't believe I saw that testimony.

21 MR. BAKER: If you'll excuse me for a second, Your Honor.

22 THE COURT: Sure.

23 [Pause]

24 MR. BAKER: I'll pass the witness, Your Honor.

25 THE COURT: Very well.

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1 [Pause]

2 REDIRECT EXAMINATION

3 BY MR. WARD:

4 Q All right. If Dr. Miller, was it Dr. Miller the --

5 A Anesthesiologist, I think.

6 Q Anesthesiologist that saw him?

7 A I believe so.

8 Q Was it Dr. Miller who used the pinwheel?

9 A I am not sure that it was Dr. Miller who -- I'll  
10 have to look through here to find out who used the pinwheel,  
11 but I was shocked, I know that.

12 THE COURT: Let's take a five minute break.

13 [Recess]

14 THE COURT: Whenever you're ready, Mr. Ward.

15 MR. WARD: Thank you, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. WARD:

18 Q Dr. Becker, did you have an opportunity to look at  
19 the records of the physicians that you were being examined  
20 about on cross-examination?

21 A Yes.

22 Q Dr. Miller and some of the other doctors?

23 A Yes.

24 Q Dr. Tauber.

25 A Yeah, they're all contained in part 2 of my report,

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14 App. 2727

1 the record review.

2 Q And did you find that the information that were  
3 provided in most of those records in terms of the original  
4 accident was different from the accident as reported at the  
5 time ambulance attendants and at the time it was reported to  
6 Dr. Heaps and at the time it was reported to Dr. Nork?

7 A Yes, they're different versions.

8 Q Okay. And they were more embellished versions?

9 A Yes.

10 Q And so the -- would it be fair to say that those  
11 doctors, in expressing their opinion, were expressing them  
12 based on different versions that existed at the time of the  
13 injury?

14 A Yes, that's true.

15 Q And virtually all those doctors were told that there  
16 was a neck and/or back or other pains other than the knee  
17 within the first year following the injury.

18 A Yes. That --

19 Q If not almost immediately following the injury.

20 A That's true.

21 Q And --

22 A Indeed, that was the history that I got when I first  
23 saw him.

24 Q Okay. And that turned out to not be the history as  
25 reflected in the records, at least.

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1 A That's true.

2 Q Okay. And now did you look at the records of  
3 Dr. Mortillaro?

4 A Oh, yes.

5 Q And what did Dr. Mortillaro find?

6 A Well, he had found different things at different  
7 times. He didn't find anything that conflicted with what he  
8 reported other than -- I'm trying to find the report that is  
9 most telling.

10 Page 21 and -- now, he -- I guess page 16 describes  
11 evaluation for mental disorders by Mortillaro. He found  
12 exaggeration and embellishment and he raises the issue of  
13 credibility based on the psychological tests. And that's in  
14 his written report. And I'm trying to put my finger on it.

15 THE COURT: Can I, Counsel, if we're going to hear from  
16 Mr. Mortillaro ?

17 MR. BAKER: Maybe. I hope so.

18 THE COURT: Okay. So you mean, like, next week we may  
19 hear him?

20 MR. BAKER: I'm sorry, Your Honor. Yes, Your Honor.

21 THE COURT: Okay.

22 MR. BAKER: I can't find him right now.

23 THE COURT: Okay.

24 MR. BAKER: I've been looking.

25 THE COURT: Okay. Thank you. Sorry for the

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1 interruption, Mr. Ward.

2 MR. WARD: It's okay, Your Honor. It's your court --

3 THE COURT: I just was --

4 MR. WARD: -- not mine.

5 THE COURT: I just was curious because we're talking a  
6 lot about what Mr. Mortillaro found and what he didn't find.  
7 And we're hearing from other witnesses so I'm just curious  
8 whether he's going to actually testify or not.

9 MR. BAKER: I don't believe so, Your Honor.

10 MR. WARD: I can tell you that I operated on the  
11 assumption that he was going to be one of the key witnesses.

12 THE COURT: Okay. Thank you.

13 MR. BAKER: In my mind he's not a key witness, Your  
14 Honor.

15 THE COURT: Okay.

16 MR. WARD: I operated under the assumption that he was  
17 coming to testify.

18 THE COURT: Okay.

19 MR. WARD: Whether he was a key witness or wasn't a key  
20 witness.

21 THE COURT: Okay. Thank you.

22 THE WITNESS: I think what his psychological testing does  
23 is it tells us that there are psychological factors here which  
24 are coloring the presentation. And that they are going to  
25 color the presentation in the direction of exaggeration,

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1 embellishment and even to the degree that credibility is in  
2 question. That's all it says.

3 Now, he neglected to do or didn't do, I won't use  
4 the word neglected, failed to do a -- one of the subscales in  
5 the MMPI, which is called the Lees-Haley scale.

6 Did we mention the Lees-Haley?

7 THE COURT: You did, sir.

8 THE WITNESS: And the Lees-Haley scale, of course, when  
9 he tested the patient, I figure it was 2005, had not been  
10 accepted by the MMPI people as part of their legitimate study.  
11 However, we took -- I took the raw data that he -- the answer  
12 sheet, in other words, and we have a computer program that we  
13 plug the answers into the computer program and computer  
14 program gives us a Lees-Haley scale -- score. Because it's  
15 now a standard part of the MMPI. And that score was so high  
16 that Dr. Mortillaro, any knowledgeable, up-to-date  
17 psychologist would have to say that there is an element of  
18 misrepresentation of fact in this case.

19 There's some fact -- that doesn't mean that it's all  
20 untrue. This doesn't -- this just -- it does mean that it's  
21 an element. And as I say, it's not either or. It's just a  
22 factor that needs to be considered when you're considering  
23 planning for this man, deciding what -- how much a placebo  
24 affect you get if do a sympathetic block and it works.  
25 Particularly, you try a stimulator and it works, until you

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1 pull the stimulator out. Is that a placebo affect or is it  
2 not?

3 Well, once you factor in the Lees-Haley and you  
4 factor in these other things, then I think it makes you very  
5 reluctant to say, well, yeah, let's put in a permanent  
6 stimulator.

7 This is a big deal putting in a permanent  
8 stimulator. And I think that it is probably clinically not  
9 necessary because I don't think it's going to provide him any  
10 sustained relief. I think it would provide him relief for a  
11 while and then it would not. And it would -- it's like doing  
12 back surgery on him. I couldn't bring myself to do back  
13 surgery on this man. I just think it would be very  
14 ill-advised. And I think it would be a failure.

15 And so I'm -- even though I'm -- was seeing him as a  
16 Defense examiner, you know, I'm concerned about him as a human  
17 being. I don't want him to get a procedure that I think he  
18 shouldn't have. And I know I'm in the minority. But I also  
19 know that I am able to, in all humility, view this man more  
20 comprehensively, psychologically as a psychiatrist and  
21 biomechanically as an orthopedist than any other single doctor  
22 who has seen him.

23 And that's why I went into the kind of medicine that  
24 I'm in. You know, I do this because I want to help people.  
25 That's the bottom line, you know.

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1 MR. WARD: Okay.

2 THE WITNESS: I'm more interested in helping people than  
3 I am in helping Mr. Ward.

4 THE COURT: May I ask a question, Mr. Ward?

5 MR. WARD: Certainly, Your Honor.

6 THE COURT: The Lees-Haley component, I think, you said  
7 was not approved until 2007?

8 THE WITNESS: Yes, that's correct.

9 THE COURT: And Dr. Mortillaro would have examined  
10 Plaintiff before 2007. Right?

11 THE WITNESS: That's right.

12 THE COURT: Okay. Thank you. Please proceed, Mr. Ward.

13 BY MR. WARD:

14 Q Dr. Becker, is 2007 the year that the MMPI started  
15 officially grading this in their official grading scales?

16 A Yes.

17 Q But had it been used commonly in the practice for a  
18 period of time before that?

19 A Yes. We've been using it -- I've been using it for  
20 probably since about -- soon after it was developed.

21 Dr. Lees-Haley wrote a number of papers. And because of the  
22 kind of work that involves litigation, worker's compensation  
23 and personal injury, it seemed to me that it was a very  
24 important new scale to consider. And so a lot of us used it,  
25 but didn't put as much weight on it as we do now that it's

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1 been officially recognized, because it's been normed [sic] on  
2 millions of patients, literally millions of patients.

3 Q And they started norming it on millions of patients  
4 even before the year 2000. Isn't that correct?

5 A Yes.

6 Q And it's been -- so it's been in use for how long?

7 A I'm not sure. But my memory is it's around '94 or  
8 '95 that Dr. Lees-Haley wrote his first papers and described  
9 the scale.

10 Q And so it had been in common use for ten years at  
11 the time Dr. Mortillaro was doing his testing. Isn't that  
12 correct?

13 A It's correct. But I also have to say that it was  
14 somewhat controversial because anything that's new almost is  
15 bound to be controversial. And the controversy was more or  
16 less resolved when it was accepted as a standard scale.

17 Q Okay. And is it -- does the fact that it has been  
18 accepted make any tests done before invalid?

19 A Oh, no. No. No. The -- I mean, the data -- the  
20 raw data, you put into a computer, the truths and falses [sic]  
21 of the MMPI. And now the official schedule from Minnesota  
22 includes a Lees-Haley scale, whereas before it didn't. But it  
23 uses the same data.

24 Q Okay. And so it would be appropriate for you to use  
25 it?

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1 A Oh, yes.

2 Q And --

3 A Based on the data of 2005.

4 Q And that tells you that it's way beyond the -- way  
5 beyond the certainty of conscious misrepresentation?

6 A Yes.

7 Q And --

8 A I really have to underscore that it doesn't mean  
9 that everything is consciously misrepresented. It just means  
10 that there's an element of conscious misrepresentation in some  
11 of the issues. That's all it means.

12 Q Okay. Now, is there any question in your mind as to  
13 whether the -- this patient should have recovered from the  
14 injury that he sustained in November 22, 2004?

15 A No. No, I think that he should have recovered.

16 Q Do you --

17 A I think he should have recovered from that.

18 Q And do you --

19 A That's a recoverable injury.

20 Q And do you think he did recover?

21 A I think he did.

22 Q And is that to a reasonable degree of medical  
23 probability?

24 A I would say so. Those magic buzz words.

25 Q And do you think that the complaints that he has

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1 today and the complaints that he has in the last couple of  
2 years are caused by this injury of November 22, 2004?

3 A No, I don't. That's what I think takes a long  
4 stretch of the imagination. No, I don't think that.

5 Q And is that to a reasonable degree of medical  
6 probability?

7 A Yes, it is. I think that -- you know, this man  
8 injured his knee. And then he had derivative symptoms in his  
9 fingers. But he represents that everything that's happened to  
10 him since then is because of this accident at the casino and I  
11 simply can't buy that. I think that's really farfetched. It  
12 didn't happen. It didn't happen.

13 Q Well, does he not only represent that all of these  
14 things not only happened to him after the injury at the  
15 casino, but they happened to him right away after the injury  
16 at the casino?

17 A Well, a year later he did, yeah.

18 Q Right. He started telling people that he had all  
19 these pains immediately after the accident.

20 THE COURT: Sorry. Mr. Baker?

21 MR. BAKER: I think that that's leading a little bit.  
22 It's his witness --

23 THE COURT: It is. Sustained. Ask you to rephrase.

24 MR. WARD: Sure.

25 MR. BAKER: Go ahead and answer the question, Casey.

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1 It's fine.

2 BY MR. WARD:

3 Q Now, I'm really lost. I'm --

4 MR. BAKER: Didn't he start --

5 MR. WARD: Yeah.

6 MR. BAKER: Didn't he start telling people that his pain  
7 began right after the accident?

8 THE COURT: Mr. Baker, are you helping again?

9 MR. WARD: I object. I object.

10 MR. BAKER: I told you I gave him a list of questions,  
11 Your Honor. We've just been passing it back and forth.

12 THE COURT: You're helping with the exhibits. Now,  
13 you're helping with the questioning.

14 MR. BAKER: I'm just trying to get my witness on the  
15 stand, Your Honor.

16 THE COURT: I understand.

17 MR. WARD: And I'm not trying to slow it down. I'm  
18 trying to --

19 BY MR. WARD:

20 Q On the topic of complaints --

21 A Uh-huh.

22 Q -- how many treaters has Mr. Rodriguez gone to?

23 A I've got a list here, one, two, three --

24 MR. BAKER: Your Honor, this is outside the scope of  
25 cross.

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1 BY MR. WARD:

2 Q Don't count.

3 A Yeah. It's a long list.

4 Q Lots?

5 A Yeah.

6 MR. BAKER: Objection. Outside the scope of cross.

7 THE COURT: It is. Sustain the objection.

8 THE WITNESS: Okay.

9 BY MR. WARD:

10 Q And in terms of making your decision and your  
11 evaluation and your analysis, did you take into consideration  
12 the fact that he went to a lot of different people?

13 MR. BAKER: Again, outside the scope of cross.

14 THE COURT: It is. Sustained.

15 THE WITNESS: Okay.

16 BY MR. WARD:

17 Q Did you see that Dr. Miller diagnosed Mr. Rodriguez  
18 with RSD?

19 A Yes. Yes, he did.

20 Q Is there anything inconsistent about a diagnosis of  
21 RSD by Dr. Miller and the use of a pinwheel?

22 MR. BAKER: Objection. Asked and answered, Your Honor.

23 THE COURT: And the use of what?

24 MR. WARD: A pinwheel.

25 THE WITNESS: A pinwheel.

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1 THE COURT: It was asked and answered. Sustained.

2 BY MR. WARD:

3 Q When you examined the patient --

4 A Yes.

5 Q -- did you specifically look for the potential RSD  
6 points?

7 A Yes, I did. There are various --

8 MR. BAKER: Your Honor, this has already been asked and  
9 answered as well.

10 MR. WARD: I did not ask him about page 14 in his report.

11 MR. BAKER: Well, then it's outside the scope of cross.

12 THE COURT: Sustained.

13 BY MR. WARD:

14 Q Based on all of the questions that were asked of you  
15 on cross-examination, have you changed your opinion about  
16 whether this man had RSD?

17 A No. I'm convinced he does not have RSD. He may  
18 have had a very mild form of RSD which resolved because RSD,  
19 contrary to some testimony that I've heard here, is curable.  
20 It does sometimes get cured. But if he did have a mild form  
21 of RSD, he certainly doesn't have anything -- not any hint of  
22 it -- didn't when I examined him. And I really went over him  
23 with a fine tooth comb to see if there was anything that would  
24 explain RSD.

25 Q Does RSD come and go

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1 MR. BAKER: Outside of the scope of cross, Your Honor. I  
2 never asked him any questions about the waxing and waning of  
3 RSD.

4 MR. WARD: He --

5 THE COURT: That's true. He gave previous testimony.  
6 The Court's got a pretty good memory. Sustained.

7 MR. WARD: Thank you. I have no further questions.

8 THE COURT: Mr. Baker.

9 MR. BAKER: Just real quickly.

10 THE WITNESS: Yeah.

11 RE-CROSS-EXAMINATION CONTINUED

12 BY MR. BAKER:

13 Q You said you cared about Enrique Rodriguez as a  
14 person?

15 A Yes.

16 Q And you want to help him as a person?

17 A I --

18 MR. WARD: Outside the scope of my redirect.

19 THE COURT: Sustained.

20 MR. WARD: We're going to play the same game.

21 BY MR. BAKER:

22 Q Doctor --

23 MR. BAKER: No further questions.

24 THE WITNESS: Okay.

25 THE COURT: All right. With the thanks of the Court,

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1 Doctor, you may be excused.

2 THE WITNESS: Oh, thank you.

3 MR. WARD: May I take just two minutes with the witness,  
4 Your Honor? I'll be right back.

5 THE COURT: Sure.

6 MR. BAKER: Can I call Dr. Tauber in?

7 THE COURT: Yes. Let's call him in and we'll have him  
8 seated and be ready for him.

9 MR. BAKER: Sure.

10 [Designation of record concludes at 3:35 p.m.]

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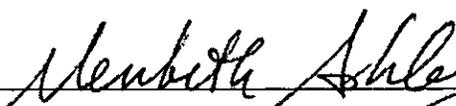
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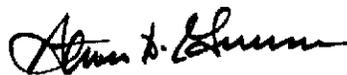
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DISTRICT COURT  
CLARK COUNTY, NEVADA

  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 FIESTA PALMS LLC, )  
 )  
 Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

FRIDAY, NOVEMBER 5, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. JACOB TAUBER

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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1                    FRIDAY - NOVEMBER 5, 2010 - 3:02 P.M.

2                    [Designation of record begins at 3:02 p.m.]

3                    MR. BAKER: Your Honor, I'd like to call Dr. Tauber.

4                    THE COURT: Very well. Doctor -- is it Tauber or Tauber?

5                    MR. BAKER: Tauber.

6                    DR. TAUBER: Yes, Jacob.

7                    THE COURT: Please come forward to the witness box, sir.

8                    DR. TAUBER: Do you want me to come up?

9                    THE COURT: Yes, sir. Please remain standing and raise  
10 your right hand to be sworn by Madame Clerk.

11                    DR. JACOB TAUBER, PLAINTIFF'S WITNESS, SWORN

12                    THE CLERK: Please be seated, stating your full name,  
13 spelling your last name for the record.

14                    THE WITNESS: Jacob Eric Tauber, T-A-U-B-E-R, MD.

15                    THE COURT: Whenever you're ready, Mr. Baker.

16                    MR. BAKER: Thank you.

17                    [Counsel Confer]

18                    DIRECT EXAMINATION

19 BY MR. BAKER:

20                    Q     Would you introduce yourself to the Court, in terms  
21 of your education and experience?

22                    A     Sure. Well, starting with college, I received my  
23 bachelor of arts degree in 1972 from the University of  
24 Pennsylvania, Phi Beta Kappa, Magna Cum Laude. I went to  
25 medical school at Yale and received my M.D. in 1976.

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1 I did my general surgical training at Cornell, New  
2 York Hospital, and then returned to Yale for my orthopedic  
3 surgery residence, with the last year being the chief  
4 residency year. I completed that in 1980.

5 That's when I moved to California. I became a  
6 member of the UCLA clinical faculty when I moved to California  
7 and I went on staff at numerous hospitals, including  
8 Cedars-Sinai, Brotman, Glendale Adventist. I've served as the  
9 chief of orthopedic surgery in the past at both Brotman and  
10 Glendale Adventist. I was board certified in 1981. I became  
11 a fellow of the Academy of Orthopedic Surgery in 1983. I've  
12 published; I'm a member of numerous societies.

13 That's sort of a capsule summary.

14 Q I liked it. Thank you.

15 MR. BAKER: Your Honor --

16 THE COURT: Mr. Baker, we have another Yaley, who also  
17 finds himself in California. Two in one day.

18 MR. BAKER: And when I was a kid, I knocked out most of  
19 my front teeth in the swimming pool at Cornell, trying to go  
20 off of the high board.

21 THE COURT: Oh, boy.

22 THE WITNESS: By the way, I got in my car to drive to  
23 California three days after finishing my residency.

24 MR. BAKER: Your Honor, I move to admit him as a treating  
25 physician and qualify him as an expert in the field of

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1 orthopedic surgery and related modalities.

2 THE COURT: Any objection, Mr. Ward?

3 MR. WARD: I certainly don't object to him as a treating  
4 physician and I certainly don't question his qualifications,  
5 but he's not a retained expert and I would object to it on  
6 that basis.

7 THE COURT: Objection is noted for the record. The  
8 motion is granted.

9 BY MR. BAKER:

10 Q Doctor, would you reach behind you and get Volume 2  
11 of the exhibits?

12 A Sure.

13 Q And, Doctor, I spoke to you about the fact that I'm  
14 going to be extremely brief with you, so that your direct and  
15 cross-examination can be completed today.

16 A No problem, yes.

17 Q Would you turn to Section 23 -- or Exhibit 23.

18 A I have it.

19 Q Were you a treating physician for Enrique Rodriguez?

20 A Yes.

21 Q And were you a treating physician for Enrique  
22 Rodriguez associated with injuries he sustained as a result of  
23 an incident at the Palms Hotel in November of 2004?

24 A Yes.

25 Q And is this your file with respect to your treatment

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1 of Enrique Rodriguez?

2 A It is.

3 Q And is the treatment reasonable, necessary and  
4 causally related to the incident in November of 2004?

5 A It is.

6 Q And what was -- and is that your opinion to a  
7 reasonable degree of medical probability?

8 A It is.

9 Q And what was the bill for your services with respect  
10 to the treatment of Enrique Rodriguez associated with the  
11 injuries he sustained at the Palms Hotel in November of 2004?

12 A \$9,745.

13 Q Was your treatment reasonable, necessary and  
14 causally related to the injury?

15 A Yes.

16 Q Was your bill reasonable, necessary and causally  
17 related to the injury?

18 A Yes.

19 MR. BAKER: Move to admit 23, Your Honor.

20 THE COURT: Any objection?

21 MR. WARD: No, Your Honor.

22 THE COURT: Twenty-three is admitted.

23 [Plaintiff's Exhibit 23 Received]

24 BY MR. BAKER:

25 Q Now you performed a meniscectomy on his right lower

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1 extremity -- his left lower extremity?

2 A I did more than that. I also removed a loose body  
3 and I did a chondroplasty, but the answer is yes.

4 Q What was the most likely and probable cause of the  
5 loose body?

6 A The loose body came from a -- the chondromalacia  
7 that existed and, in my opinion, that is all related to this  
8 incident.

9 Q And the surgery performed by Doctor --

10 A Shannon?

11 Q Shannon, thank you.

12 A Yes.

13 Q And is it your opinion that the loose body was a  
14 piece of -- for lack of a better word, chopped off or chipped  
15 off soft tissue caused by the traumatic assault upon his knee  
16 as a result of Dr. Shannon's surgery?

17 A It's a piece of the articular cartilage, as opposed  
18 -- and I have a photograph of it.

19 Q Go ahead and show it to the Judge.

20 A Here's an extra copy.

21 THE COURT: Have you seen this, Mr. Ward?

22 MR. WARD: No, I haven't, Your Honor.

23 THE COURT: Do you want to come up and take a look?

24 MR. WARD: Sure.

25 THE WITNESS: This is -- this little pebble-like

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1 structure is the loose body in the knee that I removed.

2 THE COURT: Okay.

3 THE WITNESS: And just from the standpoint of  
4 explanation, this did not show up on any study done before  
5 surgery.

6 BY MR. BAKER:

7 Q Is that atypical?

8 A It's not atypical because if it's not calcified and  
9 if it's articular and the piece breaks off, it gets nourished  
10 by the synovial fluid and it will grow. And it can actually  
11 act like a marble thrown into a bunch of gears.

12 Q And is it your opinion to a reasonable degree of  
13 probability that the presence of that loose body was directly  
14 and proximately caused by the accident at the Palms Hotel in  
15 November of 2004?

16 A It is.

17 Q Okay, Doctor.

18 A Did you want this or --

19 THE COURT: Yeah, I do.

20 THE WITNESS: I have an extra copy, so --

21 THE COURT: Oh, thank you.

22 MR. BAKER: Do you want me to have that marked, Your  
23 Honor?

24 THE COURT: Well, if you're going to seek to admit it, I  
25 guess you should.

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1 MR. BAKER: Well, you can just look at it. I wasn't  
2 really going to seek to admit it.

3 THE COURT: Okay.

4 MR. BAKER: Okay.

5 BY MR. BAKER:

6 Q Doctor, it was testified here that -- well, before  
7 we get to that, you also found the torn meniscus; is that  
8 correct?

9 A And I have a photograph of that.

10 Q And is that torn meniscus recurrent from the surgery  
11 occurring -- performed by Dr. Shannon?

12 A Correct.

13 Q We heard testimony today that a torn meniscus  
14 without locking is not symptomatic in its own right, it  
15 doesn't cause pain. Will you respond to that?

16 A That would defy everything that has been known for  
17 at least the last 40, if not 50, years.

18 Q A torn meniscus itself is a pain generating  
19 mechanism?

20 A Sure.

21 Q And if I were to tell you that Dr. Becker testified  
22 that it wasn't, how would you respond to that?

23 A I would say that that defies -- I mean, I can  
24 explain it, but that -- first of all, I've done thousands of  
25 knee surgeries. I've done over 1000 total knee replacements.

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1 I've done thousands of arthroscopic surgeries, so I have  
2 literally thousands of patients who would attest to the fact  
3 that you don't have to have locking to have pain and to be  
4 improved by surgery, but forgetting about my own experience,  
5 that's what's described in literature and you -- it doesn't  
6 require locking to have pain. I mean, that -- and  
7 incidentally, my own father had a meniscectomy done without  
8 locking.

9 Q Your father just had his 95th birthday?

10 A Right.

11 Q Mazal tov.

12 A But that was done at age 70. And at age 70 he had a  
13 meniscectomy done for pain without locking. So I mean,  
14 between what's published, what's commonly known, the medical  
15 literature, my experience, my family experience, I can say  
16 without any question you can do a meniscectomy -- you can just  
17 have pain without locking.

18 Q And, Doctor --

19 A And did you want the photograph of the meniscal  
20 tear?

21 Q Sure. If you could just show it to the, Judge.

22 THE COURT: I'd like to see it. Do you want to see it,  
23 Mr. Ward?

24 MR. WARD: Sure, Your Honor.

25 BY MR. BAKER:

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1 Q Where did you perform -- without giving an  
2 explanation, again I just want to give Counsel time for his  
3 cross-examination.

4 A This is a probe that's inserted in the defect in the  
5 meniscus and is piercing it with this fragment. And so I  
6 trimmed it out -- you can see, I trimmed it back and removed  
7 it, but this probe is sitting within the torn meniscus.

8 THE COURT: Thank you.

9 THE WITNESS: Sure.

10 BY MR. BAKER:

11 Q Where --

12 A The surgery was performed at the Wilshire Surgery  
13 Center. If -- and I think that was your question.

14 Q It was. Are the Wilshire Surgical Center bills  
15 contained in your records as well?

16 A They're not in my records, but I have seen their  
17 billings and they were reasonable and necessary and  
18 appropriate and related to this incident as well.

19 Q And are you familiar with the total amount of that  
20 Wilshire bill?

21 A Well, he also had care at Wilshire Surgery Center;  
22 he had some pain management.

23 MR. BAKER: Your Honor, I'm going to ask Rob to find that  
24 bill real quick.

25 THE COURT: Very well.

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1 THE WITNESS: That's Number 30, I believe.

2 BY MR. BAKER:

3 Q Thirty? Thank you. And could you tell me what the  
4 total charges for the -- and the surgery, of course, had to be  
5 performed at a surgical center or hospital?

6 A Correct.

7 Q And could you tell me what the total amount of that  
8 bill was, with respect to the surgical room charges and  
9 otherwise?

10 A Okay. That was \$17,991. And there's another bill  
11 from Wilshire Surgery Center for pain management care of  
12 \$8,260.

13 Q And were both of those approximately 17,000 and  
14 8,000, reasonable, necessary and causally related to the  
15 subject incident?

16 A Yes.

17 Q To a reasonable degree of probability?

18 A They were.

19 Q And are both of those bills reasonable, necessary  
20 and causally related to the subject incident?

21 A Yes.

22 Q To a reasonable degree of probability?

23 A They are.

24 MR. BAKER: Move to admit 30, Your Honor.

25 THE COURT: Any objection to 30?

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1 MR. WARD: No, Your Honor.

2 THE CLERK: It's already in.

3 THE COURT: Thirty has already been admitted, Mr. Baker.

4 MR. BAKER: Thank you.

5 BY MR. BAKER:

6 Q Were there any other costs associated with the  
7 medical procedure that you performed on Enrique Rodriguez?

8 A Not that we haven't covered.

9 Q There is a Beverly Tower Center Advanced Imaging  
10 bill, which is 21.

11 A Right.

12 Q Is that an MRI ordered by you?

13 A Right. And that was ordered -- the -- that MRI was  
14 done following my surgery and that is the MRI of July 25,  
15 2006.

16 Q And is that reasonable, necessary and causally  
17 related to the subject accident?

18 A It is.

19 Q And that's your opinion to a reasonable degree of  
20 probability?

21 A Yes.

22 Q What was the bill for that, please?

23 A Number 21 is 1430 -- \$1,430.

24 MR. BAKER: Move to admit 21, Your Honor.

25 THE COURT: Any objection?

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1 MR. WARD: No, Your Honor.

2 THE COURT: It will be admitted, 21.

3 [Plaintiff's Exhibit 21 Received]

4 BY MR. BAKER:

5 Q You're the person who referred Enrique Rodriguez out  
6 for an RSD evaluation?

7 A Correct.

8 Q Do you have an opinion whether or not Enrique  
9 Rodriguez suffers from RSD or a similar neurogenically  
10 mediated pathology?

11 A It is my opinion that he does.

12 Q Is that your opinion to a reasonable degree of  
13 medical probability?

14 A Yes.

15 Q Thank you.

16 MR. BAKER: No further questions, Your Honor. I'll pass  
17 your witness.

18 THE COURT: Well, I have one, since it relates to this  
19 picture and --

20 MR. BAKER: And let me -- do you want me to admit those  
21 then?

22 THE COURT: Well, I just want to ask him, given the  
23 testimony we heard from the last witness about this loose  
24 body, you testified this little round thing was the loose  
25 body?

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1 THE WITNESS: It is.

2 THE COURT: And we heard testimony from another witness  
3 that these loose bodies don't present any pain.

4 THE WITNESS: The answer to that is a loose pain doesn't  
5 present pain when it's in a site where it doesn't impinge.  
6 And when it -- because it's loose, it can float around within  
7 the knee and then get into a place where it does impinge and  
8 cause pain. It can also cause buckling or giving way or  
9 swelling, but it depends on where it goes. So if it's in the  
10 top of the knee, above the patella and the suprapatellar  
11 pouch, then it will not cause pain or a problem, but because  
12 it's loose, it floats around within the knee and when it goes  
13 into a spot where it causes a problem, it will cause pain.

14 THE COURT: What about this picture, can you tell us  
15 where it was and whether it would have been causing pain at  
16 the time that you took the picture?

17 THE WITNESS: At the moment I took the picture it would  
18 not have been causing pain because it floated to the  
19 suprapatellar pouch, above the patella. So at that -- if you  
20 knew that it would stay there, which it doesn't, then it  
21 wouldn't be a painful entity.

22 So -- but you -- I can also tell you it was mobile.

23 THE COURT: I understand. Thank you. Any follow up  
24 based on my questions?

25 MR. BAKER: Can I follow up with that?

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1     ///

2     BY MR. BAKER:

3           Q     So is it fair to say there was one definite pain  
4     generating mechanism, which was the torn meniscus?

5           A     Oh, you had several.  You had the loose body, the  
6     torn meniscus and there may have been some discomfort from the  
7     chondromalacia, the residual as well.

8           Q     Okay.  And each of those would be contributory to  
9     the pain complaints that were reported by Enrique Rodriguez?

10          A     Yes.

11          Q     And none of those were identified on the MRI?

12          A     Correct.

13          Q     But it's fair to say that intraoperative  
14     visualization is the gold standard of being able to see in  
15     pathology?

16          A     There's no question of that.  I've operated on many  
17     people with negative MRIs or incorrect MRIs over the years.

18          Q     Thank you, Doctor.

19          MR. BAKER:  Pass the witness, Your Honor.

20          THE COURT:  Very well.  Mr. Ward?

21     BY MR. BAKER:

22           Q     Doctor, before --

23          MR. BAKER:  I'm sorry.

24     BY MR. BAKER:

25           Q     -- is that last opinion stated to a reasonable

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1 degree of probability as well?

2 A With overwhelming probability.

3 Q Medical probability?

4 A Yes.

5 Q Thank you.

6 MR. BAKER: I've got my whole team here reminding me to  
7 say medical probability.

8 THE COURT: Very good, Mr. Baker. Whatever it takes.

9 MR. BAKER: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. WARD:

12 Q Now when was it you did the surgery, Doctor?

13 A The surgery date is April 21, 2006.

14 Q And after you performed the surgery, did the patient  
15 get better?

16 A Some of his symptoms went away. He did have some  
17 improvement, but he developed burning and so his symptoms  
18 evolved, or changed, and the burning is what led me, among  
19 other things, to diagnose RSD, which is also known as CRPS.

20 Q And the -- you have a chart entry from May 2nd, '06.

21 A I do.

22 Q And what does that indicate to you?

23 A I took his stitches out; his wounds were benign.  
24 The patient told me he had improved with the surgery, but he  
25 has residual symptomology. I've advised him he will never

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1 have a perfect knee and I recommended physical therapy.

2 Q I'm looking -- maybe mine is different. I'm not  
3 sure what I'm looking at. It's Bates Stamp Number 14. Do you  
4 see that?

5 A I'm looking at my chart. If you want me to look at  
6 yours, I will be glad too. Which is the numeric entry of my  
7 chart in this?

8 MR. BAKER: Twenty-three.

9 THE WITNESS: Twenty-three. And you want me to look at  
10 Number 14? Oh, those are the handwritten notes of that day.  
11 BY MR. WARD:

12 Q Whose notes are those?

13 A That is my staff in the room with me and then you'll  
14 see the dictated report on Page 13.

15 Q Where did the statement come from?

16 A The statement that he's feeling better, able to bear  
17 weight, would be from the patient.

18 Q Okay. So the patient told you that he was able to  
19 weight-bear more but still feeling unstable; is that correct?

20 A That's correct.

21 Q Is that what you would expect 11 days post-op?

22 A It's not unusual.

23 Q Okay. And he complained of also buckling with  
24 popping?

25 A Correct.

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1 Q Were you able to isolate the buckling and popping?

2 A Well, when you have an abnormal joint surface from  
3 the chondromalacia, you -- and you haven't had the opportunity  
4 to rehab your knee, as you've only had surgery a week or two  
5 before, you may still have some buckling or popping.

6 Q Right. My question is were you able to confirm  
7 that?

8 A No, that's his subjective complaint. I didn't see  
9 his knee buckle or -- on him.

10 Q Did you do an examination to see if there was any  
11 popping?

12 A There's still fluid in the knee 11 days post-op, so  
13 you can't feel it that well.

14 Q Okay. Now, you saw the patient for the first time  
15 on February 14, '06?

16 A Correct.

17 Q Now why was it that the patient came to you rather  
18 than going back to Dr. Shannon?

19 A My understanding was he had moved to LA.

20 Q Okay. So your understanding was that during the  
21 period of time that he was being examined by -- being operated  
22 on by Dr. Shannon he lived where?

23 A I thought he lived here.

24 Q Okay.

25 A Actually, he had moved to Riverside to be more

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1 specific.

2 Q Okay. That -- who told you that he had moved to  
3 Riverside and that's why he was coming to you --

4 A Well, when he --

5 Q -- and not Dr. Shannon?

6 A I'm sorry. When he filled out his patient  
7 registration form, he filled out an address in Riverside,  
8 California.

9 Q Correct.

10 A So that's what I have for his address.

11 Q Right. So my question, sir, is the evidence before  
12 this Court is that he lived in Riverside at the time of the  
13 accident. He lived in Riverside at the time of the surgery by  
14 Dr. Shannon. So what I'm trying to find out is, who told you  
15 that he had moved to -- just moved to Riverside and that's why  
16 he started coming to you?

17 A I didn't -- I should not have said he just moved to  
18 Riverside. I don't know -- I just know that he lived in  
19 Riverside when I did his surgery. In terms of where he lived  
20 when he had surgery by Dr. Shannon, I don't know that answer.

21 Q Let me start again. I'm not trying to put you into  
22 a box here. What I'm trying to find out, sir, is do you know  
23 why this patient came to you when he had been going to  
24 Dr. Shannon? Why he changed doctors.

25 A I just know that there was a referral from his --

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1 from another doctor to me and that he was living in the area.  
2 That's the total -- that's the totality of what I know.

3 Q Correct. Okay. Now he told you that he had been  
4 injured in an accident at the casino, right?

5 A Right.

6 Q What did he tell you were the injuries that he had  
7 sustained as a result of that accident?

8 A When he saw me he complained of pain in his knee and  
9 ankle.

10 Q That's not my question, sir, and I know you want to  
11 get out of here and I want to get out of here too, so if you  
12 are okay, I will re-ask my question.

13 A Okay. He -- oh, here it is. He sustained injuries  
14 to his neck, back and left knee.

15 Q Okay. So he told you that when he was injured at  
16 the casino, that he injured his neck, back and left knee,  
17 correct?

18 A Correct.

19 Q Do you know whether that's true?

20 MR. BAKER: Your Honor, this is outside the scope of  
21 direct examination, as well.

22 THE COURT: Well --

23 MR. BAKER: I only asked him about his knee.

24 MR. WARD: I understand. This is cross-examination, Your  
25 Honor. I'm entitled to ask him about the basis for his

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1 opinions.

2 THE COURT: I'll overrule the objection.

3 THE WITNESS: I didn't review -- I reviewed the records  
4 with respect to his knee. I didn't review every record with  
5 respect to other regions. So I couldn't answer -- I couldn't  
6 give you an appropriate answer to that.

7 BY MR. WARD:

8 Q Okay. He told you, did he not, that physical  
9 therapy did not provide relief; isn't that true?

10 A Correct.

11 Q So he told you that after the accident he had been  
12 -- he had seen Dr. Nork and he had been given physical therapy  
13 and the physical therapy didn't help him?

14 A That was really focused on the knee. The answer is,  
15 that's correct.

16 Q Okay.

17 A But the knee pain persisted in spite of therapy.

18 Q Yeah, I'm just -- that's what he told you, correct?

19 A That's correct.

20 Q He didn't -- he told you that therapy didn't help.

21 A His knee.

22 Q Right.

23 A Correct.

24 Q And you didn't, of course, go look to see whether  
25 that was accurate or not, correct?

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1           A     Specifically, no, but he did need surgery for his  
2     knee.

3           Q     Okay. Now the floating body that we're talking  
4     about, that shows up in that photograph, how large is that at  
5     the time of the photograph? Just -- I mean, just general  
6     range?

7           A     On the order of five, six millimeters in diameter.

8           Q     Okay. And is that something you said that grows?

9           A     Yes, you see when you break off a piece of articular  
10    cartilage in your knee, the synovial fluid nourishes it. So,  
11    for instance, if he had not had surgery and additional time  
12    had passed, that would enlarge.

13          Q     Okay. And now how is it you know what caused it to  
14    break off?

15          A     Oh, because it was a piece of articular cartilage  
16    and because we know that he had had a chondroplasty and we  
17    know that the natural history is that he didn't have -- that  
18    when you have a chondroplasty for chondromalacia and when you  
19    see the chondromalacia that I even saw, that it can break off.

20          Q     Okay.

21          A     And that's the most common source.

22          Q     And so when it -- it likely broke off; is that  
23    correct?

24          A     I'm sorry?

25          Q     It likely broke off at the time of the surgery?

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1           A     No, we don't know for sure when it broke off because  
2 there's -- it could have been the piece that was floating  
3 around that was hidden and grew over time or it could have  
4 been the piece that broke off because you see when you do a  
5 chondroplasty, which is what Dr. Shannon did, you don't  
6 recreate a normal surface, you're just removing the abnormal.  
7 Once you remove the abnormal, you have abnormal wear  
8 characteristics at that area and so as an example, even though  
9 I did an additional chondroplasty, he could break off more  
10 pieces just because of abnormal wear. That's the reason you  
11 get your tires balanced and you have your tread checked. It's  
12 all actually related in a similar fashion.

13           Q     But in terms of how this was, am I correct that you  
14 don't know how big it was when it broke off?

15           A     Of course not.

16           Q     Okay. Could have been very, very small?

17           A     It probably was.

18           Q     And so it would have been much smaller than it was  
19 at the time you demonstrated on that photograph?

20           A     Correct.

21           Q     And so it is much more likely that it would be  
22 hidden when it's very, very small?

23           A     When it's very small you may not even see it.

24           Q     Okay. And when it's very, very small it may not  
25 cause problems?

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1 A That's true.

2 Q Okay. So you did surgery about six months after he  
3 had his surgery by Dr. Shannon; is that correct?

4 A Right.

5 Q And so you don't know where in that six month period  
6 that it got as big as it got?

7 A That would be true.

8 Q But you would believe that it did grow?

9 A Yes.

10 Q And so you couldn't say exactly what day it broke  
11 off?

12 A True.

13 Q But what you could say is, it broke off sometime  
14 either during or after the surgery?

15 A No, it could have broken off -- any time after this  
16 incident, had been small, have been hidden and grown since  
17 then. So what I can say to you is, that it broke off on or  
18 after November of 2004, but I have no way to know precisely  
19 when and I've no way to know precisely the size that it was  
20 when it did break off.

21 Q If it was a very small piece, how do you know that  
22 it broke off on November 22, 2004 and didn't break off before  
23 then?

24 A Because when you have a person who has  
25 chondromalacia in an area where there's a torn meniscus

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1 causing wear on the medial femoral condyle, then the odds are  
2 over -- and, you know in medicine you can never say never or  
3 always, but I can say with reasonable medical probability that  
4 the torn meniscus, which is a causal -- which was a cause of  
5 his medial femoral chondromalacia, and since that came from  
6 the incident, that this piece broke off on or after November  
7 of 2004. And it would be highly unlikely for this piece to  
8 have broken off before that date.

9 Q Okay. And the -- but in terms of the surgery by  
10 Dr. Shannon, you don't know whether it broke off before or  
11 that or at that time or afterward?

12 A That's true.

13 Q And the only thing you can say with some certainty  
14 is that at the time it broke off, it in all likelihood was a  
15 lot smaller than it was at the time you observed it?

16 A I'd say that's true.

17 Q Okay. And the arthrogram -- the arthrogram MRI,  
18 whether it would show on that would be determined by a variety  
19 of things, one of which would be how big it was?

20 A True.

21 Q One of which would be where it was?

22 A Not so true. In other words, if you have a loose  
23 fragment in the knee, you are -- if it's above a certain size,  
24 it's easier to see on an MR arthrogram. The location of that  
25 is not going to be as significant. So that piece is an

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1 unlikely finding on an MR arthrogram or on an MRI, no matter  
2 where it is.

3 Q Okay. So no matter where it is, it's not likely to  
4 be found, no matter how big it is, it's not likely to be  
5 found?

6 A That's not true. If it's -- once it's above a  
7 certain size, if it were twice or three times that size, then  
8 it's more likely to be found.

9 Q Okay. So what we would say based on probability is  
10 at the time of the surgery by Dr. Shannon, that it would have  
11 been much smaller?

12 A Well, we don't even know that it was broken off or  
13 there.

14 Q Okay.

15 A We -- I -- all I can tell you is that it came after  
16 this incident, but I -- I've already said that I don't know  
17 when it broke off.

18 Q Sure. Okay. But you know that at least the first  
19 time you saw the patient after your surgery, he was getting  
20 better?

21 A To a degree he was.

22 Q And you're -- are you aware that he told Dr. Becker  
23 that he got no improvement at all from the surgery that you  
24 did for him?

25 A I don't know what he told Dr. Becker.

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1 Q Okay. If that's what he told Dr. Becker that would  
2 not fit with what you observed; is that correct? Wouldn't fit  
3 with what he told you?

4 A Well, it wouldn't fit with what he said in the first  
5 visit, but he did have -- but it would be consistent with the  
6 fact that he had a significant issue that developed. So in  
7 his mind I can understand where he may feel he didn't benefit,  
8 but at the same time he got rid of one set of symptoms, but  
9 has another. So I don't know how to necessarily answer that.

10 Q And the condition that he would have had, the torn  
11 meniscus --

12 A It had a residual tear, or a recurrent tear of the  
13 meniscus.

14 Q Okay. So he had a tear of the meniscus at the time  
15 you operated on him five, six months after Dr. Shannon did?

16 A Correct.

17 Q Did he have that tear in the meniscus after the  
18 surgery by Dr. Shannon? I mean, that day after Dr. Shannon --  
19 did Dr. Shannon leave a tear in there?

20 A I don't think so. It's always a possibility, but I  
21 don't believe so. I think it's related to the fact that  
22 there is an abnormal medial femoral condyle wearing on the  
23 meniscus. And so, if you take a rubbery substance and create  
24 a sandpaper over it, it can create additional tearing.

25 Q And the tear that you saw in the meniscus, would you

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1 expect that to appear on an arthrogram MRI?

2 A Not necessarily.

3 Q More probably than not, it would, or more probably  
4 than not, it would not?

5 A I -- it could go either way. I don't know. It may  
6 show and it may not, so I don't know that I can answer that --

7 Q So you don't have an opinion?

8 A Well, it didn't show on this MR arthrogram, is what  
9 my opinion is.

10 Q The one conduct --

11 A And whether it would show -- I'm sorry?

12 Q The one conducted by Dr. Shannon?

13 A Correct, the MR arthrogram.

14 Q Okay. I'm sorry, I may have interrupted you. I  
15 didn't mean to.

16 A No, that -- you see, the point is that you treat a  
17 patient and not a study and in the end, these studies are  
18 wonderful and I was in practice before MRI existed, but I've  
19 had so many patients over the years who have come in -- I mean  
20 I just operated on a golf pro friend of mine who had an MRI  
21 that an intact medial -- his MRI showed a torn medial meniscus  
22 and an intact lateral meniscus and when I arthroscoped him,  
23 the MRI was wrong both ways. His medial meniscus was intact  
24 and his lateral meniscus was torn. So it had both a false  
25 positive and a false negative in the knee, but it didn't make

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1 my surgery unnecessary because he says he's a lot better, so  
2 in the end I treated my patient. That's what I'm supposed to  
3 do. What I did with Mr. Rodriguez was I treated my patient.

4 Q And how about the pain in his left ankle?

5 A I didn't find much in his ankle.

6 Q But he did complain of pain in his left ankle; isn't  
7 that right?

8 A He did.

9 Q Right. So he complained of pain in his left ankle  
10 and you examined it and you didn't find anything; is that  
11 right?

12 A I found some slight tenderness. It's possible there  
13 was an old sprain, but I didn't think there was anything  
14 significant.

15 Q And you offered the opinion that as a result of the  
16 injury on November 22, 2004, that the patient also sustained  
17 injuries to the neck and back; isn't that true?

18 A No, I didn't. I simply said he had a history of  
19 neck and back injury based on his history. That's what he  
20 told us, but I didn't find anything in his neck or back when I  
21 saw him.

22 Q Okay. And did he tell you that he had sleep apnea  
23 that he related to the accident?

24 MR. BAKER: Your Honor, aren't we now really outside of  
25 the scope of direct, Your Honor?

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1 THE COURT: It is sustained.

2 MR. WARD: Your Honor, for the record, I think I'm  
3 entitled to ask what he bases his opinion on and what he  
4 relies on to formulate the opinions of this patient.

5 THE COURT: Objection's noted for the record. Sustained.

6 BY MR. WARD:

7 Q You offered the opinion that he had RSD?

8 A Yes.

9 Q And you sent him out for evaluation?

10 A Correct.

11 Q Why did you send him out for evaluation?

12 A Because orthopedic surgeons customarily do not treat  
13 RSD. The treatment is customarily -- the diagnosis is  
14 customarily confirmed by either a neurologist or a pain  
15 management specialist and the treatment is customarily done by  
16 pain management specialists. So as an example, proper  
17 treatment of RSD involves such procedures as sympathetic  
18 blocks or epidurals or procedures of that nature and the pain  
19 management people do a lot more of those.

20 And when those procedures -- with certain  
21 indications, people can require spinal stimulators and  
22 whatnot, so the bottom line is those are all procedures in the  
23 customary domain of pain management.

24 Q Is RSD covered on the orthopedic boards?

25 A Sure, to some extent. It's a diagnosis we have to

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1 familiarize ourselves with because we have patients who get  
2 that condition. That doesn't mean we necessarily treat it.

3 Q And what was it you found that led you to believe  
4 that the patient had RSD?

5 A Interestingly, when he came in in September of 2006  
6 he had the complaint of burning. Burning is a classic  
7 complaint for RSD. When a person has pain that's  
8 disproportionate to how that patient should be functioning at  
9 that time, that is one tip. And frankly, if I had been  
10 smarter I would have diagnosed it earlier.

11 Q And so on the basis of burning pain you diagnosed  
12 RSD?

13 A No, I diagnosed it based on the fact that he had  
14 disproportionate pain, he had burning and when he returned to  
15 me in September that issue had been raised, I believe, by a  
16 neurologist, as well. So -- and at that point I thought that  
17 that's what he had, but -- so what I did was I sent -- I said  
18 in my report of September 2006 that he had a complaint of  
19 burning even at rest. This is consistent with a reflex  
20 sympathetic dystrophy and I said I am recommending the patient  
21 be seen in pain management to determine if in fact there is  
22 reflex sympathetic dystrophy and to undergo care for that --  
23 for this.

24 So my point is, I didn't definitively make the  
25 diagnosis. What I said was the diagnosis was consistent with

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1 his complaints, but I wanted to defer to the appropriate  
2 specialist to confirm that existence of it and then to treat  
3 it properly.

4 Q So you didn't diagnose RSD?

5 A I made a presumptive diagnosis, but I didn't make a  
6 definitive diagnosis.

7 Q And that was based on burning?

8 A That was based on disproportionate pain and burning  
9 at rest.

10 Q Okay. So the patient told you that he had burning  
11 pain in his knee and the patient told you that his pain was  
12 very, very bad and on the basis of that you diagnosed RSD?

13 MR. BAKER: This has been asked and answered, Your Honor.

14 THE COURT: It has. Sustained.

15 BY MR. WARD:

16 Q Did you base it on anything else?

17 A No.

18 Q Thank you.

19 MR. WARD: I have no further questions.

20 MR. BAKER: No further questions, Your Honor.

21 THE COURT: Very well. With the thanks of the Court,  
22 Dr. Tauber, you may be excused.

23 THE WITNESS: Thank you, Your Honor.

24 [Designation of record concludes at 3:36 p.m.]

25

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DISTRICT COURT  
CLARK COUNTY, NEVADA

*Alan D. Quinn*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ,	)	
	)	
Plaintiff,	)	CASE NO. A-531538
	)	
v.	)	DEPT. X
	)	
FIESTA PALMS LLC,	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE  
MONDAY, NOVEMBER 8, 2010

**REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. WALTER KIDWELL**

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

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Defendant's Witness(es):

None

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EXHIBITS

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1 in California, been here for a long time.

2 Q Where'd you go to undergraduate?

3 A I did my undergraduate at UNLV and UNR. Went to  
4 medical school at Uniform Services University of Health  
5 Sciences in Bethesda, Maryland, Military Medical School. Did  
6 my internship, residency, and fellowship training in the  
7 United States Navy.

8 Q And what -- in what area do you practice in Las  
9 Vegas?

10 A Pain management.

11 Q And you're licensed in Las Vegas?

12 A In Nevada, yes.

13 Q And you're board certified in pain management?

14 A Yes.

15 MR. BAKER: Move to admit the doctor as a treating  
16 physician of Enrique Rodriguez and is an expert in the field  
17 of pain management and anesthesiology.

18 THE COURT: Any objection, Mr. Ward?

19 MR. WARD: No, Your Honor.

20 THE COURT: Very well.

21 BY MR. BAKER:

22 Q Doctor, I told you --

23 THE COURT: So ordered.

24 MR. BAKER: Thank you, Your Honor.

25 THE COURT: You always forget that part, Mr. Baker.

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1 MR. BAKER: I'm just -- I'm learning.

2 THE COURT: You're ready to go, I see.

3 MR. BAKER: I'm learning.

4 BY MR. BAKER:

5 Q Doctor, were you a treating physician of Enrique  
6 Rodriguez?

7 A Yes, I was.

8 Q When did you first see Enrique Rodriguez?

9 A In March 2006.

10 Q And I'm going to ask you --

11 MR. BAKER: And may I approach the witness, Your Honor?

12 THE COURT: Yes.

13 MR. BAKER: I waited to answer.

14 BY MR. BAKER:

15 Q What volume do you have in front of you?

16 A Volume 2.

17 Q I'm just going to give you Volume 1 as well. Did  
18 you bring your chart with you today?

19 A I did.

20 Q Would you feel more comfortable referring to your  
21 chart?

22 A That'd be easier.

23 Q Okay. For what conditions were you treating Enrique  
24 Rodriguez?

25 A For neck and low back pain.

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1 Q Okay. And what type of neck and low back pain was  
2 he experiencing, meaning was it radicular or was it axial?

3 A It appears to be mostly axial. He had a bit of  
4 radicular component, but I don't think that was as significant  
5 as the axial.

6 Q And for the record, the Judge knows, but we still  
7 have to make a record for the appellate court in the event it  
8 gets that far. Would you describe the difference between  
9 axial and radicular pain?

10 A Radicular pain is what you get when you get  
11 sciatica, basically. A nerve root gets irritated, sends pain  
12 down the dermatome of whatever nerve root is being irritated.  
13 For instance, a C-7 nerve root would radiate to the middle  
14 finger. C-6 would radiate to the thumb. In the low back, L-4  
15 would radiate across the top of the knee and the inside of the  
16 ankle. L-5 would radiate to the top of the foot and the toes.  
17 S-1 would radiate to the outside of the foot. So that gives  
18 us a guide of pretty much where the lesion is based on where  
19 the pain goes.

20 Q And you're aware that Dr. Shah performed a milogram  
21 of Enrique's cervical area and determined that it was not  
22 radicular in nature but, rather, axial pain?

23 A Correct. He had a ENG consistent with carpal tunnel  
24 syndrome, which could mimic C-7 radicular pain. And that  
25 explains a lot.

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1 Q Okay. What type of services did you provide for  
2 Enrique Rodriguez?

3 A Primarily injection therapy and some medication  
4 management for a while.

5 Q Do you have an opinion with respect to the mechanism  
6 of injury with respect to Enrique's lumbar and cervical  
7 spines?

8 A I do. Initially, he was injured at a hotel, injured  
9 his knee. Subsequent to that injury, he had a great deal of  
10 difficulty ambulating with some significant postural changes.  
11 And I think -- my opinion is his back and neck pain progressed  
12 throughout his course of pain after his initial injury.

13 Q We've heard some testimony from doctors with respect  
14 to masking. Dr. Shannon described it as like a lot of people  
15 talking quietly in the background and one person shouting in  
16 your face. When that person stops shouting, you're able to  
17 hear the background noise. Would you describe the physiologic  
18 aspects of physiologic masking to the Judge, please?

19 A Well, it's quite common. I mean it's not rocket  
20 science. You focus on what hurts the most, and --

21 Q I love it when rocket scientists say it's not rocket  
22 science. Go ahead.

23 A Well, I see it all the time. I'll receive patients  
24 with multiple areas of pain. And as soon as I get one cleaned  
25 up, something else starts hurting that was essentially there

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1 all along. It's just they didn't pay attention to it, because  
2 the other thing hurt so bad. Knees and shoulders tend to be  
3 extremely painful, I mean more than what you would think. But  
4 anatomically, for some reason, the knee and the shoulder is  
5 really bad, like worse than a kidney stone. And I think  
6 it's --

7 Q I've had surgery on both.

8 A Yeah. And I think it's because of the weight  
9 bearing involved. But that seems to be the trend all these  
10 years. I've seen knees and shoulders, for some reason, it's  
11 just miserable for people. So when your knee is putting you  
12 through the roof, it's quite easy to ignore something that's  
13 not quite as strong in the neck or the low back.

14 Q I'd like to ask you to go to Exhibit 28, Volume 2.  
15 And before I do that, is it your opinion to a reasonable  
16 degree of medical probability that the mechanism of injury is  
17 as you just described?

18 A Yes.

19 THE COURT: Did you say 23, Mr. Baker?

20 MR. BAKER: 28, Your Honor.

21 BY MR. BAKER:

22 Q Are you at 28?

23 A Yes.

24 Q What specific medical services did you provide to  
25 Enrique?

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1           A     Provided epidural injections to his neck and low  
2 back on two occasions, diagnostic selective nerve root blocks  
3 to his neck and low back on one occasion, and medications.

4           Q     And the blocks did not work, is that correct?

5           A     The epidural injections were stacked, so that I did  
6 the low back one week, the neck the next, the low back the  
7 following week, the neck the next. And he really got no  
8 sustained improvement from it.

9           Q     And is that consistent with a pain of an axial  
10 rather than a radicular nature?

11          A     Yes, it can be.

12          Q     Would you explain to the Judge why that is?

13          A     Center of the spinal cord -- or center of the spine  
14 is a spinal cord. It's surrounded by spinal fluid. Then  
15 there's a long fiber sheath that holds that all in. It's call  
16 a dura. Epidural technically means outside the dura.

17                 The nerve roots exit the spine from the spinal cord  
18 at each level between the vertebrae, and they're enveloped a  
19 little bit of the dural sheath as they leave the spine and go  
20 to the periphery of the legs.

21                 The epidural space is really not a true space. It's  
22 a potential space. It means if you put something in it, it'll  
23 expand to accommodate it. When a woman has a baby, we place a  
24 catheter in the epidural space in the low back. And as we  
25 pump local anesthetic medications in there, it saturates the

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1 area of local anesthetic, anesthetizes the nerves in that  
2 area, and relieves the pain of labor.

3 And epidural steroid injection is a similar animal  
4 in that we're trying to get cortisone type medication, a  
5 little bit of local anesthetic, in the epidural space with the  
6 hope that it will anesthetize the structures around it. It  
7 works best for radicular pain, sciatica. It works really well  
8 for herniated discs with sciatica. It's less effective for  
9 spinal stenosis. It's less effective for discogenic pain.  
10 And the real issue is not so much axial pain, but discogenic  
11 pain from an internal disc disruption. That is really the  
12 bottom line definition.

13 Q Is it your opinion to a reasonable degree of  
14 probability that he's suffering from an internal disc  
15 disruption?

16 A That would be yes.

17 Q And can you explain what the difference between --  
18 and you know you're right, but yeah, you're correct. It's not  
19 so much axial versus radicular but discogenic versus non.

20 A Right.

21 Q Would you explain internal disc disruption to the  
22 Judge?

23 A Certainly. Well, before I do that, the reason the  
24 medication doesn't work as well for an internal disc  
25 disruption is because the medication doesn't get inside the

1 disc. The problem is inside the disc. The medication  
2 envelopes the structures around the disc, and sometimes it  
3 helps.

4 Now, an internal disc disruption, by definition, is  
5 a painful disc, in other words, a disc that's been proven to  
6 cause pain with abnormal disc architecture, which means it's  
7 not intact. A normal disc is built kind of like a jelly donut  
8 and steel belted radial tire, if you can imagine that.

9 Q You're making me hungry.

10 A The outside of the disc has multiple layered fibers  
11 like a tire or an onion, very tough and fibrous.

12 Q Is that the annulus?

13 A That's the annulus. And take two Frisbees and put  
14 them on top of each other. That's kind of what it looks like.  
15 And the center has this jelly called a nucleus. It kind of  
16 acts like a shock absorber for the spine.

17 So as a disc degenerates and becomes internally  
18 disrupted, little cracks and tears develop through the annular  
19 fibers, that tough fibrous outside, and allows disc material  
20 to leach to the periphery.

21 In a herniated disc, that disc material actually  
22 gets out of the periphery, and that's how it causes sciatica,  
23 because the nucleus, the jelly, is full of proteins that is  
24 seen as a foreign body when it gets out into the body. So it  
25 creates an intense inflammatory reaction. If you took the

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1 scope and went in and looked at it, it'd all be red and  
2 swollen just like if somebody had hives or poison ivy.

3 So putting steroids in there shuts off the chemical  
4 reaction of inflammation and treats the pain. It doesn't fix  
5 the anatomy, but it treats the pain. However, current  
6 research has shown that the reason a disc hurts is thought it  
7 was just because of those nerve endings in the peripheral  
8 annulus, which is probably the case, but also, an internally  
9 disrupted disc will actually grow nerve endings inside the  
10 disc that are nociceptive. Nociceptive means pain nerves.  
11 And that's why a disc hurts.

12 Q And does the medical literature suggest that  
13 disruption of the interior of the disc, such as you just  
14 described, is associated with postural changes?

15 A Yes.

16 Q Okay. And did you see a Strehlow Radiology report  
17 with respect to Enrique Rodriguez?

18 A Correct.

19 Q Did you note that they describe specifically  
20 postural changes mediated by spasming?

21 A Correct.

22 Q And is that exactly what you would expect to see  
23 with somebody who's ambulating with assistive devices and  
24 limping over a period of years?

25 A Absolutely. Not only that, I can take anybody and

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1 put a one inch lift in their shoe, and over the subsequent  
2 weeks, they're develop significant back pain.

3 Q And that's supported in the medical literature --

4 A Yes.

5 Q -- as well?

6 A Yes.

7 Q And if somebody suggested that it wouldn't, would  
8 you disagree with that?

9 A Correct. In fact, that's why they put lifts in  
10 shoes for people that have leg discrepancies, because the  
11 sequelae is back pain.

12 Q Okay. Exhibit 28, are these medical bills and  
13 records associated with your treatment of --

14 A Yes.

15 Q -- Enrique Rodriguez? Was your treatment of Enrique  
16 Rodriguez reasonable, necessary, and causally related to the  
17 injuries he sustained at the Palms Hotel to a reasonable  
18 degree of medical probability?

19 A Yes.

20 Q Could you please tell the Judge the amount of your  
21 bill?

22 A Well, I'm assuming --

23 Q It's on Bates Stamp Number 3.

24 A That's assuming I can read my own ledger.

25 Q It looks like \$11,372.

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1 A That's correct.

2 Q And were those bills reasonable, necessary, and  
3 causally related to the injuries sustained by Enrique  
4 Rodriguez at the Palms to a reasonable degree of medical  
5 probability?

6 A Yes, sir.

7 MR. BAKER: Move to admit 28, Your Honor.

8 THE COURT: Any objection to 28, Mr. Ward?

9 MR. WARD: No, Your Honor.

10 THE COURT: So ordered.

11 [Plaintiff's Exhibit 28 Received]

12 BY MR. BAKER:

13 Q The services you provided, you provided at a surgery  
14 center, is that correct?

15 A That's correct.

16 Q And what surgery center was that?

17 A Medical District Surgery Center.

18 Q And Medical District Surgery Center is Exhibit  
19 Number 20. And I believe that that might be in Volume Number  
20 1. Well, no, is it the first exhibit in Volume Number 2?  
21 Yes. Sorry about that, Doctor. I've been having trouble the  
22 whole trial with that.

23 And if you'll turn to page number 2. Are those  
24 records set forth in Exhibit 20 the medical bills generated  
25 with respect to the treatment Enrique Rodriguez received at

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1 the diagnos- -- the surgical center you just referred to?

2 A Yes, it is.

3 Q And were the treatment and the bills reasonable,  
4 necessary, and causally related to the injuries sustained by  
5 Enrique Rodriguez at the Palms Hotel in November of 2004?

6 A Yes, it was.

7 Q And is that your opinion to a reasonable degree of  
8 medical probability?

9 A Yes, sir, it is.

10 MR. BAKER: Move to admit 20, Your Honor.

11 THE COURT: Any objection to 20, Mr. Ward?

12 MR. WARD: No, Your Honor.

13 THE COURT: So ordered.

14 [Plaintiff's Exhibit 20 Received]

15 BY MR. BAKER:

16 Q Are you aware that Enrique was also receiving some  
17 less invasive modalities to attempt to help him with his pain  
18 complaints associated with the subject incident?

19 A That's correct.

20 Q Your -- some of the past modalities were through  
21 chiropractic, is that right?

22 A That's correct.

23 Q Could you turn to Exhibit Number 17, please? Is  
24 this treatment from Integrated Healthcare?

25 A Yes.

1 Q And if you'll look on Bates Stamp Number 6, you  
2 could see that your procedure reports are contained within  
3 this file.

4 THE COURT: I don't have a 6, Mr. Baker.

5 MR. BAKER: Bates Stamp Number 6, Your Honor?

6 THE COURT: No.

7 MR. BAKER: No. Are you in --

8 THE WITNESS: I have 6.

9 MR. BAKER: Are you in 20?

10 THE COURT: 17 you said.

11 MR. BAKER: That's because I'm in the wrong one.

12 THE COURT: Oh, see.

13 BY MR. BAKER:

14 Q This is Integrated Healthcare of Nevada?

15 A Yes.

16 Q And was the treatment received at Integrated  
17 Healthcare of Nevada reasonable, necessary, and causally  
18 related --

19 A Yes.

20 Q -- to the subject accident? Is that your opinion to  
21 a reasonable degree of probability?

22 A Yes.

23 MR. BAKER: And move to admit 17, Your Honor.

24 THE COURT: Any objection to 17, Mr. Ward?

25 MR. WARD: No, Your Honor.

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1 THE COURT: 17 is admitted.

2 [Plaintiff's Exhibit 17 Received]

3 MR. BAKER: Moving on to 20, Your Honor.

4 THE COURT: 20, okay. Thank you.

5 MR. BAKER: Thank you.

6 THE WITNESS: We did 20.

7 BY MR. BAKER:

8 Q Right. That was the service center, is that  
9 correct?

10 A Correct.

11 Q If you'll go to 22.

12 MR. WARD: What's he on now, Exhibit 22?

13 BY MR. BAKER:

14 Q Are these pharmacy bills associated with the care  
15 rendered to Enrique Rodriguez?

16 A Yes.

17 Q Doctor, can I ask you for an epidural after we  
18 finish here? I can't seem to turn my head at all.

19 A Sure.

20 Q I appreciate that. It's ibuprofen and a variety of  
21 other medications that were prescribed to Enrique Rodriguez  
22 associated with the injuries that he received in the subject  
23 incident?

24 A Yes.

25 Q And are those bills, while not compiled --

1 MR. BAKER: And we'll do it for the Court later.

2 BY MR. BAKER:

3 Q -- were they reasonable, necessary, and causally  
4 related to the subject incident?

5 A Yes.

6 Q To reasonable degree of medical probability?

7 A Yes.

8 MR. BAKER: Move to admit 22, Your Honor.

9 THE COURT: Any objection to 22?

10 MR. WARD: No, Your Honor.

11 THE COURT: 22 is admitted.

12 [Plaintiff's Exhibit 22 Received]

13 BY MR. BAKER:

14 Q And if you would turn to Exhibit 27, please.  
15 Doctors -- well, basically, every doctor who's a doctor in the  
16 case who is a treating physician has testified that the carpal  
17 tunnel syndrome that Enrique Rodriguez experienced was  
18 associated with the use of the assistive walking devices. Do  
19 you concur with that opinion?

20 A Yes.

21 Q To reasonable degree of medical probability?

22 A Yes.

23 Q And what's contained in Exhibit 27 is an EMG or a  
24 nerve conduction velocity?

25 A Both.

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14 App. 2796

1 Q Oh, both. Were those studies reasonable, necessary,  
2 and causally related to the subject incident?

3 A Yes.

4 Q To a reasonable degree of medical probability?

5 A Yes.

6 Q And could you please tell the Court what the charges  
7 for those studies were?

8 A \$2,118.

9 Q And are those bills reasonable, necessary, and  
10 causally related to the subject incident to a reasonable  
11 degree of medical probability?

12 A Yes, they are.

13 MR. BAKER: Move to admit 27, Your Honor.

14 THE COURT: Any objection to 27, Mr. Ward?

15 MR. WARD: No, Your Honor.

16 THE COURT: 27 is admitted.

17 [Plaintiff's Exhibit 27 Received]

18 BY MR. BAKER:

19 Q Can I ask you to turn to 19, please, which is the  
20 last exhibit in Volume 1?

21 A I'm going to teach you guys how to use an iPad.

22 Q I need a lot of teaching on that. Are those medical  
23 pharmaceutical bills associated with prescriptions given to  
24 Enrique Rodriguez?

25 A Yes.

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14 App. 2797

1 Q And are those reasonable, necessary, and causally  
2 related to the incident at the Palms Hotel in November 2004 to  
3 reasonable degree of medical probability?

4 A Yes, sir.

5 Q And there's several different pages, is that right?

6 A Right.

7 Q But they're not duplicative, is that fair to say?

8 A As far as I can tell.

9 Q Can you read off the amounts on each page into the  
10 record, please?

11 A The first page is like summary for \$2,402.60. The  
12 actual -- there's another one for \$1,823.95 and \$1,235.30,  
13 \$659.60. Those are the summaries. I don't know if these  
14 reflect in the summaries or not.

15 Q That's fine.

16 A You want me to go through the individual pages?

17 Q And are the bill -- the prescription amounts  
18 contained in Exhibit 19 reasonable, necessary, and causally  
19 related to the subject incident?

20 A Yes, they are.

21 MR. BAKER: Your Honor, move to admit 19.

22 THE COURT: Okay. 19, any objection, Mr. Ward?

23 MR. WARD: No objection, Your Honor.

24 THE COURT: 19 is admitted.

25 [Plaintiff's Exhibit 19 Received]

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14 App. 2798

1 BY MR. BAKER:

2 Q And if you would turn to 27, please? Oh, did we  
3 already do 27? 27 is admitted.

4 MR. BAKER: Your Honor, can I take a moment with the  
5 clerk if that's okay --

6 THE COURT: Sure.

7 MR. BAKER: -- to for just some housekeeping?

8 THE COURT: That's a good idea, Mr. Baker.

9 MR. BAKER: Thank you. I just want to make sure what's  
10 in evidence, if that's okay. Are 1 through 7 in evidence?

11 THE CLERK: Would you like me to just make you a copy of  
12 this? Or do you want to do it on the record?

13 MR. BAKER: I think we could just do it real quick.

14 THE CLERK: Okay. 1 through 7. I have 1 is not  
15 admitted.

16 MR. BAKER: Okay. Are 2 through 7?

17 THE CLERK: Correct.

18 MR. BAKER: Okay. 8 through 27?

19 THE CLERK: I have 13, 18, 24, and 26 not admitted.

20 MR. BAKER: I have 13 is admitted, 18 is not admitted.

21 And what did you say?

22 THE CLERK: 24 and 26.

23 MR. BAKER: Okay. So 13 was the Strehlow Radiology bill,  
24 and that was the one that talked about the postural changes.  
25 And I believe that that was admitted through Dr. Schifini.

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14 App. 2799

1 THE CLERK: Okay.

2 MR. BAKER: Well, then we'll just --

3 THE CLERK: What day to you have, and I can look it up.

4 MR. BAKER: That's okay.

5 BY MR. BAKER:

6 Q Would you turn to Exhibit 13, please?

7 THE COURT: You know, part of the issue, I think, is that  
8 we have a relief clerk in from time to time. So it's a little  
9 hard to keep track of these things.

10 MR. BAKER: Okay.

11 THE COURT: We can check it out later.

12 BY MR. BAKER:

13 Q Are you familiar with the fact that he had a  
14 radiologic examination at Strehlow Radiology, where they  
15 talked about postural changes?

16 A That's correct.

17 Q And is that reasonable, necessary, and causally  
18 related to the subject incident?

19 A Yes.

20 Q To reasonable degree of probability?

21 A Yes.

22 Q Medical probability? Yes?

23 A Yes.

24 Q And the amount of that bill was?

25 A Eighty-five dollars.

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14 App. 2800

1 Q How much?

2 A Eighty-five. Is that the one I'm looking at?

3 Q Eighty-five dollars. Okay.

4 A Eighty -- yeah.

5 MR. BAKER: Okay. Move to admit 13, Your Honor.

6 THE COURT: Any objection to 13?

7 MR. WARD: No, Your Honor.

8 THE COURT: 13 is admitted.

9 [Plaintiff's Exhibit 13 Received]

10 MR. BAKER: So going from 27, 27 is admitted?

11 THE CLERK: 27 through 30. 31 is not admitted.

12 MR. BAKER: Correct. And 32, is it admitted?

13 THE CLERK: Correct.

14 MR. BAKER: 34, 35, 36, 37, 38, 39, 40, 41, 42 are  
15 admitted?

16 THE CLERK: I have 35 through 42 admitted. I don't have  
17 34 as admitted.

18 BY MR. BAKER:

19 Q Would you please turn to Exhibit 34? 34 are imaging  
20 studies associated with the bone scan that was conducted on  
21 Enrique Rodriguez?

22 A Yes.

23 Q And you understand the bone scan was conducted as  
24 part of his treatment course in this matter?

25 A It looks like there are other images too.

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14 App. 2801

1 Q Yes. And an MRI?

2 A Correct.

3 Q And were all of the imagery conducted, contained in  
4 Exhibit 34, reasonable, necessary, and causally related to the  
5 subject incident?

6 A Yes.

7 Q To a reasonable degree of probability?

8 A Yes.

9 Q And could you tell me what the billing amount is,  
10 please?

11 A Well, it looks like \$5,278.

12 Q And were those costs and bills reasonable,  
13 necessary, and causally related to the subject incident?

14 A Yes.

15 Q To a reasonable degree of probability?

16 A Yes.

17 MR. BAKER: Okay. Do we have 35 in?

18 THE CLERK: Correct, 35 through 42.

19 MR. BAKER: 35 through 42 are all in.

20 BY MR. BAKER:

21 Q 43, if you could please turn to that. And that  
22 might be contained in Volume Number 3.

23 THE COURT: Are you moving to admit 34?

24 MR. BAKER: Yes, Your Honor. I'm sorry. I move to admit  
25 34.

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14 App. 2802

1 THE COURT: Mr. Ward, any objection?

2 MR. WARD: No objection, Your Honor.

3 THE COURT: 34 is admitted

4 [Plaintiff's Exhibit 34 Received]

5 BY MR. BAKER:

6 Q 43 is the Matt Smith physical therapy bill, is that  
7 right?

8 A I don't have volume three.

9 MR. BAKER: May I approach, Your Honor?

10 THE COURT: Sure.

11 THE WITNESS: I have this, volume four.

12 MR. BAKER: Is this yours, Your Honor?

13 THE COURT: It is, but you can borrow it if you'd like.

14 MR. BAKER: Thank you, Your Honor.

15 BY MR. BAKER:

16 Q Are those the Matt Smith physical therapy bills?

17 A Yes.

18 Q And were the services provided at Matt Smith  
19 reasonable, necessary, and causally related --

20 A Yes.

21 Q -- to the subject incident?

22 A Yes.

23 Q To a reasonable degree of probability?

24 A Yes.

25 MR. BAKER: Move to --

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14 App. 2803

1 BY MR. BAKER:

2 Q And how much was the bill?

3 A Forty-one thousand three hundred.

4 Q And are those bills reasonable, necessary, and  
5 causally related to the subject incident?

6 A Yes.

7 Q To a reasonable degree of medical probability?

8 A Yes.

9 MR. BAKER: And move to admit 43, Your Honor.

10 THE COURT: Any objection to 43, Mr. Ward?

11 MR. WARD: Yes, I would object on the same basis, that is  
12 lack of foundation, lack of personal knowledge of this care,  
13 and that this is a non-disclosed expert.

14 MR. BAKER: It's the same --

15 MR. WARD: The same objection. I'm not expecting a  
16 different ruling, Your Honor.

17 THE COURT: Objection is noted for the record. The item  
18 will be admitted.

19 [Plaintiff's Exhibit 43 Received]

20 MR. BAKER: Do we 44, 45, 46, 47, 48, 49, and 50  
21 admitted?

22 THE CLERK: I have 44, 45, 46. 47 is not admitted.

23 MR. BAKER: Okay.

24 THE CLERK: 48 through 51 are admitted.

25 MR. BAKER: 48 through 51 are admitted.

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14 App. 2804

1 THE CLERK: 51 --

2 MR. BAKER: 47 is not.

3 BY MR. BAKER:

4 Q Can you please turn to 47? Does 47 have to do with  
5 pharmacy -- pharmaceutical prescriptions from Walgreen's  
6 Pharmacy?

7 A Yes.

8 Q And were those prescriptions reasonable, necessary,  
9 and causally related to the subject incident?

10 A Some of them are, yes.

11 Q Which ones were?

12 A Most of the pain medications. There's two  
13 prescriptions here for ketoconazole, which probably shouldn't  
14 be.

15 Q And how much were those two prescriptions?

16 A Let me try to figure this out here. I don't think  
17 it has a price here on this sheet.

18 Q Other than those two prescriptions, was the  
19 remainder of medication reasonable, necessary, and causally  
20 related to the subject incident?

21 A And there's two for Singulair as well. So the  
22 amitriptyline, morphine should be. So other than Singulair  
23 and ketoconazole, yes.

24 Q And the remainder are reasonable, necessary, and  
25 causally related?

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14 App. 2805

1 A That's correct.

2 Q And the total amount of the bill is? Sorry to do  
3 that to you, Doctor?

4 A Here are the prices. I'm not sure it lists the  
5 total.

6 Q Pardon me?

7 A I don't think it lists the total. These are  
8 individual charges.

9 Q So the individual charges, if you could state again  
10 for the Court which would not be related. Singulair and --

11 A Singulair and ketoconazole. There's some other  
12 things in here, Nasonex, that's not related to the pain.

13 Q Okay. Would you -- just so that we can have a  
14 record of it for the Court, so that I can back those costs  
15 out, which of the drugs are not related?

16 A All right. Let me go -- give me a minute. It's a  
17 big chart.

18 Q Housekeeping is never fun.

19 A Advair, Prolair inhaler, Sandostatin.

20 Q These are the ones that are not related?

21 A Correct.

22 Q Would it be easier to say the ones that are related?

23 A I have to go through each page and see what's there.

24 Q Okay.

25 A Nasonex, Lovastatin, Mupirocin.

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14 App. 2806

1 Q Can you say that again for the record?

2 A Mupirocin, M-U-P-I-R-O-C-I-N.

3 Q Is not related?

4 A I don't believe so. At least it might not be.

5 Q Oh.

6 A Cephalexin, Azithromycin.

7 Q That's an antibiotic.

8 A Yeah. Diprivan, and that's about it.

9 Q Okay. Is that an inclusive list of medications that  
10 are contained in Exhibit Number 34 [sic] that are not directly  
11 and proximally related to the subject incident?

12 A That's correct.

13 Q And would it be fair for the Court to understand, if  
14 we back out the charges of that specific enumerated list, the  
15 remainder of the charges would be reasonable, necessary, and  
16 causally related to the subject incident?

17 A That's correct.

18 MR. BAKER: Move to admit the entire exhibit subject to  
19 the redaction of the bills that are not related, Your Honor.

20 THE COURT: Mr. Ward, any objection?

21 MR. WARD: The same objection, Your Honor.

22 BY MR. BAKER:

23 Q And the opinions that you just rendered were to a  
24 reasonable degree of medical probability?

25 A That's correct.

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14 App. 2807

1 Q Thank you, Doctor. You've helped me clean that  
2 house. Let's get back to talking about Enrique.

3 THE COURT: Motion is granted.

4 MR. BAKER: Oh, thank you, Your Honor.

5 THE COURT: I believe that was 34 [sic], wasn't it?

6 MR. BAKER: Yes, Your Honor.

7 THE COURT: 34 [sic] is admitted. But it's my  
8 understanding Mr. Baker is going to provide a redacted copy.

9 MR. BAKER: Yes, Your Honor.

10 [Plaintiff's Exhibit 34 Received] [sic]

11 MR. BAKER: And so, now do we have all of the exhibits,  
12 with the exception of Number 1, Number 18, Number 26 --

13 THE CLERK: 24 is not admitted.

14 BY MR. BAKER:

15 Q Doctor, could I ask you to turn to 24. I think it's  
16 a \$700 bill or something. Are you aware that Enrique  
17 Rodriguez had knee surgery from Dr. Tauber in Los Angeles?

18 A Yes.

19 Q And are you aware that as part of the knee surgery,  
20 it's reasonable and customary to send somebody out for  
21 pre-surgical screening?

22 A That's correct.

23 Q And you understand that Enrique Rodriguez had a past  
24 pulmonary embolism?

25 A Yes.

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14 App. 2808

1 Q So it's reasonable to do a chest x-ray for  
2 pre-surgical screening?

3 A Absolutely.

4 Q And are the bills that are contained in Exhibit  
5 Number 24 associated with that sort of examination?

6 A Yes.

7 Q And are those sort of examinations reasonable,  
8 necessary, and causally related to the subject incident at the  
9 Palms Hotel?

10 A Yes.

11 Q To a reasonable degree of medical probability?

12 A Yes.

13 Q And the billing amount for that was?

14 A Six hundred and seventy-three dollars and fifty  
15 cents.

16 Q Is that reasonable, necessary, and causally related?

17 A Yes.

18 Q To a reasonable degree of probability?

19 A Yes, sir.

20 MR. BAKER: Admit 24, Your Honor.

21 THE COURT: Any objection, Mr. Ward?

22 MR. WARD: The same objection, Your Honor.

23 THE COURT: Very well, same ruling. The Court notes your  
24 objection. That is admitted.

25 [Plaintiff's Exhibit 24 Received]

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1 MR. BAKER: 27 is not in evidence, is that right?

2 THE CLERK: Correct, it is not.

3 MR. BAKER: 31 is not in evidence?

4 THE CLERK: Correct.

5 MR. BAKER: 33 is in evidence?

6 THE CLERK: It is not.

7 MR. BAKER: Oh, okay. 33 should not be in evidence. But  
8 the remainder through to 50 are in evidence?

9 THE CLERK: I don't have 43.

10 THE COURT: We admitted 43 I believe.

11 MR. BAKER: We just --

12 THE CLERK: Right, okay.

13 MR. BAKER: That was Matt Smith physical therapy.

14 THE CLERK: Correct.

15 MR. BAKER: Anything else?

16 THE CLERK: 47 is not admitted.

17 MR. BAKER: We just admitted 47 I thought.

18 BY MR. BAKER:

19 Q If you could turn to 47, please. Those were the  
20 Walgreen's bills that we talked about.

21 THE COURT: That's the one you're going to provide the  
22 redacted copy?

23 MR. BAKER: Yes, Your Honor.

24 THE COURT: That was admitted.

25 THE CLERK: That's 34.

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14 App. 2810

1 THE WITNESS: That's one. It's 47.

2 BY MR. BAKER:

3 Q 47 were the Walgreen's bills that we talked about  
4 before?

5 A Yes.

6 THE CLERK: 47 is redacted.

7 BY MR. BAKER:

8 Q And the amount of --

9 MR. BAKER: I'm sorry?

10 THE CLERK: Go ahead.

11 BY MR. BAKER:

12 Q And the amount of those bills were?

13 A I can't find a total on this.

14 Q Okay. I'll just move to --

15 A Wait. Wait.

16 Q It's reasonable, necessary, and causally related to  
17 the subject incident?

18 A I got it. On the last page, \$25,138.86.

19 Q Reasonable, necessary, and causally related to the  
20 subject incident?

21 A That's correct.

22 Q To a reasonable degree of medical probability?

23 A Yes, it is.

24 MR. BAKER: Move to admit 47, Your Honor.

25 THE COURT: But is that the item that you have to provide

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14 App. 2811

1 the redacted version?

2 MR. BAKER: I thought that was 34, Your Honor.

3 THE WITNESS: No, I think it's this one.

4 BY MR. BAKER:

5 Q That one?

6 A Yeah.

7 Q Okay.

8 MR. BAKER: Yes, that's the one I have to provide the  
9 redacted version.

10 THE COURT: So that number is going to change when you do  
11 that.

12 MR. BAKER: Yes, Your Honor.

13 THE WITNESS: Let me look at 34 here real quick and make  
14 sure.

15 THE COURT: Subject to the same objection, Mr. Ward?

16 MR. WARD: Yes, Your Honor.

17 THE COURT: Very well, noted for the record.

18 THE WITNESS: No, 34 was imaging.

19 BY MR. BAKER:

20 Q Okay. Thank you.

21 THE COURT: 47 is admitted.

22 [Plaintiff's Exhibit 47 Received]

23 MR. BAKER: And then are we admitted through to 50?

24 THE CLERK: Through 51 -- 50. Correct.

25 MR. BAKER: Okay. Have I said thank you? Thank you.

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14 App. 2812

1 THE CLERK: You're welcome.

2 BY MR. BAKER:

3 Q You want to talk about Enrique a little bit?

4 A Sure.

5 Q What's your prognosis for him?

6 A Probably more of the same. He's going to suffer  
7 chronic pain, neck and low back. Probably need surgery at  
8 some point.

9 Q Dr. Schifini and Dr. Shah testified -- well,  
10 Dr. Shah testified that he might need a laminectomy or a  
11 fusion to a reasonable degree of probability. Dr. Schifini  
12 said that probably not a laminectomy, because that's just for  
13 stenosis, but he would need at least a one level fusion. Do  
14 you concur with their opinions?

15 A I concur a laminectomy probably wouldn't be the  
16 optimal surgery. It'd probably be a fusion.

17 Q And is it your opinion that he'll require a fusion  
18 as a result of the injuries sustained in the subject accident  
19 to a reasonable degree of medical probability?

20 A I do.

21 Q There was a mention that you weren't going to  
22 prescribe Enrique medication any longer.

23 A Correct.

24 Q Why is that? If you could explain it to the Judge.

25 A He lives in Riverside, California. We're

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1     prescribing two scheduled medications. There's even a  
2     suggestion about starting him on some methadone at one point.  
3     That's very difficult to monitor this across state lines.  
4     It's better that one practice do all the meds proximate to  
5     where he lives.

6             Q     And if it was raised that you had some concern about  
7     him abusing his drugs, how would you respond to that?

8             A     Well, no. If he's not doing what he's supposed to,  
9     he's breaking the law and so forth, we just discharge him from  
10    the clinic cold.

11            Q     And that hasn't been done, is that right?

12            A     No, no. This was just one of those situations where  
13    it's impractical to monitor from distance. I've done it.  
14    It's just very impractical.

15            Q     It's hard. Never in your records did you suggest  
16    any necessity to conduct a Waddell's, is that correct?

17            A     No.

18            Q     And would you explain to the Judge why?

19            A     He never presented himself other than what he is. I  
20    never had any suspicion that he was magnifying symptoms or  
21    malingering.

22            Q     If it was suggested that he was magnifying symptoms  
23    or malingering, how would you respond?

24            A     I might suggest that somebody get video surveillance  
25    on him.

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1 Q Because you don't think it's there?

2 A No. I mean you'd look into it. Actually, on  
3 patients that I am suspicious of, I'll actually watch them get  
4 into their car from the window. I look for inconsistencies.

5 Q And is it your opinion as well that before having a  
6 lumbar fusion, Enrique will require some sort or more  
7 non-invasive injection therapy such as you've already  
8 conducted?

9 A Certainly. Most patients, the situation will wax  
10 and wane a little bit. Once in a while, they'll flare and  
11 have severe pain. And that's when you do injections.

12 Q And is it your opinion to a reasonable degree of  
13 medical probability that he'll require future injections, the  
14 type you've already conducted, as a direct result of the  
15 injuries sustained at the Palms Hotel?

16 A That's correct.

17 Q Is that your opinion to a reasonable degree of  
18 probability?

19 A Yes, it is.

20 Q Doctor, has Enrique Rodriguez been permanently  
21 injured by the accident or the incident at the Palms Hotel and  
22 Casino?

23 A I believe so.

24 Q Could you explain to the Judge what you mean by  
25 that?

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1           A     Well, this has been going on for, what, six years  
2     now. He's obviously still suffering a great deal. Past  
3     longevity of pain is a pretty good predictor of what the  
4     future is going to hold. He's got RSD in his knee, which is a  
5     very debilitating condition. Have they gone through RSD in  
6     detail?

7           Q     Yes.

8           A     It's --

9           Q     You didn't treat him for his knee though, did you?

10          A     No, but --

11          Q     You left that up to Dr. Shah and Schifini and the  
12     remainder?

13          A     Right. Plus he's been seen by a pain specialist in  
14     California. RSD is a diagnosis you don't want to get. People  
15     have amputations for bad RSD. It's the most miserable thing  
16     on the planet. The wind blowing on your skin can cause  
17     burning excruciating pain.

18                 In regards to his neck and low back, he continues to  
19     suffer from pain. He does have the specter of what appears to  
20     internal disc disruptions. And generally, those just go on to  
21     get worse with time.

22          Q     So you foresee misery for him?

23          A     Correct.

24          Q     Thank you.

25     MR. BAKER: I'll pass the witness.

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1 THE COURT: Very well.

2 BY MR. BAKER:

3 Q Have all of the opinions you've been given just now  
4 to a reasonable degree of medical probability?

5 A Yes.

6 Q Thank you.

7 [Pause]

8 THE COURT: Mr. Ward.

9 MR. WARD: Thank you, Your Honor.

10 THE COURT: Whenever you're ready.

11 [Pause]

12 CROSS-EXAMINATION

13 BY MR. WARD:

14 Q Good morning, Dr. Kidwell.

15 A Good morning, sir.

16 Q Now do you know who Dr. Thalgott is?

17 A Yes, I do.

18 Q Who's Dr. Thalgott?

19 A He's an orthopedic spine surgeon.

20 Q He's an orthopedic spine surgeon.

21 A That's correct.

22 Q And now, do you ever refer patients to Dr. Thalgott?

23 A Yes, I do.

24 Q You do. Why do you refer them to Dr. Thalgott?

25 A Because he's an excellent spine surgeon.

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1 Q And do you rely on him to make a diagnosis as to  
2 when surgery is appropriate?

3 A Yes, many times. Yes.

4 Q Well, if you -- what I'm asking -- and perhaps my  
5 question wasn't a very good one. If you had a patient who you  
6 had a question about whether they needed back surgery, and you  
7 referred him to -- him or her to Dr. Thalgott, you would  
8 expect Dr. Thalgott to do an independent evaluation.

9 A That's correct.

10 Q You wouldn't expect that you would make a  
11 determination of what kind of surgery would be performed and  
12 then just ask Dr. Thalgott to perform that?

13 A Oh, no. He's -- what surgery would need to be done  
14 would be strictly his call.

15 Q Okay. So --

16 A In my role, I have a pretty good feel for who might  
17 be surgical, but ultimately, the decision to do surgery is up  
18 to the surgeon.

19 Q Right. And when Dr. Thalgott does surgery and does  
20 it under some sort of an anesthetic, does he often have an  
21 anesthesiologist?

22 A Well, I would hope so.

23 Q Okay. He wouldn't do that himself?

24 A No.

25 Q He wouldn't make that call?

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1 A Make the call as far as what, sir?

2 Q As what kind of anesthesia should be used and how  
3 much of it and monitoring it during the surgery. That would  
4 be done by the anesthesiologist, correct?

5 A Well, there are times where there are options  
6 regarding a particular surgery, and a surgeon might ask for a  
7 regional anesthesia as opposed to a general anesthetic on a  
8 given condition.

9 Q Uh-huh.

10 A But the actual administration of an anesthetic is up  
11 to the anesthesiologist. Absolutely.

12 Q Right. He wouldn't walk over and say now be sure  
13 you use this amount and be sure you make the injection here.  
14 He wouldn't do a thing like that, he'd leave that to you?

15 A Correct. Now let me clarify that. He will request  
16 procedures from me for diagnostics or treatment. He'll refer  
17 patients to me to do, let's say, selective nerve root blocks  
18 or discograms.

19 Q Uh-huh.

20 A And then unless there's a reason not to, I'll do it,  
21 absolutely.

22 Q Okay. But in terms of just pure anesthesia, that's  
23 your line.

24 A Are you speaking in terms of surgical anesthesia or  
25 interventional pain medicine?

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1 Q Surgical anesthesia.

2 A Correct, okay.

3 Q That's your area, right?

4 A Right, although I don't do anesthesia anymore.

5 Q But you're board certified in that area?

6 A Yes, I am, sir.

7 Q And you understand it?

8 A Yes.

9 Q You've had a lot of experience?

10 A Quite a bit.

11 Q Had many years in the Navy.

12 A Too many. Actually, I miss the Navy, but --

13 Q And you did lots of anesthesia, but you didn't do

14 many back surgeries, is that correct?

15 A Actually, I was a surgical intern. So I did assist

16 on some back surgeries during my training.

17 Q Long time ago?

18 A Long time ago.

19 Q But you never decided to get board certified in

20 orthopedics?

21 A No, sir.

22 Q Now was Dr. Thalgott -- wait. Let me ask you this.

23 You're not trained in biomechanics, are you?

24 A I'm not quite sure what kind of training you need

25 for that, but I'll say no.

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1 Q Well, you don't hold yourself out as a biomechanical  
2 expert, do you?

3 A No, sir.

4 Q I mean you didn't go over to the Palms and take a  
5 look at where this accident occurred and try to reconstruct  
6 the accident and figure out what kind of injuries  
7 Mr. Rodriguez did or did not sustain on the night in question?

8 A That's correct.

9 Q Okay. And the very first time you talked to  
10 Mr. Rodriguez was about a year after, year-and-a-half after  
11 the accident?

12 A That's correct.

13 Q Okay. And am I correct that you can't tell by  
14 looking at a person or a film or a examination when something  
15 happened?

16 A That's generally correct.

17 Q Okay. You can't look at a picture and say oh, it's  
18 got a date marked in there when this thing happened. You  
19 can't do that.

20 A That's correct.

21 Q Okay. So it's fair to say, is it not, that when you  
22 determine causation, you're largely doing it on history?

23 A That's correct.

24 Q You're doing it based on what somebody tells you  
25 happened.

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1 A Yes, sir.

2 Q And based on what somebody tells you they  
3 experienced after that happened, correct?

4 A That's correct.

5 Q Now do you know if Dr. Thalgott was involved in the  
6 treatment of Mr. Rodriguez?

7 A Yes, he was.

8 Q He was. And how is it you know that?

9 A Well, Dr. Thalgott referred him to me.

10 Q Oh. So you got your referral from Dr. Thalgott?

11 A Yes.

12 Q Okay. So you've had some opportunity to discuss  
13 with Dr. Thalgott his examination and treatment with  
14 Mr. Rodriguez?

15 A No, I haven't discussed it with him.

16 Q Did you get any information from Dr. Thalgott?

17 A I have some of his progress notes.

18 Q Okay. How about his report?

19 A Which report?

20 Q The first report from February 21, 2006.

21 A I'll have to look and see if I have that one  
22 specifically.

23 Q Wasn't that provided to you with the referral?

24 A Yes, that's -- I had that.

25 Q Okay. Now tell me, Doctor, that report that is

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1 dated February 21, 2006, that's from Dr. Thalgott, correct?

2 A That's correct.

3 Q Center for Diseases and Surgery of the Spine?

4 A Yes.

5 Q And now, his report says that at the time of the  
6 accident, that Mr. Rodriguez got up and was dizzy and  
7 confused, is that true?

8 A Is that --

9 Q Page 1.

10 A -- true what he said?

11 Q Is that true that that's in the report?

12 A Yes, sir.

13 Q Page 1, that's in the report. And a little bit  
14 further down, it says he's under the care of physical therapy  
15 with no relief, isn't that true?

16 A That's true.

17 Q And it says that he's seen a chiropractor with no  
18 relief, isn't that true?

19 A That's true.

20 Q And on page 2, it says he states his pain in his  
21 back, hands -- I'm sorry. I misspoke here. Starting fourth  
22 line here on page 2, he states his pain in his neck, hands,  
23 and back started with the accident, 11/22/2004, isn't that  
24 correct?

25 A That's correct.

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1 Q So he's -- so this report says that he had all these  
2 problems starting with that accident on that date, correct?

3 A That's correct.

4 Q And in fact, it says by January of the next year, he  
5 was dropping things, right?

6 A That's correct.

7 Q And it says he had physical therapy on his neck and  
8 back, isn't that correct?

9 A Yes, sir.

10 Q Okay. Now that past medical history is bladdering  
11 [sic] frequent -- bladder frequency?

12 A Yes.

13 Q Now past medical history, that would mean it's not  
14 related to the accident, correct?

15 A Past medical history is simply, you know, medical  
16 problems, injuries so far.

17 Q Not related to the accident?

18 A Correct.

19 Q Okay. And he -- and so, it has asthma as a past  
20 medical history, is not related to the accident?

21 A That's correct.

22 Q Has ear ringing, doesn't it?

23 A Yes.

24 Q So he has ear ringing, past medical history, not  
25 related to the accident, correct?

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1 A Okay. I'll buy that.

2 Q Well, isn't -- is there any reason to think that two  
3 of them are and one of them isn't?

4 A Well, you're asking me to comment on the intent of  
5 his medical records. So I'm kind of reluctant to do that.

6 Q Okay.

7 A Generally speaking, those kind of questions you  
8 should probably be asking Dr. Thalgott.

9 Q Okay. Well, Dr. Thalgott is not here.

10 A Okay. Well, it doesn't mean I'm an expert on his  
11 record.

12 Q Okay. So in -- with respect to testifying about  
13 other people's medical records, you don't know what's in them,  
14 is that --

15 A No, that's not true. I can read it just as well as  
16 you can, sir. But the point is you're asking me to speak  
17 about intent.

18 Q Okay.

19 A In other words --

20 Q Well, then I'll withdraw that.

21 A -- past medical history is past medical history.  
22 Inference is that it's not related to the accident, and I  
23 could appreciate that, but I can't say that conclusively.

24 Q Okay. And let's go to page 4 under impression.  
25 Under impression, it says he states he began having neck, arm,

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1 and back discomfort initially, correct?

2 A That's correct.

3 Q That says it was overshadowed by his knee.

4 A That's correct.

5 Q Right. It says that he's had pain. He describes  
6 the symptoms -- he says internal disc disruption type symptoms  
7 of the cervical spine and intermittent radiculopathy and well  
8 as probably facet and discogenic pain in his low back,  
9 correct?

10 A That's correct.

11 Q And then he says right after that, this has now been  
12 over a year-and-a-half, and they have not abated. So I do  
13 think they are simple myofascial pain. Correct?

14 A Correct.

15 Q So what you know from Dr. Thalgott's records before  
16 Dr. Thalgott -- before you actually saw the patient, you got  
17 this report that told you that this patient had been having  
18 these kinds of back related pains for a year-and-a-half and  
19 they'd not abated, correct?

20 A Correct.

21 Q Okay. And that's important for you to make your  
22 determination as to what is and is not related to the  
23 accident, isn't that true?

24 A Yes, that's true.

25 Q Okay. And so, when you offer your testimony that

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1 all of these -- all of your treatment and everything you did  
2 and all of the testing is related to the accident, it's based  
3 on your understanding of that information, isn't that correct?

4 A Well, I take my own history and physical on the  
5 patient as well.

6 Q Well, why don't we take a look at that? Let's talk  
7 about your -- your first report is March 20, 2006, is that  
8 correct?

9 A That's correct, sir.

10 Q And he told you your history -- by the way, was this  
11 taken by you or by your physician's assistant?

12 A By me.

13 Q He told you that he was knocked down, sustaining  
14 injuries to his neck, low back, and left knee, correct?

15 A That's correct.

16 Q So he told you the same thing he told Dr. Thalgott.

17 A That's correct.

18 Q And you relief on that?

19 A Yes.

20 Q And you assumed that was true?

21 A Yes.

22 Q And he told you that he had physical therapy that  
23 increased his pain, primarily in his right arm, is that  
24 correct?

25 A Correct.

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1 Q And you relied on that?

2 A Yes.

3 Q And then he told you that he had two months of  
4 chiropractic treatments and that didn't help any, correct?

5 A That's correct.

6 Q And you relief on that?

7 A Yes.

8 Q And you assumed that those chiropractic treatments  
9 were to these areas, to his neck and his back?

10 A Yes, I did.

11 Q Okay. And he told you that because of his illness,  
12 that he couldn't perform household chores, is that right?

13 A Illness. Are you suggesting infectious disease  
14 or --

15 Q I'm sorry. I apologize. I didn't mean to interject  
16 that. Because of his condition.

17 A Okay.

18 Q Is that a better word?

19 A Yes.

20 Q Okay. Because of his condition, he couldn't perform  
21 household chores.

22 A Correct.

23 Q Correct? And it says that he was able to drive, but  
24 he's not working, is that right?

25 A That's correct.

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1 Q Now what was he using to assist him to walk when he  
2 came in to see you?

3 A I don't know if I have that documented.

4 Q Would it be fair to say there's no indication in  
5 your report that he was using anything to assist him to walk?

6 A Correct. There doesn't appear to be anything in my  
7 report.

8 Q Okay. That would be significant, wouldn't it?

9 A Well, it's part of the puzzle, yes. It's a piece of  
10 information.

11 Q Right. So that would be the kind of thing you'd  
12 write down if there were an issue, correct?

13 A Well, I might have missed that and not dictated it.  
14 I don't know. I can't remember.

15 Q Well, my question is not whether you missed it or  
16 didn't dictate it. My question is isn't that the kind of  
17 thing that's significant information to you?

18 A Yes, it is.

19 Q Okay. So if you -- if, in fact, it was there and  
20 you didn't do it, then you left something significant out of  
21 your report, is that correct?

22 A It's entirely possible.

23 Q Okay. It's your intention to leave significant  
24 things out of your report, isn't that true?

25 A That's correct.

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1 Q You take pride in your work?

2 A Yes, sir.

3 Q And you did a neurological examination on him, did  
4 you not?

5 A That's correct.

6 Q And what did you find about his gait on that first  
7 day that you saw him?

8 A His gait that day was normal.

9 Q Okay. So now, we're talking about a time that is  
10 four-and-a-half years ago, correct?

11 A Correct.

12 Q A year-and-a-half after the accident.

13 A Yes, sir.

14 Q And his gait was normal. And his sensory was  
15 intact?

16 A Correct.

17 Q And his motor strength was intact?

18 A Correct.

19 Q And his reflexes were intact?

20 A Yes.

21 Q And his -- how about walking on his heels and toes?  
22 Could he do that?

23 A He was able to stand on his heels and his toes, yes.

24 Q Okay. He didn't have any problem with that, right?

25 A Right. That tests muscle strength in the legs.

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1 Q Squat was intact?

2 A Correct.

3 Q Sensation was normal?

4 A Correct.

5 Q And now, Dr. Thalgott was only seeing the patient  
6 for his back, isn't that correct?

7 A Neck and back.

8 Q I apologize. What I meant to say was he's seeing  
9 him for his upper body and not for his lower body.

10 A I'm sorry. What? He saw him for his neck and low  
11 back.

12 Q Right. He didn't see him for his knee.

13 A No, sir.

14 Q Right. Because Mr. Rodriguez was being treated by  
15 somebody else for his knee.

16 A Correct.

17 Q Dr. Crovetti, correct?

18 A Yes.

19 Q Okay. So the only thing Dr. Thalgott was seeing him  
20 for was things other than his knee. And so, when Dr. Thalgott  
21 sent him to you, you were looking for things that were dealing  
22 with his back.

23 A That's correct.

24 Q Not with his knee.

25 A Correct.

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1 Q And now, you said on your -- at the time of your  
2 March 20, 2006 examination, that the patient's symptoms have  
3 persisted for well over a year, correct?

4 A That's correct.

5 Q And when you're talking about the patient's  
6 symptoms, you're talking about his back and neck issues.

7 A Correct.

8 Q And so, in March of 2006, approximately a  
9 year-and-a-half after this accident, you were saying that the  
10 patient's neck and back issues had persisted for well over a  
11 year, correct?

12 A Well, actually, I was referring to his knee as well,  
13 because that's part of his pain complaint. So, historically,  
14 that was persisting as well.

15 Q Now, Doctor, I've got -- I want to ask you about  
16 some other visits. And my records, unfortunately, are not in  
17 order. So I'm going to have you jump around. I'm not doing  
18 it on purpose. I just -- I can't do it any other way, because  
19 they're --

20 A That's fine.

21 Q -- out of order. Let's jump ahead to February 5,  
22 2007. That's about ten months after you saw him for the first  
23 time, correct, a little over ten months?

24 A Yes.

25 Q And in the first line of that, that's an office

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1 note?

2 A Yes, it is.

3 Q Okay. Is that prepared by your physician's  
4 assistant?

5 A Yes, it was.

6 Q Okay. It wasn't prepared by you?

7 A No.

8 Q But your physician's assistant, I take it, is quite  
9 capable of taking a history and examining a patient and  
10 writing down the appropriate things?

11 A One would hope so, yes.

12 Q Well, I mean --

13 A Yes.

14 Q -- she works for you, doesn't she?

15 A Uh-huh.

16 Q I mean if the patient came in and said -- and you  
17 said you wanted them to be examined by the physician's  
18 assistant, and you said -- and I asked you if the physician's  
19 assistant was competent, you wouldn't say well, I don't know.

20 A No, she's extremely competent.

21 Q Okay. So she's extremely competent. And part of  
22 competence with the medical profession is to accurately write  
23 down what comes out of an examination, isn't that true?

24 A Correct.

25 Q So that you can rely on it.

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1 A Yes.

2 Q Because you don't sit with her every single moment  
3 of her visit with the patient.

4 A That's correct.

5 Q Because if you did, there wouldn't be any point in  
6 having a physician's assistant, isn't that correct?

7 A That's correct.

8 Q Okay. So a physician's assistant meets with and  
9 exams the patient, and takes a history, and asks questions,  
10 and writes down things, so that you can review them and rely  
11 on them.

12 A That's correct.

13 Q And your physician's assistant said in this office  
14 note, a year -- approximately ten-and-a-half months after the  
15 first examination that the pain pattern and overall pain  
16 control remains unchanged, is that right?

17 A That's correct.

18 Q And he's on morphine, correct?

19 A That's correct.

20 Q Which you prescribe for him.

21 A Correct.

22 Q And he's on Vicodin, which somebody else prescribed  
23 for him.

24 A Correct.

25 Q Now this says -- and perhaps I can save some time of

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1 going in depth in some of your other examinations. But this  
2 says he has had a series of three epidural steroid injections  
3 to his cervical and lumbar spine, is that correct?

4 A Correct.

5 Q And so, how many trips does that mean to the surgery  
6 center? Is that three trips or is that six trips?

7 A Actually, it was five.

8 Q Would you explain?

9 A The full --

10 Q I'm just a lawyer. I don't understand these things,  
11 so --

12 A Well, he had two injections to his neck and two  
13 injections to his low back on different days. For an epidural  
14 injection, I'll do a maximum amount of steroid that is safe  
15 and reasonable for a given individual on one injection. If  
16 injection two regions, then I have to cheat one area for the  
17 other. So you get a suboptimal injection. So the low back  
18 injections and necks were done separately to optimize the  
19 amount of medication I'm putting in the area that hurts.

20 The last injection was a selective nerve root block.  
21 And so, technically, it's an epidural steroid injection, but  
22 it's also a diagnostic test. So the volume and dose I put in  
23 is a lot smaller. I anesthetize a segment and see if the pain  
24 is relieved. That's the diagnostic part of it. The amount of  
25 steroid deposited is a lot less. So I can do two regions at

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1 the same time without overdosing him on steroids. So the last  
2 injection was a combination neck and low back. That's how we  
3 end up with five.

4 Q Okay. And so, he had a series of three epidural  
5 steroid injections to the cervical and lumbar spine, correct?

6 A Correct.

7 Q Okay. So we have five trips to the surgery center.

8 A Correct.

9 Q Each one of which involves conscious sedation.

10 A Correct.

11 Q And that's something like a derivative or something  
12 similar to valium and Verset.

13 A Well, I use Verset and Alfentanil, typically.

14 Q Okay. And essentially, that isn't technically a  
15 general anesthesia. But as far as the patient goes, it's a  
16 lot like a general anesthesia, isn't it?

17 A Well, the patient is always able to respond. The  
18 purpose of sedation is, one, patient comfort, also to keep him  
19 from moving around.

20 Q Right.

21 A So -- but they're always able to respond. They're  
22 just -- it's like three-martini sedation.

23 Q Okay. And the Verset is -- among other things, so  
24 they don't remember it?

25 A Well, they may or may not remember it. The -- you

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14 App. 2836

1 can give a lot of Verset and create complete amnesia. But I  
2 don't do that. I use the combination of two medications to  
3 get a synergistic effect, because my goal is to provide  
4 comfort, do the procedure quickly, but have them fairly alert  
5 15 or 20 minutes later, when we're done.

6 Q Okay. So this is not a procedure that's terribly  
7 uncomfortable to the patient, correct?

8 A With their sedation. Without sedation, it's pretty  
9 uncomfortable.

10 Q But you don't do it without sedation.

11 A Correct.

12 Q You do it with sedation.

13 A Yes, I do.

14 Q So that's all we're talking about.

15 A Yes, sir.

16 Q With sedation, it's reasonably comfortable to the  
17 patient, isn't that correct?

18 A Correct. And they don't move.

19 Q Yeah. I mean that's the idea, isn't it?

20 A Yeah. A moving target is tough.

21 Q We don't have to hurt people to help them.

22 A Correct.

23 Q Okay. Now -- so the patient has been to the surgery  
24 center five times --

25 A Correct.

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1 Q -- for steroidal injections.

2 A Correct.

3 Q And they haven't done him any good, isn't that  
4 right?

5 A That's correct.

6 Q No good.

7 A That's correct.

8 Q And so, on February 5, 2007, Mr. Rodriguez comes in  
9 and wants to go back to the surgery center again, is that  
10 right?

11 A Well, I mean that's an option if something is  
12 changing. It doesn't appear like much is changing in here,  
13 but that's one of the future options. To be honest, if it  
14 came down to whether we were going to do another injection,  
15 and I were to see the patient, I would have recommended  
16 discograms.

17 Q You're aware of this visit.

18 A Anecdotally, yes.

19 Q Were you -- you signed at the bottom, didn't you?

20 A Yeah, I signed that I reviewed the note afterwards.  
21 I did not perform the visit.

22 Q Okay.

23 A And that's typical to a medical practice.

24 Q Okay. And --

25 A Otherwise, why would you have a P.A.?

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1 Q And did you know anything about whether he was going  
2 to have another injection?

3 A He wasn't going to have another injection.

4 Q Okay. So you didn't -- so he was not going to have  
5 another injection.

6 A No. At that point in time, he was not.

7 Q Okay. Now if we -- if -- do you see on the right  
8 side of the page, down about three lines, you see the word  
9 pain?

10 A You mean plan?

11 Q Pain. I'm looking at February 5, 2007.

12 A Okay. Pain is -- okay.

13 Q You see the word pain?

14 A Correct.

15 Q And you see four lines down from that it says the  
16 word today?

17 A Yes.

18 Q And that whole sentence is today he requests for a  
19 repeat epidural steroid injection, isn't that correct?

20 A Correct.

21 Q So Mr. Rodriguez, having been there five times  
22 without it doing any good, is, on this day, coming in and  
23 requesting to go do it again, right?

24 A Correct.

25 Q And it notes after that that he's had the series of

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1       steroidal injections with no improvement, correct?

2           A       That's correct.

3           Q       And then it says, after discussion with Walter  
4       Kidwell, M.D., which I believe would be you --

5           A       Yes.

6           Q       -- it is indicated for him to have a repeat steroid  
7       injection, correct?

8           A       Yeah. I'm pretty sure that's a typo. That should  
9       be not indicated. And the reason I say that -- and I don't  
10       have an independent recollection of it, but it doesn't make  
11       sense, and because if she was going to order an injection, she  
12       would have ordered it. She didn't order it. And there's no  
13       reason to repeat any injections at that time, because they  
14       didn't do him any good.

15          Q       So you believe that your records here are wrong.  
16       And when it says he is indicated to have a repeat, that it  
17       should say he's not indicated to have a repeat?

18          A       That's my belief, yes, sir, because it doesn't make  
19       sense.

20       THE COURT: Let's take a ten minute break.

21       [Recess]

22       THE MARSHAL: Please come to order.

23       MR. BAKER:  Oops, not now.

24       THE MARSHAL: We're back in session.

25       THE COURT:  Please be seated.

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1 Did you settle this case yet?

2 MR. WARD: Sorry, Your Honor.

3 MR. BAKER: We decided that we'd have lunch.

4 THE COURT: You settled on lunch?

5 MR. BAKER: No, Your Honor.

6 THE COURT: All right. Mr. Ward, whenever you're ready.

7 MR. WARD: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. WARD:

10 Q Dr. Kidwell, since we stopped here, I'm going to  
11 change directions here for a moment. You said you looked at  
12 Dr. Thalgott's notes.

13 A That's correct.

14 Q Correct? Do you have his notes in your file?

15 A Yes.

16 Q Okay. Would you take a look at his note from  
17 11/9/2006?

18 THE COURT: Can I ask if we're going to actually hear  
19 from Dr. Thalgott during this trial?

20 MR. BAKER: We're not, Your Honor.

21 THE COURT: Okay. Thank you.

22 THE WITNESS: I don't have that one. I only have two  
23 notes.

24 BY MR. WARD:

25 Q Yeah, may I approach the witness?

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14 App. 2841

1 MR. BAKER: Sure.

2 THE COURT: Yes.

3 MR. WARD: I'm going to show him page 10. If you know  
4 where that is in the book, we can --

5 MR. BAKER: I'm on it.

6 MR. WARD: You're on it? Okay. Can we tell the witness,  
7 tell me, tell somebody?

8 MR. BAKER: Huh?

9 MR. WARD: Where is it?

10 MR. BAKER: It's --

11 MR. CARDENAS: Exhibit 39.

12 MR. BAKER: It's -- oh, I'm sorry. It's in Exhibit 39.

13 MR. WARD: Okay.

14 MR. BAKER: Bates stamp --

15 MR. WARD: Are you sure it's not 14?

16 MR. BAKER: I told you. That's what's been happening to  
17 me the whole time.

18 MR. WARD: Exhibit 39.

19 MR. BAKER: Bates stamp 10.

20 MR. WARD: Okay, Exhibit 39. May I approach the witness,  
21 Your Honor?

22 THE COURT: Yes.

23 BY MR. WARD:

24 Q Exhibit 39. These books aren't big enough.

25 A I don't know if they can make them much bigger.

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14 App. 2842

1 Q What page number?

2 MR. BAKER: 10.

3 MR. WARD: 10?

4 BY MR. WARD:

5 Q Do you see it?

6 A Yes.

7 Q And, now Dr. Thalgott is his spine surgeon, correct?

8 A That's correct.

9 Q And Dr. Thalgott says, "He is certainly not a  
10 surgical candidate," correct?

11 A Correct.

12 Q Okay. And Dr. Thalgott says, "Nerve injections  
13 don't seem -- didn't seem to make any difference, so I'm not  
14 sure this is neurogenic."

15 So, that means -- neurogenic means it's caused by  
16 nerves. And so that -- he's saying here that whatever  
17 condition there is there isn't caused by nerves, isn't that  
18 correct?

19 A I would take that to mean radicular.

20 Q Well, it doesn't say radicular, does it?

21 A No, but that's what I would take it to mean.

22 Q Okay. It says, "So, I'm not sure this is  
23 neurogenic?"

24 A Correct.

25 Q Okay. And do you know Dr. Thalgott well enough to

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14 App. 2843

1 know whether he knows what radicular is?

2 A Yes.

3 Q Does he know what radicular is?

4 A Yes.

5 Q Does he say this is radicular?

6 A He does not there, but that's how I'd take it to me.

7 Q Okay. He actually says, "I can't quite explain what  
8 this is," doesn't he?

9 A That's what he says.

10 Q Right. So, "I can't explain. I can't quite explain  
11 what this is," is different from saying it's radicular.

12 A You're asking my interpretation of his note.

13 Q No, I'm not asking your interpretation. I'm just  
14 asking if the statement, "I can't quite explain what this is,"  
15 is different from the statement, "It's radicular."

16 A Okay, correct.

17 Q It is? Okay. And now he has shoulder problems,  
18 correct?

19 A Correct.

20 Q And now he's got urology problems, correct?

21 A Correct.

22 Q Okay. Now, let's move over to January 18, 2007.

23 I'm guessing it's right around there. I don't --

24 MR. CARDENAS: It's January --

25 MR. BAKER: Oh, I'm sorry. January what?

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1 MR. CARDENAS: -- 18th.

2 MR. BAKER: Eighteenth is 9.

3 MR. WARD: 9, thank you.

4 BY MR. WARD:

5 Q Bates 9.

6 A Okay, wrong way open.

7 Q Do you see that?

8 A Yes.

9 Q So he's saying January 18, 2007, that would be  
10 pretty close to four years ago, right?

11 A Correct.

12 Q He's saying he is not a surgical candidate for his  
13 back, isn't that correct?

14 A That's correct.

15 Q And if we move to, and I'm guessing you turn back  
16 one more page. If we move to April 12, 2007, correct?

17 A Correct.

18 Q He says, "From my standpoint, he is certainly not a  
19 surgical candidate for reconstruction of his lumbar spine," is  
20 that correct?

21 A Correct.

22 Q Okay. And Dr. Thalgott is a notable spine surgeon,  
23 isn't he?

24 A Correct.

25 Q He's not an anesthesiologist?

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1 A No.

2 Q And there's not a hierarchy between orthopedic  
3 surgeons and anesthesiologists, is there?

4 A I don't follow you.

5 Q Well, one isn't necessarily better than the other?  
6 They're just different?

7 A They're different fields, yes.

8 Q They're just different fields?

9 A Correct.

10 Q And so with Dr. Thalgott, his field is orthopedic  
11 spine surgery and he thinks that the patient is not a surgical  
12 candidate, correct?

13 A Correct.

14 Q And in April or August 30, 2007, he says that the  
15 patient is not a surgical candidate, isn't that correct?

16 A Correct.

17 Q And the patient is seen once more by Dr. Thalgott,  
18 is that correct?

19 A What date?

20 Q May 13, 2008.

21 A Okay.

22 Q Correct?

23 A Correct.

24 Q And then he isn't seen again by Dr. Thalgott, is he?

25 A I don't know. That's the last entry in this book.

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1 Q Okay. And so that would be two-and-a-half years  
2 ago?

3 A Correct.

4 Q Okay. When is the last time you saw the patient?

5 A Seen by my PA February 5, 2007.

6 Q Okay. And that's the last time he was in your  
7 office?

8 A That's correct.

9 Q And, now, on this February 5, 2007 exam that we were  
10 talking about, you noted that his gait is antalgic?

11 A Correct.

12 Q Is that correct? And he walks with a cane?

13 A Correct.

14 Q And you made a note, or somebody made a note in your  
15 records, that he walked with a cane?

16 A Correct.

17 Q So, if we compare these two visits, this one from  
18 the very first time you saw him in early 2006 and we compare  
19 that with a visit of early 2007, the patient really hasn't  
20 improved, has he?

21 A I'd say no.

22 Q Right, okay. And, now, if we take a look here at  
23 January 3, 2007 in your records, Doctor.

24 A Okay.

25 Q He's still scoring high on pain, is that correct?

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1 A That's correct.

2 Q And he had an issue with respect to parts of his  
3 body twitch?

4 A Yes.

5 Q And you recommended that he see a neurologist,  
6 correct?

7 A I believe he was seeing a neurologist. It was  
8 basically recommended that he run that by the neurologist.

9 Q Right. You advised him to see his neurologist for  
10 this?

11 A Correct.

12 Q You didn't make that diagnosis?

13 A No.

14 Q You're aware that his neurologist did an EEG and it  
15 was normal?

16 A The EEG? I didn't know that.

17 Q You know what an EEG is, don't you?

18 A Yes, I do.

19 Q Okay. This business about twitching, this is all by  
20 history, is it not?

21 A Correct.

22 Q And there was a physical examination, is that  
23 correct?

24 A That's correct.

25 Q And the physical examination said his gait was

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14 App. 2848

1 normal, wasn't it?

2 A Yes.

3 Q And it said that he had good sitting form, correct?

4 A Correct.

5 Q And so there was a renewal for Morphine?

6 A Correct.

7 Q And if we take a look at December 4, 2006, do you  
8 find that?

9 A Yes.

10 Q And that again is your PA?

11 A Correct.

12 Q And he's on Morphine, isn't that correct?

13 A Correct.

14 Q And nothing seems to have changed. All the pain is  
15 the same, right?

16 A That's correct, sir.

17 Q And his gait is normal, right?

18 A Yes.

19 Q And he has good sitting time?

20 A Correct.

21 Q And that was -- that's almost four years ago, right?

22 A Correct.

23 Q Do you know what he's been doing in the last four  
24 years?

25 A As far as what?

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14 App. 2849

1 Q Anything.

2 A No, sir.

3 Q And if we take a look at November 6, 2006.

4 A Yes.

5 Q And it says, "Physical examination, that the patient  
6 is alert, oriented, and ambulatory."

7 A Correct.

8 Q No mention of a cane, right?

9 A Correct.

10 Q And ambulatory means he's getting around?

11 A Ambulatory means he's walking.

12 Q Right. And his --

13 A Yes, sir.

14 Q And his gait is normal?

15 A That's correct.

16 Q Right? And he has good sitting time?

17 A Correct.

18 Q Okay. November 6th, that's actually more than four  
19 years ago, right?

20 A What's today's date? Yes, almost exactly four years  
21 ago.

22 Q I was hoping you would know that.

23 A Almost exactly four years ago.

24 Q Okay. And renewal of the Morphine?

25 A Yes.

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1 Q Three times a day?

2 A Correct.

3 Q Okay. And October 9, 2006?

4 A Correct.

5 Q And I realize we're going backwards here, but that  
6 suggests that he was sent for hand therapy, correct?

7 A Correct.

8 Q And it didn't help, right?

9 A Correct.

10 Q Are you beginning to see a pattern here?

11 A What's that?

12 Q Nothing seems to help, right?

13 A Well, okay.

14 Q Well, isn't that true? You did how many injections,  
15 five? Didn't help. He was back asking for more. Sent to  
16 hand therapy, didn't help. He told you he'd been to a  
17 chiropractor for two months and it made him worse. Told you  
18 he went to physical therapy after the accident and it made him  
19 worse.

20 MR. BAKER: Objection, Your Honor, compound and  
21 narrative.

22 BY MR. WARD:

23 Q Okay. Isn't all that true?

24 A That's true.

25 THE COURT: Overruled.

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1 BY MR. WARD:

2 Q Are you seeing a pattern here?

3 A I don't think the data supports a conclusion.

4 Q Oh, okay. And on October 9 you actually increased  
5 his Morphine, is that correct?

6 A Correct.

7 Q And is there any reference in here to his gait?

8 A Yes, antalgic. He's ambulatory with a cane.

9 Q Okay. So here he is -- on this date, he's antalgic.  
10 What line is -- I see the ambulatory with a cane. Where is  
11 the --

12 A Well, that infers that, ambulatory with a cane.

13 Q Well, wait, let me get this clear. Does it say in  
14 here that his --

15 A No, it doesn't.

16 Q -- gait is antalgic?

17 A No, sir, it doesn't.

18 Q Okay. It says he's using a cane?

19 A That's correct.

20 Q And if his gait were antalgic, that would be  
21 important?

22 A Yes, sir.

23 Q And you would expect your physician's assistant to  
24 write down anything that was important?

25 A Correct.

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1 Q And it's not written down?  
2 A Correct.  
3 Q And he's seen on September 12, 2006, correct?  
4 A Correct.  
5 Q And, "The patient is alert, oriented, and  
6 ambulatory," correct?  
7 A Correct.  
8 Q No reference to a cane?  
9 A Correct.  
10 Q It says, "His gait is normal and he has good sitting  
11 time."  
12 A Correct.  
13 Q And he's seen on August 7, 2006?  
14 A Correct.  
15 Q And that reports that he has had selective nerve  
16 root block.  
17 A Correct.  
18 Q And it says, "Immediately after the procedure, the  
19 patient reported no change in his usual pain," correct?  
20 A Correct.  
21 Q And he's to be seen by Dr. Thalgott for further  
22 evaluation?  
23 A Correct.  
24 Q And he is currently on Vicodin and Elavil?  
25 A Correct.

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1 Q And the pain -- it says, "The pain doesn't follow  
2 any specific dermatome." What does that mean, specific  
3 dermatome?

4 A That's a reference to radicular type pain.

5 Q Okay. Because certain parts of our body are  
6 innervated by different nerves, we can have a pain in one  
7 place and not another related to the same thing and his didn't  
8 follow a specific dermatome, is that correct?

9 A Correct.

10 Q And it makes note of the fact that at the last visit  
11 you had prescribed Morphine for him, correct?

12 A Correct.

13 Q And he was seen on July 10, 2006?

14 A That's correct.

15 Q And it says, "He is alert, oriented, and  
16 ambulatory."

17 A Correct.

18 Q And you would expect that if his gait had been  
19 antalgic, there would be a note, correct?

20 A Correct.

21 Q And there is no note?

22 A No, sir.

23 Q And the July 20, 2006 is your report to  
24 Dr. Thalgott.

25 A That's the operative note from the selective nerve

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1 blocks and then there's a letter to Dr. Thalgott.

2 Q Okay. And this letter is the one dated July 20,  
3 2006?

4 A That's correct.

5 Q And it begins by saying, "I performed staged  
6 selective nerve root blocks on Enrique Rodriguez today,"  
7 correct?

8 A Correct.

9 Q Number one, and it gives the nerve, and it says,  
10 "Resulted in no change in the usual pain," correct?

11 A Correct.

12 Q Number two, and it gives the specific nerve. It  
13 says, "Resulted in no change in the usual pain," correct?

14 A Correct.

15 Q And number three gives the specific nerve and says,  
16 "Resulted in no change in the usual pain," correct?

17 A Correct.

18 Q And you made the comment then, "It appears that the  
19 exact pain generator remains elusive," isn't that true?

20 A That's correct.

21 Q Now, you have a progress note from June 29, 2006.

22 A Correct.

23 Q And that talks about two sets of cervical and lumbar  
24 epidural steroid injections with no sustained improvement.

25 A Correct.

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1 Q And now, the note right in the middle of that first  
2 paragraph says, "The patient has been seeing Dr. Gamazo  
3 [phonetic throughout] Mortillaro, who has suggested that he  
4 might benefit from Methadone as a primary pain medication."

5 A Correct.

6 Q Correct? Dr. Mortillaro is a psychologist, isn't  
7 he?

8 A Dr. Gamazo is too. Those are two separate doctors.  
9 They're psychologists.

10 Q Okay. And psychologists don't prescribe medication,  
11 do they?

12 A Correct.

13 Q Are you in the habit of asking psychologists what  
14 pain medication ought to be --

15 A No.

16 Q -- given to a patient?

17 A No, I didn't ask them. They offered as a  
18 possibility.

19 Q Okay. Does it seem to you that maybe they're going  
20 a little bit out of their qualifications?

21 A No, we collaborate all the time. Basically, it's a  
22 recommendation. I evaluate and determine whether it's  
23 important -- if it's something I want to do or not, whether  
24 it's beneficial of the patient.

25 Methadone is not necessarily a bad medication, but

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1 again, that's a medication that can be very dangerous. And I  
2 follow people very closely when I have them on Methadone.

3 Q Right.

4 A Methadone has an advantage of having a pathway to  
5 treat neuropathic pain as opposed to regular narcotics that do  
6 not.

7 Q You wouldn't prescribe something for a patient  
8 unless you thought it was the right medication to prescribe?

9 A Correct.

10 Q But in terms of these two psychologists volunteering  
11 what the pain medication ought to be, that's outside their  
12 field, isn't it?

13 A It's just a recommendation. It's nothing more than  
14 that.

15 Q Well, I understand it's a recommendation, but do you  
16 know what kind of training they have in pain and prescription  
17 drugs?

18 A Well, they don't have -- I don't know what they have  
19 in the way of prescription drugs. They don't prescribe.

20 Q Right. So far as you know, you don't know of any  
21 training that they have in prescription drugs, isn't that  
22 true?

23 A I don't know. They might; I don't know.

24 Q Let me ask you something very specific. You don't  
25 have any knowledge that they have any training in prescription

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1 drugs, isn't that true?

2 A Specifically, no, sir.

3 Q And we have here in June 2006, "The patient's gait  
4 is antalgic."

5 A That's correct.

6 Q And the sitting time was good.

7 A Correct.

8 Q Now, you have a procedure report that I've skipped  
9 over a bunch of things. I'll try to find a date on it. Under  
10 DOT, it has 5/8/06. Would that mean that this report is  
11 approximately May 8, 2006?

12 A I've got one May 5, 2006.

13 Q Okay. I'm looking here at the indications. I want  
14 to make sure that I'm looking at the right one. May I  
15 approach the witness, Your Honor?

16 THE COURT: Of course.

17 BY MR. WARD:

18 Q Is this -- I'm looking at this. And it doesn't -- I  
19 can't seem to find a date on this. See there?

20 MR. BAKER: Is that it?

21 MR. WARD: Procedure diagnosis.

22 MR. BAKER: Go ahead.

23 MR. WARD: Is that it.

24 MR. BAKER: How many lawyers does it take to turn the  
25 page?

1 MR. WARD: Screw in a light bulb. Yeah, okay.

2 THE WITNESS: I'm thinking three.

3 BY MR. WARD:

4 Q Can you tell what page -- what that --

5 A That's selective nerve root blocks I performed.

6 Q Okay.

7 A Three sets. And that's basically the procedure note  
8 from the letter --

9 Q Okay.

10 A -- that you went through.

11 Q Can you tell me the date on that document?

12 A July 24, 2006.

13 Q Okay. So, July 24, 2006.

14 A Oh, it's July 20th, I'm sorry.

15 Q Okay.

16 A The dictation was the 24th. The procedure was --

17 Q July 20, 2006. And you have the pre-procedure  
18 diagnosis, post-procedure diagnosis, and procedure performed,  
19 correct?

20 A Correct.

21 Q And in the pre-procedure diagnosis, number one is  
22 neck pain?

23 A Correct.

24 Q Number two is low back pain?

25 A Correct.

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1 Q Nothing about the knee, isn't that right?

2 A Correct.

3 Q Okay. And you have down here as indications,  
4 "Failed conservative therapy?"

5 A Correct.

6 Q And that's based on the fact that you were told that  
7 before you saw this patient that for a year-and-a-half he'd  
8 had neck and back pain that hadn't gotten any better.

9 A Correct.

10 Q Okay. And that's what you were told about a  
11 year-and-a-half after the accident?

12 A Correct.

13 Q Okay. And you had that same comment, failed  
14 conservative therapy, on your note that has the dictated  
15 5/8/06. Do you see that? It's called a procedure report.

16 A 5/4/06?

17 Q The dictated portion says 5/8. It doesn't mean -- I  
18 don't know when that means that it was, but -- may I approach  
19 the witness?

20 THE COURT: Yes.

21 BY MR. WARD:

22 Q See what I'm referring to down there? It says  
23 5/8/06? And I'll take that --

24 A Can you scroll to the top?

25 Q Yeah, I will. I just wanted to show you. I can't

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1 -- I don't have the whole thing here. There's no date at the  
2 top.

3 A Yeah, I think that's -- I don't have that  
4 transcription service anymore. It's one of the main reasons.

5 Q But do you see what I'm talking about?

6 A Yeah.

7 Q Can you find what I'm --

8 A Yeah, hold on. 5/13/06, 5/7/06.

9 MR. BAKER: I'm like lost.

10 THE WITNESS: Oh, I've got it right here. I'm sorry.

11 BY MR. WARD:

12 Q You got it?

13 A Yeah.

14 Q Okay. Is it correct that it -- down at the bottom,  
15 it says DOT would be date it was transcribed of --

16 A Correct.

17 Q So, it's somewhere about that date, correct?

18 A Well, the procedure was May 4th.

19 Q Okay, right.

20 A That's down at the bottom right hand, date of  
21 procedure.

22 Q Right, okay. And that gives the pre-procedure  
23 diagnosis of neck pain and it gives the indications as failed  
24 conservative therapy.

25 A Correct.

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1 Q And so what that means is we go back to you were  
2 told that this patient had had -- essentially had had neck  
3 pain since the time of the accident and it had been treated  
4 conservatively and it hadn't gotten any better.

5 A Correct.

6 Q And you, I take it, never went back and looked at  
7 his records to find out if that was actually true.

8 A That's correct.

9 Q You just accepted what the patient told you.

10 A Correct.

11 Q And you never questioned anything that the patient  
12 told you essentially, isn't that true?

13 A Well, I took it at face value.

14 Q Right. But you said earlier you didn't bother to do  
15 any checking. You didn't -- you said sometimes you look out  
16 the window to see people getting in their car. You didn't do  
17 that with this patient.

18 A I don't really like where you're going with this. A  
19 patient is sent to me for injections. I evaluate them and  
20 determine if injections are indicated or not and I did them.

21 Q Right. But you accepted --

22 A I did not -- yeah, I accepted what he told me --

23 Q Right.

24 A -- just like any other patient.

25 Q You didn't think it was appropriate or necessary for

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1 you to go out and do anything with respect to checking the  
2 background of this patient.

3 MR. BAKER: Your Honor, it's asked and answered already.

4 THE COURT: It has been. Sustained.

5 BY MR. WARD:

6 Q And so your commentary here is based strictly on  
7 what the patient told you?

8 MR. BAKER: Asked and answered as well, Your Honor.

9 THE COURT: Sustained again.

10 [Pause]

11 MR. WARD: Thank you, Doctor.

12 THE COURT: Mr. Baker --

13 MR. BAKER: Hi, Doctor.

14 THE COURT: -- any redirect?

15 MR. BAKER: Yeah, just a couple of questions.

16 REDIRECT EXAMINATION

17 BY MR. BAKER:

18 Q How you doing, Doctor?

19 A Good.

20 Q Sick of being on the stand?

21 A Oh, yeah.

22 Q Let's just talk about a couple of things. Counsel  
23 spoke with you about one of Dr. Thalgott's records, is that  
24 right?

25 A That's correct.

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1 Q Where Dr. Thalgott talked about the fact that he  
2 couldn't quite figure out where something was coming from, is  
3 that right?

4 A That's correct.

5 Q Let me read to you what he was actually talking  
6 about because I think that there might be some confusion. He  
7 says, "He has a myriad of complaints. At this point, we'll  
8 continue his therapy. He's having some ulnar-type symptoms in  
9 his right hand. The nerve injections didn't seem to make a  
10 difference, so I'm not sure that this is neurogenic. I can't  
11 explain what this is."

12 Now, you're aware that Enrique did have injections  
13 into his hand, is that right?

14 A Correct.

15 Q And here he's not talking about his back or his  
16 neck. He's talking about his arm, is that right?

17 MR. WARD: Objection, leading.

18 THE COURT: Sustained.

19 BY MR. BAKER:

20 Q Doctor, is it your understanding that he's talking  
21 about his arm, not his back or his neck?

22 A At that point and time, yes.

23 Q Right. So when he said, "I can't explain what that  
24 is," was he talking about his arm at that time?

25 A I believe so.

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1 Q And you know that this was before, don't you not,  
2 that he had the nerve conduction velocity test on his arm?

3 A Correct.

4 Q And that nerve conduction velocity test showed that  
5 there was a median nerve disturbance, is that correct?

6 A Correct.

7 Q So, they found out what it was with respect to his  
8 hand, isn't that true?

9 A Well, that's the whole point.

10 Q Right. And it's the same point where you rule  
11 things out, isn't it fair to say, as part of a medical  
12 diagnosis in a medical procedure?

13 A Correct.

14 Q And when you performed your injections, were you  
15 attempting to rule out radicular pain?

16 A Correct.

17 Q And when Dr. Thalgott talked about ruling out  
18 neurogenic pain, is that in comparison to discogenic pain,  
19 pain relating to the disc itself?

20 A Like I said, I take him, his reading of neurogenic  
21 pain, to infer radicular.

22 Q Right. And, in fact, it was discovered that there  
23 wasn't a radicular component, is that --

24 A Correct.

25 Q So that was ruled out. That's what you were trying

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1 to do, is that what you're saying?

2 A Correct.

3 Q And so you came up with a diagnosis which was  
4 internal disc disruption, is that correct?

5 A That's correct.

6 Q Which is not neurogenic pain. It's discogenic pain,  
7 is that correct?

8 A Correct.

9 Q And that's your opinion to a reasonable degree of  
10 probability, that he was suffering from discogenic pain?

11 A That's correct.

12 Q Okay. So, now they talked about some of the time.  
13 Do you know that RSD is a disease that wax and wanes, is that  
14 correct?

15 A That's correct.

16 Q And we've heard a lot of testimony about how that  
17 will change. Is it strange to you that Enrique Rodriguez'  
18 presentation wasn't absolutely static? It wasn't the same  
19 every day?

20 A No, I'd expect it to vary.

21 Q Okay. So, sometimes he used a cane and sometimes he  
22 didn't, is that right?

23 A Yes, sir.

24 Q Do you see anything remotely suspicious about that?

25 A No.

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1 Q Okay. And is that your experience with patients  
2 that you have who RSD, that it tends to wax and wane?

3 A That's correct.

4 Q And, by the way, a big deal was made about  
5 ambulatory. Ambulatory just means not in a wheelchair, right?

6 A Basically, yes.

7 Q Yeah. I mean it's never been suggested by us or any  
8 of the doctors that Enrique is wheelchair bound, is that fair  
9 to say?

10 A That's correct.

11 Q So, if you see ambulatory, that's consistent with  
12 the remainder of his medical records, is that correct as well?

13 A Correct.

14 Q Okay. Now, give me a second, would you, Doctor?

15 THE COURT: Sure.

16 [Pause]

17 BY MR. BAKER:

18 Q Now, it was talked about the fact that Dr. Thalgott  
19 says that he was not a surgical candidate. Do you recall  
20 speaking about that?

21 A Yes.

22 Q And we've had other doctors testifying in this room  
23 that there's no way that he should have a lumbar surgery done  
24 until he gets his spine stimulator to get rid of the pain in  
25 his knee. Would you agree with that?

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1 A Yes.

2 Q Okay. Would you explain to the Judge why that is?

3 A Well, the knee is the primary pain component. Once  
4 you treat that, you see what's left, number one. Number two,  
5 the spinal cord stimulator now can cover back pain and leg  
6 pain. That's new technology. Two years ago you couldn't make  
7 that statement. Spinal cord stimulator wouldn't treat leg  
8 pain.

9 Usually in the context of a failure back surgery  
10 syndrome, but RSD is certainly an indication for it as well.  
11 But now the technology exists that with a tripole technology,  
12 we can cover back pain from about L-1 on down pretty reliably.

13 Q And Dr. Schifini testified that he actually put a  
14 lead to his back on the temporary spinal cord stimulator.

15 A Right.

16 Q And that that didn't help his back pain except  
17 transiently. Did you understand that?

18 A I didn't know that, but whether I did or not is  
19 irrelevant because that was done more than two years ago if I  
20 recall.

21 Q Correct. Now you've stated that you know  
22 Dr. Thalgott, is that right?

23 A That's correct.

24 Q And he's a good surgeon?

25 A He's a great surgeon.

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1 Q And you've transferred patients back and forth with  
2 him?

3 A Yes.

4 Q Would Dr. Thalgott ever recommend surgery on a  
5 person awaiting a spinal cord stimulator for his knee that  
6 he's unable to get?

7 MR. WARD: Object, no foundation for this. We don't know  
8 what Dr. Thalgott has to say about this. This is speculative.

9 THE COURT: Mr. Baker.

10 MR. BAKER: He said he understands Dr. Thalgott. They  
11 refer patients back and forth. He's had experience with  
12 patients with Dr. Thalgott and he's aware for the standards  
13 for prescribing surgery and recommending surgery in patients.

14 MR. WARD: Your Honor, this witness said on  
15 cross-examination that he didn't know what was in  
16 Dr. Thalgott's mind and that he couldn't even interpret  
17 Dr. Thalgott's suspicions in his medical records. So, how he  
18 could possibly offer this kind of an opinion is without  
19 foundation.

20 THE COURT: Well, let me ask you this, Mr. Baker. The  
21 way you phrased your question, it was a general one. Does it  
22 apply to specifically the Plaintiff?

23 MR. BAKER: Huh-uh, general.

24 THE COURT: General question?

25 MR. BAKER: Yeah, but I can restate the question.

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1 THE COURT: Well, let's have you restate it then as it  
2 applies to Plaintiff.

3 BY MR. BAKER:

4 Q Would it be acceptable to recommend surgery for  
5 Enrique Rodriguez on his back when he is still suffering from  
6 an untreated RSD on his knee?

7 A I have not seen Dr. Thalgott do that, so I don't  
8 think so.

9 Q Okay. And it's nothing that you would recommend?

10 A Uh-uh.

11 Q And because you will continue to have the postural  
12 changes, is that correct?

13 A Correct.

14 Q And will you explain to the Judge, is there a cycle  
15 associated with the back pain and the postural changes, the  
16 limping and the use of assistive devices?

17 A When his pain is bad, I would anticipate that he  
18 would have an altered gait, altered posture, and that would  
19 adversely affect his back.

20 Q And we've heard testimony in this Court as well  
21 about the fact that if back surgery was done before his knee  
22 was repaired, he would likely rip out that back surgery due to  
23 the continued postural changes. Do you have an opinion with  
24 respect to that?

25 MR. WARD: Objection, leading, argumentative.

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1 THE WITNESS: that would --

2 THE COURT: Overruled.

3 THE WITNESS: Oh.

4 THE COURT: You can answer the question, sir.

5 THE WITNESS: That would put asymmetric stress on the  
6 back and could, if you fused one level, it would probably  
7 accelerate adjacent segment breakdown.

8 BY MR. BAKER:

9 Q Another thing too, since Dr. Thalgott's reports,  
10 it's been three years, is that right?

11 A Correct.

12 Q Could you explain to a reasonable degree of medical  
13 probability to the Judge what's been occurring with respect to  
14 Enrique's back and neck as a result of continued postural  
15 changes?

16 A My suspicion is that it would continue to hurt and  
17 possibly get worse --

18 MR. WARD: Object.

19 THE WITNESS: -- mechanically.

20 MR. WARD: Move to strike. There's no foundation that  
21 this doctor knows what's been going on. In fact, the  
22 foundation is specifically to the contrary. He began his  
23 answer with, "My suspicion." It calls for speculation and no  
24 foundation.

25 THE COURT: Sustain the objection.

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1 BY MR. BAKER:

2 Q Doctor, in patients that you've treated who have  
3 continued to have postural changes over time, could you please  
4 explain to the Judge they cycle that they get into with  
5 respect to their pain complaints?

6 MR. WARD: Relevance unless it relates to this patient.

7 MR. BAKER: Well, he's a human being like any other human  
8 being, isn't he?

9 THE COURT: Overrule the objection.

10 THE WITNESS: As I said, my suspicion is most patients I  
11 would expect, I would anticipate would go on to have further  
12 pain as a result of their altered gait and posture.

13 BY MR. BAKER:

14 Q And does the altered gait and posture help the  
15 condition or does it hinder and hurt the condition?

16 A It hurts the condition. It makes it worse.

17 Q In what way?

18 A Continued asymmetric stress on the structure  
19 involved.

20 Q Thank you, Doctor.

21 MR. BAKER: No further questions, Your Honor.

22 BY MR. BAKER:

23 Q And is your opinion with respect to that last  
24 question to a reasonable degree of medical probability?

25 A Yes, sir, it is.

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1 MR. BAKER: Thanks to my team. I appreciate it.

2 THE COURT: Okay, Mr. Ward. Any follow-up?

3 MR. WARD: Yes, Your Honor.

4 RECROSS-EXAMINATION

5 BY MR. WARD:

6 Q Doctor, the diagnosis you made on this patient is  
7 what, that he has some internal nerve fibers growing in his  
8 disc?

9 A No, the definition was internal disc disruption.

10 Q And you think that's what's causing the problem?

11 A Most likely, yes.

12 Q Okay. You haven't seen anything like that from  
13 Dr. Thalgott with respect to this patient, have you?

14 A Didn't he in one of his notes say this is discogenic  
15 pain?

16 Q I don't know. Did he?

17 A I saw it.

18 Q Did -- but you're suggesting that he's a surgical  
19 candidate, isn't that right?

20 A I'm suggesting he's a potential surgical candidate.

21 Q And Dr. Thalgott says unequivocally that he's not a  
22 surgical candidate, isn't that true?

23 A At that point and time, yes.

24 Q Well, at that point and time. You haven't seen this  
25 patient for how many years?

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1           A     Three or four years.

2           Q     And so all of the treatment that you're testifying  
3 to about occurring tot his patient and what he had got and  
4 what he needed in the last three-and-a-half years has all been  
5 since the very last time you saw this patient, is that true?

6           A     True, but what you should be asking me is why do I  
7 think he's a potential surgical candidate. That's what we're  
8 not asking here.

9           Q     But I'm not asking you that because you're an  
10 anesthesiologist. You're no spine surgeon. So you don't do  
11 spine surgeries, do you?

12          A     Correct, but I --

13          Q     Okay.

14          A     -- send people to surgeons for surgery.

15          Q     And you send people to spine surgeons to do  
16 evaluations and offer opinions?

17          A     Well, I would think you'd want to know why I'm  
18 saying what I'm saying.

19          Q     Isn't it true that you send them to spine surgeons  
20 to offer opinions?

21          A     Correct.

22          Q     And you expect them to look at the patient and  
23 evaluate them?

24          A     Remember, Dr. Thalgott sent the patient to me, but  
25 I'll take them.

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1 Q Okay, so he sent the patient to you. Did he send  
2 this patient to you to tell him whether he should be doing  
3 surgery?

4 A No.

5 Q Okay. Thank you.

6 THE COURT: Mr. Baker?

7 FURTHER REDIRECT EXAMINATION

8 BY MR. BAKER:

9 Q So, why? So, why?

10 MR. WARD: Did he see it's the scope of the direct or the  
11 recross?

12 MR. BAKER: It's exactly the whole point of the recross,  
13 Your Honor.

14 THE COURT: I think the question is appropriate, but I'll  
15 ask you to narrow the focus some.

16 BY MR. BAKER:

17 Q Did you want to respond to the question why do you  
18 believe he's going to require a lumbar surgery?

19 A Yes, I mean I think that's the crux of the whole  
20 thing, why.

21 Q Give it to us.

22 A A surgeon will say they're not a surgical candidate  
23 at this point and time. He doesn't feel he's appropriate for  
24 surgery at this point and time. There is incomplete data,  
25 simply incomplete data.

1           The hypothesis is that he has internal disc  
2 disruption in the lumbar spine. There are two basic  
3 structures that cause this kind of pain in the low back, discs  
4 and facet joints. Neither one of them have been explored as  
5 far as a potential pain generator.

6           The symptoms are most consistent with discogenic  
7 pain. It could be facet pain, but most consistently with  
8 discogenic or perhaps both. The way to prove or disprove the  
9 hypothesis is to do a discogram.

10          Q     And we talked about the fact that -- or you spoke  
11 about the fact that we don't want to cause pain, that your  
12 lumbar epidural injections aren't painful. Tell her about a  
13 discogram.

14          A     A discogram is very painful. It's the worst  
15 procedure I do on people. We don't take it lightly. You take  
16 a patient, you put needles in all the discs you are going to  
17 test, and under pressure you'll inject x-ray contrast to  
18 stretch the disc. If the disc is torn or causing discogenic  
19 pain, it hurts -- excuse my French -- it hurts like hell.  
20 It's extremely painful.

21                I've seen patients with Post-Traumatic Stress  
22 Disorder have discograms. It's something we don't take  
23 lightly and there are techniques to blunt the pain of it.

24          Q     And isn't actually the point of the discogram to re  
25 -- give me the word. It's called committing pain, but it's

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1 to --

2 A Reproduce.

3 Q -- reproduce --

4 A Reproduce the pain, identify the pain generator, and  
5 that's what this is all about is identifying the exact pain  
6 generator. You can look at an MRI and see multi level disc  
7 disease. You don't know what's hurting. You don't know which  
8 disc or which structure is actually causing that pain. And  
9 that's the purpose of these procedures, to determine exactly  
10 which structure would require surgery if surgery was an  
11 option.

12 Dr. Thalgott doesn't have any more information than  
13 I do. He's an excellent surgeon and I understand him  
14 completely. At that point and time, he's not a surgical  
15 candidate. He also has the specter of his knee problem, not a  
16 surgical candidate.

17 However, let's say he didn't have a knee problem and  
18 I did a discogram showing that he had maybe one or two levels  
19 positive. I guarantee he'd be a surgical candidate. And  
20 based by multiple reputable spine surgeons in this town.

21 Q And he --

22 A Now, I am not a spine surgeon. I admit it, but I  
23 sure work with them a lot.

24 Q And can I ask you to turn --

25 MR. WARD: Wait, I want to voice an objection. I object

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1 to the last response and I move to strike on the basis that  
2 it's speculative. He's talking about things that Dr. Thalgott  
3 might have done or would have done. Dr. Thalgott has not been  
4 here to testify. Dr. Thalgott hasn't seen the patient for  
5 several years. This gentleman hasn't seen the patient for  
6 several years. It is all speculative.

7 MR. BAKER: He's talking about the course of treatment  
8 that someone with a diagnosis of internal disc disruption.  
9 That's a recognize diagnosis within the community, a diagnosis  
10 he deals with all the time. He has a tremendous experience of  
11 individuals who are diagnosed with internal disc disruption.

12 He set the foundation, the fact that they ruled out  
13 a radicular component. He's testified to a reasonable degree  
14 of medical probability that the pain is discogenic rather than  
15 neurogenic and testified to a reasonable degree of probability  
16 that there's an internal disc disruption. There's a complete  
17 foundation for that question.

18 THE COURT: Any final thoughts, Mr. Ward?

19 MR. WARD: I won't waste the Court's time by repeating  
20 what I just said, Your Honor.

21 THE COURT: Objection is noted for the record.  
22 Overruled.

23 BY MR. BAKER:

24 Q Doctor, could you please turn to Exhibit 39, page  
25 19?

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14 App. 2878

1 MR. WARD: What is that, Mr. Baker?

2 MR. BAKER: It's Dr. Thalgott's report.

3 MR. WARD: Of what date?

4 MR. BAKER: Of --

5 MR. WARD: The first one, 2/21/2006?

6 MR. BAKER: I think so.

7 MR. WARD: And what page?

8 MR. BAKER: Hold on one sec.

9 THE WITNESS: Page 18 at the top.

10 BY MR. BAKER:

11 Q Yeah. Could you please read to the Court on page 18  
12 what type of symptoms Dr. Thalgott said that Enrique Rodriguez  
13 was experiencing at the time of this February 2006  
14 examination?

15 A Early I think he has internal disc disruption type  
16 symptoms of the cervical spine and intermittent radiculopathy  
17 as well as probably facet or discogenic pain on his low back.

18 Q And there was a diagnosis of internal disc  
19 disruption?

20 A Correct.

21 Q And do you know that Dr. Shah back in November of  
22 '06 said that Enrique Rodriguez would require lumbar surgery  
23 if his knee was not fixed?

24 A Correct.

25 Q You're aware of that record as well?

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1 A Yes.

2 Q Do you see a pattern?

3 A Yes.

4 MR. BAKER: No further questions, Your Honor.

5 FURTHER RECROSS-EXAMINATION

6 BY MR. WARD:

7 Q I would like to direct the doctor to the same page.

8 A Page 18?

9 Q Right.

10 A Yes, sir.

11 Q Now, the doctor thinks that there is disc disruption  
12 type symptoms, correct?

13 A Correct.

14 Q He doesn't say disc disruption, does he? He says,  
15 "Disc disruption type symptoms."

16 A Correct.

17 Q Correct?

18 A Correct.

19 Q So his opinion is not disc disruption. His opinion  
20 is that the patient has related disc disruption type symptoms.

21 A He said, "As well as probably facet or discogenic  
22 pain in his low back."

23 Q Right.

24 A That's an internal disc disruption.

25 Q Right. And that's the doctor's opinion?

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14 App. 2880

1 A Correct.

2 Q And the doctor thinks that it's not simple  
3 myofascial pain?

4 A Correct.

5 Q And it -- but it could be simple myofascial pain,  
6 could it not?

7 A It could possibly be a component of it, but in  
8 reality the -- what that means, let's say you strain your  
9 back.

10 Q I'm just asking if it's simple myofascial pain. Can  
11 you answer that question?

12 MR. BAKER: Your Honor, he was in the middle of --

13 THE COURT: Well, if he needs to answer yes or no, you'll  
14 need to phrase it that way, I think, Mr. Ward.

15 MR. BAKER: Can I ask that he be able to complete his  
16 answer, Your Honor?

17 THE COURT: Unless you want to rephrase your question.

18 MR. WARD: I'll rephrase the question.

19 BY MR. WARD:

20 Q Isn't it true that he says in his report, "So, I do  
21 not think they are simple myofascial pain?"

22 A Correct.

23 Q And is he saying why he doesn't think it's simple  
24 myofascial pain?

25 A He says I think he --

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14 App. 2881

1 MR. BAKER: Your Honor, now we're outside of the scope.

2 THE COURT: Yeah, I guess we are.

3 MR. WARD: Your Honor, I'm reading from the very same  
4 page he cross-examined on.

5 MR. BAKER: It's on a complete --

6 MR. WARD: And this is right in the scope. It's in the  
7 very same paragraph.

8 MR. BAKER: Yeah, it's a different type of pain. It's a  
9 different issue and --

10 MR. WARD: It is not --

11 MR. BAKER: -- myofascial pain and discogenic pain are  
12 completely unrelated.

13 THE COURT: I'll allow it to a limited extent. Let's not  
14 get too far afield, Mr. Ward.

15 MR. WARD: I won't. Your Honor, I'm within two lines of  
16 where he was, so I'm not very far away.

17 THE COURT: I know that, Mr. Ward. That's why I  
18 overruled the objection.

19 MR. WARD: I apologize, Your Honor.

20 BY MR. WARD:

21 Q Dr. Kidwell, doesn't Dr. Thalgott in his report say,  
22 "This has now been over a year-and-a-half and they have not  
23 abated, so I do not think they are simple myofascial pain,"  
24 isn't that true?

25 MR. BAKER: Asked and answered, Your Honor.

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14 App. 2882

1 THE WITNESS: That's true.

2 THE COURT: Overruled.

3 BY MR. WARD:

4 Q And so Dr. Thalgott is saying, "I'm making this  
5 decision based on the fact that the patient has reported to me  
6 in effect that he's had these pains for a year-and-a-half  
7 unabated."

8 A What he is saying is, "I do not think they are  
9 simple myofascial pain."

10 Q Because they are -- have not been abated for a  
11 year-and-a-half.

12 A Are you asking my opinion?

13 Q Isn't that what he says?

14 A What he says is not simple myofascial pain.

15 Q And he says, "It's because they have not been abated  
16 for a year-and-a-half."

17 A Correct.

18 Q Thank you.

19 FURTHER REDIRECT EXAMINATION

20 BY MR. BAKER:

21 Q And sometimes it helps to read the whole thing, I  
22 think. Maybe we could go through that together.

23 A It's called context.

24 Q Yes. If you go to 19 and begin -- it's like reading  
25 in Hebrew, Your Honor. You read from this way to this way.

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14 App. 2883

1 THE COURT: That's what I understand.

2 BY MR. BAKER:

3 Q Yeah, he states he began having neck --

4 MR. WARD: Exceeds the scope.

5 MR. BAKER: -- arm and back --

6 THE COURT: Where are we at, Mr. Baker?

7 MR. BAKER: We're one line away from where Counsel had  
8 read during his recross.

9 MR. WARD: We're on a different page, I think. Aren't we  
10 on a different page?

11 MR. BAKER: It's under impression on page 19. So it  
12 starts impression on page 19 and then it continues on page 18,  
13 Your Honor.

14 THE COURT: I think you're entitled to explore this.

15 BY MR. BAKER:

16 Q "He states he began having neck, arm, and back  
17 discomfort initially but it was overshadowed by his knee." Do  
18 you see where Dr. Thalgott said that?

19 A Yes.

20 Q And are you aware that he reported to Dr. Mortillaro  
21 in September of '05 that he thought his neck and back were  
22 being ignored?

23 A Yes.

24 Q Thank you, Your Honor.

25 THE COURT: Any follow-up?

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14 App. 2884

1 MR. WARD: No, Your Honor.

2 THE COURT: Well, I have one question if you don't mind,  
3 Dr. Kidwell.

4 THE WITNESS: Not at all.

5 THE COURT: It had to do when you described the -- you  
6 described the procedure when you're trying to reproduce the  
7 pain in the various discs.

8 THE WITNESS: The discogram.

9 THE COURT: The discogram. And you inject the dye into  
10 the various discs.

11 THE WITNESS: Yes.

12 THE COURT: You said that's about one of the most painful  
13 things that one of your patients could undergo, but there was  
14 something you used sometimes to blunt the pain.

15 THE WITNESS: Correct.

16 THE COURT: What -- how can you blunt the pain if you're  
17 trying to reproduce the pain? I don't understand that.

18 THE WITNESS: That's an excellent question. The way I do  
19 a discogram is to try and make it as humane as possible and  
20 yet get good objective data, and of course, taking an  
21 subjective experience and making it as objective as possible.

22 The exact criteria of a properly performed discogram  
23 is to produce concordant pain and a patient is totally alert  
24 and can report concordant pain. There also has to be an  
25 element of abnormal disc architecture. And the third element

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14 App. 2885

1 is you have to have other levels that are negative to validate  
2 the study, i.e., not producing pain.

3 So, many physicians will not sedate or sedate very  
4 lightly to do this. Placing the needles is very painful.  
5 It's a very long needle. It has to go through your back about  
6 this far, depending on how thick you are, into your disc.  
7 It's a pretty good size needle.

8 So, my particular technique, the one I have been  
9 using since I was in the Navy, is I would sedate people  
10 generously for needle placement. Once the needles are in  
11 position, I'll write a test. I'll give them medications to  
12 block the first medications and wake them up.

13 So, the biggest medication is Versed. It's is a  
14 benzodiazepine. You can block that with a medication called  
15 Romazicon. Within a minute they'll be totally alert and  
16 awake.

17 So, once they're awake, I have a conversation with  
18 them verifying that they're awake, they know who I am, why  
19 we're here. Then I talk about the procedure we're going to  
20 do, that they can't see what I'm doing, but it's important  
21 they don't know what I'm doing.

22 Then I'll test each disc one at a time. Usually  
23 I'll go for the ones I think are going to be abnormal first to  
24 validate the study and get a good control of it. I inject  
25 each disc with x-ray contrast under pressure. There is a

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14 App. 2886

1 special gauge on the syringe I use and we crank and we watch  
2 the pressures and we watch the fluoro screen at the same time  
3 looking for abnormalities.

4           Once you've achieved maximum pressure, there are  
5 pressure parameters for this, you just can't crank in 200 psi  
6 and call it valid. It's like 0 to 50 psi is the range you  
7 use.

8           So, I'll test each disc sequentially noting their  
9 pain responses, watching the fluoro screen, and watching the  
10 volume that I put in. A normal disc won't produce any pain.  
11 They won't even know I'm doing it.

12           However, if the disc is torn or a pain generator, it  
13 will reproduce their pain quite significantly. Once I've  
14 obtained or determined the disc is positive I stop  
15 pressurizing it. There's no reason to keep putting them  
16 through the rough. But I'll go back and I'll retest anything  
17 that was positive a second time, and I do that by injecting a  
18 high concentration of local anesthetic.

19           As the medication goes in and stretches the disc  
20 again, reproduces the pain, and then hopefully goes on to  
21 anesthetize it some because I know these things hurt like hell  
22 and I want them to have some comfort afterwards.

23           Then at the very end when I pull the needles out,  
24 any positive level, I'll drop an epidural injection on top of  
25 it, again just for pain after the procedure. Then they'll go

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14 App. 2887

1 to recovery for a while, then on to a CT scan.

2 So, the two elements that are very painful is  
3 placing the needles, very painful, especially as you get down  
4 towards the disc and penetrate the disc annulus, and then the  
5 actual testing itself.

6 So, what I do is try to make the first part as  
7 painless as possible. The second part I can't do anything  
8 about. That's the nature of the beast.

9 THE COURT: Thank you. Any follow up based on my  
10 questions from either?

11 MR. WARD: Yes, I do, Your Honor.

12 MR. BAKER: Uh-huh.

13 FURTHER REDIRECT EXAMINATION

14 BY MR. BAKER:

15 Q Could you explain to the Court a little bit about  
16 the pressurization and the fluid volume that you would expect  
17 a normal versus not normal disc?

18 A By definition, when you first put the dye in, the  
19 first squirt that shows up in the disc is called opening  
20 pressure. You stop, measure the pressure, that's the resting  
21 pressure inside the disc. A positive disc will have pain  
22 within 0 to 50 psi above opening pressure. The lower the  
23 pressure, the more sensitive it is.

24 Also, you don't really want to exceed 4 milliliters  
25 of dye. However, sometimes you do. In a very degenerated

1 disc, it will accommodate a lot of volume. And sometimes  
2 you'll have a hard time generating enough pressure because a  
3 disc is so degenerated, but those are generally the criteria,  
4 0 to 50 psi above opening pressure.

5 Pain above that is considered indeterminate. It may  
6 be a positive disc, but according to the definition, it's  
7 indeterminate.

8 Q And one follow up question. What's the cost of a  
9 discogram including the procedure and your time in a surgical  
10 suite?

11 A Let's say you do a three level discogram. Average  
12 costs are, of course it's varied. This gentleman would  
13 probably end up with -- how many levels he got?

14 Q Four.

15 A Probably a five level discogram. They get a  
16 control. I figure about \$1,000 per disc, rough average, plus  
17 surgery center charges, another \$5,000.

18 Q How much? I'm sorry.

19 A Probably \$10,000 for the total package.

20 Q And is it your opinion he'll require a discogram to  
21 a reasonable degree of medical probability?

22 A He would probably have one before he'd have surgery,  
23 yes, sir.

24 Q As a direct and proximate result of this subject  
25 incident?

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14 App. 2889

1 A Correct.

2 Q To a reasonable degree of medical probability?

3 A That's correct.

4 Q And I'd just ask you to look at one more thing. I  
5 think there were four levels of discs that showed pathology.  
6 Would he then need a sixth level to have a control above and  
7 below each of --

8 A No, I would just do a five level discogram, and this  
9 is why. Most surgeons won't operate on more than three  
10 levels, so it's a moot point.

11 Q Okay. Thank you.

12 MR. BAKER: No further questions.

13 THE COURT: Mr. Ward?

14 FURTHER RECROSS-EXAMINATION

15 BY MR. WARD:

16 Q Yes, Dr. Kidwell. Isn't it true that for many  
17 members of the medical profession that discograms have fallen  
18 out-of-favor?

19 A No.

20 Q That's not true?

21 A It's controversial, but it's not out-of-favor. It  
22 remains the gold standard for diagnosing.

23 Q Well, but it's controversial, is it not?

24 A It's controversial in that Eugene Carragee is one  
25 researcher who's been --

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14 App. 2890

1 MR. BAKER: From Stanford?

2 THE WITNESS: -- from Stanford, for years been trying to  
3 discount discograms and he's been unsuccessful. But there is  
4 no other way to determine discogenic pain. You cannot see  
5 pain on an MRI, a CT scan, x-ray. It is the only way you can  
6 determine what structure is causing the pain.

7 BY MR. WARD:

8 Q Isn't the criticism of discograms, is it they have  
9 too many false positives?

10 A Isis has shown that that's not exactly the case.  
11 There is a very low false positive rate if you have negative  
12 control levels to validate the study.

13 The more levels that are negative versus positives, the  
14 stronger the correlation. But all tests have a false positive  
15 rate. It's very low in discograms if performed properly  
16 depending on results.

17 If you have a four level positive discogram, your  
18 confidence level goes way down. But then again, no one is  
19 going to operate on four levels anyway.

20 Q So, there is a confidence level problem with  
21 discograms in certain circumstances?

22 A Well, there is with any studies. I mean that's part  
23 of the process. That's by definition.

24 Q And Dr. Thalgott has not recommended a discogram for  
25 this patient, has he?

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1 A Not at this time.

2 THE COURT: Mr. Baker?

3 MR. BAKER: Just one follow-up question and it's just  
4 kind of for giggles.

5 FURTHER REDIRECT EXAMINATION

6 BY MR. BAKER:

7 Q Isn't Dr. Carragee in his article the one who used  
8 as a norm for false positives on discograms and he saw no  
9 evidence of chronic disabling discogenic injury in the  
10 population of Portuguese strawberry growers in Washington?

11 MR. WARD: I will object to this questioning on a learned  
12 treatise without having provided me with a copy ahead of time.

13 THE COURT: Sustain the objection.

14 MR. BAKER: Thank you.

15 THE COURT: You know, Dr. Kidwell --

16 THE WITNESS: Yes, ma'am.

17 THE COURT: -- I thank you for answering my question.

18 I've heard testimony lots of times about these discograms, but  
19 it's generally the jury that gets to ask the questions, not  
20 the Judge. So, thank you for answering my question.

21 THE WITNESS: Oh, thank you for asking.

22 MR. BAKER: We don't have any other witnesses today, Your  
23 Honor.

24 THE COURT: Very well. With the thanks of the Court,  
25 Dr. Kidwell, you may be excused.

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14 App. 2892

1 THE WITNESS: Thank you, ma'am.

2 THE COURT: Very well. What's the schedule -- we can go  
3 off record for scheduling purposes.

4 [Designation of record concludes at 11:28 a.m.]

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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.

  
\_\_\_\_\_  
ANTOINETTE M. FRANKS, Transcriber

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

\_\_\_\_\_ /

**APPELLANT'S APPENDIX**  
**VOLUME 13**

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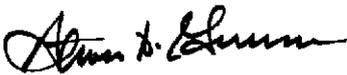
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DISTRICT COURT  
CLARK COUNTY, NEVADA

  
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ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

THURSDAY, NOVEMBER 4, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF TERRANCE DINNEEN

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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DEFENDANT'S:

None



1 employers with 1,500 employees or more, and we would assist in  
2 looking at their losses, the injuries that their employees  
3 were having, and assist those employees in returning to work.

4           Fifteen years ago, I moved to Reno, acquired a very  
5 small competitor, where we primarily have done work with  
6 veterans with service connected disabilities, assisting them  
7 in returning to work. Then in addition to that, I've done  
8 forensic work, such as what I'm here to talk about today, both  
9 in the area of vocational rehabilitation and economics. And  
10 I've published in both of those areas as well.

11           Q     Have you worked in the social security department?

12           A     I have. I worked for the office of hearings and  
13 appeals under the Social Security Administration as the  
14 court's expert for 20 years, where I was there at the request  
15 of the Court to aid and assist in sorting out the issues of  
16 disability and the vocational impact of disability, primarily  
17 on contested cases where the person had been turned down, and  
18 they were now going in front of a United States Administrative  
19 Law Judge.

20                     A judge has an option of having a vocational expert  
21 there, as well as a medical expert that will sit through the  
22 hearing, review the records and respond to any questions to  
23 clarify any vocational issues and the person's ability to work  
24 in the labor market.

25           MR. BAKER: And Your Honor, at this time, I would ask

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1 that he be qualified in the area of vocational rehabilitation  
2 and forensic economics.

3 THE COURT: Any objection, Mr. Ward?

4 MR. WARD: No, Your Honor.

5 MR. BAKER: Okay. Just to let the Court know --

6 THE COURT: So ordered.

7 MR. BAKER: Thank you, Your Honor. Just to let the Court  
8 know --

9 BY MR. BAKER:

10 Q You and I have done a few trials together. Is that  
11 right?

12 A We have.

13 Q Maybe four or five?

14 A Yeah. I don't think five. Three or four. I was  
15 trying think.

16 Q There have been times that I have come to you and  
17 ask you to use vocational rehabilitation and forensic  
18 economics services and you looked at the case and told me,  
19 basically, I have no case and --

20 MR. WARD: Object. Leading.

21 THE COURT: Sustained.

22 MR. BAKER: He's an expert on just introduction, Your  
23 Honor.

24 THE COURT: I understand.

25 MR. BAKER: Would you like me to rephrase it?

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1 THE COURT: Yeah. I think so.

2 BY MR. BAKER:

3 Q Are there times you've told me -- have you agreed to  
4 participate in every case I've asked you to render an economic  
5 decision -- opinion?

6 A Probably more accurate way is, I've agreed to see  
7 your clients and evaluate whether or not I think there is an  
8 economic loss, and chances of vocational rehabilitation.

9 Q And have there been sometimes you told me that that  
10 answer was no?

11 A There's been some times, yes, that I've told you no,  
12 that I don't believe there is a vocational or economic loss  
13 that we can calculate.

14 Q I have tried to start every examination with a  
15 triple negative, so I think I got it done through today. When  
16 were you first contacted in this case?

17 A In 2008.

18 Q Was that by my office?

19 A It was.

20 Q And what was your assignment?

21 A I was asked to look at the vocational issues, the  
22 types of work that Mr. Rodriguez was able to do prior to his  
23 accident, to look at what vocational options he may have in  
24 the future and then, if there was going to be a loss, that he  
25 wasn't going to be able to make as much money, to calculate

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1 that loss. I was also asked to look at the costs of future  
2 medical care and calculate those values as well.

3 Q As in dollar value?

4 A Yes.

5 Q Okay. Did you do an evaluation of Enrique Rodriguez  
6 with respect to rehabilitation issues?

7 A I did.

8 Q What was that evaluation of?

9 A I met with Mr. Rodriguez, went through the types of  
10 work that he's done in his past, the amount of education that  
11 he has, you know, physically how he was doing, how he self  
12 assessed the limitations that he has, what had happened  
13 between the injury and when I saw him, which was about two and  
14 a half, three years ago when he was injured. And I think that  
15 encompasses most of what I did in the initial evaluation.

16 Q Did you also conjunctively review materials?

17 A I did.

18 Q Could you explain to the judge what you looked at?

19 A I looked at the medical records that I was provided  
20 with, that summarized the medical treatment that he had. I  
21 looked at three years of tax returns that I was provided with,  
22 as I developed my opinions to write my report.

23 Q Did you review any materials on social security?

24 A I did.

25 Q What materials did you review?

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1           A     I have a letter from Social Security that's in my  
2 file, that I reviewed. And I think that, maybe, without going  
3 through everything, that's the only one that's directly from  
4 Social Security.

5           Q     Is there a time --

6           MR. WARD: I would object and move to strike any response  
7 about Social Security. Social Security is not relevant to  
8 these findings. And I think it is prejudicial, and --

9           MR. BAKER: Your Honor, social security

10          MR. WARD: it's hearsay.

11          MR. BAKER: Social security is absolutely relevant to  
12 these findings. 214405 return to work at There is no argument  
13 being made that Mr. Rodriguez is not disabled, and there was a  
14 Social Security determination that he was disabled. You have  
15 previously ruled on an issue that it wasn't relevant when  
16 Enrique was speaking about it because of causation. He is  
17 specifically not, and has said at these depositions, speaking  
18 about causation, just his disability status, whether or not he  
19 is disabled, and a determination by the federal government  
20 that he is disabled is certainly not.

21          MR. WARD: Counsel for plaintiff is now putting forth to  
22 the Court exactly what I was objecting to by saying it, that  
23 it found to be disabled. What he was before the Social  
24 Security commission, what was said, what was actually found,  
25 what was testified to -- that's all hearsay. We don't have it

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1 before us. It's not been provided to me. It wasn't -- none  
2 of that information was given in the deposition. And I think  
3 it's all hearsay.

4 THE COURT: Well, Mr. Baker, is your intent to address  
5 this issue in a very narrow fashion?

6 MR. BAKER: Yes, Your Honor.

7 THE COURT: Overrule the objection.

8 MR. BAKER: Thank you.

9 BY MR. BAKER:

10 Q Discussed your evaluation in its entirety?

11 A We have.

12 Q And the information that you would have in its  
13 entirety?

14 A Yes.

15 Q And this with respect to your initial evaluation is  
16 this before coming to your calculations and conclusions?

17 A Yes.

18 Q Okay. Did you come to an opinion whether or not  
19 Enrique Rodriguez was disabled?

20 A I did.

21 Q And disabled from work?

22 A Yes.

23 Q Could you explain to the judge your methodology and  
24 the basis of your opinions?

25 A I looked at the medical records and the diagnoses

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1 that were in my file, in terms of --

2 Q Sorry. Can I just interrupt you for just one second  
3 before? Is there a definition of disability that we could use  
4 to give us some context to this?

5 A Yes. There are several different definitions. The  
6 most prominent one would be the preclusion from substantial  
7 gain for acuity. That's a definition of disability that's  
8 used by the Department of Veteran Affairs, probably almost  
9 every long term disability insurer in the United States uses  
10 that definition, as does the Social Security Administration.

11 MR. WARD: Object to -- I object to the Social Security  
12 standards and move to strike.

13 THE COURT: Noted for the record. Overruled.

14 THE WITNESS: Yeah. So it's a definition that's used by  
15 both private entities, as well as public entities, when we  
16 look at a person as to whether or not they're capable of  
17 substantial gain from acuity. From a functional standpoint,  
18 the preclusion of substantial gainful activity is defined as  
19 the ability to make, right now, \$950 a month or more. So it  
20 not only involves a person's physical ability to work, it also  
21 involves looking at their earning capacity. So when the  
22 determination is made as to an individual meeting that  
23 definition, it means that they've looked at the vocational  
24 background, the transferability of any skills or skill moving  
25 to a different job that the person may be physically able to

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1 do, plus what they might earn as well. So you see people that  
2 are high wage earners, that can work ten hours a month and  
3 make over \$900 in that ten hours. And even though they may  
4 have a severe impairment, they would be determined not to meet  
5 that definition of disability because they can earn over \$950  
6 a month. And those standards are applied to every Social  
7 Security case, particularly with individuals under 50, as to  
8 whether or not the person meets that definition of disability.  
9 So it's a fairly complex definition of disability, and a  
10 fairly stringent one. But it is one that's commonly used  
11 by --

12 THE COURT: -- objection as to --

13 MR. WARD: Your Honor, may I ask for an ongoing  
14 objection? I don't want to keep interrupting. Obviously this  
15 is before the Court at this point, so I think the prejudice is  
16 already there. So I don't want to be rude and keep  
17 interrupting, but I do want to protect the --

18 THE COURT: Noted for the record.

19 MR. WARD: Thank you, Your Honor.

20 BY MR. BAKER:

21 Q And was that definition actually codified?

22 A Yes.

23 Q Can you explain that to the Judge?

24 A In the Ticket to Work Act -- passed under the first  
25 motion of George -- elder -- Bush administration in 1999.

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1 Congress took notice of that definition of disability. It's  
2 probably one of the most studied definitions of disability  
3 because of the impact of the number of people who meet that  
4 definition of disability -- have on the Social Security  
5 system. And the general accounting office had done a study  
6 that was actually written into the act, the Ticket to Work  
7 Act, that found a .5 percent return to work rate of people who  
8 meet that definition of disability, meaning 99.5 percent of  
9 the people who were found to meet that definition of  
10 disability do not return to work.

11 Q And with respect to that definition, are the .5  
12 percent who return to work -- are they just not lazy, and the  
13 other 99.5 percent lazy?

14 A There -- well, there's been subsequent studies to  
15 try and determine what are the characteristics that fit into  
16 that .5 percent. The only correlation that they've been able  
17 to find is higher levels of education, individuals that have  
18 education beyond high school into the college level and into  
19 the graduate school level. The number of people who returned  
20 to work was a severe impairment -- tend to have higher levels  
21 of education. But that's the only correlation they could  
22 find. They couldn't find any correlation with specific types  
23 of impairment, whether it was a congenital impairment or a  
24 disease impairment or an impairment generated out of an  
25 accident. You know, and they attempted to look at all those

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1 different variables, trying to figure out what was the  
2 characteristics, and how can we get more people back to work.  
3 And that's the only correlation so far. Some of those studies  
4 do have a bit higher return to work rate. Highest one I've  
5 seen is about 10 or 11 percent, still meaning more people  
6 don't return to work than do. But the one that Congress took  
7 notice of was the .05 present.

8 Q And did Enrique meet the definition of disability,  
9 according to your evaluation of his medical records and your  
10 experience as a vocational rehabilitation expert?

11 A Well, when I saw him and interviewed him, he had  
12 told me that he had met that definition of disability, so I  
13 knew that. In terms of my work with the Social Security  
14 Administration, because he was under 50, it wouldn't surprise  
15 me if they went through a fair amount of steps when they  
16 evaluated whether or not he would meet that level of  
17 disability.

18 Q Is it a difficult definition to meet?

19 MR. WARD: Object. Move to strike on the basis of  
20 speculation.

21 THE COURT: Overruled. Let's have some foundation,  
22 Mr. Baker.

23 BY MR. WARD:

24 Q How many Social Security disability cases do you  
25 work here?

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1           A     When I went off that panel, I had testified in a  
2 little over 4,500 cases.

3           Q     And in each of those 4,500 cases was a certain  
4 process used by the administration?

5           A     Yes.

6           Q     And was the process consistent?

7           A     Yes.

8           Q     And was there a specific process utilized for  
9 individuals under 50?

10          A     Yes.

11          Q     And was that consistent?

12          A     Yes.

13          Q     And does Enrique Rodriguez qualify as an individual  
14 under 50 with respect to that consistent process?

15          A     It does.

16          MR. BAKER: I would ask, then, Your Honor, that I be  
17 allowed to have an explanation for most of this.

18          THE COURT: Very well.

19          BY MR. BAKER:

20          Q     Please explain the process.

21          A     Anybody under the age of 50 is considered a younger  
22 individual. Starting at age 50, you're considered approaching  
23 advanced age. And from age 55 to 60, you're considered of  
24 advanced age. And of age 60, you're considered of retirement  
25 age. I hate those titles and those age groups, but --

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1 THE COURT: Me, too. I object.

2 MR. BAKER: Sustained, Your Honor.

3 THE WITNESS: You know, so different standards begin to  
4 apply because age becomes a factor in disability, starting at  
5 age 50. If you're 49 and three-quarters, if you're under the  
6 age of 50 at any of those levels, you have to meet a different  
7 criteria, a criteria that's harder to meet, in relation to  
8 whether or not you're disabled. So when a person is under 50,  
9 the case is looked at with a much greater scrutiny than, say,  
10 a person who's over 60. And you can have two people with  
11 identical backgrounds, but the age difference of, say, 49 and  
12 61, there's a much higher probability that the person at age  
13 61 would be found disabled, and the person who's under the age  
14 of 50, because of the consideration of age as a factor of  
15 disability --

16 BY MR. BAKER:

17 Q Is it a difficult definition to meet?

18 A It is. It's a very difficult definition of  
19 disability to meet because you have, not only a physical  
20 component that you have to meet, there's an earning component  
21 that you also have to meet, based on your ability to perform  
22 job skills.

23 Q And did Enrique Rodriguez meet that criteria?

24 A Yes.

25 Q And was he rendered totally disabled by the federal

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1 government?

2 A He was.

3 Q After going through that process that you've  
4 described?

5 A Yes.

6 Q And is it an intensive process?

7 A Yes.

8 Q And was that the entirety of your basis for  
9 determining that Enrique Rodriguez was totally disabled?

10 A No. It was one of the pieces of the --

11 Q Tell the judge what pieces.

12 A Well, I've reviewed the medical records, noted the  
13 diagnosis, complex regional pain syndrome. You know, that's a  
14 very nasty little condition to try and rehabilitate somebody  
15 from, you know, due to the impact of pain on daily functioning  
16 and the inability of us to get a person to the point where  
17 they can function at some consistent level. That's sort of, I  
18 guess, a roundabout way of saying if we can get somebody who  
19 can function four hours a day, five days a week, consistently,  
20 then we've got a good chance of starting them back on  
21 employment, you know. But if that four hours comes every  
22 third day or second day or fifth day, or three times a month  
23 that they can work, and it's not predictable, unless they have  
24 some highly unusual job skills, their chances of getting them  
25 back to employment are not good. In Enrique's case, the

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1 impact of the complex regional pain syndrome, I felt, was a  
2 significant factor in terms of creating impairment, you know,  
3 functionally as well as a disability reason and function,  
4 interact, you know, replace. Certainly, significant amounts  
5 of various types of medication, you know, that he was and has  
6 been -- you know, I felt that are more probable on that basis.  
7 There was not a reasonable probability that we could  
8 successfully rehabilitate him.

9 Q And is it your opinion to a reasonable degree of  
10 professional probability that indicates Enrique Rodriguez was  
11 totally disabled?

12 A Yes.

13 Q Now, once you determined that he was disabled, did  
14 he set about to calculate lost handling?

15 A I did.

16 Q What materials were you provided to calculate the  
17 lost handling?

18 A I was provided the tax returns, three of them, from  
19 1999, 2001 and 2004.

20 Q Are you familiar with the fact that those tax  
21 returns were filed in April -- filed in 2009 or 2010?

22 A Yes.

23 Q What impact would that have on your calculation, if  
24 anything?

25 A I took the tax returns to be reflective of his

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1 vocational activity in those years. They were apparently  
2 filed, and they did report income, business income, during  
3 those years.

4 Q Do you also look at information regarding gross  
5 sales?

6 A I did.

7 Q Could you explain to the judge what the totality of  
8 that information is?

9 A Sure. Mr. Rodriguez has been through most of his  
10 life, with a couple of years of exception, self-employed, you  
11 know, buying and selling houses, building -- finding  
12 fixer-uppers, repossessed houses or houses going into  
13 repossession. This was, of course, before the current  
14 economic conditions that we're in now. So he'd find  
15 distressed properties, buy them, fix them up, you know, and  
16 flip them and resell them. In terms of the gross sales, in  
17 2004, he had reported \$401,954, in 2001 \$144,400 in gross, and  
18 in 1999, 286,000 in gross sales in those years. But of  
19 course, that doesn't reflect his income. But it does show,  
20 you know, a fair amount of activity that he was doing to  
21 generate income.

22 MR. BAKER: Okay. Your Honor, can I approach the bench,  
23 please?

24 THE COURT: Sure.

25 MR. BAKER: I've given Mr. Ward some charts for Mr.

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1 Dinneen and let me just make sure that --

2 THE COURT: Thank you.

3 MR. BAKER: We will refer to those charts in a little  
4 bit.

5 MR. WARD: I'll object to these. I'll put it on the  
6 record, whenever Your Honor pleases.

7 MR. BAKER: Okay. Another thing is, at least for now,  
8 Your Honor, until foundation is made merely for demonstrative  
9 purposes, the same as if he had walked up in front of a jury  
10 and drawn charts on - on the board.

11 THE COURT: Okay. There's not a motion to admit this  
12 item yet.

13 MR. BAKER: I'm sorry, Your Honor?

14 THE COURT: There's not a motion to admit this item yet,  
15 Mr. Ward.

16 MR. WARD: Right. That's why I wanted to get up and say  
17 I'll make a motion at the appropriate time.

18 THE COURT: Sure.

19 BY MR. BAKER:

20 Q And by the way, was information on some of these  
21 charts information gotten from most of this trial, trial  
22 testimony?

23 A Relating to the exhibits?

24 Q Yes.

25 A Yes.

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1 Q And you used the information that you found in the  
2 course of the trial to, not manufacture, but to produce these  
3 charts?

4 A Some of them, yes. The ones dealing with the cost  
5 of medicines and the cost of the spine stimulator. That was  
6 information from the trial. The lost earnings charts are --  
7 one of them is identical to what's in my report, and then one  
8 is generated based upon some of the opinions of Dr. Schifini.

9 Q And more specifically, the one that speaks about  
10 table one statistical worklife expectancy -- that was produced  
11 with your report?

12 A Yes.

13 Q And the second, which would be table two return to  
14 work part time -- was that generated specifically from the  
15 trial testimony of Dr. Schifini related to that?

16 A Yes.

17 Q Now, you weren't given voluminous documents with  
18 respect to your calculations, were you?

19 A No.

20 Q So did you go to any outside sources to attempt to,  
21 for lack of a better word, fill the gaps?

22 A I did.

23 Q Could you explain to the judge the methodology that  
24 you employed in calculating an average with respect to Enrique  
25 Rodriguez?

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1           A     Sure. First, from the period of 1999 to 2004, I  
2 only had three tax returns. For 2003, 2002 and 2000, I didn't  
3 have any tax returns or reported income in those years. The  
4 reported business income in 2004, where he had the 400 in  
5 gross sales, the reported income was 208,000. Then, where he  
6 had the 144,000 in 2001, the reported income was 1,748. And  
7 where he had the 286, 286,000 in gross sales in '99, the  
8 reported income was 76,513. So quite a bit of variance in  
9 those numbers -- you know, I looked at the income as percent  
10 in different ways to try and analyze that income, to determine  
11 an annual earning capacity and what his skill set were.  
12 Earning capacity is, essentially, what a person's ability to  
13 generate income is in the labor market.

14                     There are a couple of authors that say earning  
15 capacity is the highest earnings that anybody is capable of  
16 earning. Yes. Roger Weddington Field [phonetic], in their  
17 writing -- and they're pretty prolific in their field --  
18 defined earning capacity as the highest ability that  
19 somebody's demonstrated. Other authors indicate that you've  
20 got to look at the skills, the labor market and what those  
21 skills are worth in determining earning capacity. And I did  
22 both. I looked at what Enrique had done. He did some of the  
23 repairing on these properties on his own. I would classify it  
24 as some of the easier repairing, you know, not major. And he  
25 was selective in picking properties that didn't need major

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1 repairing, medic repair, you know, to get them in a salable  
2 shape. But he had more skills than that, because he was  
3 finding the properties, identifying it, negotiating with  
4 lenders, you know, a variety of different things related to  
5 the buying and selling, as well as, you know, doing the work.  
6 So I looked at real estate sales. I looked at real estate  
7 broker. But he'd never been licensed in either one of those.

8 Q What are you looking at again?

9 A That's a good question, actually, that. We look at  
10 different databases to find out what earning capacity is. The  
11 one I predominantly use is one push by the Economic Research  
12 Institute, which uses surveys, not only from the Bureau of  
13 Labor and Statistics, but also private surveys. They're the  
14 company that the Fortune 50 and Fortune 500 go to if they  
15 decided they wanted to open an engineering company in Vegas.

16 They go to ERI to determine, you know, what are we  
17 going to have to pay for engineering, help and managers in Las  
18 Vegas. So it's a fairly widely used database. I decided not  
19 to use the ones related to real estate because he never had a  
20 real estate license or a broker's license. I ultimately  
21 looked at handyman, and thought that was a reasonable  
22 consideration. And I also looked at the Department of Labor  
23 statistics, agency education to see what the average earnings  
24 for a man at his educational level would be. And I looked at  
25 all those, and eventually decided to take the average of the

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1 three years of earnings that I had over a six year period. So  
2 I treated three years as zero earnings.

3 Q Meaning that when you did an average over six years,  
4 for those years not reporting any income, you averaged in as  
5 zero?

6 A Yes. I divided the total, essentially the total for  
7 the three years, I divided by six -- may be a simpler way to  
8 say that. And eventually, I decided to use that figure.  
9 Handyman was about 35,000 a year, 35,000 and change. I find  
10 that exact figure for --

11 Q That was through the database?

12 A That was the ERI database. Right. The average  
13 earnings by education for a person of his age, according to  
14 the Bureau of Labor and Statistics, was about 55,000. And  
15 averaging his actual earnings over the six year period was  
16 about 47,000. And ultimately, I looked at that and said that  
17 looks to me to be the most reasonable figure to use. I was  
18 hesitant to use handyman because it discounts a significant  
19 area that he had skills in, and I was hesitant to use real  
20 estate broker and real estate agent. They were higher, but  
21 seeing that he was never licensed, I didn't think that that  
22 would be an appropriate figure to use. And there is no data  
23 on house flippers, in terms of what their earning capacity is.  
24 It simply doesn't exist. The Bureau of Labor and Statistics  
25 doesn't collect it, and ERI doesn't collect it. It's probably

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1 just too small and too diverse a database for anybody to try  
2 and collect that data.

3 Q Okay. And just so I'm sure I'm not getting  
4 confused, is it fair to say that you've used three bases for  
5 determining his earning capacity, one being the tax records,  
6 the second being the ERI database and the third BOL  
7 statistics?

8 A Correct.

9 Q Is that fair?

10 A Yes.

11 Q And when you did the average with respect to his  
12 taxable income that you saw on the tax forms, how did it fall  
13 with respect to the ERI database and the BOL statistics for  
14 people of his age, experience and education?

15 A Well, it was higher than handyman, which I felt was  
16 appropriate. It was lower than the average earnings of  
17 individuals of his age, which I also felt was appropriate  
18 because of those periods of time where there weren't reported  
19 work. And it was substantially lower than real estate brokers  
20 and real estate salespeople. But again, he didn't fit in  
21 totally to those categories. So I felt that using the actual  
22 earnings that were reported as income from his business  
23 activity, over a six year period, would be a reasonable  
24 approximation of what his annual earnings ability would be.

25 Q Is it an accepted methodology in forensic economics

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1 to test empirical data against statistical means such as the  
2 ERI database and the BOL information?

3 A Yes.

4 Q And is that what you did in this case?

5 A Yes.

6 Q And didn't the number fall right into the mean?

7 A Yes. Excluding the real estate broker and real  
8 estate salespeople, it's probably a little bit above the  
9 35,000, 55,000, 47s. So it's a little bit above what the mean  
10 between those three figures would be.

11 Q So in a scientific methodology, does that show an  
12 acceptable projection of the amount?

13 A I believe it does. Yes.

14 Q Is that within a reasonable degree of professional  
15 probability?

16 A It is.

17 Q Now, on table one, you set up a statistical worklife  
18 expectancy. But before we get to that, when you were talking  
19 about the Fields and Woods definition, you could have actually  
20 selected the 208,000 he made in one year and used that as his  
21 earning capacity?

22 A Yes.

23 Q That would have been a little bit too cute, though,  
24 wouldn't it?

25 A I don't know if I would classify it as too cute.

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1 Given the significant variance in earning capacity here, I  
2 mean, there have been countless times when I've used the year  
3 before an injury -- earnings, to be demonstrative of earning  
4 capacity. You know, in this case, I didn't think it would be  
5 demonstrative because we had such huge variability in terms of  
6 income. Little closer range in the gross income, but from  
7 1,700 to 200,000 in his actual reported business income, you  
8 know, a huge range. So I didn't feel that using the 2008 from  
9 2004, the year before he got injured, would be reflective of  
10 what his future earnings ability would be, albeit there are  
11 authors that say that's the best figure to use. And at times,  
12 I've certainly agreed with that. The last year before an  
13 injury is a good figure to use to establish earning capacity.

14 Q And before you go through the chart with the Court,  
15 you've dealt with people who flip real estate before?

16 A Yes.

17 Q And is this variance in income unusual to you in  
18 that industry?

19 A No.

20 Q -- characterized

21 A The variances are huge.

22 Q Okay. Well, why don't you take the judge through  
23 your chart.

24 A Certainly.

25 Q And for the record, we're looking at table one,

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1 statistical worklife expectancy.

2 A Yes.

3 Q The top part of the chart just identifies  
4 Mr. Rodriguez, his date of birth, the date that he was  
5 injured, his age of -- his age at injury, which was 41.36  
6 years, and his worklife at injury. Now, I use a statistical  
7 worklife table that was published in the Journal of Legal  
8 Economics in 2001. It's the most widely used worklife  
9 expectancy table in our field. And essentially, what  
10 statistical worklife expectancy means is that we're going to  
11 look at the probability that a person may pass away before  
12 they leave the labor market, that they may be unemployed due  
13 to economic downturns, that there may be a reason that  
14 somebody would relocated, wife gets a job and the husband has  
15 to move to, you know, a different community. Those types of  
16 factors are taken into the development of those tables. You  
17 know, so when you find a person in their 40s and you look at  
18 their statistical worklife, and you add it to age 61, you  
19 shouldn't look at age 61 and think that's the exact age at  
20 which he would leave the market. You should look at the 19.86  
21 years, and that would be the number of years that he would be  
22 expected to work before he left the labor market. But to  
23 calculate the value, we add the two together. So it's a way  
24 that we account for all of those variables that could have  
25 impacted a person. Now, there are other ways to do it. This

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1 is the predominant way that most forensic economists do this.  
2 You can carry the calculation out to 100 year by year, and  
3 calculate the probability of employment, and the probability  
4 of death, you know, each year out to age 100, because at the  
5 life expectancy tables -- will go out to that age.

6 The product of the calculation, generally, though,  
7 is not -- the reason I mentioned that, I read the -- Thomas  
8 Cargill's report and his method is the method of calculating  
9 out to 100. His age on 6/30/2010, which was 46.96 years. The  
10 reason that that date is important is, we always have to  
11 select a date where we're going to stop the past losses and  
12 start calculating the future losses. And that was the date  
13 that I did the original report. And then, his life expectancy  
14 of 7804 -- going down to the next column, I began calculating  
15 his losses on 1/1 of '05. And I selected that date because in  
16 2004, he had 208,000 in earnings.

17 And I looked at that and said, you know, it doesn't  
18 really make sense with that high an earnings year, given his  
19 earnings pattern, to assign a loss from the original date he  
20 was hurt, as often we do. You know, and bring it forward I  
21 thought it made much more sense to start the loss in January  
22 of '05 due to the high number in my report.

23 So in '05, we have \$49,293. That's bringing out  
24 \$47,000 forward by the employment cost index. Employment cost  
25 index is a United States Department of Labor statistic that

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1 shows how much wages go up each year. So we're allowing for  
2 an increase in wages. And in these years, it was running  
3 right around 3 percent. The same thing for --

4 Q It's basically COLA?

5 A Yes. It's COLA, but it also has a productivity  
6 factor, you know, because it is based upon reported wage  
7 earning. So the '06, the 59,920 is again using the Employment  
8 Cost Index to bring it forward. You know, the '07, the  
9 52,702, in '08, the 53,967. And now, in 2009 and 2010, we're  
10 getting down to under 2 percent, about 1.5 percent. Wages  
11 started growing at a slower rate, as we've been in this  
12 recession.

13 Q Did you calculate for that?

14 A I did. And adjusting for that, and then through the  
15 first six months of 2010, it gives you \$289,111 in past  
16 losses.

17 Q You brought it forward to November. Would that be  
18 approximately another 20,000?

19 A Yeah. Well, it's really -- the November period is  
20 really accounted for at this point in a future loss. And it  
21 would make a small difference to bring it forward to --

22 Q Okay so, the difference from June to now is taken  
23 out in the future wage loss calculation.

24 A It is, in this. It is.

25 Q And what is your calculation as to the total past

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1 losses that Enrique Rodriguez suffered?

2 A 289,111.

3 Q And that's your opinion to a reasonable degree of  
4 professional probability?

5 A It is.

6 Q Let's talk about -- and it's really too sad to see  
7 how present value is working these days, but I think that the  
8 Court's not even going to have to hear present value anytime  
9 soon, because -- but would you explain to Her Honor the  
10 technology with respect to calculating future earnings?

11 A Sure. In calculating future loss, Your Honor, you  
12 have to look at what wage increase is like during the future  
13 over a period of time. In this case, approximately 15 years  
14 or so. You know, there are a variety of different ways that  
15 you can look at it. There are forecasted growth rates that  
16 you can look at from the Department of Labor.

17 Q Before you start your discounting discussion,  
18 though, is the number that you used as a total future loss  
19 before discounting simply applying the average income loss per  
20 year and projecting that into the future?

21 A It is. But it's both grown and discounted to  
22 present value, so the number that you have under the present  
23 value calc -- shows those figures in present value.

24 Q Okay sorry for interrupting, discuss --

25 A So you know, the -- when I did this, the current

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1 employment cost index was 1.7 percent. And it's since moved  
2 up very slightly to 1.9. So we're increasing his income by  
3 what the current employment cost index is. One of the reasons  
4 I used current rates deals with discount rates. And back in  
5 June, the rates that we used to discount by were subtracting a  
6 value to represent interest that could be earned, with the  
7 rates of return on five, ten and 30 year United States  
8 treasuries.

9           We use treasuries because they're a very safe  
10 investment. We know that hopefully, the United States  
11 government is going to be there to pay the interest on those  
12 treasuries. We use current rates because when an award is  
13 made -- and there's case law that speaks to this, it's  
14 invested at a point in time, at the current available rates,  
15 not at a forecasted rate, not at a historical average rate,  
16 but at the rate that is then currently available.

17           Dr. Cargill and I disagree on that. I couldn't  
18 glean from his current report exactly where he was right now  
19 with discount rates. In the past, he's used a historical  
20 average which has been around 6 percent, to discount buy. And  
21 you can't, by argument with him -- and I'm sure he'll tell you  
22 his arguments with me -- is that you can't discount by 6  
23 percent when you can't go into a bank and get 6 percent on  
24 your interest. If you're going to discount by a factor that  
25 reasonable approximates what a person can get in interest,

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1 have a valid figure. So anyway, we're using current rates in  
2 June of this year. That yielded the present value of the  
3 \$679,723 of the future lost income. And referring to the  
4 bottom of the chart, add those two together -- the \$968,834.  
5 That's the combination of the past losses plus the present  
6 value of losses over the statistical period that he would be  
7 expected to work.

8 Q And what was your calculation across --

9 MR. WARD: Your Honor, I would object and move to strike  
10 the colloquy about his discussions with Mr. Cargill as  
11 Dr. Cargill is not being responsive to the question.

12 THE COURT: Is -- are you intending to call Dr. Cargill?

13 MR. WARD: I am.

14 THE COURT: Overruled.

15 BY MR. BAKER:

16 Q What was your calculation of his future losses,  
17 discounted to present dollar value after interest?

18 A The 679,723.

19 Q And is it your opinion to a reasonable degree of  
20 professional probability that that is the present value of his  
21 future losses?

22 A It is.

23 Q And when you total the past losses and the future  
24 losses, the discounted future losses, what were the total  
25 losses in this case, in terms of his economic loss of

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1 opportunity?

2 A That's the \$968,834.

3 Q And is that your opinion to a reasonable degree of  
4 professional probability?

5 A It is.

6 MR. BAKER: Your Honor, this report was submitted with  
7 his original report and was -- counsel a long, long time ago.  
8 I move to have it admitted as our last one.

9 THE COURT: Any objection?

10 MR. WARD: Is this table one?

11 MR. BAKER: Table one.

12 MR. WARD: Yes. I object to it as not being provided at  
13 the time the witness was deposed.

14 THE COURT: What? I thought Mr. Baker just said you were  
15 provided this document long time ago.

16 MR. WARD: But it --

17 MR. BAKER: Your Honor, is this your original report?

18 THE WITNESS: Yes. This is just taken out of my original  
19 report that we had at the time of my deposition.

20 MR. WARD: Okay. Then I withdraw my objection.

21 THE COURT: Very well. It will be admitted next in  
22 order.

23 THE CLERK: Number 78.

24 [Plaintiff's Exhibit 78 Received]

25 BY MR. BAKER:

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1 Q Could you refer to the next table, please? Now, you  
2 were provided, which is table two, to work part time?

3 A Yes.

4 Q You were provided with Dr. Schifini's trial  
5 testimony. Is that correct?

6 A I was.

7 Q And you say, basically, me trying like heck to get a  
8 spinal cord stimulator for Enrique. Is that fair to say?

9 A Yes.

10 Q And Dr. Schifini commented that perhaps, with the  
11 spinal cord stimulator, the reduction in his knee pain, even  
12 given some of the lumbar problems that you have in the  
13 medications and beyond, that perhaps, you could do some  
14 part-time work and referred to a vocational rehabilitation  
15 expert?

16 A Yes.

17 Q Okay. And that's you, isn't it?

18 A Yes.

19 Q Okay. Did you do a calculation with respect to the  
20 possibility that he would be returned?

21 A I did, because Dr. Schifini was -- I didn't see him  
22 testify. I just read his testimony. But he seemed pretty  
23 clear in his testimony, that with a spine stimulator, there  
24 would be a reduction in pain medication, as well as a  
25 reduction in pain. So things like stamina, the ability to do

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1 something, should improve. Then if that's going to happen, so  
2 I arbitrarily looked at that and said, okay. He's got the  
3 spine stim that's got to come in. There's the adjustments  
4 that he's got to go through with the various devices over the  
5 first year, you know. And I said, well, let's just say in  
6 three years, that the spine stim has been able to reduce his  
7 pain level, and subsequently reduce his medication at that  
8 point. You could do part-time activity. So what this shows,  
9 if I can call your attention to just the future losses, past  
10 losses stay the same.

11 Q Can I ask you about that for just a second? You're  
12 not testifying as to medical probability of returning to the  
13 work force. Is that fair to say? You're just saying that if  
14 the Court finds that he can return to the workforce, you would  
15 give him some direction as to what his anticipated losses  
16 would be?

17 A Yes. So you know, so this would assume that he has  
18 three years of continuing medical treatment where he can't  
19 work. And at the end of that three years, he goes back to  
20 work but earns half of what he used to. And then, that  
21 continues over the remainder of his worklife expectancy. So  
22 it reduces the loss because now, we're saying there's going to  
23 be income in the future. And that reduced the future loss  
24 from 679,723 to 422,592, if he is able to return to work as a  
25 result of the intervention with a spine stimulator.

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1 Q So in the event he's able to return to work on a  
2 part-time basis, his past losses would be the same. is that  
3 fair to say?

4 A Yes.

5 Q And his future losses for 422,592?

6 A Yes.

7 Q Losses at 711,703?

8 A Yes.

9 Q And that's your opinion to a reasonable degree of  
10 professional probability?

11 A Yes. If the spine stim is successful.

12 Q And the information gathered on this chart was  
13 believed from your reading of Dr. Schifini's trial testimony  
14 in this matter?

15 A Yes.

16 MR. BAKER: I move to admit table two, Your Honor.

17 THE COURT: Any objection?

18 MR. WARD: No, Your Honor.

19 THE COURT: Table two will be admitted next in order,  
20 Mr. Baker.

21 MR. BAKER: Thank you.

22 [Plaintiff's Exhibit 79 Received]

23 BY MR. BAKER:

24 Q Have we discussed all your opinions with respect to  
25 past and future wage loss?

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1 A We have.

2 Q Now, you also went through Dr. Schifini's trial  
3 testimony and gleaned from that, some future medical losses  
4 that he testified to a reasonable degree of medical  
5 probability that Enrique Rodriguez would incur?

6 A Yes.

7 Q And is that continued on future medical care cost,  
8 table A?

9 A It's the one where it's Dr. Schifini's trial  
10 testimony. I just want to make sure we're on the same one.  
11 We have the --

12 MR. BAKER: I apologize. Can I approach, Your Honor?

13 THE COURT: Sure.

14 BY MR. BAKER:

15 Q Is that what I'm looking at?

16 A That's the spine stim. Sorry. I was looking --

17 Q Why don't we start with the spine stimulator?

18 A Uh-huh.

19 Q And if you could take the judge through your  
20 opinions, please?

21 MR. WARD: And may I object, Your Honor?

22 THE COURT: Sure.

23 MR. WARD: There have been all kinds of numbers that have  
24 been bandied about in this Court that were never provided  
25 before this trial started. The -- this witness was deposed a

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1 month ago and was asked about his opinions, and opinions on  
2 this topic were not offered. He was asked if he was going to  
3 have additional opinions, that we would like to have them so  
4 that we could do further deposition. In addition to which,  
5 when I asked him about the issues of the life care plan, which  
6 is what this is a part of, his answer at page 86 was, "I would  
7 leave the medical issues to Kathy Hartman (Phonetic) in  
8 relation to the life care plan. She makes various  
9 recommendations within the life care planning area. There are  
10 those opinions contained in her report, and I would not  
11 respond to these." So I've had no opportunity, nor has this  
12 witness been qualified as a life care planner. And he is  
13 testifying or will be testifying as to items that the doctor  
14 sat, from the witness stand, and offered testimony that we'd  
15 never heard before about -- maybe it's going to cost something  
16 about this. And now, it's being transmitted into a life care  
17 plan. And I object for all of those various reasons.

18 THE COURT: Okay. Mr. Baker?

19 MR. BAKER: Your Honor, first, none of the doctors in the  
20 case were deposed, so if you want to find out their opinion,  
21 you would probably ask them, wouldn't you?

22 Second of all, I am not -- this is not, as counsel  
23 said, anything that was continued in the life care plan. This  
24 is simply outside the life care plan. He testified,  
25 Dr. Schifini, from the stand, over objection. And that

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1 testimony was found by the Court.

2           And third, I know the Court knows, but I'd like to  
3 respectfully point out that N.R.S. 50.285 says, "The facts or  
4 data in a particular case upon which an expert bases an  
5 opinion or inference, may be those perceived or made known to  
6 him at or before the hearing." And I would just ask the Court  
7 to not let him use that. So on the basis that the doctor was  
8 never deposed, you can't claim any sort of surprise. These  
9 opinions were all by Dr. Schifini. They do not fall within  
10 the life care plan. Schifini never said that he wasn't going  
11 to testify with respect to that. And N.R.S. 50.285 very  
12 specifically allows him to come to opinions for things he's  
13 heard at the hearing.

14           MR. WARD: And the doctors were not deposed because there  
15 was a life care plan stating what all of the future medical  
16 expenses would be for this plaintiff.

17           THE COURT: Well, you know, frankly, I guess you take  
18 your chances if you don't depose a witness, and then you don't  
19 know what he's going to testify at trial. But that's beside  
20 the point. With respect to your objection, it's my  
21 understanding that these pages have to do with testimony that  
22 Dr. Schifini gave in court the other day. Is that right,  
23 Mr. Baker?

24           MR. BAKER: And only those.

25           THE COURT: So objection is noted for the record.

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1 Overruled.

2 BY MR. BAKER:

3 Q Would you please take the Court through, really, all  
4 you're doing here is you're discounting numbers put into  
5 evidence by Dr. Schifini. Is that fair to say?

6 A Yes.

7 Q And again, we're not speaking about any issues of  
8 causation or otherwise. It's a mathematical calculation?

9 A That's correct.

10 Q Could you please take the Court through?

11 A Sure. What I did, Your Honor, is I went through  
12 Dr. Schifini's trial testimony in relation to where he placed  
13 the cost for various things, and also what we refer to as  
14 periodicity, which means when is it going to happen, and  
15 calculated the present value based upon those. There are a  
16 couple of minor differences in, you know, one area. He had --  
17 and I can find it here -- you know, he had a replacement  
18 period that would exceed life expectancy.

19 Q You said that he'd need four replacements --

20 A If we need four replacements every ten years, then  
21 you know, the last one would actually be after his statistical  
22 life expectancy. So I made that adjustment, feeling that I  
23 couldn't testify as an economist to an issue that  
24 statistically, would be after the probability of life. So --  
25 but that was really the only difference between this. Was the

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1 one that exceeded life expectancy. Other than that, I looked  
2 at what he said, what he said things cost, when he said they  
3 would happen, or how many times they would happen. And we  
4 calculated the present value of those based upon the item and  
5 when it would occur.

6 Q Okay.

7 A And in doing that, you know, if we take the first  
8 item, the original spinal cord stimulator --

9 Q Future medical cost, table A?

10 A Table A. Yeah. If I can draw Your Honor's  
11 attention to the total and the present value, they're the same  
12 in this chart because that's expected to occur within the next  
13 year. So there's really no reason to adjust that figure.  
14 Going down to the next item, the programming fees, four times  
15 during the first year after battery replacement, then every  
16 four years once thereafter. And you'll notice the total cost  
17 if 16,200. And the present value is 14,647. The footnotes  
18 that you'll notice, following that footnote three, tells you  
19 what we used to grow that by. And in this case, we used the  
20 medical consumer price index, professional fees which were 2.4  
21 percent, you know. So we're growing that at 2.4 percent. And  
22 the discount rates for footnote number 11 -- and those were  
23 footnote -- those were discount rates when I did this chart as  
24 of yesterday. Those were the rates on the treasuries that  
25 were quoted there, that we're discounting by. So the next

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1 item again is a replacement of the battery pack every four  
2 years, the 22,000, the total and present value, you know. If  
3 we can go to the third item, hospital fees --

4 Q Yeah. What's going on there?

5 A Yeah. This is what I want to draw everybody's  
6 attention to. You know, we have a total cost of \$70,000, but  
7 the present value of it goes up. If you look at the footnote,  
8 you'll see that hospital fees are increasing at 6.2 percent.  
9 And hospital fees, traditionally in the medical consumer price  
10 index, are way above inflation. It's one of the major areas  
11 of healthcare issues, because hospital fees are increasing so  
12 fast. Anything done in a hospital is tremendously expensive.  
13 and those costs go up every year. Unfortunately, you know,  
14 that rate of increase is higher than what you can get at the  
15 bank, in terms of interest. So it creates a higher present  
16 value because you're not earning enough interest to compensate  
17 for that high growth rate.

18 Q So you're actually back in time here?

19 A Yeah. And that's -- it is a issue with hospital  
20 fees. Most other things, you know, that we look at, you know,  
21 there's a discount to present value, a lesser area. But in  
22 hospital fees, you know, they are accelerating so fast and  
23 continue to accelerate so fast, that they're far outpacing  
24 interest. Another part of that is -- we have exceedingly low  
25 interest rates now, and with the Federal Reserve announcement

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1 that they're going to be buying more debt yesterday, those  
2 rates are going to be going down even further in the next year  
3 or two. What essentially happens is, the Federal Reserve goes  
4 to a bank and says, hey, we'll buy a bunch of your loans. We  
5 want these loans. And the bank says, fine. We'll sell them  
6 to you. And now, all of a sudden, the bank has more cash to  
7 lend out to the community because the Fed has bought those  
8 loans. And that drives interest rates down, in an attempt to  
9 stimulate the economy. This came out just yesterday and said  
10 that they're going to be buying up loans again. So that will  
11 further accelerate this trend, you know, at least in the short  
12 term.

13 Q You saw the stock market bottomed out, lost 180  
14 points in response to that, huh?

15 A Yeah. It was up 200 and something, you know, today,  
16 you know, as people are going -- are interested that you can  
17 get it so low. They're looking for higher rates of return  
18 value, going into stocks.

19 Q Have you finished your review of page one?

20 A I have.

21 Q Can you explain to the judge the contents of page  
22 two?

23 A Certainly. Page two, again, you know, the surgeon  
24 fees -- you can see that it's 122,000 discounted to present  
25 value. It's 96. The electrode replacement is 66,000

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1 discounted to present value. It's 53,000. The surgeon's  
2 fees, 60,000 -- discounted to present value, it's 49. And  
3 then, we're back to hospital fees related to the electrode  
4 replacement, which has a total of 210,000. And over this  
5 period of time, you know, the present value goes up to  
6 362,000, which is again an illustration of what's going on  
7 with hospital fees.

8 Q Which is an anomaly in discounted?

9 A In discounting, it is. It actually creates what's  
10 called a negative discount rate, which means interest is  
11 compounded because you're not getting enough interest to keep  
12 up with what the increase in hospital costs have been. And  
13 that's been a 20 year trend, that hospital costs have been  
14 increasing in this 5, 6 and 7 percent, sometimes as high as  
15 eight percent annually, range.

16 So it's the prime target, in terms of what's driving  
17 medical care costs, is hospital fees. You know, and we're  
18 even looking at physician fees and look at medical  
19 commodities. You'll see that it's a third of what hospital  
20 fees are increasing at.

21 Q So total costs are 829,200?

22 A That's the total cost. And then, the present value,  
23 you know, driven by the hospital fees, is \$959,227.

24 Q And the reason the present value is more than the  
25 total costs is exactly by the nature of what you just

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1 the present value of the income stream, Your Honor.

2 THE COURT: And this one is based on five, ten and 20  
3 year rates?

4 THE WITNESS: It is. And you know, starting -- and I  
5 don't remember the exact date. I should apologize for that.  
6 But it was, I think, September 1st, we decided to add to all  
7 of our calculations a 20 year, you know. We had been using,  
8 you know, a five, ten and thirty, you know. And it had been  
9 brought to my attention several times that that meant that  
10 everything from ten years on was at a 30 year rate, you know.  
11 And that was a reasonable criticism, you know. I felt that,  
12 you know, when we're calculating values over a longer period  
13 of time, using the 30 year rate for everything over ten, you  
14 know, is probably not a good thing.

15 And we started, September 1st, including a 20 year,  
16 so you'll find five, ten, 20 and 30. So you know, that was a  
17 difference that we made on all of our calculations going  
18 forward. So to an extent, you know, I've got one foot back  
19 the way we used to do it on the income loss. But that's a  
20 short period, remember.

21 That's, you know, only about 14 years. So I didn't  
22 feel the need to go back and remember to do that calculation  
23 because of this change in the methodology. Here, we're  
24 calculating the loss over about 30 years for medical  
25 treatment. And you know, there -- that certainly comes into

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1 play, but the other sharp object thought that. That's a very  
2 good question.

3 THE COURT: Well, you know, I just was trying to follow  
4 it, and math is not a strong suit for me. And I'm the first  
5 to admit it. So I guess my question really is, do you take  
6 those different figures and add them together, and then divide  
7 by three? Or how do you do that? Just --

8 THE WITNESS: No. For -- we try and keep it simple. You  
9 know, for the first five years, we use the five year rate of  
10 return. For years, you know, six through ten, we use the ten  
11 year.

12 THE COURT: I see. Okay.

13 THE WITNESS: For years 10 through 20, you know, we use  
14 the 20 year.

15 THE COURT: Okay.

16 THE WITNESS: And for years 20 to 30, we use the 30 year.  
17 When we looked at this change, you know, we also looked at --  
18 maybe we ought to go one, two, three, four, going yearly  
19 increments. And at some point, I may move to that. It  
20 depends upon how narrow the yield curve gets on interest  
21 rates. And that's just -- the yield curve is just what's the  
22 difference between the three month note and the 30 year note,  
23 you know, to bring more accuracy, used in the ten year, that  
24 could go out, actually, in some cases, to 40 years, for people  
25 younger than Mr. Rodriguez. You know, it made sense that we

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1 not have that long a period of time, so we started including  
2 the formula.

3 THE COURT: I don't know, Mr. Baker, if you had any  
4 follow-up based on my questions, but I appreciate the  
5 clarification.

6 MR. BAKER: No, Your Honor. I'm just now confused as to  
7 why I move to object. Did I move to admit future medical care  
8 costs, table A, spinal cord stimulator, pages one and two?

9 THE WITNESS: I believe you did.

10 THE COURT: Yes.

11 MR. BAKER: And based on --

12 THE COURT: Yes. They were admitted over counsel's  
13 objection.

14 MR. BAKER: I don't know if this is a second copy of  
15 this. I'm confused. I'm sorry.

16 THE COURT: So this table A, future medical costs, is a  
17 two page document.

18 BY MR. BAKER:

19 Q Now, there's also a page for medical care costs,  
20 table B. Is that correct?

21 A Yeah. I don't believe we called it B. I think we  
22 left it I. But it's the drug and supply. Oh, B. Yep.  
23 You're right. Sorry. I'm getting ahead of myself here.

24 Q Okay. And is this copy -- that's okay. Is this  
25 document also generated off of trial testimony of

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1 Dr. Schifini?

2 A It is.

3 Q Okay. Could you -- I'd like to move this along just  
4 a little faster for the Court. So if you could just tell us  
5 what's present on this, it's the fusion, pre-fusion MRI for  
6 level district RAM and selective nerve repley injections, all  
7 selected by Dr. Schifini. Is that right?

8 A Yeah. On this one, you know, these items that he  
9 talked about, we couldn't put an exact period to, you know.  
10 He just says there are going to be future care needs, but he  
11 doesn't really come out clearly and say exactly when it's  
12 going to occur. And that creates a technical problem in  
13 calculating present value because if you know when something  
14 is going to occur in the future, then you can calculate that  
15 value to a certain degree. When you don't know, you have no  
16 way to calculate it. So I included this chart because he  
17 included -- Dr. Schifini included it in his testimony, as to  
18 things that were going to need to occur. But it's not  
19 calculated in present value. It's just simply added up,  
20 because I couldn't glean from his testimony where, in  
21 Mr. Rodriguez's future life, those events would happen.

22 Q So you provided a range?

23 A Well, the range was provided by Dr. Schifini, you  
24 know, because he said for example, in the total knee  
25 replacement, you know, he says one to two in lifetime. Okay?

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1 And that created a range because it might be one. You know --  
2 and if it's one, it's 103,000. If it's two, it's 207,000.

3 Q So you provided for the Court, the lowest, most  
4 estimated -- or highest, most estimated available from  
5 Dr. Schifini's testimony?

6 A I did.

7 Q And was the total range that you discussed \$432,540  
8 to \$686,392?

9 A It was.

10 Q And is that your opinion to a reasonable degree of  
11 professional probability?

12 A It is.

13 MR. BAKER: Move to admit, as next in order, future  
14 medical care costs, table B, Your Honor.

15 THE COURT: Mr. Ward?

16 MR. WARD: Your Honor, in addition to all the other  
17 objections that I have made, I would like to point out -- I  
18 would like to object on the basis that these figures are  
19 unspecific, that Dr. Schifini is not a surgeon who's going to  
20 do these kinds of surgeries, and I think there's a lack of  
21 foundation for the information that has provided -- I don't  
22 think Dr. Schifini gave, from the witness stand, \$103,752 for  
23 a knee replacement. The rest are all just general sort of  
24 numbers and I think there's a lack of foundation and a lack of  
25 specificity.

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1 MR. WARD: In addition to which, these are not previously  
2 disclosed.

3 THE COURT: Mr. Baker?

4 MR. BAKER: It's my simple argument, Your Honor,  
5 Dr. Schifini on the stand -- the Court with a sufficient  
6 foundation for his opinions. Mr. Dinneen has actually  
7 testified -- the Court no doubt noticed my collection of trial  
8 testimony with respect to the total knee replacement. That  
9 was the number I went over with Dr. Schifini from their life  
10 care plan.

11 THE COURT: Objection is noted for the record.  
12 Overruled. The item will be -- is this one page?

13 MR. BAKER: It's one page.

14 MR. WARD: It's one page.

15 THE COURT: Item is admitted, next in order.

16 [Plaintiff's Exhibit 81 Received]

17 BY MR. BAKER:

18 Q Dr. Schifini, trial testimony --

19 A Yes?

20 Q Is this what I went over with Dr. Schifini, certain  
21 medications that were contained in the life care plan?

22 A Yes.

23 Q And it's the total discounted to present dollar  
24 value?

25 A It is.

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1 Q \$199,119?

2 A It is.

3 Q And is that your opinion to a reasonable degree of  
4 professional probability?

5 A It is.

6 MR. BAKER: Okay. Your Honor, I would move to admit  
7 Dr. Schifini's trial testimony, table one, drugs and supplies.

8 THE COURT: That's a two page item. Right?

9 MR. BAKER: It is two pages.

10 THE COURT: Any objection, Mr. Ward?

11 MR. WARD: Yes. Object. Lack of foundation for these  
12 specific costs and in terms of how they were disclosed and  
13 what the amounts are.

14 THE COURT: Well, didn't Dr. Schifini give this testimony  
15 during the course of the trial?

16 MR. WARD: This information, the foundation for this  
17 information, was never laid.

18 THE COURT: I think you made a previous objection similar  
19 to that one at the time Dr. Schifini testified. Objections  
20 overruled, noted for the record. This item will come in. The  
21 Court notes it's two pages, Plaintiff's next in order.

22 [Plaintiff's Exhibit 82 Received]

23 BY MR. BAKER:

24 Q Have we gone over all the calculations?

25 A We have.

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1 Q I'd like to talk to you -- you reviewed  
2 Dr. Cargill's report?

3 A I did.

4 Q And did you note in Dr. Cargill's report, where he  
5 spoke about that, and Enrique would probably not make money as  
6 a real estate flipper because of the real estate market now?

7 A Yes. I saw that.

8 Q Do you agree with that?

9 A Well, first, Dr. Cargill has previously testified  
10 that he's not a vocational expert. Second, there are a wealth  
11 of skills that he has, absent this injury, that would be very  
12 useful in the labor market, not the least of which is, banks  
13 are hiring people like Enrique, and giving them 50 homes, go  
14 out and look at these homes, tell us which ones you think we  
15 should sell, which ones might, with minor repair, have an  
16 increase in value, which is right within his skillset. Plus,  
17 now there's probably more opportunity for flipping homes than  
18 there's ever been in the market. So first, I don't believe  
19 that Dr. Cargill has the skill set to evaluate vocational  
20 skills. Second, there -- if Enrique was able bodied -- I hate  
21 that term -- at this point, and able to resume his previous  
22 career, he could certainly look at, you know, these  
23 opportunities that are available with banks. There are some  
24 hedge funds that are attempting at this point to do the same  
25 thing. They're going to banks and saying, okay. You've got

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1 100 homes. We think we can buy them and make money out of  
2 them. We want to make a deal on those 100 homes. They're  
3 hiring people to then go out and look at the specific houses,  
4 to make sure that we've all seen the reports on these  
5 foreclosed homes. The toilets are gone. The sinks are gone.  
6 There's much damage. They've left the water running when they  
7 walked out, so nobody was there for two weeks. So everything,  
8 including the floor, is ruined. And so, they're hiring people  
9 to go out and take a look at houses, and saying, sell this  
10 one. Sell this one. Sell this one. This one needs a lot of  
11 repair, you know, and helping sort out those issues. So I  
12 think his skills are just fine in this tough market. I don't  
13 see a reason to reduce his earning capacity due to the current  
14 market.

15 Q And in fact, his skill set is exactly what's  
16 required to be successful in this market?

17 A Yes.

18 Q Are all of your opinion stated to a reasonable  
19 degree of professional probability?

20 A They are.

21 MR. BAKER: Your Honor, I pass the witness.

22 THE COURT: Very well. Mr. Ward?

23 MR. WARD: Your Honor, if I may take a moment to set up.

24 THE COURT: Sure. In fact, let's take a five minute  
25 break while you do that. Do we need it?

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1 MR. WARD: I don't need it. I'm just, you know --

2 THE COURT: Okay. Go ahead then.

3 MR. WARD: I'm concerned about getting done with the  
4 witness before the end of the day.

5 THE WITNESS: Mr. Ward, do you know about how much time  
6 you're going to have with me? Can you give me just a rough  
7 guess?

8 MR. WARD: It depends on your answers.

9 THE COURT: Then let's take a five minute break.

10 [Recess]

11 THE COURT: Okay. Everybody's back, it looks like. No.  
12 We'll round, if you need to, Mr. Baker.

13 MR. WARD: Are we ready?

14 THE COURT: I'm sorry? Ready when you are.

15 MR. WARD: Okay.

16 CROSS-EXAMINATION

17 BY MR. WARD:

18 Q Katherine Hartman -- who is Katherine Hartman?

19 A She's a nurse that does life care plans and works  
20 with us.

21 Q And how long have you been working with Katherine  
22 Hartman?

23 A Over ten years.

24 Q Okay. And she has more initials behind her name  
25 than just R.N., doesn't she?

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1 A Yes.

2 Q T.S.N.?

3 A Yes.

4 Q And C.C.N.?

5 A Yes.

6 Q And you've had occasion to work with her for ten  
7 plus years?

8 A Yes.

9 Q Fairly closely?

10 A Yes.

11 Q She know what she's doing?

12 A Yes.

13 Q She a competent life care planner?

14 A Yes.

15 Q Do you know what she does in doing life care plans?

16 A I have general knowledge of it, but I'm not a life  
17 care planner.

18 Q I understand you're not a life care planner, but you  
19 know what she does to do life care plans, don't you?

20 A In some areas, yes.

21 Q Okay. You know that she talks to doctors?

22 A Yes.

23 Q And you know she talks to hospitals?

24 A Yes.

25 Q And she talks to providers of equipment?

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1 A Yes.

2 Q And when she does a life care plan, I take it she  
3 wants to do it right?

4 A Yes.

5 Q And in your experience, she does it right?

6 A Yes.

7 Q And she knows what she's talking about?

8 A Yes.

9 Q Do you have an opinion as to whether she knows the  
10 difference between a stimulator battery and a Duracell  
11 battery?

12 A I do. I saw that in Dr. Schifini's testimony.

13 Q Well, he kind of maligned your partner, didn't he?

14 A Well, he didn't have very nice things to say about  
15 your life care planner, either. He didn't like either life  
16 care plan. But I do know the difference, you know, between  
17 those two.

18 Q Okay. Well, do you think Katherine Hartman knows  
19 the difference between these two?

20 A I believe she does.

21 Q Okay. Now, when I took your deposition, you gave me  
22 numbers from a life care plan. Isn't that correct?

23 A I did.

24 Q And what you did was took the life care plan that  
25 your partner, or that Ms. Hartman had prepared, and utilized

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1 that to come up with your numbers?

2 A Yes.

3 Q And you thought that her life care plan was correct.  
4 Right?

5 MR. BAKER: Objection, Your Honor.

6 THE COURT: I'm sorry?

7 MR. BAKER: He's not a life care planner. He can't  
8 testify to whether the contents of her life care plan, in  
9 terms of its actual contents, was correct or not correct.

10 THE COURT: Well, I'll ask you to rephrase. But I'd like  
11 some clarification because he keeps referring to Ms. Hartman  
12 as your partner. Is she your partner?

13 THE WITNESS: No, Your Honor. She's not.

14 MR. WARD: I tried to correct that because I realize I  
15 was making a mistake. What I'm not -- I'll correct that.

16 THE COURT: Okay.

17 MR. WARD: Perhaps I was using partner too loosely.

18 BY MR. WARD:

19 Q You work together?

20 A We do.

21 Q In the same place?

22 A Yes. At times.

23 Q In the same building?

24 A Well, you know, she does most of her work from her  
25 home. You know, but she is in our office, you know, three to

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1 four times a week because we do joint projects.

2 Q She has a desk at your own office?

3 A Yes.

4 Q And you have a desk at your own office?

5 A I do.

6 Q And you know who she is?

7 A I do.

8 Q And when you have projects like this, she does a  
9 life care plan?

10 A She does -- the contents of the life care plan are  
11 developed by her. My portion would be calculating the present  
12 value.

13 Q Correct. And you're retained -- your company is  
14 retained by attorneys, among other things, to do work for  
15 them. Correct?

16 A Yes.

17 Q And in this instance, your company was retained to  
18 prepare a life care plan and to price it, and to do a  
19 vocational rehabilitation, too?

20 A Yes.

21 Q And do present value calculations?

22 A Yes.

23 Q And you asked Ms. Hartman to do the life care plan  
24 portion of that?

25 A I don't remember if I asked her or the assignment

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1 came in that way, but she clearly did do a life care plan.

2 Q And you knew she was doing it?

3 A Yes.

4 Q And you wouldn't have her doing it for your company  
5 if you didn't think she knew what she was doing, would you?

6 A No.

7 Q And you thought, when you put the numbers to this,  
8 the present value to it, you thought that her numbers were  
9 accurate. Otherwise, you wouldn't have used them?

10 A Yes. That's correct.

11 Q Okay. Now, you looked at her life care plan to do  
12 your present value numbers. Isn't that correct?

13 A I did.

14 Q And when you testified, when I took your deposition,  
15 you had her -- a number of documents that related to her life  
16 care plan to price it. Correct?

17 A I did. You know, my hesitancy there was, in her  
18 deposition, there was another document, you know, that she  
19 produced, that we didn't do the present value calculations,  
20 you know, on.

21 Q Right.

22 A You know, but we did do the present value  
23 calculations on the life care plan that she produced in 2008.

24 Q Okay.

25 A So I get a little bit concerned, quantifying which

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1 document you're talking about.

2 Q Okay. Well, let me ask you this. You're -- you  
3 looked at the numbers that -- you looked at the numbers as  
4 they went down here?

5 A Is that the 2008 upper right-hand corner?

6 Q Yes. Yes.

7 A Yes.

8 MR. WARD: Okay. And I can approach the witness, Your  
9 Honor?

10 THE COURT: Sure. But could you tell me which document  
11 you're referring to, Mr. Ward?

12 MR. WARD: Yes. We're looking at -- I believe this comes  
13 from -- I'm sorry? 56. Document number 56.

14 THE COURT: Tell me what the name of the document is.

15 MR. WARD: It's life care plan.

16 THE COURT: The one that was just admitted through  
17 Plaintiff's?

18 MR. WARD: No. This one has not been admitted.

19 THE COURT: Okay. 56, you say?

20 MR. WARD: Yeah. I'm going to write up here the areas  
21 that I'm interested in, Your Honor, so that it'll be in front  
22 of you.

23 THE COURT: Okay. Thank you.

24 MR. WARD: Okay.

25 BY MR. WARD:

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1 Q Now, she has on page one of table A, surgeon  
2 Dr. Vayer [phonetic]. Do you see that?

3 MR. WARD: May I approach the witness, Your Honor?

4 THE COURT: Sure.

5 BY MR. WARD:

6 Q See that?

7 A Yes.

8 Q Okay. And what does she have with -- what is it she  
9 has that she talked to Dr. Vayer about?

10 A Well, without reading the narrative, you know,  
11 what's here is six additional with spine stimulator placement.  
12 And then, she has a CPT code, you know, and a 600-per-visit C  
13 table K for surgical consults, that the total cost was 3,600.  
14 And the present value at that time was 4,961.

15 Q Right. Right. What I just wanted was, and the  
16 reason I asked my question so specifically is, this was with  
17 respect to Dr. Vayer and the spinal cord stimulator. Isn't  
18 that correct?

19 A Yes.

20 Q And the cost that she has here for Dr. Vayer, to  
21 which she shows is going to be the one placing the spinal cord  
22 stimulator, you have the present value of \$2,961. Isn't that  
23 correct?

24 A Yes.

25 Q And the other entry, with respect to spinal cord

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1 stimulator in this document, appears on page 17, by --

2 THE COURT: Sure.

3 THE WITNESS: That's the trial. All right. I'm there.

4 ///

5 BY MR. WARD:

6 Q Okay. And that is spinal cord stimulator. Correct?

7 A Yes.

8 Q And you did the number calculations because the  
9 proposal here is for the next 32.77 years?

10 A Well, you know, the 32.77 is the remaining life  
11 expectancy. This was done in 2008. But if I can draw your  
12 attention to year initiated and year suspended, in looking at  
13 the present value and the total figures at that time, it was  
14 anticipated that that would be done within the next 12 months.  
15 Those figures are neither growing or discounted.

16 Q Okay. Well, this is -- but this says permanent, to  
17 be replaced by Dr. Vayer. Isn't that correct?

18 A Yes.

19 Q And it gives that there would be, down here, two  
20 times of the permanent. Correct?

21 A I would need to go back to K, you know, and see.

22 Q Yeah. I'm --

23 A I'm not sure what that two means.

24 Q I'm -- let's stay with me here for a moment.

25 A Certainly.

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1 Q Let's move to unit cost. It says permanent PE. It  
2 says, under frequency, it says permanent to be replaced by  
3 Dr. Vayer. Isn't that correct?

4 A Yes.

5 Q And then, it gives purpose. And then, under unit  
6 cost, it has perm, meaning I assume, permanent. Right?

7 A Again, I didn't -- the permanent or -- this is  
8 nothing that I would have done, you know. So I guess the  
9 short answer is, I would assume, from English, that it says  
10 what it says. But I didn't develop this, and would not  
11 necessarily testify --

12 Q Okay. It says perm, doesn't it?

13 A It does.

14 Q And then, after that, it has \$96,145(2)?

15 A Yes.

16 Q And if we multiply that, we come up, coincidentally,  
17 with 192,900 -- \$290.00?

18 A Yes.

19 Q And that happens to be the number that's in the next  
20 column?

21 A Yes.

22 Q And that's 192,290?

23 A Yes.

24 Q And then, under that, it has elec, E-L-E-C?

25 A Uh-huh.

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1 Q And you don't know, of course, whether that means  
2 electric, but you assume it does?

3 A I would assume it'd be electrode.

4 Q Electrode?

5 A Yeah.

6 Q Okay.

7 A But --

8 Q Electrode?

9 A -- again, you'd be, you know --

10 Q And it has a \$10,310?

11 A Yes.

12 Q And after that, it has five?

13 A Yes.

14 Q And that total is \$51,550. Isn't that correct?

15 A It is.

16 Q And under that, it has battery. Correct?

17 A Yes.

18 Q Okay. And battery's actually spelled out. Correct?

19 A It is.

20 Q So we know battery is battery. Right?

21 A Yes.

22 Q And battery is \$4,000. Isn't that correct?

23 A Yes.

24 Q And after battery, it has eight in parens. Isn't  
25 that right?

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1 A It does.

2 Q And eight times four is 32,000. Correct?

3 A It is.

4 Q And after that, it has remove?

5 A Yes.

6 Q And it has the \$9320, and after that it has open  
7 paren, two. Correct?

8 A Yes.

9 Q And coincidentally, if we multiply 9320 by two, we  
10 have \$18,640. Isn't that right?

11 A There's nothing else in this life care plan that  
12 makes any reference to any additional costs for the  
13 stimulator. Isn't that true?

14 A You know, I haven't read this life care plan. And  
15 my expertise would be responding to growth and discount rates  
16 and calculations.

17 Q Okay.

18 A You know, so I guess short of reading it, I am sure  
19 you wouldn't misrepresent it to me.

20 Q I would not. And so, if we totaled this, we would  
21 come up with about \$256,000 in round numbers, plus or minus  
22 1,000?

23 A No. I think it'd be more than that. I haven't  
24 totaled it, but just of 80, between the two, I think it'd be  
25 more around 180 -- or 280,000.

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1 Q Okay. Let's say --

2 A You know, but again --

3 Q Let's say 280,000.

4 A I can pull out a calculator and give you an accurate  
5 figure if you want me to.

6 Q Well, I actually don't because I'm concerned about  
7 the time, but --

8 A All right.

9 Q These are the numbers and they are whatever they  
10 are.

11 A Yes. That's correct.

12 Q And these are the actual numbers that came from the  
13 life care plan. Right?

14 A In 2008. Yes.

15 Q Right. And the numbers that were -- that you just  
16 testified to are dramatically higher than that, aren't they?

17 A Yes.

18 Q And you never saw those until a couple days ago.  
19 Right?

20 A No. I didn't see Dr. Schifini's numbers until I saw  
21 his testimony.

22 Q Okay. Now, this number also included, on that last  
23 page, right below that was the gastric bypass. Is that right?

24 A Yes.

25 Q And that says, cost includes surgeon fees,

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1 anesthesia, three day stay, assistant. And that's \$17,040?

2 A Yes.

3 Q Okay. Now, Doctor, is it Doctor?

4 A Me?

5 Q Yes.

6 A Mr.

7 Q Mister, I'm all screwed up. I'm calling you doctor  
8 and I'm calling Katherine Hartman your partner. And what's  
9 happening here? I don't care. Sit wherever you want. That's  
10 fine. You're not bothering me at all.

11 Q Now, tell me this, sir. The number that the  
12 phraseology that I think you have used is reasonable degree of  
13 professional responsibility -- probability. I'm sorry.  
14 Reasonable degree -- I got the ITYs mixed up. Reasonable  
15 degree of professional probability. Is that right?

16 A I don't think that's quite the way I would say it,  
17 but certainly, reasonable probability is a term that we use --

18 Q Okay.

19 A -- often, meaning that the probability is over 50  
20 percent.

21 Q Okay. And would you tell me -- the income of  
22 Mr. Rodriguez for the year 2004 is what?

23 A Well, the recorded business income from his activity  
24 was \$208,605.

25 Q Okay. And is that your opinion as to what the --

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1 his income was?

2 A That's my opinion as to what the reported business  
3 income on the tax return is.

4 Q Well, sorry. That's not my question. My question,  
5 sir is, is that your opinion as to what his income was?

6 A If that's the reported business income, yeah. Now,  
7 certainly, in the remainder of the --

8 Q That's not my question. My question, sir, is that  
9 your opinion as to what his income was to a reasonable degree  
10 of professional probability?

11 A It's -- I would testify to it as it's what his  
12 earnings were. Now, that business income goes through some  
13 adjustments in his tax returns, if that's what you're getting  
14 at.

15 Q What do you believe his net income to be for the  
16 year 2004?

17 A Well, the business income was the 208. The taxable  
18 reported income was 192. And the adjusted gross was 200.

19 Q That's for the calendar year, 2004?

20 A It is.

21 Q Okay. These three numbers are --

22 A That's the reported business income from the  
23 business.

24 Q Okay.

25 A And the gross that year was 400 and something, 401.

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1 Q 192?

2 A The 192 is the taxable income.

3 Q Okay.

4 A Okay.

5 Q And this first one, the gross income was income?

6 A That's business income.

7 Q Business income? Okay. So let's deal with the  
8 business income. Is it your opinion to a reasonable degree of  
9 professional probability that his business income, in the year  
10 2004, was \$208,000?

11 A If that's what's reported on the return, yes.

12 Q That's not my question. My question is, is it your  
13 opinion that that's what his income is, to a reasonable degree  
14 of professional responsibility?

15 A Sure. That's what the business income is.

16 Q Okay. When you say that's what the business income  
17 is, you used, in your direct examination, you used the term  
18 reported income?

19 A Yes.

20 Q Isn't it true that you don't know if any of this  
21 income was reported?

22 A I do know that it was reported.

23 Q Have you received additional information since I  
24 took your deposition --

25 A Yes.

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1 Q -- that you haven't told me about?

2 A I just received this. It's a letter dated October  
3 20th from the tax preparer, indicating that the returns were  
4 filed.

5 MR. WARD: Okay. I'd like to make that part of the  
6 record.

7 THE COURT: Do we need a copy of that, Mr. Dinneen?

8 THE WITNESS: I don't think we need to, Your Honor. You  
9 know, counsel provided it to me, so presumably, he has another  
10 copy. I can replace that in my file, just for expediency.

11 THE COURT: Very well.

12 MR. WARD: I'm sorry. But I'm not going to mark it?

13 THE COURT: Not?

14 MR. WARD: Not. Now --

15 THE COURT: I guess he's not going to move to admit it  
16 after all.

17 MR. WARD: I'm not going to move.

18 MR. BAKER: Okay.

19 BY MR. WARD:

20 Q Now, when your deposition was taken -- by the way,  
21 when does that say they were found?

22 A It doesn't. It just says -- it's short. I can read  
23 it.

24 Q No. That's okay.

25 A Okay.

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1 Q I just want to know if it says when they were filed.

2 A No. It just says that we reprepared and filed  
3 Enrique's tax -- Enrique Rodriguez tax returns for '99, '01  
4 and '04.

5 Q Okay.

6 A But it doesn't say when those were filed.

7 Q Right. And you have a tax return that's dated 2004,  
8 do you not?

9 A I do.

10 Q I mean, for the year 2004?

11 A Yes.

12 Q And when is it signed?

13 A You know, clearly, November of '09. And I can't  
14 make out whether that's a five or an eight. And I think we  
15 discussed a little bit of that, that those handwritten numbers  
16 were hard to read.

17 Q Okay. So it's November '09. Correct? I mean, of  
18 2009?

19 A Yes. November of 2009.

20 Q And you have a tax return for 2001. Is that  
21 correct?

22 A I do.

23 Q And when was it -- what was the date on it?

24 A Well, there's -- let me look a little farther. I'm  
25 looking at the first two pages. The tax preparer signed it

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1 11/8/04, and this is the '01 return.

2 Q So 2001 return is dated '04. Is that correct?

3 A Correct.

4 Q And there's a 1999 return?

5 A There is.

6 Q And when is that dated?

7 A That looks like 11/3 of '09.

8 Q Okay. Now, didn't you meet with Mr. Rodriguez in  
9 the year 2008?

10 A I did.

11 Q And didn't you ask him for information to evaluate  
12 his income?

13 A Yes.

14 Q And didn't you tell him that you would like to have  
15 tax returns from him?

16 A Tax returns is one of the items we look for.

17 Q And didn't you tell him you would like to have  
18 Social Security statements?

19 A The Social Securities and others. W-2s are another.

20 Q Okay. Now, I'd like to show you this document.

21 [Counsel confer]

22 MR. WARD: May I approach the witness, Your Honor?

23 THE COURT: Yes.

24 BY MR. WARD:

25 Q That is an exemplar. Can you tell me that he's an

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1 exemplar of what?

2 MR. BAKER: I'm just going to object to the foundation of  
3 that document, Your Honor. But I think I probably objected  
4 too soon, and see if he even knows what that is.

5 THE COURT: Let's wait and see if he does recognize it.

6 THE WITNESS: Sure. You know, this is a sample, you  
7 know, of a Social Security statement. It does -- it's not  
8 germane to Mr. Rodriguez.

9 BY MR. WARD:

10 Q I didn't suggest that it was.

11 A Okay.

12 Q That's a sample of a Social Security statement?

13 A It is.

14 Q I think it says Wanda Anywhere (Phonetic) or  
15 something in the name.

16 A Wanda Worker.

17 Q Wanda Worker.

18 MR. BAKER: I'll just continue to object to foundation,  
19 and the fact that that's not the type of document that the  
20 Court can take judicial notice of.

21 THE COURT: Noted for the record. Let's see where he  
22 goes with it, especially, given the witness's last statement.

23 MR. BAKER: Yes, Your Honor.

24 BY MR. WARD:

25 Q Okay. Now, you're aware that the Social Security

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1 Department sends out a similar kind of document each year.

2 Correct?

3 A Yes. You're supposed to get it four months before  
4 your birthday.

5 Q Right. To each person?

6 A Yes.

7 Q And when that document comes in, that shows income.

8 Correct?

9 A It shows the reported income through payroll tax  
10 withholding.

11 Q Well, it also shows reported income from  
12 self-employment tax, does it not?

13 A Not always. It depends upon how the self-employment  
14 tax is reported.

15 Q Is there a method in which one can get  
16 self-employment and/or Social Security tax payments from the  
17 federal government?

18 A You know, that I don't know. It depends on how the  
19 income is reported. Earned income, you know, from employment  
20 for example, if you hired me and I went to work for your law  
21 firm, you would pay me and produce a W-2. and out of those  
22 W-2 and quarterly reports, Social Security compiles this  
23 report. However, when you get into self-employment and  
24 business income, that's a different bailiwick in terms of the  
25 reporting of income to the Social Security Administration.

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1 Q Well, one has to pay self-employment tax, doesn't  
2 one?

3 A Depends on how the income is reported. Some  
4 business income is subject to self-employment tax. Some  
5 business income is not. And I do not put myself out as an  
6 expert in taxation.

7 Q Right. But you are -- you spent a long time  
8 affiliated with the Social Security Department, did you not?

9 A I did.

10 Q And you spent a lot of time evaluating tax returns,  
11 have you not?

12 A Looking at tax returns to determine income? Yes.

13 Q Right. And you hold yourself out as an expert in  
14 economics?

15 A Yes. In forensic economics.

16 Q Right. And you can look at a tax return and see  
17 whether the person who filed a tax return claimed to have paid  
18 self-employment tax, can't you?

19 A Yes.

20 Q And you've looked at these returns, and they have an  
21 allotment for self-employment tax, do they not?

22 A I was confused by exactly whether -- you know, I saw  
23 for example, in '04, it was about 67,000 that he paid in  
24 income tax. But I was confused by, and couldn't figure out if  
25 there was a separate -- it would be about 15 percent holding

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1 for the Social Security taxes in that return.

2 Q Well, isn't there a reference in the return to  
3 self-employment tax?

4 A Yeah. There is a reference. And it was \$16,486.

5 Q So according to the tax return, self-employment tax  
6 was paid?

7 A Yes.

8 Q So if self-employment tax was paid, self-employment  
9 tax and Social Security are essentially the same, aren't they?

10 A That should end up, eventually, in a Social Security  
11 report.

12 Q Right. So you would expect that that would appear  
13 in the Social Security statement that's mailed out every year  
14 to every person?

15 A Well, it would depend on -- this was filed 11/3 of  
16 '09. Usually, you know, they're a year behind. So that  
17 probably wouldn't have shown up until next year at some point.

18 Q Well, I'm not talking about any particular year,  
19 Mr. Dinneen. I'm talking about in general. You would  
20 expect --

21 A I'm sorry. I just misunderstood your question.

22 Q You would expect that, in general, that Social  
23 Security -- that self-employment taxes would appear on the  
24 Social Security statement. Correct?

25 A Yes. When the self-employment tax is listed, that

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1 usually does correspond to the Social Security report, but not  
2 always .

3 Q Right. And you don't know what Mr. Rodriguez's  
4 Social Security report says, do you?

5 A No. I've never seen one.

6 Q Because he's never given you one, has he?

7 A No. I've never seen one.

8 Q And you've asked for it, have you not?

9 A You know, I'm sure I probably did.

10 Q Right.

11 A Because I asked for all the list of earnings  
12 records, as I previously testified.

13 Q Right. You asked for it in 2008.

14 A Yes. For earnings records.

15 Q And that would be some sort of outside confirmation  
16 that, in fact, these taxes were paid, wouldn't it be?

17 A That the taxes -- would be outside confirmation that  
18 the taxes were paid? Yes.

19 Q Okay. And you never got that?

20 A No. I have not seen a Social Security report.

21 Q And are the return that you saw for the year 2004 --  
22 was actually done, or at least signed, a year after you asked  
23 for it. Correct?

24 A Yes.

25 Q You were asking for a return. At the time you asked

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1 for it, you were asking for a return that should have been  
2 prepared three years before. Correct?

3 A I wasn't asking for a return that should have been  
4 prepared for three years before. I was asking for earnings  
5 information. But clearly, there was a significant delay, you  
6 know, in the filing of this return.

7 Q If, in fact, it was filed?

8 A You know, the only -- if in fact it was filed? I  
9 mean, I don't -- all I have is the letter that I previously  
10 testified to.

11 Q Okay. And you don't know who wrote that letter?

12 A No. I don't know the individual personally or  
13 professionally.

14 Q And the letter, if the taxes were filed, that would  
15 call for a payment of taxes, would it not?

16 A It would.

17 Q And do you have -- did you get any sort of cancelled  
18 checks or anything, indicating that any of the taxes were  
19 paid?

20 A No.

21 Q How about for the year back in 1999? Did you get  
22 anything from that?

23 A No. All I have is the tax returns.

24 Q And how about from the year 2001? Did you get  
25 anything from that?

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1           A     You know, I misspoke. I have some other documents  
2 that relate to income, that are backup for the tax returns. I  
3 do not have, you know, any other documents such as from the  
4 Social Security Administration or, you know, that show how  
5 that income was reported.

6           Q     And I'm assuming you haven't gotten any additional  
7 documents to back up the tax returns since I took your  
8 deposition a month ago. Correct?

9           A     No. Other than the ones that we've discussed in my  
10 file, that are closing statements on houses, that type of  
11 thing. No.

12          Q     Yeah. Let me just talk about dates and make sure  
13 this is clear. I took your deposition a month ago, and you  
14 had certain financial information.

15          A     That's correct.

16          Q     And you haven't received anything new since then.  
17 Correct?

18          A     Other than the letter from the tax preparer, you  
19 know. No.

20          Q     The letter from the tax preparer doesn't have any  
21 financial information in it, does it?

22          A     It does not.

23          Q     Okay. And you took a look at the information that  
24 was provided for in the tax return. Correct?

25          A     I did.

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1 Q The income from the year 2004?

2 A Yes.

3 Q Now, what is it? Seventy-five percent of the income  
4 that you have looked at for the six year period all comes from  
5 the year 2004?

6 A I don't know that I ever broke it down as a  
7 percentage, but eyeballing it, you know, certainly the  
8 majority of it does. Yes.

9 Q Somewhere in the 70, 75, 80 percent -- somewhere in  
10 that general range?

11 A You know, I could figure it out.

12 Q It's okay.

13 A Okay.

14 Q Now, let's talk about the year 2004. Now, what is  
15 the income that year?

16 A Are you talking about the business gross income? Or  
17 are you talking about the business income? Or are you talking  
18 about the adjusted gross income?

19 Q Just tell me what you want to tell me and give me  
20 the number.

21 A Well, all right. The gross receipts, which is under  
22 income for the business, were 401,954. The --

23 Q Let's stop right there. Now, the gross receipts  
24 were 401?

25 A Correct.

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1 Q And you were provided with backup information  
2 relating to that. Is that correct?

3 A Some. Yes.

4 Q Okay. Now, Mr. Rodriguez has told us that he gave  
5 you all the information that needed to be done to make all the  
6 calculations from all these years.

7 MR. BAKER: Objection. Facts not in evidence.

8 THE COURT: Sustain the objection. Ask you to rephrase.

9 BY MR. WARD:

10 Q Did you ask Mr. Rodriguez for information to back up  
11 the claimed income?

12 A I don't remember.

13 Q You don't know whether that's what you asked him for  
14 when you met in 2008?

15 A In 2008, I was asking him for, you know, tax  
16 returns, W-2s, any documents that would show the income that  
17 he had in the preceding years. I don't recall if I asked him  
18 for actual back-up information to a tax return for that  
19 income. I rarely ask for that, so I think it was just  
20 provided to me. I don't think I asked for it.

21 Q Well, you took a look at the information. And how  
22 much back-up information did you get in terms of what the  
23 gross income was that you're --

24 A You know, without going through these documents,  
25 there were some years that there more than others. There were

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1 some --

2 Q I'm just talking 2004.

3 A Yeah. Yeah. Without going back and looking at  
4 those documents, and segregating them out by year, I don't  
5 remember what the amount of the closing statements were.  
6 There are various checks that were issued to Mr. Rodriguez,  
7 you know, in those years. And I didn't commit all of that to  
8 memory.

9 Q Well, I'm not asking you from memory. I'm asking  
10 you if you can tell me.

11 A Well, I can. It'll take me a while to do that. But  
12 -- because I have not segregated out the checks by year, you  
13 know, or the closing statements and attempted to assign them  
14 to a year. I took them to be representative of work activity.

15 MR. WARD: Well, I'd like to read from your deposition,  
16 from page 65. Your Honor, we have lodged an original of that  
17 deposition with the Court.

18 THE COURT: Are you moving to publish the deposition?

19 MR. WARD: I'm asking to -- I'm asking about what I'm  
20 going to read from his deposition. yes.

21 MR. BAKER: Is he just going to read from it?

22 THE COURT: Do you have a question for the witness?

23 MR. WARD: Yes. I have a question for the witness. I  
24 just asked a question of the witness about -- could he tell me  
25 the back-up information for the \$401,000 and I want -- and

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1 he's told me he can't do it. And so, I want to read from his  
2 deposition.

3 THE WITNESS: You know, that's not correct. I didn't --

4 THE COURT: Hold on. Wait a minute. He didn't say he  
5 couldn't do it. He said he could do it, but it would take a  
6 while. So think you need to follow up with another question  
7 before you simply read from his deposition.

8 MR. WARD: Okay.

9 BY MR. WARD:

10 Q Isn't it true that you told me, when we met a month  
11 ago, that you had totaled up his income, and it did not total  
12 the \$401,000 that was claimed?

13 A You know, to tell you the truth, I don't remember.  
14 It's not something I did in preparation for this. But I would  
15 suspect that to be an accurate statement, because my memory is  
16 that I didn't have back-up documents to -- that exactly  
17 equaled the gross income for any of the years.

18 Q Well, with respect to 2004, isn't it true that your  
19 back-up information only, instead of 401,000, only totaled  
20 166,000?

21 A That may be true. I didn't review that for my trial  
22 testimony today. I can tell you that it is clear that I do  
23 not have total back-up information that equals the amounts  
24 that are on the returns, in what I was provided with.

25 Q Okay. And in fact, the back-up information that you

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1 have is substantially less than what's claimed on the return.

2 Isn't that true?

3 A I would believe so. Yes.

4 Q Okay. And you didn't do any additional  
5 investigation to find out what the income was?

6 A I was told I had everything that was available to  
7 me. And that's the extent of it.

8 Q Okay. And what you had, what you had was available  
9 to you for the year 2004 -- was information that showed gross  
10 receipts of approximately 166,000. That would be \$166,058.  
11 Isn't that correct?

12 A Again, I don't remember those totals. But you know,  
13 I don't have any reason to dispute that the gross income,  
14 given the documents that I was provided with, does not equal,  
15 you know, the business gross income.

16 Q So can I use the number \$166,058 --

17 MR. BAKER: As what?

18 BY MR. WARD:

19 Q -- that you had back-up information for?

20 A Again, I will -- without going back and adding it  
21 all up, you know, I'll accept that figure as representative,  
22 but I haven't -- but again, I haven't added them up and  
23 totaled them for this trial appearance today.

24 MR. WARD: I would like to read from this witness's  
25 deposition, page 66, Your Honor.

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1 THE COURT: I don't know that this is the way to do it,  
2 but if it's not too long, I guess you can.

3 BY MR. WARD:

4 Q Page 66, line 24 through page 67, line 1. Question,  
5 \$166,058 -- and that would be the gross income that you are  
6 able to account for. Is that correct? Answer, yes. Does that  
7 refresh your recollection as to whether this is the gross  
8 income that you were able to account for in the year 2004?

9 A I assume it is. You know, again, I didn't revisit  
10 it, but had I had that total, or did I total it then, I would  
11 assume that would be correct.

12 Q Okay. And now, isn't it true that you didn't have  
13 anything that told you what the expenses were?

14 A There were no itemized expenses. You know, but I do  
15 have, for example, there's a cost of goods sold. This is a  
16 2001, of 169,717. I do not have any list of what that cost of  
17 goods sold was, so --

18 Q How about for 2004? Why don't we stick with 2004  
19 for now?

20 A I'm sorry. I am in 2004. Okay?

21 Q Okay. And so what was the cost of goods sold for  
22 2004?

23 A The cost of goods reported in the return was  
24 169,717. You know, but I don't have records of what that cost  
25 of goods sold was, either.

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1 Q And you don't have any information about that, other  
2 than --

3 A Other than what's in the return? No.

4 Q Okay. And now, the profit -- these are the sales of  
5 single family homes?

6 A I understand them to be for the most part. Yes.

7 Q Okay. And the home that he sold in 2004 was his own  
8 personal home, was it not?

9 A You know, that I don't know because it's not  
10 reported that way in this return.

11 Q Okay.

12 A And income tax was paid on the gross amount, which  
13 you know, in the sale of a personal residence, the income tax  
14 can be deferred. So it wasn't -- from what I can gather, it  
15 wasn't reported as a personal residence sale in this return.

16 Q You don't have any information on what income tax  
17 was actually paid, do you?

18 A Other than what's stated here, the 67,000, the  
19 15,000 and the self-employment tax and 50,000 in income tax --

20 Q Right.

21 A No. But I don't have a record of, say, a check that  
22 was made payable to the Internal Revenue Service.

23 Q You don't have any outside source that confirms what  
24 was actually paid, if that return was actually filed. Isn't  
25 that true?

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1 A That's true.

2 Q It would be relatively easy to get that, wouldn't  
3 it?

4 A I don't know.

5 Q You don't know?

6 A I don't. I generally, you know -- if I get tax  
7 returns, I get them from counsel. I have not gone  
8 independently to the IRS and tried to obtain tax returns that  
9 have been filed.

10 Q You're aware that the IRS has a provision that if  
11 you lost your tax return and you want to find it, that you can  
12 contact them and get a copy?

13 A Yes. I'm aware of that process.

14 Q If it was filed?

15 A If it was filed. Yes.

16 Q And you're aware that you can contact the Social  
17 Security Administration and get a copy of your Social  
18 Security/self-employment taxes that were paid, if they were  
19 paid?

20 A Yes.

21 Q And you understand that that's a relatively simple  
22 process?

23 A The Social Security is a relatively simple process.

24 Q Right.

25 A The IRS process, I would assume, is simple, but I've

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1 never done it.

2 Q Right. And you haven't seen either one of those?

3 A No. I haven't.

4 Q And you're looking at a return that is dated for  
5 the year 2004, and claims to have been prepared in the year  
6 2009. Is that right?

7 MR. BAKER: This is asked and answered, Your Honor.

8 THE COURT: Yeah. Sustained.

9 BY MR. WARD:

10 Q And so, you don't have anything that confirms any of  
11 these numbers that you have. Isn't that correct?

12 MR. BAKER: That's also asked and answered, Your Honor.

13 THE COURT: Sustained.

14 BY MR. WARD:

15 Q Well, let's go back to the -- let's go to the year  
16 2001. What the information that you have there in 2001 --  
17 when was that return signed?

18 A This --

19 Q When was it dated?

20 A This was dated 11/8 of '04.

21 Q Okay. And so, that was what? Three years after the  
22 time that it should have been filed?

23 A Yes.

24 Q Okay. And if you -- is that when you believe that  
25 was filed?

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1           A     You know, all I have is the statement that it was  
2     filed. You know, it's the same person, you know, that wrote  
3     the letter, that says it was filed. And that's 11/8/04. But  
4     I don't have any -- other than the letter, I don't have  
5     anything that proves that this was filed.

6           Q     Right. Okay. And the signature on there indicates  
7     that it was signed in the year 2004?

8           A     Correct.

9           Q     Which would be three years after -- two years, two  
10    years plus after it was due. Correct?

11          A     Yes.

12          Q     And for the back-up information for that year, what  
13    are -- what is the claim of the gross from the year 2001,  
14    business income?

15          A     The gross receipts were 144,400.

16          Q     Okay. Now, that relates to the sale of a property  
17    at 3404 North Fairfax Drive in San Bernardino. Isn't that  
18    correct?

19          A     You know, again, I'll accept it because I'm sure  
20    that you're telling me what's in my file. But without going  
21    and looking for it --

22          Q     I'm telling you what you told me very emphatically  
23    when I asked a question at your deposition.

24          A     Sure.

25          Q     You were able to answer it then, weren't you?

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1           A     You know, I don't remember and I don't have a copy  
2 of my deposition here. You know, so --

3           Q     You want me to read it to you?

4           A     No. I told you, I accept what you're saying as --

5           Q     Okay. So if he sold the property for \$144,400, you  
6 wouldn't expect that to be his income, would you?

7           A     No.

8           Q     No. His income would be less than that. Correct?

9           A     Yes.

10          Q     And so, to calculate that income, you'd have to know  
11 what he paid for that house?

12          A     Well, I took off of the return, you know, what the  
13 reported business income was, which was the 1,748 for that  
14 year. And again, he had cost of goods sold at 119, some  
15 maintenance and repair that are here. But I do not have,  
16 other than what's stated on the return, you know, the back-up  
17 information for that.

18          Q     So you have no back-up information whatsoever.  
19 Correct?

20          A     You know, again, I have probably -- I don't know --  
21 30 sheets, maybe more, of back-up information, but I didn't  
22 look at it in preparation for my trial appearance today. But  
23 the back-up information is clearly limited in relation to the  
24 tax returns.

25          Q     Okay. And to do an actual calculation of how much

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1 his income was, you'd have to know how much he paid for those  
2 houses?

3 A Well, I accepted the tax return as having reliable  
4 information in terms of what the business income was that  
5 year. I didn't attempt to go back and to assign, in any year  
6 that I had taxes for, what, you know, profit would be assigned  
7 to a particular house.

8 Q Okay. Now, the -- your file contains -- you have  
9 every job file here. Right?

10 A I do.

11 Q Okay. And it contains Bates number 140?

12 A You know, some of mine, I have Bates numbers on.  
13 Some, I don't. So if you could --

14 MR. WARD: Okay. May I approach the witness and show him  
15 this document?

16 THE COURT: Sure.

17 THE WITNESS: Do you want me to find that in my file and  
18 see if I have it? If you're representing to me that you got  
19 it when I gave my deposition, I'll accept that just to save  
20 time, you know.

21 BY MR. WARD:

22 Q No. I'll represent to you that it was taken out of  
23 your file, and you gave me your file at the deposition.

24 A No. That's fine.

25 Q And the Bates stamp says the Dinneen's job file.

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1 A Yes. It does.

2 Q That would be you.

3 A It would be.

4 Q Dinneen's job file number 40?

5 A 140. Yes.

6 Q 140? Okay. And does that show expenses with  
7 respect to that transaction?

8 A It does.

9 Q What are the expenses that it shows?

10 A It shows property taxes, home warranty, hazard  
11 disclosure, commissions, a payoff of a mortgage.

12 Q Okay.

13 A Title fees.

14 Q Right.

15 A Escrow fees, document prep fees, title insurance.

16 Q Right.

17 A A wire that was done, demand Investors Title Company  
18 and distributed to investors.

19 Q And who are the investors?

20 A I don't know.

21 Q Okay. It just says investors?

22 A Yes.

23 Q It doesn't say Enrique Rodriguez, does it?

24 A No. It just says to investors and proceeds due to  
25 seller.

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1 Q And where it says -- did you skip any of the  
2 expenses?

3 A I was going through them fairly fast. I probably  
4 missed a couple.

5 Q Well, I'm going to ask you to see those. Can you  
6 see back mortgage?

7 A I don't see back mortgage interest.

8 Q No? And since I gave you my copy, can I take a  
9 look?

10 A Sure.

11 Q The date of this document is when?

12 A 2/17/04.

13 Q And when it says mortgage interest there, does it  
14 give dates?

15 A It says, mortgage -- oh, I see what you're saying.  
16 It says mortgage interest from 12/1 of '03 to 3/1 of '04,  
17 \$8,750.25.

18 Q So that would be back mortgage interest, wouldn't  
19 it?

20 A I would assume so.

21 Q Right. And how much are the foreclosure fees?

22 A Foreclosure fees were 3,930.

23 Q Okay.

24 A I should probably say that correctly. 3,930.

25 Q Okay. So the foreclosure fees were about \$4,000 and

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1 the interest in arrears was about what?

2 A I'm sorry. I was just looking at this document.  
3 Interest in arrears? Well, the interest from 12/1 of '03 to  
4 3/1 of '04 was 8,750.

5 Q Okay. That's interest in arrears, isn't it? That's  
6 a common term that economists use, don't they?

7 A I don't know that economists use it, but it's a  
8 common term in real estate.

9 Q Okay. And you're familiar with real estate?

10 A To some degree, yes.

11 Q And that means interest that wasn't paid. Correct?

12 A I would assume it to be. Yes.

13 Q Okay. And now, you were told, I believe, that  
14 Mr. Rodriguez sold this house because the market was hot at  
15 that time. Is that right? Is that what you were told?

16 A I don't remember.

17 Q You don't remember him telling you that?

18 A Yeah. No. I don't have an independent recollection  
19 of that. It's possible he did.

20 Q Okay. And now, based on your experience with real  
21 estate investors -- you've dealt with real estate investors in  
22 the past, haven't you?

23 A Some. yes.

24 Q You've evaluated them for purposes of vocational  
25 rehabilitation?

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1 A Yes.

2 Q And does it bode well for a real estate investor to  
3 have a house foreclosed on?

4 MR. BAKER: Objection, Your Honor. Outside of the scope  
5 of his expertise and lack of foundation.

6 THE COURT: Sustained.

7 MR. WARD: May I voir dire the witness then?

8 THE COURT: Sure.

9 VOIR DIRE EXAMINATION

10 BY MR. WARD:

11 Q Do you not know about what it takes to be a real  
12 estate investor?

13 A You know, the real estate investors that I have  
14 worked with -- how can I describe this? They're -- generally  
15 have not been high income people. You know, and using the  
16 term real estate investor can include very sophisticated  
17 people that are involved in a lot of high end type of  
18 developments, so that term, I'm a little bit concerned about.  
19 Now, I think I can answer your question. And the issue of an  
20 individual's credit, you know, certainly can affect their  
21 ability at times to negotiate deals in real estate. And I  
22 think, you know, that's what you were getting at, ultimately.

23 Q Well, how about with respect to getting loans? Real  
24 estate investors, unless they have a potful of money  
25 somewhere, have to get financing, don't they?

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1           A     Yeah.  But in this -- in these years, lending was  
2 extremely liberal, you know.  And the ability to get loans in  
3 relation to income and past credit is not anywhere near what  
4 it is today.  So it was easier with individuals with a poorer  
5 credit history to buy houses, either for themselves or as  
6 investments, during those years.

7           Q     It would be a lot more difficult today.  Correct?

8           A     It would be more difficult today.

9           Q     So it would make it harder today to be a real estate  
10 investor, if you had a foreclosure or more on your record?

11          A     Depending upon how you were dealing with credit,  
12 yes.

13          Q     Okay.  And now --

14          A     Are we done with this?  I didn't --

15          Q     Sure.

16          A     I didn't want to mix it up with my stuff.

17          Q     How many hours a week did Mr. Rodriguez work as a  
18 real estate investor?

19          A     I don't know.  He didn't know when I talked to him,  
20 because some weeks, it was a lot and some weeks, it wasn't  
21 much.  It just varied, depending upon what he was doing.  So  
22 there is no record of the exact number of hours he worked in  
23 those years.

24          Q     Would it be accurate to say that you don't know  
25 whether he worked as much as 25 hours a year?

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1           A     I don't know the exact hours that he worked, whether  
2     -- I mean, I know from these tax returns, they do reflect work  
3     activity. But you know, the amount of hours he put in to  
4     generate that work activity is unknown.

5           Q     Work activity meaning the purchase and sale of real  
6     estate?

7           A     The purchase and sale of real estate. Yes.

8           Q     And you're aware, if this seller's closing statement  
9     on this property at 996 Dahlia Court was his personal  
10    residence, the income from the sale of his personal residence  
11    would not be predictive of how much he would earn in future  
12    years, would it?

13          A     I wouldn't consider the proceeds of a personal  
14    residence income unless for some reason, it was reported as  
15    income.

16          Q     Isn't it always reported as income?

17          A     Reported as income. Yeah. I think I said that  
18    poorly.

19          Q     Yeah.

20          A     You know, the gain on a personal residence, income  
21    tax can be deferred for up to two years, you know. So there  
22    are individuals who will move into a house, fix it up and then  
23    move again. And the cost of their labor is then reflected in  
24    the proceeds of the sale. And if they're flipping personal  
25    residences, it's difficult to figure out how much of the -- in

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1 that case, he had a \$74,000 distribution to him. What portion  
2 of that would be attributable to labor, and what portion of it  
3 would be attributable to appreciation --

4 Q So it would be less. It would be less than 74,000?

5 A The labor or the appreciation, yes.

6 Q Right. But do you consider, when someone -- you  
7 know a number of people who have sold personal residences and  
8 made money on it?

9 A Yes. Both long term and short term.

10 Q Okay. And is that predictive how much a person  
11 earns when they sell their personal residence -- is that  
12 predictive of how much they'll earn in the future as a real  
13 estate investor?

14 MR. BAKER: That's also asked and answered, Your Honor.

15 THE COURT: I think it was asked and answered.

16 Sustained.

17 BY MR. WARD:

18 Q You don't know of any income from the year 2004,  
19 other than from the sale of his personal residence. Isn't  
20 that true?

21 A Unless there's other documents in '04 in here, that  
22 would be true.

23 Q Okay. Now, you have come to the conclusion that he  
24 was determined to be disabled by the Social Security  
25 Administration?

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1           A     There's -- under their regulations, yes. But the  
2 disability determination starts with state employees in each  
3 state.

4           Q     Okay. Who was the hearing officer at the hearing  
5 that Mr. Rodriguez had?

6           A     They don't have hearing officers.

7           Q     Does anyone hear -- who makes the decision on  
8 disability?

9           A     Administrative law judges.

10          Q     Okay. Who was the administrative law judge who made  
11 the decision on Mr. Rodriguez's disability?

12          A     If his case went to an administrative law judge  
13 level, disability -- it starts out with disability  
14 adjudicators, you know. And it would be a disability  
15 adjudicator in the State of California. And there are two  
16 levels to that process. If the -- at the second level, if  
17 he's turned down, it then goes to the office of hearings and  
18 appeals within Social Security. And that's where the  
19 administrative law judges work. So it's a three step process.  
20 I do not have the records of the decision making that was done  
21 during that time. I have the record that states that he meets  
22 that definition of disability from Social Security, but I do  
23 not have the records of the decision process that was going  
24 through.

25          Q     And you don't know who made that decision. Isn't

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1 that true?

2 A I don't.

3 Q And you don't know how many levels of hearings he  
4 did or did not have?

5 A No. I don't.

6 Q And you don't know what Mr. Rodriguez said at those  
7 hearings?

8 A Other than there was a consultative exam that I was  
9 advised of, I do not. You know, I do not what went on in the  
10 intricacies or whether he had a hearing.

11 Q Well, you don't know what he said, if anything, do  
12 you?

13 A I don't even know if there was a hearing. So I  
14 don't know what he said if there was a hearing.

15 Q You don't know what he said to the Social Security  
16 Administration to get a disability rate. Is that correct?

17 A Well, first it's not a rating. It's a  
18 determination, you know. And I do not know what he said.  
19 There would have been a phone interview with a disability  
20 adjudicator at one point, maybe two. And then, after that, if  
21 there's a denial, you know, it eventually goes to the office  
22 of hearings and appeals. They can make a decision with or  
23 without a hearing, on the basis of the administrative law  
24 judge. All I know is, he was determined to meet that  
25 definition of disability. I do not know who made the

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1 decision, nor do I have documents as to who made the decision.

2 Q And you don't know what representations were made to  
3 get that decision?

4 A I don't. I don't know what was in his Social  
5 Security file.

6 Q And you didn't do a functional capacity evaluation  
7 for Mr. Rodriguez, did you?

8 A No. Voc rehab people do not do functional capacity  
9 evaluations. That's physical therapy or occupational therapy.

10 Q They're done by physical therapists or occupational  
11 therapists?

12 A They are.

13 Q And you didn't see one, did you?

14 A No. They have little probative value.

15 Q And you based Mr. Rodriguez's -- the conclusion that  
16 Mr. Rodriguez's disability -- based on, essentially, what he  
17 told you and what you read in the medical records. Correct?

18 A As well as the determination of the Social Security  
19 Administration. Yes.

20 Q Did you rely on the determination by the Social  
21 Security Administration?

22 A It was part of the information that I had.

23 Q Okay. So you did rely on that?

24 A Just as I relied on the medical records and the  
25 interview that I had with him.

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1 Q Okay. And you're not here to testify about  
2 causation. Isn't that true?

3 A That's exactly true.

4 Q So you don't know which, if any, of Mr. Rodriguez's  
5 physical conditions are related to an accident of November 22,  
6 2004?

7 A I don't. Well, I wouldn't make that decision.

8 Q You're not offering any opinion on causation?

9 A No.

10 Q And you're not doing a medical evaluation.

11 A No.

12 Q Correct?

13 A That's correct.

14 Q So when you say that if the patient has -- if the  
15 person being evaluated has RSD, you're not doing any of that  
16 based on your own interpretation of what people can or cannot  
17 do with RSD. Correct?

18 MR. BAKER: Your Honor, it's stipulated that he's not  
19 going to talk about causation.

20 MR. WARD: Okay.

21 THE COURT: Very well. Then let's move on.

22 MR. WARD: Your Honor, this witness testified about RSD  
23 and what his findings were.

24 MR. BAKER: Your Honor, he testified that one of the  
25 reasons he said he was disabled -- because he reviewed the

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1 medical records and saw that there was a finding of RSD.

2 MR. WARD: And he gave an opinion about what happens to  
3 people with RSD and why that makes them disabled.

4 MR. BAKER: What?

5 THE COURT: I don't recall that, but we seem to be pretty  
6 far afield. He's been designated as an expert in the area of  
7 economics.

8 MR. BAKER: And I asked him no questions about causation,  
9 Your Honor. So it's outside of the scope.

10 THE COURT: I didn't hear any. Sustain the objection.

11 BY MR. WARD:

12 Q Were you only offered as an expert in economics?

13 A I understood my assignment to be economics and  
14 vocational rehabilitation.

15 Q Economics and vocational rehabilitation?

16 A Yes.

17 Q So you were not offered as an expert just in  
18 economics?

19 A That's correct.

20 Q You were called as an expert in vocational  
21 rehabilitation?

22 A Yes.

23 Q And you consider yourself an expert in vocational  
24 rehabilitation?

25 A Yes.

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1 Q And a lot of other people consider you to be an  
2 expert in vocational rehabilitation?

3 A Hopefully.

4 Q And you're here to testify as an expert in  
5 vocational rehabilitation. Isn't that correct?

6 A Yes.

7 Q Okay. And is it correct, then, that none of your  
8 conclusions about the disability of this particular patient  
9 are based on your own medical opinions?

10 A No. I wouldn't offer an opinion as a physician or a  
11 physical therapist.

12 Q Okay. And whether having RSD makes just the mere  
13 fact of someone having RSD makes them disabled is not  
14 something that you would offer testimony on?

15 A Can you restate that please? I'm sorry.

16 Q Sure. Sure. You will not be offering testimony  
17 that a person who has RSD is disabled just because they have  
18 RSD. You would leave a doctor to testify as to that?

19 A Well, two things there. First, you're asking me  
20 about the RSD and second, that I would leave it to a doctor.  
21 You know, we look at diagnoses that come from doctors -- you  
22 know, in this case, the complex regional pain syndrome or the  
23 reflex sympathetic dystrophy. You know, that's part of the  
24 information that we know. We then talk to the person to get  
25 an idea of what -- of the disease processes affecting them.

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1 Secondly, in relation to determination of disability, I don't  
2 know that there'll ever be agreements between voc rehab  
3 people, doctors and to an extent, physical therapists as to  
4 who is omnipotent in deciding that. We like to think that we  
5 are because we consider the job skills, duties, abilities,  
6 education when we look at disability. Physicians don't do  
7 that. You know, so I don't know that there'll ever be  
8 agreement between those specialties as to who has the final  
9 say.

10 Q Did you ever -- did you agree -- in doing your work  
11 as a vocational rehabilitation expert, did you read anything  
12 that said that Mr. Rodriguez could not sit at a computer and  
13 work?

14 A No. I don't think that that's anything in the  
15 medical records that's specifically stated that way.

16 Q So did you assume that he could sit at a computer  
17 and work? Or he could not sit at a computer and work?

18 A I concluded that he couldn't sustain work activity.  
19 That doesn't mean that he couldn't sit at a computer, you  
20 know, and do some activities. But he couldn't sustain it over  
21 a period of time.

22 Q Okay. And isn't it true that you don't know how  
23 much time he spent at any one occasion being a real estate  
24 investor?

25 A That's -- any one occasion?

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1 Q Sure.

2 A I do not know how much time he's spent in these  
3 years to produce that income.

4 Q Right. And you don't know how much time he spent,  
5 he would spend, if he were doing it today?

6 A No. I don't.

7 Q So you don't know whether, if he could sit at a  
8 computer for an hour on Monday, and sit at a computer for an  
9 hour on Wednesday, or sit at a computer for an hour on Friday  
10 and look at the real estate market, and potential real estate  
11 houses to drive by. You don't know whether he could do that  
12 or not?

13 A Well, he can sit and look at a computer. There is  
14 an intermittent nature to, you know, how long he can tolerate  
15 it, but tasks like going out, inspecting houses, determining  
16 what repairs need to be made, those sorts of physical  
17 activities I don't believe that he is capable of doing on a  
18 sustainable enough basis that he could make any money at it.

19 Q And -- but in coming to your opinion, you don't have  
20 any idea how much time he was spending doing this --

21 MR. BAKER: Your Honor, asked and answered also.

22 THE COURT: You know, we're way beyond the scope of  
23 direct examination, in addition. Sustain the objection.

24 BY MR. WARD:

25 Q Isn't it true, for back-up documentation, that W-2s

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1 and Social Security reports are always your first choice?

2 A W-2s, Social Security and tax returns are my choices  
3 there. Of the two, if somebody's employed, I prefer W-2s or  
4 the Social Security reports. Self-employment, we like to look  
5 at tax returns as well.

6 Q And you told me, when your deposition was taken,  
7 that W-2s and Social Security reports are always your first  
8 choice?

9 A Yes. It's that list of documents that we look for.

10 Q You didn't say tax returns. Correct?

11 A I don't remember. If I didn't, I should have  
12 because tax returns is something that -- tax returns are  
13 something that I do frequently see.

14 Q Okay. Is it true that you don't have any  
15 information that shows you how many houses he bought or sold  
16 in any one of these years?

17 A No. I have some information, but I don't have total  
18 information for those years.

19 Q So if I were to ask you how many houses he bought  
20 and sold in the year 2001, you wouldn't be able to tell me?

21 A That's correct.

22 Q And you don't have any information?

23 A I have some information, but I do not have total  
24 information that would allow me to figure that out.

25 Q Okay. And if your calculation used the numbers from

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1 the year 2004 backwards to 1999 --

2 A I'm sorry. I missed your question.

3 Q Yeah. To do your calculation as to how much you  
4 believe his loss was as a real estate investor, you used  
5 incomes from the year 2004, 2003, 2002, 2001, 2000 and 1999.

6 A Yes. And those years where I had no records, I used  
7 zero.

8 Q Okay.

9 A And for those years that I had records, I used what  
10 the records reflect in relation to income.

11 Q Okay. And if there were losses in the years for  
12 which you do not have any records at all, then your number  
13 would be overstated?

14 A We talked about that at my deposition. And I  
15 believe what I said was, I would need to look at it, because  
16 sometimes you can have a loss when you're self-employed and it  
17 is not reflective of a diminishment in your ability to work.  
18 You know, so if I had a return and it was a loss, you know, I  
19 would probably go back to Mr. Rodriguez and try and figure  
20 out, you know, what drove that loss, and then make a decision  
21 as to whether or not that loss figure should be included in an  
22 average.

23 Q Well, you used your calculation based on claimed  
24 profit, did you not?

25 A Based upon business income. Yes.

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1 Q Right. You didn't -- your calculation's not based  
2 on how many hours he worked?

3 A No. It's not.

4 Q It's not based on what he did. It's not based on  
5 how much effort he put into it?

6 A It's based upon what he did, to the extent that  
7 these records reflect sales activity. You know, I do not have  
8 records that, you know, show how many hours he put in, to  
9 generate that income.

10 Q The numbers that you used were from the income.  
11 Correct?

12 A Yes.

13 Q You didn't do any calculations for anything other  
14 than income. Correct?

15 A That's correct.

16 Q So you took the claimed income from 1999 and the  
17 claimed income from 2001 and the claimed income from 2004 and  
18 you totaled it up?

19 A Well, I averaged it using zeroes in the intervening  
20 years, but yes. I did add that up. It was 286,000. Divided  
21 that by six to account for the intervening years.

22 Q And, if in the intervening years, there was losses,  
23 that overall number would be less. Correct?

24 MR. BAKER: That's asked and answered, too, Your Honor.

25 THE COURT: Yeah. Sustained.

1 BY MR. WARD:

2 Q The labor market that you talked about involved  
3 someone who's working over 1,700 hours a year. Is that  
4 correct?

5 A The Department of Labor statistics -- is that what  
6 you're referring to, in relation to the average earnings?

7 Q Yes.

8 A It's -- the low end is 32 hours and the high end,  
9 you know, can be anything up to 60 or 70 hours per week. You  
10 know, the Department of Labor classifies full-time work as  
11 over 32 hours.

12 Q Right. So that's a minimum of 1,700 hours a year?

13 A Yes.

14 Q When is the last time Mr. Rodriguez worked 1,700  
15 hours a year?

16 A I don't know.

17 Q When is the last time Mr. Rodriguez told you that he  
18 had worked as an employee?

19 A That's in my report. It's a number of years ago.

20 Q Isn't it true that the last time you --

21 A I'm sorry. I was looking for your answer. Do you  
22 want me to go onto your next question?

23 Q Well, I was going to help you, perhaps.

24 A Thank you.

25 Q I thought we're getting short on time. Isn't it

1 true that you don't have information that he's worked for an  
2 employer in a full-time employment situation for at least 20  
3 years?

4 A You know, I'm not sure where to classify this  
5 Oshman's Sporting Goods employment, you know. Let's see. I'd  
6 be hesitant -- I would say it has to approach 20 years ago,  
7 given the history that he gave me. But I don't have an exact  
8 year for it.

9 MR. WARD: May I read from the witness's deposition, Your  
10 Honor?

11 THE COURT: Sure.

12 BY MR. WARD:

13 Q Page 62, line one through line six, question -- so  
14 is it correct that based on the information you had from  
15 Mr. Rodriguez, he hadn't worked at full-time employment for  
16 essentially 20 years? Answer, he hadn't. Yeah. He hadn't  
17 worked for an employer under a full-time employment situation  
18 for 20 years. That's what you told me when your deposition  
19 was taken?

20 A Yeah. Yeah. That's the Oshman's Sporting Goods,  
21 you know. And I believe that's the last reported history I  
22 have with him in an employment situation working for an  
23 employer.

24 Q Is it true that you don't have any information  
25 whatsoever about how long Mr. Rodriguez held onto any of these

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1 properties?

2 A That's true. I don't.

3 Q Do you need to know that to be able to calculate his  
4 profit? Would you not?

5 A I would need to know the expenses, but not  
6 necessarily the length of time the property was held.

7 Q Well, there's a cost of money, isn't there?

8 A Well, there's a time value of money, but usually the  
9 time value of money is not classified as an expense, other  
10 than interest paid on the notes during that time. so if you  
11 had that information, you could take an individual property,  
12 you know, and figure it out. But it would, you know, depend  
13 upon actual expenses made, actual expenses incurred.

14 MR. WARD: I have no more questions. Thank you.

15 REDIRECT EXAMINATION

16 BY MR. BAKER:

17 Q Mr. Dinneen, I have just a couple questions for you.  
18 Do you agree with me -- and it may have been submitted. It's  
19 not the best paperwork in the world. Would you agree with  
20 that?

21 A Yes.

22 Q And so, you didn't get volumes of information, as we  
23 discussed. Is that right?

24 A That's correct.

25 Q Do you know exactly why you used the two averages

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1 that you described to the judge, the ERI and the DOL averages?

2 A Yes.

3 Q And did those averages completely and entirely  
4 comport with the information that you cleaned from the tax  
5 records?

6 A Yes.

7 Q And is that an accepted methodology in forensic  
8 economics?

9 A In determining earning capacity on the vocational  
10 rehabilitation side, yes.

11 Q Sir, the available empirical information, that and  
12 the statistical base. Is that fair?

13 A Yes.

14 Q It's just exactly what we're looking for when you do  
15 a forensic analysis. Is that right?

16 A It is.

17 Q And you would try to use as many variables when you  
18 were doing a forensic analysis to show the validity of your  
19 forensic analysis. Is that right?

20 A Yes.

21 Q And that's exactly what you did as well. Is that  
22 right?

23 A Yes.

24 Q And once again, it just matched up just fine, in  
25 terms of a valid forensic analysis, meaning you didn't have to

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1 reject your hypothesis. Is that right?

2 A Yes.

3 Q Okay. So no problem there?

4 A No.

5 Q Let me ask you another question. When you talked to  
6 Enrique, and you read Enrique's medical records and you  
7 determined that he was disabled. Is that right?

8 A Yes.

9 Q And Social Security read Enrique's medical records  
10 and they spoke with Enrique and they determined that he was  
11 disabled. Right?

12 A Yes.

13 Q Well, that seems to be another validation, doesn't  
14 it?

15 A Yes.

16 MR. BAKER: Thank you. No further questions, Your Honor.

17 THE COURT: Any follow-up, Mr. Ward?

18 MR. WARD: No, Your Honor.

19 THE COURT: With thanks of the Court --

20 THE WITNESS: Thank you, Your Honor.

21 THE COURT: -- you may be excused.

22 THE WITNESS: I have Wanda Worker here, Your Honor.

23 THE COURT: That belongs to Mr. Ward, not me.

24 THE WITNESS: I just didn't want to leave it.

25 THE COURT: Thank you. We start tomorrow at 9:00.

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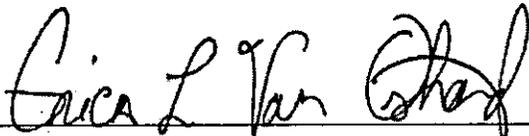
We'll stop at 4:00 tomorrow. Thank you.

[Designation of record concludes at 4:47 p.m.]

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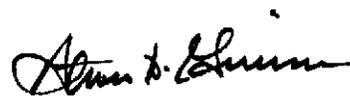
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DISTRICT COURT



CLARK COUNTY, NEVADA

CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 FIESTA PALMS LLC, )  
 )  
 Defendant. )  
 )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

FRIDAY, NOVEMBER 5, 2010

**REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. GEORGE BECKER**

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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1           A     A small college in Hartford, Connecticut, Trinity  
2 College.

3           Q     Okay. And what did -- where did you go after  
4 Trinity College?

5           A     Yale University Medical School.

6           Q     Was it as hard to get into then as it is now?

7           A     It was pretty hard to get into. I was worried about  
8 it, but managed somehow to get in.

9           Q     And so you graduated from Yale with an M.D., a  
10 Medical Doctorate?

11          A     Yes.

12          Q     Okay. And what did you do after you graduated? Is  
13 that when you got drafted?

14          A     No. I became an intern at the Yale New Haven  
15 Hospital.

16          Q     Okay.

17          A     A surgical intern, and then I had three years of  
18 post internship training as a general surgeon. And then I  
19 went into the army.

20          Q     Okay. And how -- what was the arrangement -- what  
21 was the trade off that you got to do your residency?

22          A     The deal -- it was called a Berry Plan. And to  
23 avoid being drafted and taking out of the middle of a  
24 residency program which would disrupt it, if you agreed to  
25 sign up -- to say I'll be glad to serve in the military for

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1 two years, then they would let you complete your training and  
2 not take you. And so that's what happened.

3 Q Okay.

4 A And I then went to Germany for -- extensively for  
5 two years. And unfortunately I was there when the Berlin Wall  
6 got built. And so I got involuntarily extended for an  
7 additional year and a half. So I served three and a half  
8 years in the army as a general surgeon.

9 Q Okay. And so you had here -- that would be how many  
10 years are we post M.D. degree?

11 A That's four years of training and then the years in  
12 the army.

13 Q Okay. And then what did you do after you got out of  
14 the army?

15 A Well in my last year of training I developed a  
16 fondness for orthopedics. And I go, "Oh this is really  
17 interesting. This is what I want to do." So I went back to  
18 Yale and did three more years of an orthopedic residency. And  
19 then stayed on as clinical faculty at the medical school. And  
20 taught orthopedics and had a practice of my own.

21 Q Okay. So you taught orthopedic surgery as a faculty  
22 member at Yale University Medical School?

23 A Yes.

24 Q Or Yale University School of Medicine, I guess is --

25 A Yes.

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1 Q -- probably the accurate name for it.

2 A Yes.

3 Q And you also had a practice?

4 A Yes.

5 Q And so you had three years training as a surgeon.

6 A Four.

7 Q Four year training. And how many years as an  
8 orthopedist?

9 A Three.

10 Q So we have seven.

11 A Yes.

12 Q Seven years training as a surgeon and an  
13 orthopedist. And we're not ask how many years it took to pay  
14 off the loans. And then you started a practice as an  
15 orthopedic surgeon.

16 A Yes.

17 Q Correct. And now -- somewhere along the line you  
18 moved to California?

19 A Yes.

20 Q And how many years had you been practicing when you  
21 moved to California?

22 A Well I finished medical school in '55. So in the  
23 internship and residency one is really practicing surgery. So  
24 from '55 to '77. That's 22 years.

25 Q Okay. Now did you ever have -- did you ever see a

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1 knee injury during that period of time that you had a practice  
2 of orthopedics in the northeast?

3 A Oh, yes. We -- in my practice in Windham,  
4 Connecticut one of the counties north of New Haven, I happen  
5 to become a very good friend of the University Health  
6 Physician at the University of Connecticut. And wound up  
7 getting all of the athletic department injuries -- well my  
8 partners and I would get them from basketball, from football,  
9 from track and from various sports medicine kind of injuries.

10 Q Okay. So every time somebody had an injury at the  
11 home field at least, they probably ended up with you.

12 A Well with me or one of my partners.

13 Q Okay. And what would be the range of orthopedic  
14 injuries that you would see?

15 A Well really everything from head to toe. Dislocated  
16 shoulders, sprains of the spine of various sorts, twisted  
17 ankles, fractured ankles, fractured tibias, knee injuries,  
18 cruciate ligament injuries, meniscal injuries, medial  
19 collateral and lateral collateral ligament -- the whole range  
20 of injuries.

21 Q And if they needed surgical repair, did you actually  
22 do it yourself?

23 A Yes.

24 Q And so you're familiar with, as they might say, you  
25 know your way around a knee?

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1 A Yes. I would say so.

2 Q Okay. Now, somewhere along the line you decided to  
3 expand what you were doing?

4 A Yes.

5 Q Is that correct?

6 A Yes.

7 Q And what was it that you decided to expand to do?

8 A I did a fair amount of spine surgery. And there is  
9 a certain subset of patients that would present to me -- we  
10 would do -- in those days we were doing myelograms, rather  
11 than MRI's. We didn't have MRI's then. And there would be  
12 pathology. And I would think -- I have a hunch that I'm going  
13 to be able to correct the pathology, but I'm not sure you're  
14 going to get better.

15 And some of those patients in fact didn't get  
16 better. Even though the pathology was corrected. And I  
17 thought there's something here that I don't know. A biology  
18 teacher in high school once said, "Know what you don't know."  
19 So I realized that, "Gosh maybe I need to know something I  
20 don't know." And that's why I thought I need to look into the  
21 other dimension of chronic pain, psychiatric medicine. And so  
22 I -- and I also wanted -- I'd had enough of winters in  
23 Connecticut. So I thought I wan to California.

24 And so I came out here and trained -- took a regular  
25 residency in psychiatry. After having been a professor at

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1 Yale to start in as a psychiatry residency trainee, it sort of  
2 represents downward mobility for a while anyway. But I did  
3 that and finished that training -- it was in 1980. And during  
4 that time I went to the orthopedic rounds in the hospital and  
5 got to know all the orthopedists. And they sent me a lot of  
6 orthopedic referrals, because they said well we'll send them  
7 to George Becker because he's a real doctor.

8 They didn't think psychiatrists were real doctors.  
9 So I wound up getting a lot of orthopedic referrals. And so  
10 the head of the psychiatry department said why don't -- you're  
11 the person to be the director of consultation psychiatry for  
12 the California Pacific Medical Center. So I got that job and  
13 did that for ten years. And did a lot of pain management in  
14 that job. And -- I'm talking too much.

15 Q No. That's fine. That's fine. That's -- so this  
16 was -- you were one of the early people doing pain management.  
17 Is that true?

18 A Well one of the early people at California Pacific  
19 Medical Center, certainly.

20 Q Right. Okay.

21 A I mean there was -- pain management had been around  
22 as a specialty. It didn't have a board at that time, but it  
23 had been around.

24 Q And I take it your motivation in working with pain  
25 management in orthopedic injuries was not so that you could

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1 spend more time with lawyers?

2 A No. It was -- I -- the reason I went into -- got  
3 the psychiatric training was because I thought there was  
4 another dimension. I thought it was important -- I felt there  
5 would be a diagnostic advantage in being able to view a  
6 patient simultaneously from muscular skeletal prospective and  
7 a psychiatric perspective, because one has to consider the  
8 whole patient. You know, it isn't just an injured knee or an  
9 injured back. It's a human being. And there are dimensions  
10 within that human being that are important to consider if  
11 we're going to get accurate -- the most accurate diagnosis.

12 As Sherlock Holmes says, if you don't look at all  
13 the clues, you're probably not going to find out whodunit.  
14 And so I think it is important in medicine, certainly, to look  
15 at all the information you can get. And make it --

16 Q And now, let me digress for a moment and ask about  
17 some of the things that you have done. You were the director  
18 of the Department of Psychiatry at the Presbyterian Hospital  
19 in San Francisco.

20 A Yes. Consultation psychiatry. That means when  
21 doctors -- obstetricians, gynecologists, urologists,  
22 neurologist had a patient that they suspected might have what  
23 we call functional overlay or psychological factors coloring  
24 their presentation they would call us. And we were training  
25 -- it was a training program so I had residents that I was

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1 supervising.

2 Q Okay. And now the best part, which I missed, which  
3 is actually the first one is you're an organ player?

4 A Oh yes. That's a hobby.

5 Q Okay.

6 A Yeah.

7 Q And you play the pipe organ?

8 A Yes. Yeah. I'm an assistant organist at one of the  
9 churches in San Francisco.

10 Q Okay. And you still do that?

11 A I still do that.

12 Q And now you have been on staff with the Los Angeles  
13 College of Chiropractic?

14 A Yes. That was through the American Back Society.  
15 They -- I met a number of chiropractors who are part of the  
16 American Back Society, which is a multidisciplinary society.  
17 It has chiropractors, neurologist, orthopedists, spine  
18 surgeons, internists, rheumatologists, and one of them asked  
19 me if I would write a chapter in a book that he was editing.  
20 Two or three other orthopedists had written chapters for the  
21 book. And then they said well would you like to be an adjunct  
22 faculty.

23 And so I guess I sort of slid into it through the  
24 back door. And I did go down and give some lectures there. I  
25 haven't been there, probably in ten years, though.

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1 Q Okay.

2 A But I did that for a while.

3 Q Now was that the book chapter on managing low back  
4 pain?

5 A That was -- no. That's another book chapter, but  
6 that book was edited by William Kirkaldy-Willis, who was the  
7 president of the American Back Society, but he had been a very  
8 distinguished British orthopedist and he had been in East  
9 Africa. And then he was in Saskatoon in Canada as a professor  
10 of orthopedics and then finally in Vancouver. And he asked me  
11 if I would write a book chapter on chronic pain and it's  
12 psychological meaning.

13 Q And what was your involvement with the American Back  
14 Society?

15 A Oh it was a long involvement. For ten years I was  
16 vice president of the society. But it was a multidisciplinary  
17 society. And it was really interested in issues of back pain,  
18 diagnosis and treatment. And it was a very exciting time for  
19 me. I learned a lot. I met a lot of very distinguished  
20 persons in the field. And wound up being on panel discussions  
21 and chairman -- I was chairman of a number -- probably a  
22 couple dozen pain management workshops given by the society.  
23 One of them with Gerald Aronoff -- or several of them with  
24 Jerry Aronoff, who was a distinguished person in the field of  
25 pain management.

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1 Q Now you've written a number of articles, is that  
2 correct?

3 A Yes.

4 Q And a number of those articles are about knees?

5 A Well I wrote one article on the knee, published in  
6 the Journal of the -- JAMA -- Journal of the American Medical  
7 Association.

8 Q Okay.

9 A Yes.

10 Q Now back in 1972 you wrote an article about carpal  
11 tunnel syndrome.

12 A Yes.

13 Q Is that correct? Now, so you have some knowledge  
14 about carpal tunnel syndrome?

15 A Oh, I would say yes.

16 Q Okay.

17 A I -- after that article I was inundated with  
18 referrals of patients thought to have carpal tunnel syndrome.  
19 It was before it was really well known. We're talking the  
20 '60s now and people would get this -- typists, secretaries and  
21 people who were using data input machines before computers  
22 would develop these symptoms. And so some of the wound up  
23 having neck surgery or fusions, because they thought, well  
24 these symptoms must be coming from a disk in the neck. And  
25 then they get a myelogram and they'd find a disk in the neck

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1 and they'd operate on it, but the patient would still have the  
2 same symptoms. And then someone said well maybe this is  
3 median nerve problem.

4 And then it turned out -- we did a number of them  
5 and yes, indeed it was a median nerve problem and then we  
6 started doing nerve conduction studies, electro myelograms  
7 testing the speed of the transmission through the carpal  
8 tunnel, and showing that it would be slow. And these patients  
9 indeed had a carpal tunnel problem and surgery relieved it.

10 Q The surgery -- but the surgery was on the wrist?

11 A On the wrist -- a very simply surgery.

12 Q Not surgery on the neck?

13 A No. No.

14 Q But is -- now does that relate to what it is that  
15 you do with respect to pain management in terms of looking to  
16 find solutions to patients problems that are the right  
17 solutions as opposed to the wrong solutions?

18 A Well one always hopes to make the right diagnosis.  
19 I -- in one of the book chapters I put, you know, diagnosis is  
20 the cornerstone of any kind of a medical treatment program.  
21 If you don't have the right diagnosis, you're not going to get  
22 successful treatment results. I mean that's sort of a no  
23 brainer.

24 Q And you've written a number of articles on chronic  
25 pain?

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1 A Yes.

2 Q And you have been on a number of committees and  
3 workshops for chronic pain?

4 A Yes.

5 Q And you've written a number of book chapters on  
6 chronic pain?

7 A Yes.

8 Q And you've taught a number of courses on chronic  
9 pain?

10 A Yes, to all of those.

11 Q And during this period of time, doctor, have you  
12 continued to have an active patient load?

13 A Yes.

14 Q And up until today -- not today because you flew in  
15 here last night, but up until the current time you still see  
16 patients?

17 A Oh yes.

18 Q You still see orthopedic patients?

19 A Yes.

20 Q Do you still see patients for chronic pain?

21 A Yes.

22 Q Do you occasionally see patients for lawyers?

23 A Yes.

24 Q How much of your practice is that?

25 A It's relatively very little, you know, maybe five

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1 percent or so. I think for the past three or four years I  
2 haven't had more than two or maybe three medical, legal or  
3 workers comp evaluations in a month. So I really don't see  
4 very many.

5 Q And have you worked with me before?

6 A Yes. Not very often. I don't remember the names of  
7 any cases we worked on before. I think maybe two or three  
8 times in the last ten or 15 years.

9 Q Okay. And how many dual board certification  
10 orthopedic surgeons, psychiatry do you know of? How many  
11 people have those two boards?

12 A That's interesting. It came up in an American Back  
13 Society workshop and I didn't know of any. And then we put  
14 out the word and I've discovered that there are two others.  
15 So there are three of us as of two years ago in the country.  
16 And one of them is in Wisconsin, and one of them is in  
17 Florida. And the guy in Wisconsin I had lunch with in San  
18 Francisco at an orthopedic meeting. But we're kind of rare  
19 birds.

20 Q Okay.

21 A I mean it takes a lot of training. I've -- I mean  
22 if you think about I've had -- got the doctorate of medicine  
23 in '55. I've had ten years of post graduate training. That's  
24 a lot of post graduate training. And most people don't want  
25 to do that.

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1 MR. WARD: Your Honor, we would offer Dr. Becker as an  
2 expert in orthopedic surgery and psychiatry and pain  
3 management.

4 THE COURT: Any objection, Mr. Baker?

5 MR. BAKER: May I do a limited voir dire, Your Honor?

6 THE COURT: Sure.

7 VOIR DIRE EXAMINATION

8 BY MR. BAKER:

9 Q Doctor, I was looking -- nice to meet you. I was  
10 looking at your CV. You haven't authored any papers on the  
11 diagnosis or treatment of RSV. Is that correct?

12 A That's correct.

13 Q You have not attended -- you haven't taught any  
14 classes on the diagnosis and treatment of RSV. Is that  
15 correct?

16 A That's correct.

17 Q You have -- you're not -- you do not have a  
18 fellowship in pain management. Is that correct?

19 A That's correct.

20 Q When you treat people for RSV you send them out to  
21 pain management doctors. Is that correct?

22 A That is not correct. I treat them myself.

23 Q You treat them yourself?

24 A Yes.

25 Q Have you authored any chapters in any books on RSD?

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1           A     No.

2           Q     Have you given any lectures or seminars with respect  
3 to RSD?

4           A     No.

5           MR. BAKER: Your Honor, I have no problem with him being  
6 in the areas of orthopedic surgery, psychiatry and pain  
7 management -- to an extend pain management, but he's not  
8 qualified as an expert in RSD. And I do object to him  
9 speaking about the diagnosis or treatment of RSD.

10          THE COURT: Will there be any questions regarding the  
11 RSD?

12          MR. WARD: Well yes, there will, Your Honor. And he is  
13 highly qualified to talk about RSD and treats RSD patients.  
14 There's no board certification for RSD. And he's certainly  
15 qualified in that area. I can ask him some more questions if  
16 Your Honor would like.

17          THE COURT: Well I think what we'll have to do is  
18 probably take these questions as they come. You'll have to  
19 lay a proper foundation with respect to the RSD issues. But  
20 it looks to me like he's clearly qualified in those other  
21 areas that you seek to qualify him in. So the Court's going  
22 to grant your motion.

23          Mr. Baker, you'll reserve the right to make  
24 objections as you see fit. But I think we'll have to have a  
25 proper foundation with respect to the RSD issues.

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1 MR. BAKER: The Court is granting that motion, Your  
2 Honor?

3 THE COURT: Granting -- no. No. Denying --

4 MR. BAKER: Okay.

5 THE COURT: No. No. I was granting Mr. Ward's motion.  
6 He was the one who moved this individual as an expert witness.

7 MR. BAKER: Yes, Your Honor.

8 MR. WARD: Okay. And --

9 THE COURT: You always forget that part, Mr. Baker.

10 MR. BAKER: I do. And I --

11 THE COURT: Why is that?

12 MR. BAKER: Mental block.

13 THE COURT: Okay.

14 MR. BAKER: Sorry.

15 THE COURT: Granting Ward's motion -- Mr. Ward's motion.  
16 Please proceed, sir.

17 THE WITNESS: Can I say something?

18 THE COURT: Sure.

19 THE WITNESS: I have been seeing patients with RSD for 55  
20 years, since I graduated from medical school in 1955. I have  
21 seen many patients with RSD over the years, both as a general  
22 surgeon and an orthopedist. And recently with regard to the  
23 diagnosis, because there are some of us -- and I will admit to  
24 being one, that feels the use of the term RSD or CRPS or  
25 Causalgia -- whatever you want to call it, is much over

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1 diagnosed.

2 I have seen RSD in its later stages. It is a  
3 severe, very crippling disease. And it doesn't wax and wane.  
4 It is a progressive disease unless it is cured. And it is  
5 curable.

6 There's a mythology out there that it is incurable,  
7 but it is curable. So I -- I get referred patients saying  
8 this patient is thought to have RSD, what do you think? And I  
9 evaluate them for the orthopedic community in San Francisco.  
10 So somebody thinks I have a valid opinion.

11 THE COURT: Well that may address the issue. I don't  
12 know. Please proceed.

13 DIRECT EXAMINATION CONTINUED

14 BY MR. WARD:

15 Q Is there a board for RSD?

16 A No.

17 Q When you became interested in and started your  
18 practice or expanded into pain management, was there a board  
19 for pain management?

20 A No. The pain management board was created by a  
21 group of physicians -- especially anesthesiologist and the  
22 board was established in 1991. And interestingly the board  
23 has not been accepted by or included in the list of directory  
24 of official American Board Specialties. That means boards in  
25 neurology, pediatrics, gastroenterology, ophthalmology, the

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1 whole list of common things. And they are not yet included in  
2 that list.

3 They may be at some point, but they aren't now.

4 Q Right. Okay. And how many patients have you  
5 evaluated for RSD over the years?

6 A Oh hundreds. No I haven't counted them. I don't  
7 know. I would say a very significant number.

8 Q And some of those are patients that are specifically  
9 sent to you with the question as to whether they have RSD?

10 A Yes.

11 Q How about a patient that comes to you with chronic  
12 pain who is not sent to you for evaluation of RSD. Is that --  
13 if they have symptoms of RSD is that one of the things you  
14 look at?

15 A Well of course. When you see somebody with chronic  
16 pain -- particularly pain of an extremity, upper extremity or  
17 lower extremity, one establishes what we call a differential  
18 diagnosis. And you list the possible diagnoses. In many of  
19 the patients that I see with chronic pain RSD is part of the  
20 differential diagnosis. It's a diagnosis to be ruled out just  
21 the way diabetic neuropathy is a diagnosis to be ruled out.  
22 And one has to know enough about what kind -- how does  
23 diabetic neuropathy present or how does RSD present before you  
24 can make an intelligent differential diagnosis. If you don't  
25 consider the diagnosis, you're not going to make it.

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1 Q Knees. Do you have to write an article about knees  
2 to be able to do knee surgery?

3 A No. Certainly not. At the time that article was  
4 written I was in the medical school and Yale is a highly  
5 intellectual medical school with a lot of stress on  
6 publications. And I did have an interest in a particular knee  
7 problem. And so I wrote the article. And developed a  
8 technique for a particular operation involving the knee.

9 Particularly adolescent girls have dislocating knee  
10 caps and it's a procedure to correct that problem.

11 Q Let me digress for a moment. Are you familiar with  
12 Dr. Shannon?

13 A Well I've read her reports. I have seen the  
14 photographs through the arthroscopy of the surgery she did.  
15 And I think she's a very good orthopedic surgeon. I'm very  
16 impressed by the thoroughness of her history, her  
17 documentation. And the arthroscopic photographs show that she  
18 did a really nice job cleaning up the knee. She made an  
19 appropriate diagnosis before she operated, which is what you  
20 hope to do.

21 She suspected that there was a torn meniscus and she  
22 probed an area and found where the tear was and then addressed  
23 it. And she has a wonderful photograph of the meniscus after  
24 she's been through trimming it. She did a top notch job.

25 Q Was that she did a nice job?

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1 A Yes.

2 Q Do you know how many articles she's written about  
3 knees?

4 A I don't know.

5 Q Does that effect how good a job she did?

6 A Certainly not.

7 Q No. Okay. Now, the patient that you saw in this  
8 case was Mr. Rodriguez. Is that correct?

9 A Yes.

10 Q And with respect to the evaluation of  
11 Mr. Rodriguez --

12 MR. BAKER: And just for the record, Your Honor, it's a  
13 minor thing, but I object to him being referred as his  
14 patient. He wasn't. He was an examinee.

15 THE COURT: Okay. Noted for the record.

16 MR. BAKER: Thank you.

17 MR. WARD: I apologize, I didn't --

18 BY MR. WARD:

19 Q The -- you saw Mr. Rodriguez.

20 A For evaluation. Yes.

21 Q And you were not expecting to provide treatment to  
22 him. Were you?

23 A No.

24 Q Okay. Nobody asked you to provide treatment to him?

25 A No.

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1 Q Okay. So --

2 A As a matter of fact he signed a disclaimer  
3 indicating that his understanding was that the examination  
4 would be for purposes of evaluation. That the usual  
5 doctor/patient privacy is -- doesn't apply in this case,  
6 because there will be a report produced that will be available  
7 for litigation purposes, and that he will not be treated by  
8 me. I have that in my standard form.

9 Q Now did you talk to me before you examined Mr.  
10 Rodriguez?

11 A You know, I don't remember. I talked to someone  
12 from the Archer Norris Office, and I'm not sure it was.

13 Q Did anybody tell you what it was we wanted you to  
14 find?

15 A No. You wanted me to evaluate this man.

16 Q Anyone suggest that you should make certain findings  
17 about Mr. Rodriguez?

18 A No.

19 MR. BAKER: Your Honor, I'm not going to suggest that.

20 THE COURT: I didn't think you would, Mr. Baker.

21 MR. WARD: I thought you asked the question yesterday of  
22 your expert. And so I thought it was appropriate.

23 MR. BAKER: Sure.

24 THE WITNESS: I would have replied, if anyone suggested  
25 what I should think or -- you know, I don't work that way.

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1 I'm too old to do that.

2 BY MR. BAKER:

3 Q Mr. Rodriguez was examined by you, and you prepared  
4 a report, is that correct?

5 A Yes.

6 Q And that report is marked Exhibit --

7 MR. BAKER: Sixty-six.

8 MR. WARD: Sixty-six.

9 [Counsel confer]

10 MR. WARD: Or maybe not.

11 [Counsel confer]

12 BY MR. WARD:

13 Q Okay. Exhibit 66. And it says report part one of  
14 two. Now let's start with Mr. Rodriguez came to your office  
15 that day and he arrived on time?

16 A Yes. So far as I know --

17 Q And --

18 A -- yes.

19 Q And he looked good?

20 A Yes.

21 Q And he was friendly?

22 A Yes.

23 Q And he didn't give you any problems?

24 A That's correct.

25 Q And you conducted an examination.

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1 A Yes.

2 Q Correct?

3 A Yes. Took a history and conducted an exam.

4 Q Okay. You took a history first. And was the  
5 history taken by you or taken by someone else?

6 A Oh I do it all myself.

7 Q Okay. And so you took a history and after you took  
8 the history did you conduct an examination?

9 A Yes.

10 Q And did you make notes of the examination?

11 A Yes.

12 Q Now, let's go through the history that he gave you.  
13 I'm on page 1. And I certainly don't want to read everything  
14 that's here, but he told you a little bit about himself?

15 A Yes. He did.

16 Q And he told you what kind of work he did?

17 A Yes.

18 Q What did he tell you that he did? How -- what'd he  
19 tell you that --

20 A He described working in real estate and I think  
21 buying properties, renovating them and selling them. I -- he  
22 had a name for that; I've forgotten what he called it. But  
23 that's basically what he said he did.

24 Q Okay. And at the top of page 2 did he tell you  
25 about the physical activities that he did with respect to that

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1 profession that he had?

2 A Yes. I documented it as computer as well as field  
3 work. But he had employees doing much of the labor.

4 Q Okay.

5 A And that was essentially the degree of detail I got.

6 Q Okay.

7 A I didn't go into great detail.

8 Q Okay. And he reported an injury, did he not?

9 A Yes.

10 Q And what did -- he told you the injury occurred on  
11 November 22, 2004?

12 A Yes.

13 Q And what did he tell you -- what body parts were  
14 involved in this injury?

15 A His left knee.

16 Q Take a look at the report, top of page 2.

17 A Right.

18 Q You actually wrote this down. Didn't you?

19 A Yes.

20 Q Okay. And you made your report from notes?

21 A Yes.

22 Q And what did he list as the body parts involved in  
23 this accident?

24 A Oh he listed all of these, neck, shoulders, left  
25 wrist, right wrist, midback, lower back, left knee, left

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1 ankle, left lower extremity right ankle.

2 Q Okay.

3 A So he did tell me that he injured a lot of body  
4 parts.

5 Q Okay.

6 A I'd forgotten that.

7 Q Okay. And now down later on, he described to you  
8 that -- how the incident occurred.

9 A Yes.

10 Q Did he not?

11 A Yes.

12 Q And did he tell you about something that happened to  
13 him at the casino?

14 A Yes. He described -- he was apparently at a bar --  
15 but he -- watching television and there were some Las Vegas  
16 girls throwing things out into the audience. I guess they  
17 were water bottles; I'm not sure what they were. But  
18 apparently one of these bottles landed not far from where Mr.  
19 Rodriguez was standing. A woman tried -- who had wanted to  
20 get one of the bottles apparently lost her balance and fell  
21 into his left knee. From the anterior and medial aspect in  
22 such a way that it bent the knee backwards. He was standing  
23 so that's what's called hyperextension. It's bending and  
24 straightening the knee straighter than it likes to be  
25 straightened.

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1           And he lost his balance, fell and I think he didn't  
2 fall completely to the floor; he fell into another patron at  
3 the bar.

4           Q     Okay. And then did he express to you some things  
5 that happened after that that made him angry?

6           A     Yes. I don't remember the exact details, but he  
7 felt that the casino had made an effort to get him to sign  
8 something that -- disclaiming that he had had any significant  
9 injury or that it was trivial and that it was better. And  
10 that they weren't taking him seriously. I think is the bottom  
11 line.

12          Q     And the effect on him was it made him angry?

13          A     Yes. They -- he thought they were trying to avoid  
14 his claim that he'd been injured.

15          Q     Okay. And did he tell you anything more about the  
16 video in your report there?

17          A     He did say that something about there was a video of  
18 what actually happened. The -- monitoring the people in --  
19 the patrons in the bar. And that they had said that they lost  
20 it or something like that. There was something about not  
21 being able to produce the video he said existed, and he felt  
22 they were --

23          Q     Did he tell you that they -- did he tell you that  
24 they destroyed it?

25          A     If I wrote that down, he did.

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1 Q Would you take a look at your report where it says  
2 at this point in the narrative?

3 A Oh. "They told me they had destroyed the video of  
4 the incident. I got an attorney within 30 days. And that's  
5 what they said."

6 Q Okay.

7 A Yes.

8 Q So he told you he was taken to the hospital.

9 A Yes.

10 Q In an ambulance?

11 A Yes.

12 Q And then he told you that he followed up with Dr.  
13 Nork?

14 A That's correct.

15 Q And then he told you that he had been doing some  
16 physical therapy. Moving over to page 3.

17 A Yes.

18 Q And how long did he tell you he'd been doing  
19 physical therapy?

20 A Since December -- that would be December of '04  
21 until whatever the present time is. So that would -- he saw  
22 Nork in January or February. So until then he had been doing  
23 physical therapy.

24 Q Okay. Now did he tell you about seeing Dr. Shannon?

25 A Yes. He did.

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1 Q And he tell you that she did a left knee  
2 arthroscopic surgery?

3 A Yes.

4 Q And I'm still on page 3. And did he tell you what  
5 that did for him?

6 A I didn't hear what you said.

7 Q Did he tell you -- I'm sorry. Did he tell you what  
8 that did for him? Her surgery?

9 A Yeah. He said it didn't help.

10 Q Okay. Now, let me stop there for a moment. You saw  
11 the testimony of Dr. Shannon?

12 A Yes.

13 Q And you saw the photographs that Dr. Shannon  
14 produced?

15 A Yes.

16 Q And they showed the inside of his knee?

17 A Yes.

18 Q And did he indeed have a torn meniscus?

19 A Yes. He did.

20 Q And was it repaired?

21 A Yes. She did a really good job. Trimmed it very  
22 nicely.

23 Q Okay. And so did you see any other pathology in the  
24 knee?

25 A Yes. There were some mild Condromalacia, I think on

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1 the femoral condyle and maybe on the tibia as they oppose each  
2 other. Not unusual for a person his age and weight.

3 Q So would that be what you call a degenerative chain?

4 A Yes. Condromalacia.

5 Q Would that have pre-existed this injury?

6 A Almost certainly. Probably has it in both knees.

7 Q Okay. And what is the effect of excess weight on  
8 your knees?

9 A Well, you know, they wear out faster.

10 Q And as you get older.

11 A They wear out even faster.

12 Q Now following the surgery and you saw the job that  
13 Dr. Shannon did.

14 A Yes.

15 Q What would you have expected to follow with respect  
16 to the patient? With the knee surgery and having seen the  
17 manner in which it was repaired what would you expect would be  
18 the normal course of events?

19 A I would expect that there would be improvement. And  
20 the reason being that where there was Condromalacia she  
21 smoothed off the surface so that the Condromalacia was  
22 addressed. The pre-existing -- presumably pre-existing. And  
23 she addressed the torn meniscus as well. She did a partial  
24 synovectomy, a fairly extensive one that was any inflammation  
25 around the knee. So the knee when she was finished with it

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1 was better than it was when he injured it.

2 Q And was it better than the one on the other side?

3 A Probably.

4 Q Okay. And would you expect -- would you expect that  
5 the patient would be able to run a marathon the next day?

6 A No.

7 Q Okay. What would you expect the course of recovery  
8 to be?

9 A After an arthroscopy it's an invasive procedure.  
10 You put an instrument into the knee and there are usually two  
11 or three places that you enter the knee. You do a lot of  
12 surgery, doing a synovectomy is basically cutting away the  
13 lining of the knee. Well that leaves raw tissue underneath  
14 that. And that has to heal.

15 It -- the human body has amazing recuperative  
16 properties. That's the way -- that's why those of us who do  
17 surgery can get away with it. Because the body does do a lot  
18 of healing. And you heal that. And usually a patient after  
19 arthroscopy is on protected weight bearing for maybe a week,  
20 maybe two weeks, but then they gradually get better. The  
21 symptoms of the surgery go away and the improved architecture  
22 in the knee helps them improve their symptoms. That's why you  
23 do the arthroscopy, actually.

24 Q And was there are anything that you saw that  
25 Dr. Shannon did or failed to do that would have slowed down

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1 any recovery?

2 A No. I think she did a first class job. I'd give it  
3 five stars.

4 Q Okay. Did the patient -- did Mr. Rodriguez get  
5 better?

6 A Well he said the surgery didn't help.

7 Q Okay.

8 A I have that on -- that's the middle of page 3. That  
9 didn't help. So he didn't get better.

10 Q Okay. Now I want to change directions here for a  
11 moment and I want to go back to the -- your reference on page  
12 2 where you talk about the reported injury from the November  
13 22, 2004.

14 MR. BAKER: Can you give me a paragraph?

15 MR. WARD: Sure. It's the first full paragraph at the  
16 top of page 2.

17 MR. BAKER: Starting "It's of note"?

18 MR. WARD: Starting with "He reports injury November 22,  
19 2004."

20 MR. BAKER: It's the June 2nd report. Correct. Thanks.

21 MR. WARD: You there?

22 MR. BAKER: Yeah.

23 BY MR. WARD:

24 Q You see where I am, Doctor?

25 A Yes.

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1 Q Okay. Now what I want to do is I want to bring up a  
2 calendar. And this is a calendar from November 2004.

3 A Right.

4 Q And we have filled in November 22. And that's the  
5 date of the accident and that is the date of the treatment by  
6 Dr. Heaps.

7 A Yes.

8 Q And the patient was seen at Spring Valley Hospital.

9 A Yes.

10 Q And are you familiar with Dr. Heaps examination?

11 A Yes.

12 Q And what did Dr. Heaps do in his -- well let me go  
13 back a second. Are you familiar with the report from the --  
14 from the ENTs?

15 A Yes.

16 Q Okay. The first people that saw the patient after  
17 the injury would be the ENTs. Is that correct?

18 A That is correct.

19 Q Okay. I mean the first medical people that saw him.  
20 And they made some notes, did they not?

21 A They did.

22 Q And --

23 A That's in part 2, you know of the --

24 Q Right. Okay.

25 A Okay.

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1           Q     You -- so tell us what those people said when --  
2     about their meeting with Mr. Rodriguez.

3           A     This is dated 11/22/04 and it's on page 4 of the  
4     second part of the -- my report.

5                     "Patient 41-year-old male complains of left  
6     knee pain, five out of ten, non-radiating, states  
7     pain began approximately two hours after a woman  
8     dove and hit his knee with her shoulder. Patient  
9     states woman hit his knee from the front and his  
10    knee buckled. States he tried to walk it off, but  
11    it began hurting and called 9-1-1 first. The crew  
12    cancelled. Apparently they came and then he  
13    cancelled them, said I don't need you. Patient said  
14    he would drive himself. States knee began hurting  
15    when he started walking, and he called back. The  
16    patient has no other complaints at this time. Found  
17    sitting in a chair. No obvious distress."

18                    And an exam is described. They said lower extremities.  
19    Left knee post impact with woman's shoulder negative  
20    contusion, positive swelling.

21                    Negative contusion, that's a misuse of the word  
22    contusion. Contusion is something you get from history. If  
23    someone is kicking a soccer ball and it hits you in the thigh  
24    you have a contusion. You find signs and symptoms of that if  
25    there's swelling or edema so that's simply something they say.

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1 They don't describe much other than the swelling to  
2 authenticate that there's been a contusion.

3 Q Now you heard the testimony from Dr. Shannon?

4 A Yes.

5 Q And you heard Dr. Shannon say that when you look at  
6 a knee joint you don't see any dates. Correct?

7 A Any dates?

8 Q Any --

9 A Oh.

10 Q -- not the fruit, but the like from the calendar.

11 A Yes. Yeah, you can't tell what happened when.

12 Q Okay. So you can't specifically tell that, that  
13 some condition that you're looking at occurred on a particular  
14 day?

15 A That's right.

16 Q But did you also hear Dr. Shannon say that based on  
17 the information that she had that it was consistent with an  
18 injury that would've occurred on November 22?

19 A Yes.

20 Q As he described.

21 A Yes.

22 Q Did you question her judgment about that?

23 A No.

24 Q So you're in agreement with her assessment?

25 A Yeah. I think it's kind of common sense. Yeah.

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1 Q Okay. SO let's say that she's right. And you're in  
2 agreement, that this injury to the meniscus was one that was  
3 sustained on November 22, 2004 at the Palms.

4 A I think that's reasonable probable.

5 Q Okay. Do you find that the notations that you see  
6 from the ENTs to be consistent with that kind of injury?

7 A Yes. Consistent with, but not a diagnostic of. I  
8 would say.

9 Q Right. Okay.

10 A Yeah.

11 Q But his pain is at -- what? Five out of ten?

12 A Yes.

13 Q And since we know that that happened to him, you  
14 would expect that there would be pain.

15 A Yes.

16 Q And you would expect that that would be a reasonable  
17 level?

18 A Yes.

19 Q And they show aside from that no loss of  
20 consciousness or dizziness or anything else?

21 A That's right.

22 Q But he's got a knee injury. Right?

23 A Yes.

24 Q And he's got a real knee injury.

25 A Yes.

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1 Q But he doesn't appear to have anything else. Is  
2 that correct?

3 A That's correct.

4 Q Okay. Now you looked at the records of Dr. Heaps?

5 A Yes.

6 Q And you looked at Dr. Heaps trial testimony which  
7 was the deposition in which was read into the record?

8 A Yes.

9 Q And did Dr. Heaps conduct a thorough examination?

10 A I think he conducted a very thorough examination for  
11 an emergency room doctor. He didn't confine his exam just to  
12 the knee, but he really did a thorough muscular/skeletal  
13 system exam.

14 Q And --

15 A A lot of emergency room doctors wouldn't have done  
16 that in that circumstance. But he did.

17 Q He was in the process of being board certified as an  
18 ER doctor?

19 A Is he? I -- okay.

20 Q Yeah. And what you saw fit with that?

21 A Yes.

22 Q You --

23 A Certainly so.

24 Q You thought he did a nice job?

25 A He did a very thorough exam. Yes.

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1 Q And he made an appropriate diagnosis of the knee  
2 condition?

3 A Yes.

4 Q Did he find anything else?

5 A No. He really didn't. He found, I think a little  
6 swelling in the knee. He felt the ligaments of the knee were  
7 stable. He tested for the cruciates as well as the collateral  
8 ligaments.

9 Q Uh-huh.

10 A Range of motion and the appearance of the knee. And  
11 his positive findings were involved with the knee.

12 Q Now the amount of swelling is -- does that have any  
13 correlation to the degree of the injury?

14 A I would say yes, it does. I think that if you  
15 sustain an injury in the knee, for example, which tears a  
16 cruciate -- an anterior cruciate ligament, that's a major  
17 problem. Where the ligament comes off the bone, there's  
18 bleeding and the knee fills up with blood. It's very swollen  
19 and tight and painful and hard to move. So that that does  
20 bespeak a very serious injury. If you have minimal or mild  
21 swelling, it's less serious of an injury.

22 Q Okay.

23 A So that, sure it's related.

24 Q Okay. And Dr. Heaps made recommendations for  
25 Mr. Rodriguez?

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1 A Yes.

2 Q Gave him crutches?

3 A Yes.

4 Q And did he explain why it was he gave him crutches?

5 A I think he wanted to limit weight bearing on the  
6 left lower extremity.

7 Q Okay. Did he say that one of the reasons that he  
8 wanted to do that was because the patient had an injury and if  
9 he limits weight bearing these things -- some of them at least  
10 tend to heal on their own?

11 A Yes. They do.

12 Q Has that been your experience?

13 A Yes, indeed.

14 Q The body actually does heal itself?

15 A Fortunately the body has amazing recuperative  
16 properties. Yes.

17 Q Okay. Now, Doctor, if -- you're familiar with  
18 traumatic injuries. Are you not?

19 A Yes. Indeed.

20 Q And you've seen many of them over the years?

21 A Many of them over the years. Athletic, motorcycle  
22 accidents, all kind of injuries.

23 Q Okay. Now if you have a soft tissue injury. If  
24 someone has a soft tissue injury, do you expect that the pain  
25 is going to be instantaneous or does it depend on the severity

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1 of the injury?

2 A Well this -- this gets into kind of the mythology of  
3 medicine. There's a -- the business of the so called  
4 whiplash, which orthopedists don't like to use for a term for  
5 a neck injury in rear ending automobile accidents, but the  
6 person who has a whip lash supposedly can then develop neck  
7 pain two or three weeks later. And I don't think that makes  
8 sense. If you sprain your neck -- or if you sprain your back,  
9 the ligaments involved in the sprain are richly supplied with  
10 sensory nerves which convey to your brain, this hurts. It's  
11 painful.

12 So that it's almost instantaneous. It may take  
13 overnight. Some people who have a lot of injuries wake up  
14 feeling worse than they did when the injury occurred  
15 initially. But certainly there's a kind of what I would call  
16 a refractory period after the injury when there's -- they're  
17 still some -- they're stunned somewhat. Emotionally stunned.  
18 And it's like not feeling the impact of bad news. If you  
19 discover that your daughter was suddenly killed in an accident  
20 you'd be emotionally stunned. And the full reaction would  
21 occur sometime later.

22 So there is a refractory period, but I think it's a  
23 relatively short period.

24 Q Like two, three days?

25 A Oh yeah, maybe shorter than that. Hours.

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1 Q Okay. So if there were any additional injuries  
2 would you expect them to show up within two or three days?

3 A Yes. I would.

4 Q Okay. Now, the -- let's move to December. December  
5 6 is -- I don't know if we can -- I don't know if you can read  
6 that, but that's December 6th -- Monday, December 6th, that's  
7 Dr. Nork.

8 A Well I'm looking at this through the bottom of my  
9 bifocals, so --

10 THE COURT: It's not easy to see even so, is it, sir.

11 MR. WARD: Okay.

12 THE WITNESS: Right. It isn't, but I can manage.

13 BY MR. WARD:

14 Q Okay. I'm just kind of doing this map as a -- this  
15 calendar as a place hold. This is Monday, December 6th the  
16 patient is seen by Mr. Nork?

17 A Yes.

18 Q Now this is two weeks post accident. Correct?

19 A Yes. Exactly two weeks.

20 Q And if the patient had any other issues would you  
21 expect them to have surfaced by this time?

22 A Yes. Certainly so.

23 Q And so did you look at Dr. Nork's records?

24 A Yes.

25 Q And what does Dr. Nork say?

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1           A     Well I've got it here on page 5 of the record  
2 review. He describes -- he has the history of the injury  
3 essentially similar to what I got. He was given medication  
4 and crutches and advised to return to the casino. At the time  
5 of my exam the complaint was pain in the left knee. Constant,  
6 increased with weight bearing. He was wearing a brace and  
7 only took it off to shower. He walked with crutches. He  
8 stated the swelling had subsided considerably. And there was  
9 no instability or clicking or popping or grinding or grating.  
10 And he said he never had an injury to his knee before that.

11           Q     Now is that inconsistent with a meniscal tear from  
12 November 22?

13           MR. BAKER: I'm sorry. Did you consistent or in --

14           MR. WARD: Inconsistent.

15           MR. BAKER: Okay.

16           THE WITNESS: No. It's not.

17 BY MR. WARD:

18           Q     Right. Okay. It's consistent.

19           A     It's consistent with a meniscal tear. You can still  
20 have this presentation in a meniscal tear.

21           Q     So this is -- is this exactly what you would expect?

22           A     Well it's within the range of things that you'd  
23 expect. Yes.

24           Q     Okay. And is there any reference to any other body  
25 part that's injured?

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1 A I don't see it here. And I don't recall it.

2 Q Okay. Now the Dr. Nork refers the patient to  
3 physical therapy. Is that correct?

4 A I think Rancho Physical Therapy.

5 Q Rancho Physical Therapy. And he's seen on December  
6 8th?

7 A Yes.

8 Q Now I -- there are a number of visits to Rancho  
9 Physical Therapy and I wan to try to breeze through this as  
10 quickly as we can, but do you have the records there or do you  
11 want me to bring the records up? They're in evidence aren't  
12 they?

13 A I don't have all of them here. I -- reviewed them,  
14 but haven't --

15 THE COURT: Mr. Ward, could we take about a ten minute  
16 break before you do that?

17 MR. WARD: Certainly, Your Honor.

18 THE COURT: Thank you.

19 [Recess]

20 THE COURT: Okay. We're back on the record. Whenever  
21 you're ready, Mr. Ward.

22 MR. WARD: Thank you, Your Honor.

23 DIRECT EXAMINATION CONTINUED

24 BY MR. WARD:

25 Q We're going to bring up the records from Rancho

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1 Physical Therapy and these are already in evidence. And I'm  
2 just going to go through them quickly.

3 THE COURT: What number are they, Mr. Ward, do you know?

4 MR. BAKER: I believe it's Volume I, Exhibit 15, Your  
5 Honor.

6 THE COURT: 15, you say?

7 MR. BAKER: I think so.

8 THE COURT: All right. Thank you.

9 BY MR. WARD:

10 Q Now, the Rancho Physical Therapy starts on  
11 December --

12 A Eight.

13 Q -- December 8, 2004?

14 A Yes.

15 Q Okay. Now what is the condition of the patient, as  
16 you see it on December 8th? What do they say about his  
17 complaints?

18 A Their diagnosis is left lower extremity pain.

19 Q Okay. Is there any indication that that there are  
20 any other complaints?

21 A No.

22 Q Now we are, at this point, two weeks post-injury,  
23 correct?

24 A Yes.

25 Q And what limitations on activity would you have for

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1 this patient at that time, based on this -- these physical  
2 conditions?

3 A They recount the history, that he was seen in the  
4 ER, and he was given a brace, referred for physical therapy.  
5 Well, he would be -- normally, he would be expected to be  
6 bearing some weight and to be exercising and to be  
7 strengthening his quadriceps muscles.

8 Q Okay. And based upon the assessment and the injury  
9 would you expect at this time that he would be able to move  
10 around?

11 A Yes.

12 Q But would you expect there'd be some limitation on  
13 that movement?

14 A Yes. I mean that's why he has a brace. The brace  
15 helps stabilize the knee and enables him to move without  
16 further aggravating whatever is going on inside his knee.

17 Q Okay. Would there be anything about his condition  
18 that would limit him from sedentary activities?

19 A No. No.

20 Q So would he be able to sit in a chair and watch  
21 television?

22 A Yes.

23 Q Would he be able to sit in a chair and work at a  
24 computer?

25 A Yes.

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1 Q If he knew how to use computers?

2 A Yes.

3 Q And he would be able to do other kinds of things  
4 involving movement?

5 A Sedentary and semi-sedentary things, certainly so.

6 Q Okay. So you're not expecting him to run a marathon  
7 at this point?

8 A No. But he could do quite a few things. That's why  
9 you fit a person to a knee brace, you want to keep people as  
10 active as they can be. You don't want to encourage  
11 inactivity.

12 Q Okay. And so when he's seen on December 8th at  
13 Rancho Physical Therapy he's assessed and some physical  
14 therapy is done; is that correct?

15 A That's correct.

16 Q Okay. Now he's seen again on December 10, Rancho  
17 Physical Therapy, and do you see any complaints there that are  
18 anything other than the knee?

19 A Well, I don't see anything.

20 UNIDENTIFIED SPEAKER: We see blue.

21 THE WITNESS: I've got a blue screen here.

22 [Counsel Confer]

23 MR. BAKER: Your Honor, can I approach the witness,  
24 please?

25 THE COURT: Sure.

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1 MR. BAKER: I'll hand him the exhibits.

2 THE WITNESS: Oh, great. And these will be the physical  
3 therapy entries?

4 MR. BAKER: Yeah. And they're Bates numbered on the  
5 bottom.

6 THE WITNESS: Okay. And is this what I -- what number do  
7 I want?

8 BY MR. WARD:

9 Q Well, we will do that. The reason I was --

10 A Oh --

11 Q -- avoiding that is, as you can see, these are the  
12 records from Rancho Physical Therapy and --

13 A Okay.

14 Q But, so let me find a -- let me find the page.

15 THE COURT: Fifteen, wasn't it?

16 MR. WARD: I don't --

17 MR. BAKER: It is 15.

18 UNIDENTIFIED SPEAKER: Volume I, Your Honor.

19 [Counsel Confer]

20 MR. WARD: These are not in date order, as the --

21 MR. BAKER: Well, maybe I should ask. Your Honor, I'm a  
22 little still, is it okay if I stand?

23 THE COURT: Why not?

24 MR. BAKER: Thank you. Sorry. Rob just point out that  
25 this is your courtroom.

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1 THE COURT: It's all this testimony you've heard about  
2 back issues, probably, Mr. Baker.

3 MR. BAKER: Right.

4 THE WITNESS: Right.

5 BY MR. WARD:

6 Q Doctor, would you look please at Bates 27?

7 A Now you'll have to help me. How do -- what do I  
8 look for --

9 Q Okay. We've got it back here. So let me --

10 A Oh --

11 Q -- for the moment --

12 A -- okay.

13 Q -- go from this, because we can actually -- we've  
14 isolated the pages, so we can actually find it. Can you --

15 A Is it December 10th, 2004?

16 Q December 10. Right.

17 A Okay.

18 Q And can you read that? Can you see that?

19 A "Patient says home exercise program going well.  
20 Movement in water feels much better. Treatment is above  
21 instructed in something pool therapy, exercises. Patient to  
22 continue home exercise program daily with" -- I -- it's  
23 something --

24 Q Let me stop you there.

25 A Something about "increasing range of motion, left

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1 knee."

2 Q Right, yeah.

3 A "Continue normal therapy next week."

4 Q Let me stop you there.

5 A Yeah.

6 Q Do you see anything -- do you see any complaints of  
7 anything other than the left knee?

8 A No.

9 Q And so the next visit is December 13, and these --  
10 some of these visits are on the same page.

11 UNIDENTIFIED SPEAKER: Not this one.

12 BY MR. WARD:

13 Q It's that same kind of --

14 A We've gone back to blue.

15 Q Are we back to --

16 MR. BAKER: Casey, my --

17 THE WITNESS: I didn't think this would happen in Las  
18 Vegas.

19 MR. BAKER: --my Rancho records are in the box there.

20 THE WITNESS: It happens in San Francisco all the time.

21 UNIDENTIFIED SPEAKER: Your binder isn't in order, that's  
22 what our problem is.

23 [Counsel Confer]

24 BY MR. WARD:

25 Q Okay. December 13. December 13, do you see that?

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1 A Yes, I have it.

2 Q And do you see anything other than left knee  
3 complaints?

4 A No.

5 Q And below is December --

6 A 16th.

7 Q December -- well, we're at December -- yeah,  
8 December -- it's actually, I think, December 15 written on the  
9 wrong line. But at any rate, it's Wednesday. Any indication  
10 there of anything other than left knee complaints?

11 A Only left knee.

12 Q Okay. And next is December 17th. Do you see  
13 anything there of any indication other than left knee  
14 complaints?

15 A No.

16 Q Do you see --

17 A Only left knee.

18 Q Do you see anything there that suggests that the  
19 patient is improving?

20 A "Patient says his range of motion is much better.  
21 Doing stretches daily at home. Treatment as above."

22 Q Now is that what you would expect from this kind of  
23 an injury?

24 A Yes.

25 Q And okay. So we go to the next, December 20, and

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1 this is December 20 of '04.

2 A Okay.

3 Q Do you see that, Doctor?

4 A Yes.

5 Q Do you see any indication of anything other than  
6 left knee?

7 A Left knee only.

8 Q Do you see anything that indicates he's doing  
9 better?

10 A "Excellent progress overall" is in the -- and the  
11 note ends, "excellent progress overall." That's good.

12 Q Is that what you would expect from this kind of an  
13 injury?

14 A Yes.

15 Q And do --

16 A I think what happening here, is that he did really  
17 sprain his knee, a sprain strain, and the structures around  
18 the knee, when you hyperextend it, you bend it back further  
19 than it wants to bend. And the structures that restrain that  
20 have been stretched a little bit. They haven't been torn  
21 through or there would have been a lot of swelling. But  
22 they've been stretched a little bit, more than they want to  
23 stretch and that hurts.

24 And as the -- and so the knee protects itself by not  
25 letting itself move and then as the inflammation resolves, and

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1 the thing quiets down a little bit, then the motion improves.  
2 And with the good physical therapy -- and this is a normal  
3 regimen -- you get improvement. And that's what's happened.  
4 And that's what you'd expect.

5 Q And what would you expect to be his limitation on  
6 motion during this period of time, limitation on activity  
7 during this period of time?

8 A A gradual increase to pre-injury activity.

9 Q Okay.

10 A I think the thing that's important to understand  
11 here is we know that he had a meniscal tear, but a meniscal  
12 tear isn't causing him any symptoms. That doesn't mean it  
13 doesn't need to be fixed, and it doesn't mean that the surgery  
14 was inappropriate. I think the surgery was quite proper, to  
15 be done.

16 But it means that it wasn't causing him symptoms at  
17 that time. If you have symptoms from a meniscus tear you get  
18 what's called "locking of the knee," and you'll bend the knee  
19 and then can't straighten it out all the way. That's because  
20 the torn meniscus gets in the way of straightening the knee,  
21 and that's the thing that can happen.

22 But a torn meniscus in and of itself doesn't cause  
23 pain and it doesn't cause a problem unless there's locking;  
24 that's the symptom.

25 Q Okay. And do you see any indication of locking

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1 here?

2 A No.

3 Q And the next visit is December 17. Is that --

4 UNIDENTIFIED SPEAKER: No, 20.

5 MR. WARD: Oh, 22?

6 BY MR. WARD:

7 Q Twenty-two, yeah. It's written on the wrong -- this  
8 is the one that's written on the wrong line.

9 A Okay.

10 Q This -- it's supposed -- they wrote it in Thursdays  
11 and they -- and then they put this arrow in the -- it's  
12 actually supposed to be Wednesdays, correct?

13 A All right. This is -- shows more improvement. "He  
14 says he only uses crutches for longer distances. Treatment as  
15 above." That is, again, he's making progress.

16 Q Okay.

17 A Getting better.

18 Q Now, this is -- this particular day here, do you see  
19 any indication of any complaints other than knee?

20 A No.

21 Q This is one month post-accident, right?

22 A Okay. Yes.

23 Q This is the one-month anniversary of the accident.  
24 And isn't -- is he progressing as you would expect he would  
25 progress?

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1 A Yes.

2 Q And now we go to the 23rd, we have one more entry  
3 here. On the 23rd, do you see that, Doctor?

4 A Yes.

5 Q And any indication of any complaints other than the  
6 knee?

7 A I can't read it all, but I don't see anything that  
8 suggests anything other than the knee.

9 Q Now, if --

10 A Terrible handwriting.

11 Q -- there had been any other injury to this patient,  
12 you would have expected they'd have surfaced long before this,  
13 would you not?

14 A Yes, I would.

15 Q And the fact that there is no -- nothing surfaced,  
16 what does that tell you, Doctor?

17 A Well that tells me that he really injured his knee  
18 and that seems to be what -- the extent of his injury.

19 Q Okay. And the knee's getting better?

20 A And the knee is getting better.

21 Q Okay. And he still needs to have the meniscus  
22 repaired?

23 A Yes.

24 Q But it's getting better?

25 A Yes.

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1 Q And now the meniscus repair, is that what you would  
2 call elective surgery?

3 A Yes, I would.

4 Q Now elective surgery, I take it doesn't mean that  
5 it's not necessary?

6 A No, no. I think a torn meniscus is going to cause  
7 problems along the line, and it's sort of having gall stones,  
8 you know? The gall stones might not be causing a problem but  
9 once you find gall stones, most surgeons recommend that you  
10 have your gall bladder out.

11 And I think that's good judgment. And the same is  
12 true of a torn meniscus, that it's good to get it trimmed so  
13 that it doesn't impair the job of the meniscus.

14 Q Okay. Now let's move to January 3. Any indication  
15 of any complaints other than the knee?

16 A No. And there's more improvement. "Still getting  
17 better. Walking getting easier." That sounds very good.

18 Q And is that what you would expect?

19 A Yes.

20 Q So this patient is getting good medical care?

21 A Yes.

22 Q Good physical therapy?

23 A Yes.

24 Q And ultimately a good surgeon?

25 A Yes.

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1 Q And we move to January 5.

2 A Right.

3 Q And do you see anything other than the knee?

4 A No. "Patient states he is better."

5 Q His complaint here is he still can't walk fast; is  
6 that correct?

7 A Or pivot, yeah.

8 Q Is that --

9 A Yes.

10 Q -- kind of what you would expect at this stage?

11 A Yes.

12 Q So the fact that this complaint is he can't walk  
13 fast enough is an indication that there's substantial  
14 improvement?

15 A Yes.

16 Q But he wants to make it better?

17 A Yes.

18 Q And then we move to January 5.

19 A That was January 5.

20 Q I'm sorry. January 7.

21 A Oh, okay.

22 Q And what is the SIG?

23 A Significant increase in range of motion is what that  
24 means.

25 Q Okay.

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1 A Since evaluation.

2 Q What's that tell you?

3 A That means he's getting better and increasing  
4 strength also. "Improved gait."

5 Q Okay.

6 A "But not yet" -- wall -- w-a-l -- well -- I don't  
7 know what word is.

8 Q Okay. Now is it correct, Doctor, that the physical  
9 therapy that he's continuing to get during this period of time  
10 is appropriate?

11 A Oh, I think so. Certainly so.

12 Q And is it effective?

13 A Seems to have been.

14 Q Okay. Now we -- he goes back to -- now he's seen by  
15 -- oops, I'm jumping a week. Okay. January 10, and do you  
16 see any indication of any complaints other than the knee?

17 A No.

18 Q And January 12, anything other than the knee?

19 A No.

20 Q January 13, anything other than the knee?

21 A Knee only.

22 Q Okay. Now let's move to January 17th. Do you see  
23 anything other than the knee?

24 A Nothing other than the knee.

25 Q Okay. Now on your records or your chart, Doctor, do

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1 you show that he saw on the 17th of January, he also saw Dr.  
2 Nork?

3 A Yes.

4 Q And when he saw Dr. Nork were there any complaints  
5 of anything other than the knee?

6 A No.

7 Q And what was Dr. Nork's evaluation on January 17th?

8 A Oh, let's see. Can you tell me what page I wrote it  
9 on?

10 Q I will -- I'll try.

11 A Let's see.

12 [Counsel Confer]

13 THE WITNESS: I've got it. It's page 5.

14 BY MR. WARD:

15 Q Okay.

16 A Now, what did you ask?

17 Q Yeah. What did Dr. Nork say on this visit? Any  
18 complaints about anything other than the knee?

19 A No. Complaints were only about the knee.

20 Q Okay. And did Dr. Nork find anything new?

21 A No. And he felt the patient had had a contusion of  
22 the knee with a hyperextension sprain/strain. And he  
23 recommended continuing the treatment that was already in  
24 place.

25 Q Okay. So that was it -- that was -- that fit with

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1 the pattern of what you thought was appropriate?

2 A Yes.

3 Q Okay. And now the patient is seen next, January 20  
4 in physical therapy. Do you see anything other than the knee?

5 A Well, January 20 it says N/S, I think that means "no  
6 show".

7 Q Okay. And does that tell you anything?

8 A Well it tells me he didn't appear for physical  
9 therapy.

10 Q Okay. And the next one is January 21.

11 A Yes.

12 Q Anything other than the knee?

13 A No, only the knee.

14 Q Okay. And on the 28th, he gets -- let's see. Did I  
15 jump ahead here? January 24 of 2005, any complaints other  
16 than the knee?

17 A No. "No significant changes since last week."

18 Q Okay. And January 27, anything other than the knee?

19 A No new -- something. So I guess nothing new.

20 Q Okay. And January 31?

21 A Only the knee. And he says his pain level is not  
22 any better, however.

23 Q And is there -- are there any additional findings by  
24 the physical therapy people?

25 A I don't see any noted.

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1 Q Okay.

2 A I don't --

3 Q And what's the entry from -- the next entry appears  
4 to be 2/17. It's on that same document. Can you see that?  
5 "D/C, patient not returning."

6 A "Discontinue physical therapy, patient not  
7 returning." Yeah --

8 Q Okay.

9 A -- it says.

10 Q Do you know why that is?

11 A No, I don't.

12 Q Okay. Now when you -- we now move to February 1; is  
13 that correct?

14 MR. WARD: Can we bring up the calendar a moment, please?  
15 Go back to -- we can go back to December, just quickly.

16 BY MR. WARD:

17 Q So we have December, 2004, the -- in red we have the  
18 visits almost every other day to physical therapy. We've got  
19 the examination by Dr. Nork.

20 And then we move to January and we've got about  
21 every other day to physical therapy and to Dr. Nork on the  
22 17th. And now it appears on the 17th that he went to a new  
23 doctor. Do you see that?

24 A You mean Dr. Nork?

25 Q No. January 24, 2005.

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1 A Oh, Dr. Campbell --

2 Q Right.

3 A -- the Wellness Group, yes.

4 Q And do you know why he changed doctors?

5 A No, I don't.

6 Q Okay. And was he seen by Dr. Campbell?

7 A The -- January -- I don't have an entry for Dr.  
8 Campbell.

9 Q Let me see if I can find it for you.

10 [Counsel Confer]

11 MR. BAKER: Try looking in Exhibit 8, Exhibit 8.

12 MR. WARD: Exhibit 8.

13 THE COURT: Do either of you object if I pose a question  
14 to Dr. Becker, since this is a bench trial?

15 MR. WARD: No.

16 MR. BAKER: No, Your Honor.

17 THE COURT: While we're waiting.

18 Dr. Becker, you have described this knee surgery as being  
19 elective. I think Dr. Shannon's description of it was that it  
20 was semi-elective. Didn't she say "semi-elective?"

21 MR. BAKER: That's what I recall, Your Honor.

22 THE COURT: And I just was curious as to what your  
23 thoughts are as to her description of that?

24 THE WITNESS: I would agree with that.

25 THE COURT: All right.

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1 THE WITNESS: I would agree. Well, I mean elective is  
2 sort of on a continuum. There's a difference between emergent  
3 surgery, which has to be done right now, urgent surgery which  
4 needs to be done in the next two or three days, and elective,  
5 and it can be semi-elective and you could break it down.

6 But I think, I basically agree with Dr. Shannon.

7 THE COURT: Okay. Thank you.

8 BY MR. WARD:

9 Q Doctor, I'm having trouble finding this and I don't  
10 want to slow this down. I'll find it and come back to it.  
11 But I want to go to Dr. Simpson who's also part of the  
12 Wellness Group. And is seen -- he's seen by Dr. Simpson on  
13 February 1st; is that correct?

14 A Yes. I have February 1st.

15 Q And can you tell me, does -- when he's seen by  
16 Dr. Simpson on February 1st, is there any complaint other than  
17 the knee?

18 A I don't see anything other than the knee.

19 Q Okay. How about on February 15, when he's seen by  
20 Dr. Simpson?

21 A He mentions numbness and tingling in his right hand  
22 and fingers.

23 Q Okay. Now numbness and tingling in his right hand  
24 and fingers, what would the cause of that be?

25 A Well, this man is very heavy and he's been using

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1 crutches. And common things occur commonly. And if you put  
2 pressure, as you hold a crutch, the pressure falls right in  
3 the tunnel that the median nerve goes through, the carpal  
4 tunnel and so it's not unusual to get carpal tunnel-like  
5 symptoms from pressure on the median nerve particularly in a  
6 heavy person because there's a lot weight being borne by the  
7 wrist.

8           And those of us who walk on two legs, we're bipeds,  
9 the wrist isn't supposed to be a weight-bearing joint, and it  
10 becomes that if you use crutches.

11           Q     Okay. Is that indicative of having back or neck  
12 pain?

13           A     No.

14           Q     Carpal tunnel syndrome?

15           A     No, no. No. Absolutely not.

16           Q     What is -- it's simply limited to the wrist?

17           A     It's absolutely limited to the pressure on the nerve  
18 at the wrist.

19           Q     Okay. And it's a real phenomenon?

20           A     Yes. It's a real phenomenon.

21           Q     And that's something you wrote an article about,  
22 about 40 years ago?

23           A     Yes.

24           Q     Okay.

25           A     I wrote an article on carpal tunnel syndrome, before

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1 it was popular, before it was well-known, yes.

2 Q And you've had a lot of carpal tunnel patients since  
3 that time?

4 A Absolutely.

5 Q And what are the possibilities with someone who has,  
6 has what is evidenced by Mr. Rodriguez on this particular day?

7 A Well, I mean you could treat it, but you can't do a  
8 carpal tunnel release because then he wouldn't be able to use  
9 his crutches, so you can't operate on it.

10 I suppose you could inject it with steroids, some  
11 people do that. That would be one approach. Another approach  
12 would be to give him a wrist splint to relieve the pressure at  
13 night, at least while he was sleeping, when he wasn't using  
14 the crutches.

15 But basically you have to put up with it until he's  
16 off the crutches. And usually it would regress and after two  
17 or three weeks not be symptomatic anymore. Because if you're  
18 not irritating and pressing the nerve, the pressure is  
19 relieved.

20 Q Okay. So you would expect that one of the  
21 possibilities is, after he stopped using crutches, that after  
22 a few weeks this will go away on its own?

23 A Yes.

24 Q But not all will go away on their own; is that  
25 correct?

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1 A That's correct.

2 Q And some will persist?

3 A Yes.

4 Q And for those that persist, what treatment  
5 possibilities are there? The next level is what, injection?

6 A Well, yes. At the time I wrote that paper, we were  
7 interested in finding out how people did after carpal tunnel  
8 releases. So we didn't inject very many of them, and I don't  
9 really think injection does much; it's a mechanical problem.

10 Like if you've got a stone in your shoe and you're  
11 walking around, it doesn't hurt to a -- it doesn't help to  
12 inject your foot. It's easier to take the stone out of the  
13 shoe. And so this is a common sense thing. You just -- it's  
14 such an easy operation.

15 All you do is open the ligament that's pressing on  
16 the nerve, just release it, and the nerve pops up and it isn't  
17 compressed anymore. And it heals and it gets better. It's --  
18 it really is simple. They now do it through an arthroscope,  
19 they don't even make an incision. The incision advocated in  
20 the paper, I think is about an inch and a half long, but now  
21 it's a little mini thing.

22 Q And so it's treatable?

23 A Very treatable.

24 Q And then --

25 A And curable.

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1 Q And curable?

2 A Yes.

3 Q Now do you see any other complaints there about

4 anything other than the knee and this numbness?

5 A No.

6 Q Okay.

7 A The knee and the numbness.

8 Q And now Dr. Simpson is with the same group as

9 Dr. Campbell; is that correct?

10 A I don't know, if --

11 Q They're both Wellness Group.

12 A Okay, yes. Campbell is a chiropractor, that's

13 right.

14 Q Right, okay. And now it is March 28 that -- did I

15 jump too far ahead here? No.

16 A I have Dr. Shannon.

17 Q Yeah. The next visit is -- I have a March 1, and

18 Wellness, Simpson Wellness Group. Do you see anything else

19 with Simpson other than -- is that when he reviewed the MRI?

20 A I don't have that March 1 cited in my record review.

21 Q Okay.

22 A I looked at it, but I didn't --

23 Q And you're not aware of any complaints and of

24 anything other than the knee on that date?

25 A No, I'm not.

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1 Q Now he sees Dr. Shannon on March 28; is that  
2 correct?

3 A Right.

4 Q Dr. Shannon at that time recommends surgery?

5 A Yes.

6 Q And when you called it elective, I take it you  
7 didn't mean that it wasn't appropriate to do. I mean you  
8 didn't mean elective like someone gets a nose job or something  
9 like that?

10 A No, no. I think she -- my understanding is the same  
11 as hers, that she recommends arthroscopic surgery. I would  
12 have made the same recommendation.

13 Q Okay. Now from a surgical standpoint in the -- in  
14 -- before arthroscopic surgery, surgery to the knee involved  
15 what in general?

16 A Well, it involved making an incision into the knee  
17 joint and actually opening the joint and you could go in and  
18 see some of it. But at surgery, open surgery, you can't see  
19 as much as you can see through an arthroscope because you can  
20 put the scope in little corners and places that you can't get  
21 to otherwise.

22 The knee is a very tight joint. It has strong  
23 ligaments on each side of it and in fore and aft, and because  
24 it's so tight, even when the patient is anesthetized, you  
25 can't separate the bones and look in except with an

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1 arthroscope, and you can insinuate the arthroscope in places  
2 that you couldn't see directly. And so you see more; it's  
3 really a much better procedure.

4 Q And in terms of the recuperation time, what would  
5 the normal recuperation time be for a completely open knee  
6 surgery?

7 A It takes a little bit longer. It takes probably two  
8 or three weeks before someone can start protected weight-  
9 bearing. They don't want to, because it's sore, it's very  
10 sore. It's like an open wound.

11 Q And how does that compare with our -- then  
12 arthroscope surgery?

13 A The small wound heals much faster -- or it doesn't  
14 heal faster, but there's much less length of scar to heal, and  
15 so it hurts less and it's the discomfort that keeps you from  
16 using the knee. If it doesn't hurt, you tend to be able to  
17 put weight on it.

18 Q Now, the patient has not been seen by anyone else  
19 and not getting physical therapy during the month of March,  
20 2005; is that correct?

21 A As far as these notes indicate, that's right. I  
22 don't --

23 Q What does that tell you?

24 A Well it tells me he didn't see anybody for  
25 treatment.

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1 Q Okay. And on March 28 he sees Dr. Shannon.

2 A Yes.

3 Q And she recommends surgery?

4 A Yes.

5 Q And now we move to April and you see -- does he see  
6 Dr. Shannon again?

7 A Well this chart suggests that he did see her. I'm  
8 looking for my note. I don't think I have that note of Dr.  
9 Shannon.

10 Q Okay. And you haven't seen anything that suggests  
11 that here were any complaints other than the knee?

12 A No, I haven't.

13 Q And there's no other treatment in the month of  
14 April, is there?

15 A No.

16 Q And if we move to the month of May?

17 A Nothing.

18 Q There's no treatment in the month of May?

19 A Nothing.

20 Q And we go to June, there's no treatment in --

21 A June, nothing.

22 Q -- the month of June.

23 A Right. And I don't have any notes of anything  
24 during that period.

25 Q So we're now six months, approximately post-injury,

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1 and is this in keeping with what you would expect with this  
2 kind of injury?

3 MR. BAKER: It's lacking -- objection, Your Honor; vague.

4 THE COURT: Uh-huh, could I ask you to rephrase.

5 MR. WARD: Sure.

6 BY MR. WARD:

7 Q Is the lack of ongoing treatment what you would  
8 expect with this kind of injury?

9 A Yes. And I would expect that if the injury gets  
10 better and the physical therapy notes, some of them suggest  
11 that he had gotten a lot better, and they have excellent  
12 progress in walking without crutches. But so -- and we know  
13 that the torn meniscus is not causing locking, so it's not  
14 causing symptoms. So I would think that he wouldn't need any  
15 treatment until he has the surgery.

16 Q Okay. So this is in keeping with what you would  
17 expect for this kind of an injury?

18 A Yes.

19 Q This is normal follow-up?

20 A Yes, I think so.

21 Q And in terms of the restriction on any activities of  
22 this patient, what would you expect the restriction to be at  
23 this point?

24 A If he were my patient, I'd say activity as  
25 tolerated. Do what you can do. And he'd -- the physical

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1 therapy documents what he has been able to do, and I would  
2 think that -- I would say, well you're doing it. Go ahead,  
3 keep doing it.

4 Q And if -- okay.

5 A I would encourage activity.

6 Q Now we move to July of 2005.

7 A Right. No orthopedic treatment.

8 Q And the end of July, he sees Dr. Mortillaro.

9 A Yes. That's a --

10 Q And Dr. Mortillaro is a psychologist?

11 A Yes.

12 Q And that was at the request of Dr. Shannon; is that  
13 correct?

14 A Yes. Yes, I believe so.

15 Q Okay. And now in August he sees Dr. Shannon again?

16 A Yes.

17 Q Is this in preparation for the surgery?

18 A I believe so. My documents are out of order, but  
19 she normally would see the patient pre-op.

20 Q Okay. And --

21 A I know the surgery occurs October 4, so she's seeing  
22 the patient shortly before the surgery, which you'd expect.

23 Q Okay. And the patient's seen by Dr. Mortillaro?

24 A Yes.

25 Q On the 31st of August and again on the 1st of

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1 September?

2 A That's what I have.

3 Q And she's -- sees Valley Hospital for a chest x-ray.  
4 Now what was the chest x-ray about?

5 A Well, we -- it's common practice to evaluate a  
6 person who's going to undergo anesthesia from a cardio  
7 respiratory standpoint. And we know here that there's a  
8 history of possible pulmonary embolus, and he has asthma or he  
9 had asthma.

10 Q Okay.

11 A And so he's got some history to that suggests that  
12 one would be well-advised to check his chest x-ray before you  
13 subject him to major anesthesia.

14 Q Now do the records reveal that the patient advised  
15 Dr. Shannon that he had a history of pulmonary embolus?

16 A I think the patient told --

17 Q Told?

18 A -- Dr. Shannon that --

19 Q Right.

20 A -- because that's the only way she found out.

21 Q Right.

22 A And --

23 Q And you saw the records from Magnolia Center?

24 A Yes.

25 Q And was that Mr. Rodriguez?

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1 A Yes.

2 Q At Magnolia Center?

3 A Yeah. Yes, I have that.

4 Q And did he indeed have a suspected pulmonary  
5 embolus?

6 A Yes. He was worked up for a pulmonary embolus.

7 Q Was he treated for anything else at Magnolia Center  
8 before this accident?

9 A I think they felt he had asthma. They found he had  
10 asthma and sleep apnea.

11 Q Okay. And --

12 A And he may have gotten a CPAP machine at that time.

13 Q Okay. And that was well before this accident,  
14 correct?

15 A Yes.

16 Q Now Dr. Shannon, in having a chest x-ray and the  
17 things Dr. Shannon did, was that appropriate or inappropriate?

18 A Absolutely appropriate. I think she's a good  
19 doctor. I like Dr. Shannon.

20 Q So she's doing everything that a cautious and well  
21 qualified surgeon should do?

22 A Yes.

23 Q Looking out for the patient?

24 A Yes.

25 Q And there's another visit to Dr. Shannon on

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1 September 30 and during this period of time --

2 A Yes.

3 Q -- I take it there haven't been, other than the  
4 carpal tunnel issue that we talked about, there haven't been  
5 any complaints other than the knee; is that correct?

6 A That's correct. "Chief complaint, left knee pain."

7 Q And now Dr. Mortillaro sees the patient again on  
8 October 3.

9 A Yes.

10 Q And then on October 4, Dr. Shannon does the left  
11 knee arthroscopy at Valley Hospital?

12 A Correct.

13 Q And we've talked about -- you've talked about what  
14 Dr. Shannon did?

15 A Yes.

16 Q Following Dr. Shannon's surgery and with the knee in  
17 the condition that you saw that it was on the photographs,  
18 what would you expect would happen then after the surgery?  
19 What would the course of recovery be?

20 A The normal course of recovery following a knee  
21 arthroscopy of this intensity would be that within two or  
22 three days he could start protective weight-bearing with  
23 crutches. And assuming that the entry, that he was walking  
24 without crutches before, I would think that he would have  
25 within two, three weeks at the most, be able to get away from

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1 the crutches and be walking. Because his knee is better now,  
2 than it was before he injured it.

3 Q Okay. Now, you said earlier that our body, our body  
4 heals itself.

5 A Yes.

6 Q There were some things I take it that the body  
7 doesn't heal itself?

8 A Yes, that's why we need doctors.

9 Q Job security?

10 A Yeah.

11 Q All right. A torn meniscus, will that heal itself?

12 A No. A meniscus will not heal itself because it has  
13 no blood supply.

14 Q Okay. So the meniscus needs to be surgically  
15 repaired by the surgeon?

16 A Yes, or excised.

17 Q Okay. Once that surgery is done, does the rest of  
18 the body change any differently from the way it would have  
19 changed before the accident? Is that -- does that --

20 A I'm not sure what you --

21 Q Well let me --

22 A -- mean.

23 Q Let me try it again. That didn't come out very  
24 well.

25 A No.

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1 Q Let me try it again. Is it true that our body --  
2 and I know nobody in this room wants to admit it -- but our  
3 body actually degenerates?

4 A Yes, it is.

5 Q Okay. And is that progressive?

6 A It seems to be.

7 Q And as we get older, does it progress more?

8 A It does.

9 Q And are there certain conditions that make certain  
10 parts of our body progress even faster?

11 A Yes. Gravity is one of them.

12 Q Okay. And overweightness [sic] affects the joints?

13 A Yes.

14 Q And causes them to wear out earlier than they ought  
15 to?

16 A In most cases, yes.

17 Q Okay. Now the accident happened six years ago.

18 A Right.

19 Q In another --

20 A Six years ago now, yes.

21 Q And in another couple of weeks it'll be six years.

22 A Yes.

23 Q Would you expect that Mr. Rodriguez's body has  
24 degenerated to some extent over that period of time?

25 A Yes.

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1 Q Just like yours and mine has?

2 A Yes.

3 Q And --

4 A I would expect so.

5 Q Okay. Yours has, mine has, everybody else's has?

6 A Mine surely has, yes.

7 Q Okay. And is that caused by the accident?

8 A No, no.

9 Q And does the -- is the accident somehow supposed to  
10 freeze him in time so that no more degeneration occurs, and if  
11 it does occur, it must be because of the accident?

12 A Well, no.

13 Q Did you see any additional, throughout the year  
14 2005, did you see any indication in the period of time  
15 following up from this surgery that there was any complaint  
16 other than the knee?

17 A You mean after the surgery?

18 Q Within the short period of time after the surgery?

19 A No. I don't have -- I -- if I did, I didn't  
20 document it, and I'm -- I believe that if I'd had seen it I  
21 would have documented it.

22 Q Okay.

23 A I don't find anything.

24 Q Okay. And now did Mr. Rodriguez progress, as you  
25 would have expected following this arthroscopic surgery?

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1           A     He says it didn't help -- and he says it didn't  
2 help, that he didn't get any better. And it's documented that  
3 his complaints continued.

4           Q     Okay. And if anything, his complaints got worse,  
5 didn't it?

6           A     Yes.

7           Q     And did you see anything in these films that would  
8 account for why it got worse?

9           A     You mean the films from the arthroscopy?

10          Q     Right.

11          A     No, they looked good.

12          Q     Okay.

13          A     They looked very good, actually.

14          Q     Okay. And now the patient went back to Dr. Shannon?

15          A     Yes.

16          Q     And said that he had increasing knee pain.

17          A     Yes.

18          Q     Did she just ignore him?

19          A     No. She wondered what was going on and she ordered  
20 an MRI with contrast. That means material put into the knee  
21 to outline the structures in the knee a little better than  
22 simply you would see them in a plain MRI.

23          Q     And so this is a highly efficacious study?

24          A     It's a very good study. It's a very accurate study.

25          Q     And did this study show anything abnormal?

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1 A No. My remembrance is that it didn't.

2 Q So what does that -- does that tell you anything?

3 A Well, it certainly makes one suspicious, while --  
4 one has to wonder, have we got the right diagnosis, what's  
5 going on here? Why is this knee pain going on? Why -- and we  
6 don't find any reason to explain it when we examine the knee,  
7 and even when we get an MRI with contrast, we don't find an  
8 explanation. And it raises questions about that; what's  
9 causing it, why the symptoms?

10 Q Now can someone who has a meniscus removed, at some  
11 point in time need further repair to the surgical site?

12 A Yes.

13 Q And is that because the surgical site has changed?

14 A Well, yeah. I mean the surgical site is the  
15 interior of the knee.

16 Q Right.

17 A And the interior of a knee that is a degenerative  
18 knee is going to continue to degenerate, and particularly if  
19 there's chondromalacia. I think what finally happened here  
20 was that a loose body was developed and I think that that can  
21 come from the detritus, the little fragments of the rough  
22 cartilage break off, and then they become a loose body.

23 And sometimes in the joint, they will increase in  
24 size and they become problematic, and cause popping.

25 Q Okay. So is it possible that a -- there was a loose

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1 body that was a residual from the surgery, that was so small  
2 that it couldn't be seen?

3 A It's remotely possible. I mean I don't think I -- I  
4 think Dr. Shannon did a very thorough surgery and I don't  
5 think she left any loose body in the knee, if that's what  
6 you're asking me, I'm not sure.

7 I think it's more likely that the loose body  
8 developed with ongoing use of the knee and deterioration.

9 Q So that's something that came later?

10 A I think so.

11 Q As a result of the fact that the knee was already  
12 deteriorating?

13 A Yes. That's would be my -- the way I would call it.

14 Q I take it the surgery that she conducted, no matter  
15 how good she is, can't return his knee to what it was 20 years  
16 before?

17 A That's right.

18 Q And she did make some things better. She smoothed  
19 off the inner aspect of the patella?

20 A Yes.

21 Q And that's the area where the chondromalacia would  
22 be?

23 A Yes. That's --

24 Q And --

25 A -- a rough cartilage.

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1 Q And so, there's actually some improvement there?

2 A Yes, indeed.

3 Q So does that mean that he'll never have  
4 chondromalacia again in that knee?

5 A No, it doesn't. You have chondromalacia -- as I  
6 look around the room, I think there are probably a number of  
7 cases of chondromalacia in this room.

8 Q Don't look at me --

9 A Including my own knee. But no, chondromalacia is  
10 slowly progressive, but it's not debilitating. I mean most of  
11 us manage to hobble around.

12 Q Okay. Now you know that there was a -- yet another  
13 surgery?

14 A Yes.

15 Q And that surgery was sometime later?

16 A Yes.

17 Q And before we get to when that was, during this  
18 period of time that Dr. Shannon was seeing the patient, and  
19 she had the arthrogram conducted, and she didn't find anything  
20 on it, what was her assessment of the patient's condition at  
21 that time?

22 A I think she was puzzled. She wrote something, and  
23 I'm not sure what page. She wrote: "There are symptoms with  
24 no obvious explanation for them." And that was December of  
25 '05, December of '05. "Patient with symptoms and no obvious

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1 explanation for them." She couldn't find out -- she couldn't  
2 explain the symptoms.

3 Q Right. So she could not offer an explanation that  
4 would account for the symptomatology?

5 A That's correct.

6 Q What was the symptomatology?

7 A Well, as she documents the increasing pain and I'm  
8 not sure if at that point he was complaining of popping, he  
9 may have.

10 Q Was there a period of time when she -- when he  
11 complained of popping and she couldn't find it on examination?

12 A Yes, as I recall.

13 Q So the symptomatology that we're talking about here,  
14 was it anything other than the patient complaining to her?

15 A No. It was only a historical things that the  
16 patient -- yeah, medical history.

17 Q So she did an MRI with contrast?

18 A Yes.

19 Q Couldn't find anything?

20 A That's right.

21 Q She conducted an examination, she couldn't find  
22 anything?

23 A Right.

24 Q And so she's puzzled because there's no explanation  
25 for the patient's symptoms which are patient says it hurts?

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1 A That's correct.

2 Q With -- and there's nothing else she can find that  
3 supports that?

4 A That's correct.

5 Q And at that point, does the patient leave the care  
6 of Dr. Shannon?

7 A I don't find any records of hers after that point.

8 Q Okay.

9 A So presumably did.

10 Q Now does the patient ultimately end up seeing  
11 another doctor and having surgery?

12 A Yes, he does.

13 Q And that doctor, from that surgery found what?

14 A I think he found some synovitis. He found an  
15 additional tearing of the meniscus, and I think he trimmed  
16 that further, and he found a loose body. And I don't have the  
17 note in front of me, so I'm not sure what else he found, but  
18 those were the significant findings and the loose body was, I  
19 think the --

20 Q Would you expect that the loose body would account  
21 for all of the complaints of pain of this patient?

22 A No. Loose bodies in and of themselves don't cause  
23 pain. They do cause a mechanical clunk or something -- a  
24 sense that there's something loose in the knee. But it  
25 normally isn't painful because the cartilage surfaces of the

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1 knee are not set -- they're not sensitive to pain. That's why  
2 if you have chondromalacia you can't feel it.

3           You can sometimes hear it crunch as you bend --  
4 straighten your knee and bend it. But a loose body in and of  
5 itself is not a cause for pain in the knee.

6           Q     Okay. And so what was found on that surgery at that  
7 time would have been something that did not exist at the time  
8 that Dr. Shannon did her arthroscopic surgery on October 4 of  
9 2004?

10          A     I think that's highly likely. That's most probable.  
11 I mean there's a small -- with regard to the contrast MRI,  
12 with any examination of that sort it's -- the wisdom is that  
13 if you looked for it and didn't find it, it doesn't mean it  
14 wasn't there, it just means you didn't find it.

15                So that if you -- like if you lose something in this  
16 room and it's in this room, and you hunt and you don't find  
17 it, it doesn't mean it isn't in the room. And it's that kind  
18 of logic, so that -- but the contrast MRI is highly accurate  
19 so that it's 99.5 percent sure that it's not there.

20          Q     Okay. And so that would be -- that would refer to  
21 the loose body?

22          A     Yes.

23          Q     How about the tear in the meniscus?

24          A     Probably would show it.

25          Q     Okay.

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1           A     Probably would show it if there was a significant  
2     tear. I would expect that would show.

3           Q     Would that be to a reasonable medical probability  
4     that it would show it?

5           A     Yes.

6           Q     And it did not show it?

7           A     It didn't. That's --

8           Q     So that would suggest that the condition of the knee  
9     at the time the second surgeon did the surgery, was different  
10    from the condition of the knee after Dr. Shannon finished her  
11    surgery?

12          A     Yes.

13          Q     And I --

14          A     That's right.

15          Q     -- take it that there was no intervening accident at  
16    the casino?

17          A     There's no history of any intervening accident.

18          Q     Okay. Now let me jump ahead to your exam. When was  
19    it that Mr. Rodriguez came to see you?

20          A     May 21, 2009.

21          Q     And what we talked about --

22          A     That's a year-and-a-half ago.

23          Q     What we talked about earlier was that Mr. Rodriguez  
24    told you, top of page 2, that he had an injury on November 22,  
25    2004 and the following body parts were involved: neck,

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1 shoulders, left wrist. All the ones that we've read before.

2           You've conducted a thorough examination of all the  
3 medical records for that first year. Did you see any  
4 indication that any of those were listed other than the left  
5 knee?

6           A     No, I did not.

7           Q     So does that tell you that something isn't right  
8 here?

9           A     Well, it's what I call -- it's a red flag. I think  
10 that when there is significant changes in the history from  
11 what the -- the best history, it's assumed, it's a reasonable  
12 assumption, is the history of the first doctor who sees the  
13 patient, the first people who see the patient are probably  
14 going to get the most accurate history.

15                     And that would be Dr. Heaps and then later Dr. Nork  
16 and the people in the ambulance. So when it's -- another red  
17 flag is what we call symptom proliferation. When someone who  
18 comes in with a knee injury, then develops hand symptoms, well  
19 those are -- we can relate to the knee injury, I think.

20                     But then, neck symptoms and mid-back symptoms and  
21 low back symptoms and there's a -- all these things that are  
22 listed here, wrist symptoms, ankle, both ankles, left ankle  
23 and right -- left ankle and right ankle both, I would wonder  
24 what's going on.

25           Q     Okay. And when you conducted the examination,

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1 Doctor, let's -- tell us, where is the -- I see on page 3 we  
2 have current physical symptoms, is the examination part  
3 further down?

4 A Eight, page 8 is --

5 Q Page 8?

6 A -- the examination.

7 Q Okay. Tell us about the examination? Did you do  
8 the examination or did somebody else do it?

9 A No. I always do it. I take the full history and do  
10 the exam. I don't have any assistant to do that.

11 Q Okay.

12 A We noted his blood -- he was a little hypertensive.  
13 His blood pressure was 150/90; that's borderline hypertensive.  
14 And I told him what his blood pressure was.

15 He had a brace. He was able to straighten his knee  
16 completely and he was able to walk without the brace. And he  
17 had a cane. He was at least a hundred pounds overweight at  
18 160 [sic] because someone five-six, a male with an average  
19 frame should be somewhere in the range of 140, 145 pounds. So  
20 260 is at least a hundred pounds overweight.

21 Q Now, Doctor, when you conduct this examination, do  
22 you force the patient to do anything?

23 A No, no.

24 Q You don't --

25 A I don't want to hurt people. I'm not in that

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1 business.

2 Q You don't grab his leg and bend it?

3 A No, I don't do that. I'm very gentle with people.  
4 I don't -- I don't want to cause someone pain.

5 Q And so during the period of time that you are  
6 conducting the history, obtaining the history --

7 A Uh-huh.

8 Q -- and conducting the examination, you also observe  
9 the patient?

10 A Yes.

11 Q Is that a significant part of what you do?

12 A Yes.

13 Q Okay. Let's go back to your examination here. It  
14 says "Station is unremarkable." What does that mean?

15 A It means where he stands, he stands with his spine  
16 straight, that he's not listing to one side. He doesn't have  
17 an obvious spinal curvature or some other deformity of his  
18 spine.

19 Q Okay.

20 A We talk about station and gait, stance; the way he  
21 looks when he's standing. I thought that was all right.

22 He did have a protuberant abdomen, which is not a  
23 surprise at that weight. The weight in males tends to be  
24 around the waist, unfortunately, and so some --

25 Q Why don't you tell us the rest of the exam? Tell

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1 Her Honor --

2 A Well, I examined his head and cranial nerves, those  
3 were basically normal. Neck, the range of motion when I  
4 formally examined his neck, was much less than it was when I  
5 was interviewing him. I have a lot of different things, some  
6 artworks in my office. And people tend to look around for  
7 their photographs, and I see what -- how they move their neck,  
8 particularly.

9 And there was a big difference, so that's -- I would  
10 consider that a red flag. Something is rotten in Denmark. It  
11 doesn't compute, why is he not able to move when I'm formally  
12 examining him, and why is he able to move when I'm just watch  
13 -- talking to him. So that's one thing. I measured that.

14 He had mild tenderness over the shoulder girdle, the  
15 back of his shoulder girdle in the back of his neck, and along  
16 the cervical spine. But not in an anatomic pattern, not in a  
17 pattern that would suggest a certain nerve root. It was sort  
18 of diffuse and not localized.

19 Q Can I take a second there, Doctor?

20 A Yeah.

21 Q We have nerves that come out of our spinal cord?

22 A Yes.

23 Q And they control various parts of the body?

24 A Yes.

25 Q And for example, my hand --

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1           A     Right.

2           Q     -- if I say to you my hand is numb all the way from  
3 my wrist on down, it must be a neck problem, what do you say  
4 to that?

5           A     Well, that's what we call glove or stocking  
6 hypesthesia, that's a -- I mean it's very -- in the hand,  
7 though, this is C-6, this is C-7, and this is C-8, the nerves  
8 and we -- every medical student knows that and that's sort of  
9 where the nerves go. And if someone has pain in the thumb and  
10 they don't have a carpal tunnel syndrome one would suspect  
11 that it's probably coming from the neck. And then depending  
12 on what you suspect, you get studies to confirm what you  
13 suspect.

14          Q     Okay. And so with respect to the issue around his  
15 shoulders, that was in a non-anatomical basis?

16          A     That was non-anatomic. It was too diffuse to  
17 suggest any one nerve or two nerves.

18          Q     Okay. And go on?

19          A     I examined his upper extremities. He told me about  
20 locking of his thumb. I couldn't elicit locking of the thumb.  
21 If a thumb locks when you bend the thumb, you can't straighten  
22 it and you push it hard to straighten it and it snaps. That's  
23 what's called a locking thumb. Sometimes fingers do that.  
24 And it's a thickening of the tendon where it goes through a  
25 little sheath, a pulley.

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1           But it's easily treated. It's conceivable that you  
2 could have a locking thumb and that it would get better and  
3 that it would get -- it might wax and wane, depending on what  
4 use you did.

5           A barber who is always using scissors might very  
6 well have -- I've had a barber as a patient who has a locking  
7 thumb from using the scissors all the time, so it's -- but and  
8 when he stopped using the scissors, didn't lock, but he  
9 couldn't work as a barber. So that -- you know, it's easy to  
10 release the thumb.

11           Q     Okay.

12           A     Okay. The other significant finding that his left  
13 wrist flexion was limited to 25 degrees. This is about 25  
14 degrees and the wrist normally flexes 90 degrees. So if you  
15 can only flex that much, there's a real limitation and he had  
16 that much of a limitation.

17           Q     Was that in any way related to the accident of  
18 November 22, 2004?

19           A     I -- no, no.

20           Q     To a reasonable degree of medical probability?

21           A     Yes, to a reasonable degree of medical probability.

22           Q     Okay.

23           A     That's related to degeneration in the wrist joint  
24 itself, and I think he sees Dr. Gutierrez about that, and  
25 Dr. Gutierrez I think is a hand surgeon. I would defer to

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1 Dr. Gutierrez on that issue.

2 Q Okay.

3 A Examined the back. He moved -- his back was very  
4 well aligned and he moved his back very well, surprisingly  
5 well, for someone of his weight. As noted he had a  
6 protuberant abdomen.

7 Then we go to his -- oh, he had diffuse tenderness  
8 on either side of his low back, and again this was diffuse, it  
9 was not well localized. It was like the tenderness in the  
10 neck, it was not well localized. Didn't suggest any one or  
11 any two nerve roots.

12 Q Now with respect to his spine?

13 A Yes.

14 Q Have you seen some records of some MRIs that have  
15 been done of his spine?

16 A Yes.

17 Q And does he have degenerative condition?

18 A Yes, he does. Both in his neck and in his low back.

19 Q And is that in any way related to the accident of  
20 November 22, 2004?

21 A No, no. I can't imagine why it would be.

22 Q To a medical probability?

23 A A reasonable medical probability, yes.

24 Q Okay. And his -- the MRIs that you saw, do they  
25 show bulges?

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1           A     Well, I've seen the reports of the MRIs. I have not  
2     seen the films, which I would be glad to look at, but I  
3     haven't seen them. But they do describe a number of changes.  
4     They describe disc desiccation; that's drying out of the  
5     discs. They describe bulging of the discs. They describe  
6     facet arthropathy, the joints hypertrophied, and narrowing of  
7     the spinal canal. That's called stenosis.

8                     So there are a number of degenerative changes  
9     described in those MRI reports.

10           Q     And did any of those appear traumatic in nature?

11           A     No. They're a progressive degenerative changes in  
12     nature. There's no report that shows an acute disc rupture,  
13     there's no -- actually there's no disc rupture shown. There's  
14     bulging.

15           Q     And are those affected by being overweight?

16           A     Yes.

17           Q     And for an extended period of time, does that affect  
18     your back?

19           A     Yes.

20           Q     Does that -- the fact that there are disc bulges,  
21     does that necessarily mean that you have to operate on them?

22           A     Oh, no. Absolutely not.

23           Q     Do you see any reason for surgical intervention with  
24     respect to his back?

25           A     You know, this is a -- orthopedic wisdom has

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1 increased in recent years, particularly with regard to some of  
2 the big surgeries that are being done and proposed. If we can  
3 find a single lesion, a pain generator and we'll say this is  
4 L-5 or this is L-4, we would say okay, and if the pain -- if  
5 it all computes, we would recommend surgery.

6 But if there are two or three lesions, the more  
7 lesions there are, the less anxious we are to do surgery. And  
8 he has multi-level disease. So he has multi-level disease and  
9 he is markedly overweight and I and a number of my colleagues,  
10 I know, would say this man is not a candidate for surgery.  
11 He's a disaster waiting to happen.

12 If you operate on his back, he is going to be worse  
13 and then there will be -- somebody will say, well, let's  
14 repair the fusion. In the first place, there's a risk that  
15 the fusion wouldn't heal because of the extra stress on the  
16 fusion. You do a fusion and you put screws into the vertebral  
17 bodies through the pedicles.

18 Well, if you've ever looked at a ham bone, you know  
19 that the inside of the ham bone is soft and what we call  
20 cancellous bone. It doesn't hold a screw very well and the  
21 edge of a vertebral body is fairly thin. It's only a few  
22 millimeters thick. And so you're depending on that to hold  
23 the screw, and these are big screws. I mean they're about  
24 that big in diameter.

25 And the more stress there is, the screws can pull

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1 out. The screws are designed to hold things still until the  
2 fusion takes place, and then you don't need the screws  
3 anymore. But there's a high -- the higher the risk of failure  
4 -- the risk of failure is higher when there's overweight as a  
5 complication.

6 So I think he would be a very poor candidate for  
7 disc or spine surgery and a fusion. It's interesting, John  
8 Frymoyer, who is the head of the University of Vermont  
9 Orthopedic Department and a specialist in biomechanics, talks  
10 about ill-fated fusions. And he says the most common cause  
11 for a failed surgical back is poor surgical judgment. And he  
12 is advocating that people do less and less back surgery when  
13 there's multi-level disease, because you're not likely going  
14 to get any prolonged improvement in function.

15 Q Irrespective of what is or is not the appropriate  
16 treatment for his back --

17 A Uh-huh.

18 Q -- if there were surgery is there any part of that  
19 that would be caused by or made necessary related to this  
20 accident of November 22, 2004?

21 A I don't think so. What's going on in his back is  
22 structural changes, and these structural changes are changes  
23 that have developed over time. He had them when he had this  
24 accident at the casino. They've gotten a little bit worse  
25 over time. They're still there.

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1                   And they certainly weren't caused by this accident  
2 of the knee. With regard to the spine, the knee is relatively  
3 remote and relatively trivial.

4           Q     And are these opinions to a reasonable degree of  
5 medical probability?

6           A     Absolutely, yes.

7           Q     Now what did you see next?

8           A     Oh, I examined his lower extremities.

9           Q     Okay.

10          A     He had flat feet. And I -- because of the issue of  
11 RSD had been raised, Causalgia, I did all -- looked at all of  
12 the things one would look for to see if he had any of these  
13 signs.

14          Q     Can I --

15          A     His skin --

16          Q     Can I interrupt you for a second?

17          A     Yeah.

18          Q     You're board certified in orthopedics?

19          A     Yes.

20          Q     Is there anything about RSD on the Board  
21 certification?

22          A     Oh, absolutely. It's an orthopedic problem. RSD  
23 most commonly presents to orthopedic surgeons because it's  
24 often a sequelae of a rather trivial injury. People can stub  
25 a toe and then develop RSD.

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1 RSD is described in orthopedic textbooks and every  
2 orthopedic resident is expected to be able to make a die --  
3 include RSD in differential diagnosis. And if -- I've taken  
4 the Boards and I've actually helped give the Boards and if  
5 someone didn't answer -- include that as part of a  
6 differential diagnosis of knee pain or changes in color or  
7 temperature or sweating or any of these things, he wouldn't  
8 pass the Boards. That would be a flunk.

9 Q Okay.

10 A No. It's absolutely necessary.

11 Q So it is -- and it comes under the guidance of  
12 orthopedic surgeons?

13 A General orthopedic surgery, yes.

14 Q Okay. And was RSD mentioned to be something  
15 especially aware of on your examination of Mr. Rodriguez?

16 A Well, yes. I had read the medical records and I  
17 knew that there were people who felt that he did have RSD.

18 Q Okay. Now before we get to your examination, did  
19 you see the examination of Dr. Ferrante?

20 A Yes.

21 Q And did you read what it was that Dr. Ferrante did  
22 in his examination?

23 A Yes.

24 Q And the things that he looked at?

25 A Yes.

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1 Q Did you see anything in Dr. Ferrante's examination  
2 when you -- what he said when he examined the patient that  
3 suggested that this patient had RSD?

4 A No. There was not one hard, positive finding on  
5 Dr. Ferrante's exam that he documented that would support a  
6 conclusion of RSD. And in fact, Dr. Ferrante said very  
7 tactfully, because when people refer patients to you, you  
8 don't want to insult them, you want to handle them with tact.  
9 And he says this patient may have RSD but there's insufficient  
10 data to support it. And I think it's more likely a mechanical  
11 knee problem, which makes sense based on the findings that he  
12 documents on his knee exam.

13 Q And did Dr. Ferrante request additional testing if  
14 the symptoms persisted?

15 A Yes. He, certainly I think he suggested contrast  
16 films, suggested a bone scan, that's a radio uptake -- a bone  
17 scan they inject a radioactive dye. And then they scan the  
18 bones at a certain timed interval.

19 And if there is RSD or if there's a healing  
20 fracture, or if there's an active arthritis, that area will  
21 light up and you can see increased -- it's dark on the bone  
22 scan, it's black. And it's just a -- like a diffuse redness  
23 around -- or blackness around the joint on the film.

24 MR. WARD: And may I approach the witness, Your Honor?

25 THE COURT: Sure.

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1 BY MR. WARD:

2 Q I'm going to show you from Dr. Ferrante's  
3 examination.

4 A Yes.

5 Q And this is in evidence, I believe. And what is it  
6 you see in his examination that you believe is negative for  
7 RSD?

8 A Oh, well there was no tenderness in the right knee  
9 or the ankles. The left knee was a little swollen, and  
10 swelling of course goes along with a chronic knee problem that  
11 he's had, so that's not RSD.

12 Q Swelling in the other knee?

13 A No, only in the left.

14 Q In the left knee.

15 A There was pain on extension and flexion but the  
16 range of motion was good. Well, knees can hurt, that's not  
17 diagnostic for RSD.

18 Exam of skin and subcutaneous tissues revealed a  
19 scar in the abdomen. And then he described -- but he doesn't  
20 describe any discoloration of the skin, loss of hair growth,  
21 temperature differential, texture change in the skin. And  
22 then he talks about oniko mycosis was noted in the nails of  
23 both great toes. So the --

24 Q And what is that?

25 A Oniko mycosis is a fungus infection of your

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1 toenails. It makes it -- it makes them large and overgrown  
2 and thick looking.

3 Q Is the fungus --

4 A Not very attractive.

5 Q Is the fungus in the toenails indicative of RSD?

6 A Not at all, no.

7 Q And of the testing that was recommended by  
8 Dr. Ferrante, are you aware that that was ultimately carried  
9 out?

10 A I believe he had a bone scan and that was negative.

11 Q And the x-rays?

12 A I am not sure about the comparative x-rays.

13 Q If the comparative x-rays were done and were  
14 negative, would that tell you anything?

15 A Well, that would -- you know, one thing won't make  
16 the diagnosis. A bone scan won't make the diagnosis, sweaty  
17 skin won't make the diagnosis. You have to -- and look at the  
18 whole picture.

19 And so if the bone scan is negative, that's one  
20 piece of evidence to suggest, that's not supportive of an RSD  
21 diagnosis. If the comparative x-rays are both the same,  
22 that's not supportive of an RFD -- RSD diagnosis.

23 And then these other things that he would look for,  
24 normally, like temperature and all that, would neither support  
25 or suggest that he might have. But he doesn't have much. And

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1 when that -- that's consonant with what I found. I didn't  
2 find anything to suggest RSD.

3           And the temperature, for example, RSD is not subtle.  
4 You don't have a subtle temperature differential; it's a big  
5 temperature differential. You don't have a subtle color  
6 change; it's a big color change. And temperature  
7 differential, you can have in a knee that's had two surgeries  
8 on it, even though they're healed there's a normal little  
9 temperature differential from side to the other that is  
10 normal.

11           Just the way there's a difference in size. If you  
12 measure your right biceps and your left biceps, there's  
13 usually a centimeter difference. That doesn't mean that  
14 there's anything wrong. So that's all I would say about that.  
15 I find it very farfetched to make a diagnosis of RSD.

16           Q     Is that to reasonable medical probability?

17           A     Absolutely. I think it's highly unlikely that he  
18 has RSD.

19           Q     Okay.

20           A     I think it's impossible, actually.

21           Q     And do you -- when you conducted this examination  
22 and you were looking at his lower extremities, you have here  
23 that skin color, texture and temperature were equal.

24           A     Yes.

25           Q     And do you see where I am, on page 10?

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1 A Yes.

2 Q And I take it you did not measure the temperature  
3 with a thermometer?

4 A No. I think that that -- I'll tell you. When my  
5 kids were growing up, they had earaches and they -- sore  
6 throats and things like that. I would put my hand on their  
7 forehead and I could immediately tell if they had a  
8 temperature or not, a fever or not. And we'd take the  
9 temperature and sure, they had a fever.

10 But for all the years that I made rounds on my  
11 surgical patients, and I have 15 or 20 of them, I think that  
12 it's incumbent on a physician to touch his patients. And  
13 every morning I would go around and I would my hand on my  
14 patient's forehead to ask them how they had done through the  
15 night.

16 And I could immediately tell if they had a fever.  
17 And then I'd say, well I want to see the temperature chart.  
18 And sure, I could tell a fever of a -- normal temperature is  
19 98-6, nowadays it's 37, but I'm still in a 98-6 age group. I  
20 could tell if they had a fever of a 101, which is one that you  
21 -- from palpation. I did that for 25 years, you know and I  
22 know what I'm talking about.

23 Q Is that close --

24 A I could tell.

25 Q Is that close enough for a diagnosis of whether

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1 there is or is not that particular issue for RSD?

2 A Yes. I -- the RSD patients that I've seen that have  
3 real RSD, it's not subtle. You -- I'd use the back of my  
4 hands the way you do, testing baby's bath water, and you can  
5 -- one feels really cold versus the other, versus the normal  
6 one. It's dramatic.

7 Q And tell us about the rest of your examination,  
8 please?

9 A Well, as I had noted, both toenails had the fungal  
10 infection. We've talked about the flat feet. His ankles were  
11 -- had normal range of motion. The straight leg raising was  
12 normal; that's a test of sciatic stretch. We stretch the  
13 sciatic nerve to see if he's got disc pressure.

14 Q How about McMurray's Test?

15 A Well, I would have done that, but he wanted me not  
16 -- he asked me not to do a McMurray's Test, and he asked me  
17 not to test him with a reflex hammer on that side, so I  
18 didn't. I'm -- I don't want to cause anyone discomfort, you  
19 know.

20 Q Okay. Did -- in your overall observation of his  
21 knee, did you see anything that looked out of the ordinary?

22 A There was a ten degree limitation of flexion of the  
23 knee, the one -- normally a knee bends a bit past 90 degrees,  
24 130, 140 is normal. If -- he bent 120 on the left versus 130  
25 on the other side, the right side. That was a significant

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1 finding.

2 The -- I could find no swelling, no atrophy and  
3 there was no effusion; he didn't have fluid in his knee.

4 Q And how about -- how was his toe walking?

5 A Oh, he had what's called giveaway weakness. That's  
6 another red flag, that if you have normal calf girth and you  
7 have normal reflexes, when you check the ankle jerk reflexes,  
8 Achilles tendon reflexes, you ought to be able to stand and  
9 walk on your tiptoes if you have normal ankle motion as well.

10 And if someone can do it for a second or so and then  
11 it collapses, that's what's called functional overlay. That's  
12 a positive Waddell sign. I don't -- do you know -- should I  
13 explain a Waddell's sign?

14 THE COURT: Yes, please.

15 THE WITNESS: Gordon Waddell is a Scottish orthopedic  
16 surgeon who described a number of signs that raised the  
17 question of a nonorganic cause for pain. Pain, something  
18 other than the musculoskeletal system. One of them is  
19 collapsing weakness. One of them is total body pain. One of  
20 them is pain when you press on the top of the head, they  
21 complain of low back pain. One is pain when you rotate the  
22 pelvis, they complain of low back pain.

23 Another one is -- what am I thinking -- there are  
24 five -- I'm blocking whatever the other one is. But it's --  
25 they're basically red flags that should raise your suspicion

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1 that there's more here than meets the eye, that's it's not an  
2 -- it's not something mechanically wrong.

3 So if you give away weakness on -- oh, giveaway  
4 weakness on muscle testing is what it is. If that happens  
5 then he suggests that you need to suspect that there is  
6 nonorganic causes at work here, which is true in most cases of  
7 chronic pain.

8 In my book chapter, I open it with the comment that  
9 there is a psychological dimension in all chronic pain.  
10 Anyone who has chronic pain, it isn't just physical; there is  
11 an emotional and psychological component, and that's part of  
12 why I was interested in getting some psychiatry training, to  
13 be able to address that in treating patients. So anyway --

14 Q Now after collapse weakness, you say, so -- you say,  
15 "So also when he attempted heel walking."

16 A Yes. That --

17 Q You mean, so also you mean --

18 A Well, also --

19 Q -- collapse weakness again?

20 A Yes. That was a -- on heel walking. Heel walking  
21 tests, the ability of the anterior tibial muscle, that's the  
22 muscle in the front of your leg, which if you bend your foot  
23 upward, you can feel the muscle tighten. And you should be  
24 able to heel-walk if that muscle is strong. And there was no  
25 shrinkage of that muscle, it was strong. He should have been

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1 able to heel walk. No reason for -- no anatomic reason for  
2 giveaway on that.

3 Q Okay. Then you have EHL, is that what you were  
4 talking about, EHL strength?

5 A Yeah, that's extensor hallucis longus, that's a --  
6 the big toe, that's the muscle that bends the big toe up.

7 Q And EBB [sic]?

8 A Extensor -- EDB, extensor digitorumgravis. That's a  
9 muscle that you can feel on the dorsum of the foot, on the top  
10 of the foot. And when you ask somebody to bend their toes up  
11 without lifting their foot up, that muscle tightens and he has  
12 a normal one.

13 Q Okay. Knees --

14 A On both sides.

15 Q Knees alignment?

16 A Satisfactory.

17 Q Effusion?

18 A No effusion, no fluid in the knee.

19 Q Swelling?

20 A I think I said no visible swelling, measureable  
21 swelling. I also measured his knee with a tape measure.

22 Q Okay. And what else did you find?

23 A Well, the rest was basically normal. We -- I  
24 checked the way the knee cap tracks and that was normal. He  
25 had some crepitation on motion. That means if you have the

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1 hand on the knee cap and the knee straightens, it bends down,  
2 you can feel a little crunching. I can feel it in my knee  
3 right now. So it's -- it comes with the territory. But I  
4 noted it in both knees. That confirms that he's got early  
5 degenerative changes in the knees, that's what it means.

6 Q And there were certain tests that were not performed  
7 at his request?

8 A That's correct.

9 Q And if --

10 A The McMurray test.

11 Q And he reported what?

12 A What do you mean?

13 Q At the end of that paragraph? "Such tests were not  
14 performed by the like" --

15 A Oh, he reported constant burning pain, yes. And I  
16 -- on exam I couldn't find any reason to -- how you would  
17 explain that.

18 Q Okay. Hips and ankles?

19 A They were all right, were normal, basically.

20 Q Oswestry Questionnaire?

21 A Okay. The Oswestry Questionnaire was developed in  
22 England. There's a -- on the outskirts of London, there's an  
23 Oswestry Clinic and they developed a questionnaire to measure  
24 the impact of pain on a person's activities of daily living.  
25 And we develop a score and you look at the test -- you look at

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1 the -- well, of course the patients answer these directly, so  
2 the -- you -- the test is as valid as the answers are honest  
3 by the patient.

4           Some of these suggested that they were not -- didn't  
5 make sense. One was "Pain meds have no effect on my pain."  
6 Well if pain meds have no effect on a person's pain, I wonder,  
7 well why are you taking them for, you know, if they have no  
8 effect? I mean that's outrageous.

9           Pain meds do have an effect on pain and this man is  
10 taking pain medications that are of strong enough potency that  
11 they should have an effect on his pain, and I suspect that  
12 they indeed do, because other times he said, well if I'm  
13 taking my meds, the pain is a five or a six, and other times  
14 it could reach a nine or a ten. So that's a -- he's saying  
15 that they do have an effect, but here he says they don't have  
16 an effect.

17           "I can only walk using a cane or crutches." Well,  
18 we have physical therapy notes that says he's walking without  
19 a cane or crutches and he can walk with a can or -- without a  
20 cane or crutches for short distances. So that is not  
21 completely historically true.

22           "Pain prevents me from sitting more than a half  
23 hour." When I talked to him he sat for at least an hour and a  
24 half, maybe two hours with no obvious pain. No pain; so that  
25 again, that's -- it doesn't compute. Doesn't balance.

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1 Q Okay. And standing?

2 A What did he say? "Pain prevents me from standing  
3 more than ten minutes." I did not have him stand more than  
4 ten minutes, but from the physical therapy notes I don't see  
5 any reason why he couldn't.

6 Q And how about "Pain prevents me from traveling  
7 except to doctor or hospital."

8 A Well, we know -- I know from reading the records  
9 that he was at least traveling from the Los Angeles area or  
10 Las Vegas, and driving. So that's a -- now maybe those are  
11 just for doctors or hospital visits, I don't know. But if he  
12 can travel for doctor and hospital visits and appear not in  
13 acute distress in the doctor's offices, I would think he could  
14 travel for other things too.

15 Q Next we have a pain drawing?

16 A Yes.

17 Q And there's a copy of the pain drawing?

18 A Yes. Have you got that? I don't have it with me,  
19 but --

20 Q Oh, I've got it in a report. But it says this: "In  
21 context, this -- he speaks to likelihood of a functional  
22 overlay."

23 A Right.

24 Q Okay.

25 A That means pain basically from top to bottom; neck,

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1 down to his big toes and every -- most things in between, you  
2 know.

3 Q Now Doctor, you came to some conclusions following  
4 your examination; is that correct?

5 A Yes.

6 Q And your conclusion as to whether his need for the  
7 first surgery was caused by the accident, is in accord with  
8 what Dr. Shannon said?

9 A Yes, I agree with her.

10 Q And the -- and for that surgery and the follow-up  
11 time, what period of time would you expect that the patient  
12 would be limited functionally from moving around or sitting at  
13 a work station working on a computer?

14 A You mean after Dr. Shannon's first surgery?

15 Q Total time, that first year related to the original  
16 accident and related to Dr. Shannon's surgery.

17 A Well, regards to the original accident, after a  
18 couple of weeks in the physical therapy notes, they say  
19 "excellent progress, able to" -- at one point bear more  
20 weight, full weight, good range of motion. At that point, two  
21 or three weeks, I would expect he would be able to resume  
22 pre-injury activities.

23 Q Okay. With respect to the surgery?

24 A At the point of the surgery, I would expect he would  
25 be laid up, maybe for a week, to three weeks at the most. But

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1 back -- or fairly early to semi-sedentary work.

2 Q And are there any other of his symptoms or  
3 complaints -- let me go back and ask it differently.

4 A Uh-huh?

5 Q You said that the pins and needles in his right  
6 wrist were indicative of carpal tunnel syndrome?

7 A Yes.

8 Q And so that may or may not go away with disuse of  
9 crutches?

10 A Yes.

11 Q If that didn't go away with the disuse of crutches,  
12 how long would you expect any disability to be associated with  
13 that?

14 A Well, carpal tunnel syndrome symptoms are on a  
15 continuum. And if the only symptom is tingling in the  
16 fingers, that's not very much of a deal.

17 But the nerve enervates this big muscle at the base  
18 of your thumb, that's called the flexor pollicis and the  
19 abductor -- and when you do this motion, pinching, or pinching  
20 even this way, you use that muscle.

21 And so you'd lose strength of pinch. Once you begin  
22 to get motor problems then you can have a chronic problem. If  
23 -- even, it begins to progress, it's so simple to do the  
24 carpal tunnel release, because that's curative. You really --  
25 it's like taking your appendix out when you have appendicitis;

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1 it's cured, that's it. And that's what a good carpal tunnel  
2 release does. It's cured, that's it.

3 Q Okay.

4 A And it's no big deal. You -- you know?

5 Q So if that were related and if that surgery were  
6 necessary what would you expect the period of disability to  
7 be?

8 A Shorter than what I said it was in the paper. That  
9 -- when I wrote that paper, it was 1968, I think. You know,  
10 we kept people in the hospital after disc surgery, a week.  
11 And after carpal tunnel releases we'd keep them at least two  
12 days, one or two days. Now it's a drive-by, McDonald's type  
13 surgery. You go into the surgi center, you have it done and  
14 you drive home.

15 So the disability should be very short.

16 Q Okay.

17 A I'll tell you a story. One -- in connection with my  
18 being an organist, my -- a good friend of mine was the head of  
19 the organ department at Yale. And he had a carpal tunnel  
20 syndrome on both sides. And he had a release -- I didn't want  
21 to do it, because he was my friend, and so I -- but Jim  
22 Albright [phonetic] did it at Yale. And Charles Trigbalm  
23 [phonetic], the organist played a recital the week after that,  
24 an organ recital.

25 So you know, you can do it.

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1 Q So if I get a carpal tunnel release I'll be able to  
2 play the organ?

3 A Well, as well as you could before.

4 Q Okay. Okay.

5 MR. WARD: Your Honor, my clock tells me it's noon, and  
6 we're not done yet. And I'll stop at any time the Court is --

7 THE COURT: Okay.

8 MR. WARD: -- ready.

9 THE COURT: This may be a good place for a break.

10 [Recess]

11 THE COURT: Mr. Ward.

12 MR. WARD: Yes, Your Honor.

13 Your Honor, a bit of housekeeping, I would offer  
14 Dr. Becker's CV into evidence.

15 MR. BAKER: No objection.

16 THE COURT: Any objection?

17 MR. BAKER: None, Your Honor.

18 MR. WARD: And it --

19 THE COURT: So ordered. Does it need to be marked?

20 MR. WARD: Yes, it needs to be marked F.

21 THE COURT: F like Frank?

22 MR. WARD: Yes. Defendant's F.

23 [Defendant's Exhibit F Received]

24 MR. WARD: And I have extra copies also. I'll see if  
25 there's another copy here.

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1 [Court and Clerk confer]

2 [Pause]

3 MR. WARD: I have a second one that's not punched.

4 THE COURT: Is there a copy of it in Plaintiff's exhibit  
5 book?

6 MR. WARD: I don't think so.

7 MR. BAKER: I don't think I have it, but I don't object  
8 to it being --

9 THE COURT: Do you have a copy for me?

10 MR. WARD: I just gave to copies.

11 THE CLERK: Here you go, Judge.

12 THE COURT: All right. Thanks.

13 BY MR. WARD:

14 Q And the report of June 2, 2010, part 1, this is in  
15 fact your report, Doctor?

16 A Yes.

17 Q And it was prepared following your examination?

18 A Yes.

19 Q And it reflects your opinions on this case?

20 A Yes.

21 MR. WARD: I would offer Dr. Becker's report, part 1,  
22 into evidence.

23 THE COURT: The one that he's been testifying to --

24 MR. WARD: Yes, Your Honor.

25 THE COURT: -- this morning?

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1 MR. WARD: Yes, Your Honor.

2 THE COURT: Any objection?

3 MR. BAKER: It's not what I usually do, but in this  
4 instance no objection, Your Honor.

5 THE COURT: That was number 66, right?

6 THE CLERK: Yes.

7 THE COURT: 66 is admitted.

8 [Defendant's Exhibit 66 Received]

9 MR. WARD: And part 2 of the report is number 77?

10 [Counsel confer]

11 MR. WARD: It's all 66.

12 MR. BAKER: Your Honor, just for the Court's edification,  
13 there was originally -- there's two pages that are a report  
14 itself, and then there were many pages after the first two  
15 pages which are all part of the doctor's report.

16 So I think right now what he was testifying to was  
17 within the first two pages of Exhibit 66, which is the first  
18 part of this report.

19 MR. WARD: No. He's been -- we were on page 18, I think.

20 MR. BAKER: I thought we went back to it, but that's  
21 okay. And we're on page 18.

22 THE COURT: You don't object to any of it coming in, do  
23 you, Mr. Baker?

24 MR. BAKER: I think you should -- I'm pretty sure you  
25 probably want the opportunity to read it.

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1 THE COURT: I do.

2 MR. BAKER: Yeah. So, no, I don't object.

3 THE COURT: Okay. Good.

4 MR. BAKER: All right.

5 THE COURT: Glad to hear it.

6 MR. BAKER: I know. I know the rules.

7 THE COURT: Okay.

8 BY MR. WARD:

9 Q Now, Dr. Becker, you wrote an article on managing  
10 for the book, "Managing Low Back Pain," correct?

11 A Right. I wrote two chapters of that book, actually.

12 Q And one of the chapters you wrote, Chapter 7, The  
13 Psychological Factors in Chronic Back Pain?

14 A Yes.

15 Q And although you called it chronic back pain does it  
16 apply to chronic pain in general?

17 A I think yes. Every -- anything in that chapter  
18 refers to generally chronic, non-malignant pain.

19 Q Okay. Now you have a section in which you talk  
20 about --

21 MR. BAKER: Your Honor, I'm sorry. For the record I'd  
22 object to the fact that if this is supposed to be used in the  
23 course of an examination of a witness it's supposed to be  
24 identified and provided pursuant to 16.1 something. And I've  
25 never received a copy of that article and I'm just sitting

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1 here blind.

2 THE COURT: What about that, Mr. Ward?

3 MR. WARD: I was just going to ask him questions about a  
4 chart, Your Honor, not about the whole document.

5 MR. BAKER: It's the same the objection. I've got no  
6 clue.

7 THE COURT: You have never seen it?

8 MR. BAKER: No, Your Honor, it's a complete surprise.

9 THE COURT: Nor was it cited?

10 MR. BAKER: No, Your Honor.

11 THE COURT: Sustain the objection.

12 BY MR. WARD:

13 Q Dr. Becker, you have in your practice worked at the  
14 issue of functional overlay?

15 A Yes.

16 Q And you have in your practice use something which  
17 call "red flags"?

18 A Yes.

19 Q And what is the purpose of that?

20 A Well, the purpose is very similar to the purpose of  
21 Gordon Waddell developing his signs and symptoms which we  
22 talked about earlier. They are flags designed, and I use this  
23 list of red flags very often in American Back Society  
24 Presentations. Almost every time there was a meeting I would  
25 give a paper about recognizing when there was more than meets

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1 the eye in patient who presents with, in this case, back pain.

2 It's generally know and it's generally true that  
3 most physicians, myself included, don't listen to a patient  
4 talk to me and suspect that there's anything more than total  
5 openness without embellishment, just telling the story like it  
6 is, never suspecting that there might be something rotten in  
7 Denmark, something that more than meets the eye in the initial  
8 presentation.

9 And it's because of that that Gordon Waddell  
10 developed his symptoms and said: Hey, look, when these things  
11 happen you have to look further and consider the psychological  
12 and emotional part of this presentation.

13 The same is true of my list of red flags, which I  
14 developed before I knew about Dr. Waddell and his signs. If  
15 someone said to me, hey, you've got a couple of Dr. Waddell  
16 signs in your list of red flags, and -- so there is overlap.  
17 But I -- I got 40 finally.

18 I started out with 12, and then people would come to  
19 me and say, well, what about this? And what about this,  
20 aren't these red flags? And so the list grew and it was a  
21 thing that was -- I was often asked, got emails, could I have  
22 your list of red flags, and you know, I have -- I had a slide  
23 that I showed.

24 And so anyway, I developed and there are I think 40  
25 on here.

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1 Q And is the purpose of it, Doctor, is that any one,  
2 any one of these doesn't necessary mean anything?

3 A No, that's right. It's a cumulative thing. I mean,  
4 if you have a discrepancy between observed and motion, and  
5 motion on formal testing that's a red flag.

6 If -- it's a red flag if a patient tells you that  
7 their pain is nine on a ten scale, and they're sitting calmly  
8 not exhibiting screaming or any obvious anguish; but that's a  
9 red flag. Things that don't compute.

10 Q Why don't you tell us the red flags, I assume we  
11 don't have to go through all 40, tell us --

12 MR. BAKER: Your Honor, can I be permitted a small voir  
13 dire on this issue of these red flags?

14 THE COURT: Sure.

15 VOIR DIRE

16 BY MR. BAKER:

17 Q Sir, is this list of 40, quote, "red flags," a  
18 published list?

19 A It's a list that has been published, but it's also  
20 been presented at many symposia and things. And it is a list  
21 that's in evolution, it's constantly changing, I'm adding to  
22 it.

23 Q Has it been peer reviewed?

24 A I don't understand what you mean?

25 Q Has it been submitted for peer review as a list of

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1 40, quote, "red flags," which are generally accepted in the  
2 medical community?

3 A I don't believe it has. It's been presented at  
4 American Back Society meetings and it's generally accepted at  
5 those meetings, and --

6 Q I guess what my question is, is has a peer review  
7 group ever look at this quote: list, and said that this is a  
8 list that's generally accepted in the medical community as  
9 Waddell's has been generally accepted in peer review in the  
10 medical community?

11 A I don't think it has.

12 MR. BAKER: Your Honor, I objection to the use of the  
13 quote: list, as it's not generally accepted in the medical  
14 community and does not pass the threshold for a learned  
15 treatise or other reliable medical treatise.

16 THE COURT: Is that the extent of your objection?

17 MR. BAKER: Yes, Your Honor.

18 THE COURT: Any response to that, Mr. Ward?

19 MR. WARD: Well, Your Honor, this is a -- the issue here  
20 is that this is something that's been developed entirely by  
21 Dr. Becker for his personal use.

22 And, I mean, it's used by other people, but in this  
23 particular instance he's using his own list that he explains  
24 as to why it is that he uses this in analyzing the pain to  
25 look at other things; it's not solely from this list. And I

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1 was not going to talk about anything other than the things  
2 that he found in this particular examination.

3 THE COURT: I think you can examine him to that extent,  
4 but as far as the list, if you were intending to exam him  
5 based on the list it probably should have been provided to  
6 counsel before now.

7 MR. WARD: Right. I will not examine him on the list.

8 THE COURT: All right.

9 MR. BAKER: And just to continue, my, and then I'm going  
10 to sit down, because I can see the time, having to testifying  
11 on something that hasn't been found valid within the  
12 scientific community is akin to allowing a biomechanical  
13 engineer to use one of those handmade coefficient-of-friction,  
14 to devices. I mean, they're saying the test  
15 coefficient-of-friction friction, but it hasn't been subject  
16 to any kind of review, and therefore is not considered to be  
17 valid.

18 THE COURT: Well, I'm going to sustain the limited  
19 objection. But I think, Mr. Ward, you're entitled to question  
20 this witness based on what he learned of the Plaintiff.

21 MR. WARD: Sure. Thank you, Your Honor.

22 THE COURT: Sure.

23 DIRECT EXAMINATION CONTINUED

24 BY MR. WARD:

25 Q Doctor, what is functional overlay?

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1           A     Functional overlay is the way that emotional and  
2     psychological issues, non-physical issues color the physical  
3     presentation, color the history.

4           Q     Okay. And is that something that you've looked at  
5     for some period of time?

6           A     Yes. Yes. For the last 33 years.

7           Q     Okay. And did you see any indications of the  
8     possibility of functional overlay with respect to this  
9     particular examinee?

10          A     Yes, I did.

11          Q     And can you tell us what those were?

12          A     Well, what happened was, I don't use the -- my list  
13     of red flags as a checklist, but after I've examined, taken  
14     the history and examined someone, I sometimes think, "Gee, I  
15     think there were some red flags there," and then I go back and  
16     look at the list. And I don't -- I don't even look at this  
17     list very often.

18                 But here are some that I found: a discrepancy in  
19     the injury history; there are several injury histories.  
20     Someone who has a clear-cut injury history, like I was using a  
21     cutting machine in bookbinding and the machine came down and  
22     cut off my fingertip, well, that history stays the same  
23     usually throughout time.

24                 This history has changed in terms of what symptoms  
25     precipitated initially and then how they have changed. They

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1 -- okay. Pain rated nine or more on a scale of ten when  
2 someone is sitting not in excruciating distress --

3 Q Let's --

4 A -- it's a discrepancy.

5 Q Let's stop there quickly. What's the significance  
6 of that to?

7 A Well, pain rated nine on a ten scale is the kind of  
8 pain that you wouldn't be able to sit still if you had. You'd  
9 be screaming for someone to give you something that would  
10 relieve it.

11 It's the kind of pain you would have if you spilled  
12 a cup of hot McDonald's coffee on a child's hand. The child  
13 would be in anguish and screaming. That's incredibly painful,  
14 that's a -- that's a level 9 pain.

15 Pain of a kidney stone is often considered level 9  
16 pain. And pain of childbirth is considered a pain -- level  
17 pain 9; it's extremely painful. And the person who's  
18 experiencing it is usually screaming for relief.

19 Q So is the basic issue that you're getting to, is  
20 that there's a discrepancy between what's claimed and what  
21 actually exists?

22 A Yes. In several cases.

23 Q Okay. And what is symptom proliferation?

24 A Well, it's when a person has, as in this case,  
25 started out with knee symptoms and then -- first there'll be

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1 the tingling. That's proliferation but clearly related, I  
2 think, to the injury and its aftermath.

3 But things that people might call derivative, like  
4 neck pain or back pain, or pain because of an unbalanced  
5 posture, or pain involving the shoulders or the arms  
6 otherwise. Others, or basic of the neck pain, there are  
7 number of pains that were complained about here, that I would  
8 call symptom proliferation.

9 And is that because in your opinion to a reasonable  
10 degree of medical probability that those other pains aren't  
11 related to this accident?

12 A Well, I think that these red flags, any one of them  
13 alone doesn't say that it's purely functional overlay, but if  
14 you have a whole lot of them then you have -- you're compelled  
15 to consider that very seriously. And it's just looking at  
16 data and trying to decide where the data will lead you.

17 Q How about symptoms worsen despite treatment?

18 A Yes, that would be one. If you treat something --  
19 if you have a diagnosis and you treat the diagnosis the  
20 symptoms, if the diagnosis is right ought to get better,  
21 otherwise you don't treat it.

22 Q Okay. And how about a patient being tearful or  
23 weeping?

24 A Right. Again, in context. Most people who have a  
25 knee sprain or who have a ruptured disc, it can come and be in

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1 severe pain. Most of them don't weep to embellish their  
2 presentation. I can -- I've seen patients with very severe  
3 pain who don't weep at all.

4 Q And anger?

5 A There have been studies. There have been clinical  
6 studies to show that this is -- first was in the workers' comp  
7 setting, that if a worker feels that the employer took  
8 insufficient safety precautions and because of that was  
9 injured and is very angry, the anger will often fuel symptoms  
10 that don't have a physical basis.

11 It's kind of in a way of expressing the anger with  
12 symptoms other than saying I'm angry at the employer, you  
13 know; it's kind of acted-out anger.

14 Q Does that relate to non-employment situations as  
15 well?

16 A And so -- yeah. And it obviously relates to  
17 personal injury situations. If somebody smashes the rear-end  
18 of your car it's hard not to be a little angry at them, in  
19 addition to whatever symptoms you might have.

20 Q What's the significance of childhood asthma and  
21 other chronic illness?

22 A I would defer to a pediatrician on this, or an  
23 allergist, but the general consensus is that children who come  
24 from homes in which there are some turmoil are more likely to  
25 have early asthma than children who come from homes that are

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1 free of turmoil.

2 Q Okay.

3 A Very few homes are --

4 Q And --

5 A -- completely free of turmoil.

6 Q -- discrepancy between observed and tested motion?

7 A Yes. We talked about that.

8 Q And that's a Waddell sign?

9 A Yes.

10 Q Now, so in this situation that you have here, that  
11 you analyzed --

12 A Yes.

13 Q -- that Mr. Rodriguez came to you and he presented  
14 with certain symptoms and you evaluated the records that were  
15 presented to you.

16 A Yes.

17 Q And did you come to an explanation for the claims of  
18 pain?

19 A Yes, I did.

20 Q And those are what?

21 A I felt that there was a lot of what we call  
22 "functional overlay." There was a very significant  
23 psychological and emotional component. And it was based on a  
24 number of entries in the medical record, and I can cite those.

25 I think the first was Dr. Shannon who said, after

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1 she had done her surgery; "there are symptoms with no obvious  
2 explanation for them." I agreed with that.

3 Q Did anyone else find that?

4 A Well, yes, Dr. Spellman, in February 2006 said:  
5 "The severity and the duration of symptoms is disproportionate  
6 to the reported injury and what's going on."

7 A lot of complaints and the length of time that  
8 those complaints lasted doesn't really compute, is what he's  
9 saying.

10 Q How about Dr. Mortillaro?

11 A Well, Doctor -- I was going to finish his last.

12 Q Oh, I'm sorry. Excuse me.

13 A Dr. Kidwell, in July of '06, after examining, the  
14 patient says it appears that the exact pain generated is  
15 elusive. Well, that's sort of a nice way of saying, "I don't  
16 know what's causing the pain." I think that's how I  
17 understand those words.

18 And Dr. Corvete wrote, "the pain and the complaints  
19 do not correlate with the history." So that, again,  
20 everything doesn't add up.

21 Now, Dr. Mortillaro did psychological testing and  
22 among the testing he did an MMPI. He did a number of tests  
23 like the Beck Depression Inventory and the Beck Anxiety  
24 Inventory that are tests that the patient fills -- fills out.

25 And those tests are not really psychological tests

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1 that look beneath the surface, because the person who takes  
2 the test says, you know, I have a headache, when I wake up in  
3 the morning I -- they're all subjective.

4 And they describe the way the patient wants to be  
5 perceived. The patient fills out the test for you to see and  
6 wants to be perceived the way he feels out the test.

7 However, Dr. Mortillaro did do an MMPI, and the  
8 MMPI. And the MMPI of all psychological tests is the gold  
9 standard test, you probably -- do you know about the MMPI?

10 THE COURT: Not a great deal.

11 THE WITNESS: Oh. It was developed many years ago in  
12 Minnesota, the University of Minnesota, and it's call the  
13 Minnesota Multiphasic Personality Inventory. And what it is,  
14 is a series of questions about 560, it may be plus or minus  
15 ten. Simple questions, you just answer true or false.

16 The first question is: I like mechanics magazine.  
17 Well, that doesn't seem emotionally charged, you either do or  
18 you don't. And all of the questions are similarly true or  
19 false answers.

20 This test has been in use for several decades and  
21 it's been normed on millions, and millions, and millions of  
22 individuals, and it is in the psychological community  
23 considered the gold standard psychological test of all tests.

24 The psychological test that Dr. Mortillaro used  
25 revealed, what he says that the test shows exaggeration of

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1 symptoms for secondary gain or a histrionic manner of  
2 complaining. This strong bias raises questions about the  
3 credibility of the patient's self-reports which may be  
4 inflated.

5 If psychological risk factors are present the  
6 possibility that these difficulties are associated with  
7 symptom magnification should be considered.

8 BY MR. WARD:

9 Q Now that's a comment that was made by  
10 Dr. Mortillaro; is that correct?

11 A That's a comment made by Dr. Mortillaro.

12 Q It wasn't made by you?

13 A No.

14 Q Okay.

15 A And there are other comments of Dr. Mortillaro and  
16 there -- I could give several of them to you that are similar  
17 to that, basically saying that there's evidence here of  
18 symptom exaggeration, symptom embellishment, raising issues of  
19 credibility in the historical presentation.

20 Those, again, are added to these red flags and the  
21 discrepancies that I've discovered when I took a history and  
22 examined this gentleman. And then there are these -- then  
23 there are these comments of Dr. Shannon, and Dr. Spellman, and  
24 Dr. Kidwell, and Corvete.

25 And then lastly, we found that on the MMPI there is

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1 scale called the Lees, L-E-E-S, H-A-L-E-Y. It's a Dr. Lees-  
2 Haley who's developed the scale.

3 And it's called the FB scale, and pundits have  
4 called this the fake bad scale. It has been known on so many  
5 patients now that it's part of the standard MMPI subscale  
6 list, and they publish a list in Minnesota as to what scales  
7 are valid, what scales are less valid, what scales have not  
8 yet been admitted but are provisional.

9 Well Lees-Haley was admitted fully in 2007. And the  
10 data of the scale show that if you have a Lee scale, Haley  
11 scale of 29, a score of 29, that the likelihood of conscious  
12 symptom misrepresentation of fact is in the area of 99  
13 percent. If it's above --

14 Q That's 29?

15 A Huh?

16 Q That's 29?

17 A That's the score of 29. If it's above that it's  
18 almost without question that there is. But that doesn't mean  
19 it's either or, but that means that this is a factor in the  
20 presentation. It doesn't mean that it's to all fabrication,  
21 and I think it's important to understand that. It simply  
22 means that this is an element that's got to be considered in  
23 the diagnostic conclusions that are reached and in the  
24 treatment program that's evolved for the patient.

25 Mr. Rodriguez' score was 36, that is way, way above.

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

\_\_\_\_\_ /

**APPELLANT'S APPENDIX**  
**VOLUME 12**

**ROBERT L. EISENBERG (Bar # 0950)**  
**Lemons, Grundy & Eisenberg**  
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**ATTORNEYS FOR APPELLANT**

CHRONO INDEX

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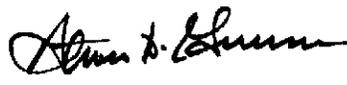
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DISTRICT COURT  
CLARK COUNTY, NEVADA

  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 2, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. RUSSELL SHAH  
VOLUME II

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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Russell J. Shah..... 5

Defendant's Witness(es):

None

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1 TUESDAY - NOVEMBER 2, 2010 - 1:02 P.M.

2 [Designation of record begins at 1:02 p.m.]

3 [Counsel Confer]

4 THE MARSHAL: Just pick that right up. Please come to  
5 order. Department 10 is now in session, the Honorable Jessie  
6 Walsh, Judge, presiding.

7 THE COURT: Good afternoon. Please be seated.

8 MR. BAKER: Good afternoon, Your Honor.

9 MR. WARD: Good afternoon, Your Honor.

10 THE COURT: Good afternoon. Please be seated. Okay.

11 MR. BAKER: Do you have that list of sheets for me?

12 MR. WARD: Yeah.

13 MR. BAKER: Is that what you're getting?

14 MR. WARD: Are all of these reasonable, necessary, and  
15 cost --

16 MR. BAKER: Is that true?

17 THE COURT: It's the same one, isn't it?

18 MR. BAKER: Good morning.

19 THE COURT: All right. We're back on record. Looks like  
20 everybody is here and accounted for. Doctor is back with us.  
21 Thanks for returning, doctor.

22 THE WITNESS: No problem.

23 THE COURT: Since it's a new day, we'll ask the Court to  
24 reswear you.

25 THE MARSHAL: Please stand and raise your hand to be

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12 App. 2223

1 sworn.

2 DR. RUSSELL J. SHAH, PLAINTIFF'S WITNESS, SWORN

3 THE CLERK: Please be seated, stating your full name,  
4 spelling your last name for the record.

5 THE WITNESS: Sure. Russell J. Shah, R-U-S-S-E-L-L, J is  
6 my middle initial, Shah, S-H-A-H.

7 THE COURT: Whenever you're ready, Mr. Ward.

8 MR. WARD: Thank you, Your Honor. I'm going to try not  
9 to pull anything over on top of me here.

10 THE COURT: If you need any help, just ask the Bailiff.  
11 I'm not saying he'll help you, but you can ask him.

12 MR. WARD: Oh, I asked --

13 THE MARSHAL: I'm always helpful, Your Honor. You know  
14 that.

15 THE COURT: That's true. You are.

16 MR. WARD: I asked Mr. Baker if he'd provide me with a  
17 list of questions and he said he would, but they haven't  
18 materialized, so I'm --

19 THE COURT: Huh, I'm surprised. Mr. Baker?

20 MR. BAKER: It's just the same question over and over  
21 again. Is it reasonable and necessary and related to a  
22 reasonable degree of medical probability?

23 THE COURT: I see. Got you.

24 MR. BAKER: And the answer is yes. Yes, thank you.  
25 Okay. Thank you.

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1 MR. WARD: Your Honor, can I approach the witness for a  
2 second?

3 [Counsel Confer]

4 MR. WARD: That's strange. Thank you, Your Honor.

5 THE COURT: Very strange.

6 MR. BAKER: Are you okay? Ready to go?

7 THE WITNESS: Yeah, I'm just -- so much information.  
8 Okay. Go ahead, please.

9 CROSS-EXAMINATION

10 BY MR. WARD:

11 Q Did you tell us you had patients until 8:00 last  
12 night?

13 A I have patients tonight even up until 8:00 tonight.

14 Q So, but there's no game on tonight?

15 A Game? I don't watch sports.

16 Q World Series, you don't?

17 A I don't watch sports, but I heard the Giants won.

18 Q Okay.

19 A You know, I'm sorry. I'm a real dud when it comes  
20 to your guy.

21 Q So, I don't have to tell you that, huh? You read  
22 that in the paper this morning?

23 A No, I just -- I have some strange life.

24 Q Now, Doctor, you started in medical school back  
25 about when?

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1 A 1989.

2 Q Okay. So you've been doing this 20 plus years,  
3 since the time you started medical school?

4 A Yeah, I mean, yeah. I mean I guess 19 -- it's a  
5 long time, 21 years.

6 Q All right. Okay.

7 A I started off in this career path, right.

8 Q Okay.

9 A That's right.

10 Q Okay. And I suppose one goes to medical school for  
11 a lot of reasons, but one of the main reasons is to be able to  
12 help people.

13 A Hopefully, yeah. That's a good idea. I mean that's  
14 what you're there for.

15 Q Well, I mean that's the goal, isn't it?

16 A Absolutely.

17 Q Okay. And so when -- is it true, doctor, that when  
18 a patient comes to you, that the very first thing you hope  
19 before you even knew anything about them is that if they've  
20 got something wrong with them that you can help them?

21 A Absolutely.

22 Q Okay. And so is it fair to say that you don't  
23 consider yourself Sherlock Holmes as a doctor. You don't  
24 cross-examine patients about this or that or the other thing?

25 A I think that that's fair to say. I'm not -- you

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1 know, there is -- you try, but you're not --

2 Q Sure.

3 A -- a Sherlock Holmes obviously.

4 Q Right. Okay.

5 A You know, and I'm not a great detective, no.

6 Q Right. But I mean if a patient comes to you and  
7 tells you that a particular event happened or an incident or  
8 an accident, you accept that?

9 A Yeah. You definitely take the history and most of  
10 your assessment is based on the history.

11 Q Right.

12 A Of course.

13 Q Right. Somebody tells you they were in a car  
14 accident, you don't go down to the intersection. You don't go  
15 down and look at the cars? Somebody says they had an accident  
16 at the Palms. You don't go over to the Palms and take a look  
17 and see what's going on there?

18 A Right. In general, that's absolutely completely  
19 correct.

20 Q Right, okay.

21 A And, that's right. I've never seen the accident  
22 or --

23 Q Okay.

24 A -- you know, I take a history, right.

25 Q And that's because you're not retained as an

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1 accident reconstruction expert?

2 A It's I don't know what that actually is, an accident  
3 reconstruction, but it sounds like that would be --

4 Q Okay.

5 A I actually just can't get out of my office.

6 Q Right.

7 A It's just the way --

8 Q Okay.

9 A -- the practice is designed. We just don't go  
10 outside.

11 Q Yeah. You don't --

12 A We just kind of -- yeah.

13 Q You don't think that's what you do, at least, is --

14 A Yeah, I've never been --

15 Q -- reconstruct accidents?

16 A Exactly.

17 Q Okay.

18 A Exactly.

19 Q So, when a patient comes in and tells you that there  
20 was an accident, you pretty much accept what they tell you,  
21 isn't that right?

22 A That's correct.

23 Q Okay. And when the patient comes in and tells you  
24 that they sustained an injury in a certain way, you accept  
25 that, don't you?

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1 A Yeah.

2 Q Okay. I mean unless it's something that seems  
3 impossible. If they said they were flying around a flying  
4 saucer and they did something, you might wonder, but other  
5 than that.

6 A Well, I mean you're taking down the history. This  
7 is what the patient's telling you.

8 Q Right.

9 A And this is their understanding of how they got  
10 injured.

11 Q Uh-huh.

12 A Obviously you're going to evaluate that.

13 Q Sure.

14 A You know, see if they're correct because they may  
15 not understand their mechanism of injury, but that's what -- I  
16 mean that's -- you know, I mean, yeah, I mean you listen to  
17 the patient. You have to.

18 Q Uh-huh, right. But if they tell you they had a pain  
19 on a particular day or at a particular time, you accept that?

20 A That's correct.

21 Q You don't go back and do an independent  
22 investigation?

23 A That's correct.

24 Q Okay. And isn't it true that as part of your  
25 treatment of patients that in addition to what we've talked

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1 about that you expect that when you do any sort of an  
2 examination of the patient or any sort of testing, that the  
3 patient is going to be completely cooperative to you?

4 A I'm hoping he's going to be cooperative. I don't  
5 know if he can tolerate the studies, but obviously we want him  
6 to participate or her to participate because it's nice to get  
7 data.

8 Q Sure.

9 A Right.

10 Q But I mean, for example, if you say to me, "How far  
11 can you turn your head to the right," and I say, "I can turn  
12 it that far," you accept that, don't you?

13 A You try, and if they're not going fully, then you  
14 try to get him to be a little more active and passive.

15 Q Right.

16 A Try to help them.

17 Q Okay.

18 A Yeah, because -- and there's a lot of guarding, you  
19 know.

20 Q Okay.

21 A You know, because a lot of patients are hesitant  
22 because they have been injured, so what happens is they may  
23 not participate, but absolutely.

24 Q Right.

25 A I mean it's just part of the exam process.

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1 Q Right.

2 A Yes, absolutely.

3 Q Yeah, yeah. And you're expecting that the patient  
4 is going to be forthright.

5 A Yes.

6 Q Because if they're not, that makes it very difficult  
7 for you to do your job.

8 A It makes it an increased challenge. That's right.

9 Q Right, okay, okay.

10 A But it happens all the time, so it's not very  
11 difficult to get used to it, so.

12 Q Okay.

13 A I mean we get used to it, so.

14 Q Okay. But by and large, you expect that when you  
15 have an examination and you ask the patient, "Does this hurt  
16 or does this whatever or I've got this or I've got that," you  
17 expect that they're being forthright with you?

18 A That's correct.

19 Q Okay. And you don't look for people that are not  
20 being forthright with you, do you?

21 A I don't know that the question -- I mean I want all  
22 my patients to be honest.

23 Q Right, but --

24 A If that's what you're asking. I mean I want them to  
25 participate, be honest, give me --

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1 Q Sure.

2 A -- you know, I mean tell me the truth so I can at  
3 least tell them what's going on, you know, help them out.

4 Q Right.

5 A You know, that's what a doctor does, absolutely.

6 Q No, I understand.

7 A Right.

8 Q But what I'm trying to get to is of course you want  
9 all your patients to be honest and when you walk into an  
10 examining room and there's a patient in there, you don't say,  
11 "Gee, I wonder if he's going to be forthright with me." You  
12 walk in and assume that he's going to --

13 A Absolutely.

14 Q -- that he's straight up.

15 A That's why they're there, right.

16 Q Okay.

17 A Right.

18 Q And you're going to have an interaction with him and  
19 you're going to be forthright with him or her, and you expect  
20 they're going to be forthright with you?

21 A Yes, absolutely.

22 Q Okay. And lastly, you expect when you have a  
23 patient, that the patient has a sincere interest in getting  
24 better, is that right?

25 A That's correct.

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1 Q Okay. You don't think that someone is just there  
2 because they've got nothing better to do that day. You expect  
3 they're there because they want to get treatment and they want  
4 to get better?

5 A Yes.

6 Q And if you give them a treatment plan and expect and  
7 ask them to do certain things or take certain medications or  
8 do whatever, you expect they're going to do that to the best  
9 of their ability?

10 A I'm hoping.

11 Q Right.

12 A Right.

13 Q You understand there's some -- there may be some  
14 limitations.

15 A That's right. There is always the exception. Like  
16 today I had a patient --

17 Q Right.

18 A -- that didn't take my medicine. You know, it's  
19 like it just keeps going and on and on. It's just, you know,  
20 because they're hesitant about medicine. There's always some  
21 -- you know, there's always a -- you know, you have to kind of  
22 delve into why they're not doing the treatment plan.

23 Q Right.

24 A What's going on. You know, because everybody has  
25 some psychosocial background and, you know, I don't believe in

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1 that medicine. You know, they had their friend, but  
2 absolutely. I want them to try and be compliant to my  
3 treatment program, yes.

4 Q Right, because essentially you think people that  
5 don't believe in doctors -- I mean there are such people out  
6 there, don't believe you should go to doctors --

7 A I know one, yes.

8 Q -- they're not coming to you, right?

9 A That's --

10 Q For the most part?

11 A That's absolutely true, yes.

12 Q Okay.

13 A Yes.

14 Q Okay. So you're thinking that if people are coming  
15 to you that they're coming to you for a reason and they're  
16 going to do their best to get better?

17 A Yeah. There's always a family member that's always  
18 pushing their other family member to come to the doctor.  
19 Absolutely, yes.

20 Q Okay. Okay. Now, I asked you a lot of questions  
21 the other day.

22 A Yes.

23 Q I don't have a transcript in front of me. I think I  
24 know where I am. I will do my best not to repeat anything. I  
25 just want to try to go through some areas relatively quickly.

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1 A Okay.

2 Q And then we'll be done and Mr. Baker, I'm going to  
3 give him a list of questions that he can ask. And then we'll  
4 be done and you can go back to your patients.

5 A Thank you.

6 Q Okay?

7 A Thank you.

8 Q Now, we were talking. I think we had made it most  
9 of the way through the report of Dr. Ferrante. Do you have  
10 that in front of you?

11 A That was on the monitor. Dr. Ferrante was --

12 Q Right.

13 A -- on the screen.

14 Q Yeah.

15 A And we were going down the report.

16 Q Yeah.

17 A I believe in Dr. Gutierrez' report. Somewhere it  
18 was on the screen too.

19 Q Okay. Now, I want to show the witness something and  
20 rather than try to pull it up, may I just approach the witness  
21 and shown him the report --

22 THE COURT: Sure. Why not?

23 MR. WARD: -- just to show him Dr. Ferrante's report.  
24 Okay.

25 MR. BAKER: It's 25, I think. Is that 25, Casey?

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1 MR. WARD: Yes, yes, it's 25. Maybe, can you find 25?

2 MR. BAKER: First time I got it right the whole time.

3 THE COURT: Noted for the record, Mr. Baker.

4 MR. BAKER: Feel like \$100, Your Honor.

5 THE WITNESS: It should be in this one. Actually, it's  
6 this one.

7 BY MR. WARD:

8 Q What did you do to your foot?

9 A I'm sorry.

10 Q What did you do to your foot?

11 A Well, I was exercising and I kind of had a personal  
12 trainer and I kind of did a partial full tear of the Achilles  
13 tendon on the right side. And it's been 12 weeks now, so it's  
14 been -- and I, you know, and I try to get a little strength,  
15 but --

16 THE COURT: You need a new trainer, Dr. Shah.

17 THE WITNESS: Yeah, you know, it's just like, you know,  
18 just -- it's unfortunate, so.

19 MR. WARD: Do you wear the same pair of shoes all the  
20 time or are all your shoes going to be half worn out?

21 THE WITNESS: Every different one and just, you know,  
22 because the height of the booth is higher and just, you know,  
23 the asymmetrical walking in them, you know. That's why I'm --  
24 but, yes, 25 is -- I have Doctor -- it says F. Michael  
25 Ferrante, UCLA Pain.

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1 BY MR. WARD:

2 Q Right.

3 A Yes.

4 Q And I just want to ask you about the area that's  
5 called assessment.

6 A Okay.

7 Q In the middle of that, it says that Dr. Ferrante  
8 suggested that if the pain continues or worsens that he should  
9 do several things. And I'm going to take them not necessarily  
10 in order, but trial of Clonidine patches and Neurontin. Do  
11 you see that?

12 A Yes.

13 Q What is that, Doctor?

14 A Different types of ways to stop the sympathetic  
15 nervous system. The Clonidine is an alpha one agonist,  
16 anti-hypertensive, I believe. And it's a blood pressure  
17 medication actually.

18 Q Okay.

19 A And it stops hyperactivity. It's also, you know,  
20 it's a patch. It's -- I'm very familiar with this patch. But  
21 it's basically -- you can buy it -- they have these patches  
22 that you can actually put on your skin. They give you a  
23 constant release. It's a medication, been around for a long  
24 time. The companies that are selling them though are -- it's  
25 quite expensive. Two hundred dollars a month for a patch, a

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1 Clonidine patch right now at CVS, but that's the retail price.

2 So, but they put them on. And it's basically  
3 another medicine, just like Gabapentin, Neurontin, which is a  
4 seizure medication, which I've probably given out to like  
5 10,000 patients by now. It's my most favorite.

6 And it's another medication that is to decrease  
7 stimulation of electrical impulses and pain. It's FDA  
8 approved for seizures, the Neurontin medication. And, you  
9 know, it's just another medication for stopping pain.

10 Q Okay. So, those two things, Clonidine patches and  
11 Neurontin, are ways -- the patch is simply a way to deliver  
12 medicine, correct?

13 A Yeah, it's just a medicine. You put it on and you,  
14 you know, it gives some skin irritation, but.

15 Q Right, okay.

16 A Right.

17 Q Okay. And so if you were giving a patient either --  
18 would you do both Clonidine patches and Neurontin or is it  
19 either or?

20 A I mean there's more than that. He just wrote down  
21 two. There's probably a whole of -- like there's 20  
22 medications that you can give. I mean, you know.

23 Q Right. I'm just talking about what he said here.

24 A I don't know.

25 Q Okay.

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1           A     I mean, you know, I give Neurontin, maybe some  
2 Clonidine patch. You know, I'm more familiar with Neurontin  
3 because I've given out 10,000 prescriptions to it.

4           Q     Okay.

5           A     I've started patients on it, so.

6           Q     Okay. Tell me --

7           A     Clonidine I'm familiar because of personal reasons,  
8 so I know Clonidine quite well too, but, you know.

9           Q     Sure. Here's my question, doctor. When you give  
10 that to a patient or, in this situation, what would you be  
11 looking for? You give it to a patient and the patient takes  
12 it or puts the patch on. What is it you're expecting?

13          A     Well, he might have decreased sweating.

14          Q     Okay.

15          A     Decreased, he might -- the goal, of course, is to  
16 reduce pain.

17          Q     Right.

18          A     So, there is so many different ways of stopping  
19 pain, so you try to use these medications to decrease some of  
20 the symptoms of pain. I mean, you know, it's just a pain  
21 medication.

22          Q     Right. So, the way you tell if that's being  
23 effective is you ask the patient and the patient reports?

24          A     Yeah.

25          Q     Okay.

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1           A     Yeah. I mean I would -- you know, I mean, yeah, if  
2 you're going to give medicine, the patient has to be  
3 compliant, has to take the medicine.

4           Q     Right.

5           A     And then, you know, see if you have a response. You  
6 know, there's always side effects, but you have to always --

7           Q     Right.

8           A     -- try to assess medications.

9           Q     No, no, I understand. And I --

10          A     Okay.

11          Q     All I'm trying to find out is when you give it to  
12 the patient, what is it you're expecting? If I understand it  
13 correctly, you ask the patient about this. "Did your sweating  
14 get better? Did your pain get better? Did your whatever?"

15          A     Yeah.

16          Q     And the patient says to you yes or no or in between  
17 or whatever. That's the way that works?

18          A     Right.

19          Q     Correct?

20          A     Right.

21          Q     Okay. And now before that is lumbar sympathetic  
22 blocks. Do you see that?

23          A     Yes.

24          Q     Now, how does that work? I understand that it's an  
25 injection, correct?

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1           A     Yes.

2           Q     And how does it -- how do you measure whether that's  
3 working or not working?

4           A     A gained response, when I'm with a patient, how they  
5 feel afterwards.

6           Q     Okay. Okay. So, the lumbar sympathetic block, you  
7 would ask the patient, "Did this give you relief or didn't it  
8 give your relief or did it decrease the pain," or whatever?

9           A     Absolutely.

10          Q     Okay. Anything else on that, lumbar sympathetic  
11 blocks?

12          A     I mean on all of them there's always going to be  
13 side effects, you know.

14          Q     Right.

15          A     And there's always complications.

16          Q     I'm not asking about --

17          A     But, you know, I mean it's just response to pain.  
18 The patient --

19          Q     Okay.

20          A     It's subjective pain relief.

21          Q     Okay, okay.

22          A     And, you know, I mean and, yeah, I mean you could  
23 maybe see the walking, to see if it changes, to see if they're  
24 having more agility. You know, things like can they move  
25 around a little more? Can they, you know -- they'll tell you.

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1 Q Okay.

2 A Hopefully. You know, I mean that's what you want.

3 Q Now, the one after that, after Neurontin, says  
4 bilateral foot and leg x-rays. And that one explains in order  
5 to contrast possible osteoporosis in the left lower extremity  
6 and foot in comparison to the right.

7 So, now how would you find if that was -- if that  
8 test told you what you wanted to see?

9 A Well, I don't know if that's the correct test, to be  
10 honest with you, but that's -- what he's looking for is bone  
11 density.

12 Q Okay. So what he --

13 A And --

14 Q -- what he would do is -- correct me if I'm wrong.

15 A Yes.

16 Q Have an x-ray taken of the left lower extremity,  
17 have an x-ray taken of the right lower extremity. And hold  
18 the two up and say, "Are they different?"

19 A I'd presume so. I mean I wouldn't personally be  
20 reading those types of x-rays, so I've never actually -- I  
21 mean don't know what's the best way. I was always thinking I  
22 guess you could do x-rays to see, you know, for -- what he's  
23 looking basically for right here is he's doing a complex  
24 regional pain syndrome evaluation.

25 Q Well, I --

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1 A Yeah, because he's looking at bone density, right.

2 Q -- understand that, but what he's looking for --

3 A Right.

4 Q I don't mean to be absurd about this.

5 A Sure.

6 Q But when I hold the x-rays up, it doesn't say,  
7 "Complex regional pain syndrome," does it?

8 A No, it's actually in chronic, as you get -- you'll  
9 see changes eventually in the bone densities.

10 Q Right.

11 A And that's what he's trying to state. I don't know,  
12 you know, his clinical background of how he evaluates. I've,  
13 you know, I mean I'm not an expert in bone density. I have to  
14 be honest with you. I would have to defer that to the  
15 radiologist and say, "Okay. Well, what's the correct test,  
16 you know, if you're going to do something?" I thought bone  
17 scan. That's what I -- but again, I'm just listening to some  
18 radiologist. Maybe he's got a different way to do things.

19 Q I'm not asking you to tell me what he's thinking --

20 A Sure.

21 Q -- because I know you don't know and I won't ask you  
22 to speculate.

23 A Right.

24 Q All I'm asking you is what that means. And what  
25 that means is bilateral foot and leg x-rays to contrast

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1 possible osteoporosis comparing the left to the right.

2 A That's correct.

3 Q Correct? Okay.

4 A Yes.

5 Q And then the other one that he has here is bone  
6 scans and that's different, correct?

7 A Bone scan is different, yes.

8 Q Okay. And you --

9 A Oh, yeah, that's right. I suggest patient undergo  
10 bone scans.

11 Q And bone scans would be looking for a similar kind  
12 of thing. You're looking at the bones.

13 A Right.

14 Q To see if there's a change?

15 A Exactly.

16 Q Okay. Okay. And the way you would tell that is you  
17 can tell by the bone density?

18 A You know, I actually don't know exactly. I've never  
19 actually looked at a bone scan, so I can't tell you.

20 Q Then I'm not trying to push you into it then.

21 A Right.

22 Q But you would send it to somebody for a bone scan  
23 and ask them to tell you whether it was normal or abnormal?

24 A That's right.

25 Q Okay. But that's the way it would be read is that

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1 somebody who looks at these things would look at it and say,  
2 "This is normal or this is not normal," or whatever.

3 A That's correct. That's right.

4 Q And then they'd provide you with that information?

5 A That's correct.

6 Q Okay. Now, you send your patients out for testing  
7 of different kinds, do you not?

8 A Yes.

9 Q Okay. You don't do everything yourself?

10 A That's correct.

11 Q Okay. And sometimes like these bone scans or like  
12 the x-rays, it's something that it's not that you couldn't do  
13 it. It's that you don't do it because of a variety of  
14 reasons. You're a neurologist and so somebody else does this  
15 and you do what you do.

16 A That's correct.

17 Q Correct? But you utilize what they give you?

18 A That's correct.

19 Q Because they're experts in their field?

20 A That's right.

21 Q And you expect they know what they're doing?

22 A That's right.

23 Q And it's going to be useful to you?

24 A Yes.

25 Q In making assessments of the patients?

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1 A That's right.

2 Q And so you would be -- these kinds of things, you  
3 might have a different way of looking at it from this  
4 particular doctor, you would have -- you would sometimes have  
5 some things that you might send a patient out for that would  
6 be the way you do your analysis. And you would look at it and  
7 come to some sort of opinions?

8 A That's correct.

9 Q Okay. Now, let's go from this is dated November 14,  
10 2006. And my best recollection is that I was going in  
11 chronological order through your records.

12 A Okay.

13 Q So, if you would be so kind as to tell me what is  
14 the next -- your next exam date after November 14, 2006.

15 A It looks like November 29, 2006.

16 Q Okay. Do you have a page number, please?

17 A Yes, 56, so section 49.

18 Q Fifty-six.

19 A Fifty-six, volume three.

20 Q Okay. Did you find it?

21 MR. BAKER: Yes.

22 BY MR. WARD:

23 Q Okay. Now, November 29, and did you have a chance  
24 to talk to your office about this business item at the top of  
25 your letter?

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1 A The business?

2 MR. BAKER: The billing issue with respect --

3 BY MR. WARD:

4 Q We were talking about this listing at the front of  
5 the -- on page --

6 A Oh, no, I haven't. They're out in Jamaica, so I  
7 was --

8 Q Oh, okay.

9 A The Montego Bay today, so.

10 Q Okay. Okay. Now, you saw him on November 29<sup>th</sup> and  
11 he said he had left knee pain.

12 A Yes.

13 Q Correct? And he said he had pain spreading into the  
14 left shin and foot with sharpness episodes.

15 A Yes.

16 Q And he said he had gained a lot of weight since the  
17 left knee injury.

18 A Uh-huh.

19 Q And he said he had right low back pain down the  
20 right leg.

21 A Uh-huh.

22 Q And he said he feels tired and has sleep apnea  
23 that's held -- that slows his thinking, correct?

24 A Yes.

25 Q And he says he has bilateral hand pain, numbness

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1 worse on the right.

2 A Yes.

3 Q Correct?

4 A Yes.

5 Q And these are all things that he told you?

6 A Yes.

7 Q And you accepted it?

8 A Uh-huh.

9 Q And then you did an objective examination, correct?

10 A Yes.

11 Q And you said that his left knee was mildly swollen,  
12 correct?

13 A Uh-huh.

14 Q Now, this is after he's had two surgeries on his  
15 left knee, is that right?

16 A I believe so, yeah.

17 Q Okay. And you found that he had good foot pulses?

18 A Uh-huh.

19 Q What's that tell you?

20 A Good foot pulse, like you don't have to worry about  
21 arterial disease.

22 Q Okay. And --

23 A You know, I do stroke evaluations, so, you know,  
24 people have peripheral vascular disease --

25 Q Right.

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1           A     -- on occasions. The arteries become narrowed and  
2 they don't get blood supply.

3           Q     Okay. And you have skin turgor, that's kind of the  
4 pressure, natural pressure kind of?

5           A     Yeah, just the way it looks, right.

6           Q     Okay. And it's -- you said that it's normal in the  
7 feet and the shin?

8           A     That's right.

9           Q     And you said left knee moderate tenderness?

10          A     Yeah.

11          Q     Okay. Now, tenderness is when you touch it, the  
12 patient says it hurts or it's tender or whatever?

13          A     Yeah, or they just kind of squirm or, you know, they  
14 have --

15          Q     Okay.

16          A     -- pain. It's pain.

17          Q     Okay. They react in some way? It's either by  
18 saying, "Ouch," or by saying, "That hurts," or by moving their  
19 leg or they do something?

20          A     Yeah, most of the time they react. That's correct.

21          Q     Okay. And you accept -- when they're your patient,  
22 you accept that, right?

23          A     Yeah. I mean --

24          Q     You don't say to yourself, "Gee, I wonder if he  
25 really has pain?" You say, "No, he says he's got pain, he's

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1 got pain."

2 A No, the tenderness has a subjective and objective  
3 component to it.

4 Q Okay.

5 A Yes.

6 Q Okay. And you have no warmth?

7 A That's correct.

8 Q Now, did you measure his skin with a thermometer?

9 A No.

10 Q You have developed a sense of touch?

11 A By hands. You just touch.

12 Q Okay. Okay. It takes a long time to do that,  
13 doesn't it?

14 A Yeah, you just touch it. Yeah, I see --

15 Q Right.

16 A I'm looking to see if there's an infected joint  
17 obviously.

18 Q Right, sure, sure.

19 A You know, because warmth means it's infected.

20 Q Right.

21 A It's a swollen joint.

22 Q Right.

23 A You just want, you know, you have to check to see if  
24 it's hot because then, you know, you can lose your joint.

25 Q Exactly.

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1 A Right.

2 Q And you've been doing this a long time and you  
3 educate your senses after a while so that you can feel things  
4 that perhaps other people can't?

5 A That's right.

6 Q And you can probably feel things better than you  
7 could when you were in undergraduate school before you went to  
8 medical school?

9 A That's correct.

10 Q Okay. And you found no warmth, right?

11 A I found no warmth or hyperesthesia in the left shin  
12 and foot.

13 Q Okay. And what does lack of warmth tell you?

14 A Just it's not infected.

15 Q Okay.

16 A I mean not infected.

17 Q Okay. I'm not questioning.

18 A Yeah.

19 Q I'm just asking you to tell me, okay?

20 A Yeah.

21 Q I'm not doubting what you found there. I'm just  
22 trying to get it into the record.

23 A If it was red and warm, I would send it to an  
24 infectious disease guy.

25 Q Right, okay.

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1           A     You know, he had surgery, so you --  
2           Q     Sure.  
3           A     -- have touched it inside. I can't see the inside.  
4           Q     Right.  
5           A     Right.  
6           Q     You said no hyper -- hyperesthesia?  
7           A     Hyperesthesia.  
8           Q     Hyperesthesia?  
9           A     That's right.  
10          Q     What is hyperesthesia?  
11          A     When you touch the area, they have increased  
12 sensation.  
13          Q     Okay. Okay. Hype aesthesia is abnormal sensation,  
14 right?  
15          A     That's right.  
16          Q     And hyperesthesia is increased sensation?  
17          A     Right, hypo, hyper. And then dysaesthesia means  
18 unpleasant sensation.  
19          Q     Okay. Okay. And so you said no hyperesthesia in  
20 the left shin or foot, correct?  
21          A     That's right.  
22          Q     And you said no sweating?  
23          A     That's right.  
24          Q     Okay. And I presume by that you mean abnormal  
25 sweating?

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1 A Yeah, yeah.

2 Q Okay. And --

3 A The skin turgor was normal, so it has to be some  
4 obviously moisture.

5 Q Right.

6 A Otherwise it'd be --

7 Q Yeah.

8 A -- decreased, right?

9 Q Yeah. And I mean our body is mostly fluid, isn't  
10 it?

11 A Yeah, that's right. Most of it's water.

12 Q So, we've got stuff everywhere. We just have --  
13 sometimes we may have more than we're supposed to have?

14 A That's correct.

15 Q But he didn't, in this particular area, have more  
16 than he was supposed to have?

17 A That's right.

18 Q No sweat. And now it says, "Change of color or  
19 intense pain." And the way that comment is, I'm assuming that  
20 what that means is no sweating, change of color, or intense  
21 pain, correct?

22 A That's correct.

23 Q So it means no change of color.

24 A Right.

25 Q No intense pain.

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1 A That's correct.

2 Q On all sensory modality testing -- testing modality  
3 done today.

4 A That's correct.

5 Q So what you did here was you checked every -- you  
6 did a complete exam of the lower extremities.

7 A That's correct.

8 Q And you didn't see anything that was out of order  
9 other than there was some moderate tenderness on the left  
10 knee.

11 A Around the left knee area.

12 Q Okay.

13 A But when I was doing the -- you know, it's the shin  
14 and foot area that I'm looking at.

15 Q Right, right.

16 A So it's not really I guess the whole legs.

17 Q Okay.

18 A It's more the -- what I'm worried about is he's --  
19 I'll just tell you so that this makes it easier. I'm just  
20 worried that he does have a clot in the leg.

21 Q Right.

22 A So, that's why you're doing this.

23 Q Right.

24 A From my point of view, if -- since I've had some  
25 family members, you know, we kind of know how people -- they

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1 have a bad problem. They're not immobile.

2 Q Uh-huh.

3 A You want to make sure the person doesn't develop a  
4 deep venous thrombosis, a clot.

5 Q Right, right.

6 A So you kind of -- you just want to check to see if  
7 how is that leg looking.

8 Q Right.

9 A So, obviously because there's secondary  
10 complications of things that occur.

11 Q Sure.

12 A So, that's one of the things. But I was definitely,  
13 you know, kind of looking to make sure that the venous -- you  
14 know, the veins are pushing blood through, there's not too  
15 much swelling down the leg.

16 Q Right.

17 A You know, because he's got the brace on.

18 Q Right.

19 A Right.

20 Q And he's your patient --

21 A Right.

22 Q -- and he's been your patient for a while.

23 A For a while, right.

24 Q And you care about him and you know him and you like  
25 him.

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1 A Right.

2 Q And so you want to do a thorough exam and make sure  
3 everything is okay.

4 A That's correct.

5 Q Okay. And so you did a thorough exam and found out  
6 that everything was okay?

7 A Yes.

8 Q Okay. And now you have antalgic slow asymmetric  
9 gait with moderate distress on exam. Tell me what that --  
10 what your finding was there, doctor, what that means.

11 A All right. He has an off balance asymmetric gait.  
12 He's limping and it's painful and he's in a lot of distress  
13 while maneuvering --

14 Q Okay.

15 A -- and walking.

16 Q Okay. Now, the asymmetric gait, is that what  
17 antalgic means is asymmetric gait, or are they --

18 A No.

19 Q -- two different things?

20 A Just painful. Antalgic means painful.

21 Q Okay.

22 A Asymmetric means not symmetric.

23 Q Okay.

24 A You know, that's why it's --

25 Q Okay.

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1 A -- you know, off balance.

2 Q Okay.

3 A That's totally -- they're separate, but they could  
4 be somewhat together.

5 Q Sure.

6 A You know, in patients that, you know, it's if you  
7 have a limp and you might be in pain, you might have  
8 asymmetric, but the reason there's three different words here  
9 is because there's three different things I'm describing.

10 Q Okay.

11 A He's antalgic, that's one. He's got the slow,  
12 asymmetric gait, that's two. And he's in moderate distress on  
13 effort. So, it's going to be more distress to even do this  
14 maneuver.

15 Q Right.

16 A You know.

17 Q Okay. And under discussion you have that he was  
18 seen in follow up. And you went over his EMG/NCV results  
19 again today.

20 A Okay.

21 Q And what -- EMG is electromyogram, correct?

22 A That's correct.

23 Q That's nerve conduction.

24 A Actually, that's a muscle test. That's the muscle.  
25 Electromyogram means electrical muscle graph, yes.

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1 Q Okay.

2 A And the nerve conduction, NCV is the nerve  
3 conduction velocity.

4 Q Okay.

5 A The nerve test.

6 Q And the -- do we have the results of that testing in  
7 your record there, do you see?

8 A Yeah.

9 Q Can you tell me what page, please?

10 A It starts off at 63.

11 Q Okay.

12 A And it goes to -- 63 is the start.

13 Q Okay. Let's bump up there for the moment. Then  
14 we'll go back to 58. Okay. So this is the -- this is where  
15 it says study type, upper and lower extremity, EMG.

16 A Yes.

17 Q Correct?

18 A Yes.

19 Q Now, the -- number one is a normal EMG study of the  
20 upper extremities?

21 A That's correct.

22 Q And what does that mean?

23 A That there's no axonal changes to the nerve --  
24 excuse me, axonal changes to the muscle. And the muscle  
25 itself does not show any muscle abnormality.

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1 Q Okay.

2 A So, there's two components to that. So, when you  
3 look at -- you're evaluating the muscle and you're just  
4 checking muscles to see if there's any nerve denervation to  
5 that muscle from the axons or from anywhere in the axons or if  
6 there's a muscle pathology itself. That's what it means.

7 Q Okay. And you have an abnormal EMG of the lower  
8 extremities?

9 A That's correct.

10 Q Okay. And then you have abnormal nerve conduction  
11 study right median distal. What is that?

12 A The right median distal compound mode action  
13 potential is prolonged. That is actually the nerve motor  
14 component, which is totally different from the axon. So,  
15 totally separate, even though we use the terminology, but  
16 they're totally looking at different things.

17 Q Okay.

18 A And it's basically -- prolonged means it's delayed  
19 at the compound -- the distal meaning when we stimulate  
20 distally, meaning the nerve actually generates somewhere  
21 around the brachial plexus in the lower armpit. And it kind  
22 of goes down and it kind of gives you the innervation to abduct  
23 the thumb so you can open up beer bottles. So, what happens  
24 is if it's a very -- it's the number one most common -- it's  
25 carpal tunnel.

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1 Q Okay.

2 A You're looking at the hand tunnel, the wrist area.  
3 You're looking at pressure on the nerve. The motor -- the  
4 median motor. Median means middle in Greek, and so back a  
5 long time ago they decided this is the middle nerve and this  
6 is carpal hand tunnel. So, it was just basically a finding --

7 Q Okay.

8 A - that showed that there is some slowing there.

9 Q Okay. So there's some slowing of the nerve  
10 conduction study and then needle EMG of the right abductor.  
11 pollicis brevis hand muscle demonstrated no significant  
12 denervation potentials.

13 A Yes.

14 Q What does that mean?

15 A That means the actual axons -- now we're going back  
16 to axons, but they're a little different. In the median  
17 motor, not the latency in the outside of the nerve, but the  
18 actual axon of this peripheral nerve.

19 Q Uh-huh.

20 A Okay, is actually not what I stick the need into  
21 this area right here. It's not dying off that particular  
22 muscle.

23 Q Okay.

24 A That's what it's saying.

25 Q Okay. Now, let's go back to 58.

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1           A     It's basically just a rating system for carpal  
2 tunnel.

3           Q     Okay.

4           A     But, you know, they just have standard radians.

5           Q     Okay.

6           A     You know.

7           Q     And now you expressed concern that you thought that  
8 you should increase -- you wanted -- you hoped to increase the  
9 mobility for Mr. Rodriguez' left knee, is that correct?

10          A     In general --

11          Q     I'm looking at discussion.

12          A     I mean in general I've been doing -- wanting that as  
13 a goal, of course, all the time.

14          Q     Okay.

15          A     Yes.

16          Q     And you found in your -- you made a plan here of  
17 things that you were -- that he was going to do, one of which  
18 was to see Dr. Wong in Las Angeles?

19          A     Yes.

20          Q     And who is Dr. Wong?

21          A     Jeffrey Wong, he's the spine orthopedic chair and  
22 UCLA.

23          Q     Okay. Did he see Dr. Wong?

24          A     I don't know.

25          Q     Okay. And you said, among other things, that the

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1 wrist splints were not helping.

2 A That's right.

3 Q Is that correct?

4 A That's right.

5 Q Okay. Now, what's the -- we're at November 29, '06  
6 What's the next, date of your next exam?

7 A According to this, August 7, '07, about nine months  
8 later.

9 Q And you're in the Bates page?

10 A It looks like it's 53.

11 Q And is there anything that -- in the subjective  
12 examination, you add here that he has continuous neck and  
13 upper back pain. You didn't have that in the last one, did  
14 you?

15 A I don't know if I did, but I don't think so. I  
16 think there was only a couple of things we wrote down on this  
17 one.

18 Q Okay. And how about this? "At night while asleep  
19 he has jerking episodes, no loss of consciousness. The jerks  
20 happen during sleep." That was reported to you?

21 A Yes.

22 Q Okay. Now, what did you think was causing that?

23 A Muscle tightness, I thought it was a muscular  
24 problem. It's common.

25 Q Okay.

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1           A     Just spasm. It's at night time, so, you know, I had  
2 to -- you know, I tried to tell him it's not a seizure. I  
3 don't think it's a seizure, you know. But you have to  
4 obviously rule it out. But basically it just -- he's been  
5 injured. You know, so just muscles are now getting weak,  
6 spasming. He's trying to rest at night and you've got these  
7 jerking movements.

8           Q     Okay.

9           A     That's by far the most common thing that I always  
10 think about, you know.

11          Q     Right. If you've got a patient who's having  
12 seizures, you want to know about it and do something about it?

13          A     Yeah, but medication sometimes also can cause it,  
14 but that's --

15          Q     Sure.

16          A     -- less likely, you know what I mean?

17          Q     Yeah.

18          A     I've seen that on a few cases, but by far, it's got  
19 to be muscle.

20          Q     Okay.

21          A     Most muscle related, you know. So, and that's a  
22 whole different issue because now you've got these weak,  
23 chronic muscles, and you have to now decide, you know, because  
24 you can't just put them on a Baclofen pump or something like  
25 that. You know, you've got to think about what you want to do

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1 with this.

2 Q Right, okay.

3 A You know, so.

4 Q And now the examination, you found that his left  
5 knee is mildly swollen, correct?

6 A Yes.

7 Q And he had good foot pulses?

8 A Yes.

9 Q Skin turgor is normal in feet and shin?

10 A Uh-huh.

11 Q Left knee, moderate tenderness.

12 A Uh-huh.

13 Q The same. No warmth?

14 A That's correct.

15 Q Correct? No hyperesthesia left shin and foot.

16 A Yes.

17 Q No sweating?

18 A That's correct.

19 Q Now change of color or intense pain on all sensory  
20 testing modality done today, correct?

21 A That's correct.

22 Q Now, you actually looked at him and saw those things  
23 before you wrote them down, isn't that correct?

24 A No, actually this looks exactly like the last one,  
25 so it's quite possible that there's a typo here meaning it

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1 looks like they're the exact same note as my last visit. So,  
2 if you could see it, it's actually word for word. So it's  
3 quite possible that I don't know if this is actually correct  
4 or not, to be honest with you, because they're the exact same  
5 note.

6 Q So, you did an examination or you didn't do an  
7 examination?

8 A I always do an exam. No, but what happens is we use  
9 computers and if you don't press the save, all the data is  
10 gone. It happens. I can't help it. I have a very expensive  
11 computer system. And I can tell you right now that how can it  
12 be the exact same exam. That's impossible, right? I mean  
13 nine months later. So, it has to be -- it's the computer. I  
14 can't do anything. I mean I can't remember then what he's got  
15 on that day.

16 Q So we can't rely on your records to --

17 A Well, you can rely on some of it and plus my plan  
18 because I mean if the plan changed, but you have to see a  
19 change obviously. I mean there's a thought process, you know,  
20 because you can't just see the exact same exam. How can that  
21 be? That's, you know -- I mean it's possible it's the same,  
22 but I can't rely on it now. I mean and there's no way because  
23 when you see these patients and you press the -- it's  
24 happened.

25 I mean we see a lot of patients and sometimes the

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1 computer, there's always a problem. I mean I have -- I spent  
2 a lot of money on the computer systems, but I mean I just --  
3 you know, I mean I try to manage the patient, but the  
4 documentation may not reflect everything, and that's just the  
5 way it is. And that's, you know, I mean I apologize, but  
6 that's the way my practice is. And I do the best I can.

7 Q Your plans --

8 A And I do a pretty good job compared to other places,  
9 so that's all -- but I want to get perfect, of course.

10 Q Your plan says EEG.

11 A Uh-huh.

12 Q Electroencephalogram.

13 A Yes.

14 Q And was that conducted?

15 A Yes.

16 Q And, now, before we get to that, what is your next  
17 exam after -- we were on August 7, '07?

18 A 9/4/07.

19 Q And would you be so kind as to give me the date on  
20 that?

21 A Sure. The number is 34.

22 Q Or not the date. You just gave me the date.

23 A Sorry, 34.

24 Q I can't even talk here.

25 A Sure, no problem. Which is good because then you

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1 can see the objective has now changed, so obviously it's been  
2 updated correctly.

3 Q Okay.

4 A Yeah.

5 Q And so here he tells you that he has left knee pain  
6 and he tells you that he has seen Dr. Miller in California,  
7 correct?

8 A Yes.

9 Q And --

10 MR. BAKER: I'm sorry. Doctor, I'm sorry. Can you give  
11 me a Bates number?

12 THE WITNESS: Number 34, 34, 3-4.

13 MR. WARD: Oh, I'm sorry.

14 MR. BAKER: Thank you.

15 MR. WARD: I thought you were -- could find it. You got  
16 it?

17 MR. BAKER: Yeah. Thank you. I appreciate it.

18 BY MR. WARD:

19 Q Okay. He has left knee pain and he's seen  
20 Dr. Miller in California, correct?

21 A Yes.

22 Q And says he's awaiting pain stimulator?

23 A That's correct.

24 Q So this is back in September of '07?

25 A That's correct.

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1 Q So, okay. And, now, he's on Topamax and Effexor and  
2 Vicodin and Morphine?

3 A He's on, yeah, Topamax, Effexor, Vicodin, and  
4 Morphine.

5 Q Okay. And you have, "The patient appears to be in  
6 moderate distress." What does that mean, doctor?

7 A He looks uncomfortable.

8 Q Okay. And, "Observation reveals no anxiety or hyper  
9 excitability?"

10 A That's correct.

11 Q Okay. Now, you did an examination of him and you  
12 found that his left knee was mildly swollen?

13 A Yes.

14 Q And that he had good foot pulses, correct?

15 A That's correct.

16 Q And his skin turgor was normal?

17 A That's correct.

18 Q And that was both in his feet and shin?

19 A That's correct.

20 Q Okay. So you did both feet, right?

21 A In skin turgor, it is normal, in feet and shin,  
22 that's correct.

23 Q Feet means two?

24 A That means two.

25 Q Okay. And left knee has mild to moderate

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1 tenderness. That's pretty much what we've had before, is that  
2 correct?

3 A Wasn't it moderate tenderness?

4 Q It was one or the other.

5 A Okay, yeah, a little different though.

6 Q Is that --

7 A Well, to me, it means a difference, but --

8 Q Okay.

9 A But, whatever, it's tender. That's fine. Okay.

10 Q Okay. Well, do you want to go back and look to see  
11 if there was a change?

12 A Yeah, I can. Yeah, before it was left knee moderate  
13 tenderness.

14 Q Okay.

15 A And now it's left knee, mild to moderate tenderness.

16 Q Which is more tender, mild or moderate?

17 A No, mild to moderate is one level less than  
18 moderate.

19 Q Okay. So left knee tenderness has decreased, is  
20 that --

21 A Yeah, it's --

22 Q Do I have it right?

23 A Yeah, to my --

24 Q Okay.

25 A Yeah, I mean he's got less tenderness right now.

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1 Q Okay, okay.

2 A On that particular, yeah, exactly.

3 Q Okay. And you checked for warmth?

4 A Yes.

5 Q And you're able to tell warmth from feeling it with  
6 your hands, correct?

7 A I would hope so. I mean, you know, I mean I'm not a  
8 thermometer, but, you know.

9 Q No, I understand, but --

10 A Yeah, I mean I try. I mean warmth, you can't -- I  
11 don't know. When I meant warmth, I meant like it has to be --  
12 you know, it can't be like one or two degrees. You know, you  
13 can't tell that sensitive.

14 Q Right.

15 A Again, when I'm looking at warmth, I'm looking for  
16 infection warmth, which is hot.

17 Q Sure, right.

18 A You know, so --

19 Q You examine both knees, right?

20 A No, I don't know if it's the knee. I was -- the  
21 warmth and the hyperesthesia of the left foot and the shin.

22 Q No, I understand that.

23 A Right.

24 Q But don't you -- to tell warmth, don't you touch  
25 both knees and see if they both feel the same?

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1 A No.

2 Q No?

3 A No, I don't.

4 Q You just feel it and say it's warm or it's not warm?

5 A No, it's he's tender, so you really can't -- how can  
6 you -- it's hard when you're tender. You don't want to touch  
7 that area because it's -- you know, you basically look at  
8 other areas. Again, you're looking at a problem with the  
9 mobilization of the left knee. You're looking for clots and  
10 infection, so you can look distally, like below the knee. I'm  
11 looking at the shin and foot. These are -- that's how I've  
12 been evaluating him.

13 The shin and foot to me are more important because  
14 if you don't move the left knee, what happens, immobilization,  
15 you get the clots. And you got -- you know, it swells up and  
16 you get a DVT, a deep venous thrombosis. That's when you see  
17 -- when I'm seeing him, I'm looking at that area.

18 Q Okay.

19 A That's how I'm looking because I'm -- you don't want  
20 to -- what you want is he's got already the other doctors  
21 helping him on one aspect. I'm making sure he doesn't, while  
22 they treat him, that he doesn't just throw a clot and die.  
23 You know, I mean that happens in chronic pain.

24 Q Okay.

25 A So that's what I'm looking for. He's a chronic

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1 patient.

2 Q And you see mild hyperesthesia, left shin and foot,  
3 and you see no sweating and you see no missing turgor?

4 A Right. He's got a little hyperesthesia, but it's --  
5 I put it down mild. I did not think the shin and foot was --

6 Q Right.

7 A -- severe. I just decided to call it mild.

8 Q And it says turgor, T-U-G-O-R, but it means -- it  
9 should be T-U-R-G-O-R.

10 A G-O-R, right.

11 Q Turgor, okay.

12 A Yes.

13 Q And antalgic, slow, asymmetric gait with moderate  
14 distress on exam, correct?

15 A That's correct.

16 Q Okay. Now, you did some testing, right?

17 A I did.

18 Q And it says, "No evidence of seizure with negative  
19 48 hour ambulatory is noted." And what does that mean?

20 A I did an ambulatory EG. We hooked him up for 48  
21 hours. It would have been done in my Long Beach practice.

22 Q Okay.

23 A My California practice. And it's basically he goes  
24 and he -- we're looking at those muscle spasms at night.

25 Q Right.

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1           A     So we're seeing if there's an epileptic discharges.

2     There is none.

3           Q     Right, okay.

4           A     It's normal. I checked it. That's not causing it.

5           Q     And you don't actually do that test, correct? You  
6     don't actually conduct the EEG?

7           A     I have a tech.

8           Q     Right.

9           A     They put the equipment on.

10          Q     Correct.

11          A     Then they bring it back. They download it.

12          Q     Uh-huh.

13          A     And I interpret it.

14          Q     Right.

15          A     Right.

16          Q     But you don't put it on his head?

17          A     I don't do that, no.

18          Q     You don't go around and make sure he doesn't take it  
19     off?

20          A     That's correct.

21          Q     You look at the -- you assume that somebody's doing  
22     that and it's all the way it's supposed to and you get the  
23     printout and you read it and you look at it and you read it?

24          A     You know, I read the re [phonetic] forms.

25          Q     Right.

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1           A     Right, okay.

2           Q     That's what I'm saying.

3           A     Yeah, of course.

4           Q     You have somebody else do a bunch of stuff and you  
5 get information and you interpret that information?

6           A     Yeah, I mean I -- right. Well, they don't get  
7 actually the information, the other person. The machine gets  
8 it.

9           Q     Yeah.

10          A     Right. It's like getting an EG.

11          Q     Yeah.

12          A     Right. I'm not the tech.

13          Q     I understand.

14          A     I actually don't put the equipment on top.

15          Q     I understand.

16          A     I just interpret, right.

17          Q     You get the data and you interpret it?

18          A     That's correct.

19          Q     Okay.

20          A     Yeah.

21          Q     I'm not trying to trick you.

22          A     Okay. All right.

23          Q     I'm just trying to --

24          A     No problem, okay.

25          Q     Okay.

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1 A Yeah, no, I -- yeah.

2 Q And you said no evidence of seizure. And then you  
3 also had requested an MRI, is that right?

4 A On are we talking about on -- you're on page 36?

5 Q Yeah, here's what I'm looking for, doctor, and maybe  
6 I'm misreading it. But I'm looking at page 36 and I'm looking  
7 at under discussion.

8 A Yes.

9 Q It says, "No evidence of seizure with negative 48  
10 hour ambulatory is noted and the MRI results are  
11 unremarkable."

12 A That's correct.

13 Q Okay. So, I'm assuming that you had an MRI done.

14 A That's right. That's right.

15 Q Okay. And I'm assuming you didn't go down to the  
16 machine. You had somebody else do it and you got the --

17 A The report.

18 Q -- report and --

19 A Yeah, there must be a report that shows an --

20 Q Right.

21 A -- an unremarkable.

22 Q Sure.

23 A That doesn't mean normal, but nothing that can  
24 explain, again, jerking movements.

25 Q Right.

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1           A     Right, so, yeah.

2           Q     So you got the report and it's unremarkable for  
3 focal pathology, meaning it doesn't point to a particular  
4 problem.

5           A     That's correct.

6           Q     Okay. And then you said, "In either case, Requip  
7 for RLS." What is RLS?

8           A     That's Restless Leg Syndrome.

9           Q     Oh, okay.

10          A     Jerking movements of the legs.

11          Q     Right.

12          A     And the back, you know.

13          Q     Okay. Is Clonidine, is it called Clonidine? Is  
14 that one of the drugs for that?

15          A     You know, I don't know if Clonidine is approved for  
16 Restless Leg Syndrome. I don't actually know.

17          Q     It's not approved for Restless Leg Syndrome.  
18 Doctors just prescribe it to patients because it helps?

19          A     You mean like off label? I don't actually know. I  
20 don't have a lot of patients I treat for, you know, Restless  
21 Leg Syndrome.

22          Q     Okay.

23          A     Requip, I believe, is. I've tried a couple of  
24 people on dose packs.

25          Q     Okay, okay.

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1           A    Now I think it's approved. I think they just got --  
2 actually, they are actually a Parkinson's medicine.

3           Q    Okay.

4           A    Requip is actually for Parkinson's.

5           Q    Okay. And then your plan is to follow up in four  
6 months?

7           A    Yes.

8           Q    Okay. And then your next exam after September 4 is  
9 what?

10          A    It's February 5, 2008, and that's 29.

11          Q    Okay. You got it?

12          MR. BAKER: Thank you.

13 BY MR. WARD:

14          Q    And he was seen in follow up and he is seeing  
15 Dr. Schifini for pain management, is that correct?

16          A    That's correct.

17          Q    Okay. Now, what was he seeing Dr. Miller for?

18          A    Dr. Miller is a pain management doctor in  
19 California.

20          Q    Okay.

21          A    And Dr. Schifini is a pain management doctor here in  
22 the Nevada area.

23          Q    Okay. So he's seeing two different doctors, one in  
24 California, one in Nevada?

25          A    Right.

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1 Q I'm sorry. I said Nevada. I should have said  
2 Nevada.

3 A Nevada.

4 MR. BAKER: There you go.

5 MR. WARD: The trap door is going to open up and I'm  
6 going to fall down into it.

7 MR. BAKER: Your Honor, I move for sanctions.

8 THE COURT: I know. We are so particular about that,  
9 aren't we?

10 MR. BAKER: Right.

11 BY MR. WARD:

12 Q And he's to see Dr. Corvete [phonetic throughout]?  
13 And what is he seeing Dr. Corvete for?

14 A He's actually an orthopedic surgeon.

15 Q Okay.

16 A For the knee.

17 Q Okay. And, now, you said here that he's had low  
18 back blocks by Dr. Schifini?

19 A Yes.

20 Q And those did not give any significant pain relief?

21 A Yes.

22 Q Okay.

23 A Left knee pain relief, right.

24 Q Okay. And he's still wearing a brace?

25 A Yes.

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1 Q And he still has left knee pains.

2 A Yes.

3 Q Correct?

4 A Yes.

5 Q And it says, "Has left knee pain and he is awaiting  
6 pain stimulator which now is," what?

7 A It says improved. I guess there's something about  
8 the pain stimulators are now improved.

9 Q Yeah, that's what it's supposed to read, right?

10 A Improved.

11 Q Improved?

12 A Improved.

13 Q Or approved?

14 A No, it says improved.

15 Q Right, that's what I'm asking you. Is the pain  
16 stimulator improved or is the pain stimulator approved?

17 A I wrote down improved. Improved means maybe there's  
18 a new stimulator.

19 Q No, I understand what improved means. I'm asking do  
20 you -- is it your opinion that the pain stimulator is  
21 improved?

22 A Yeah, I mean I guess he's -- they're waiting for  
23 some pain stimulator and I guess now there's one that's  
24 improved.

25 Q Oh, okay. So this is what he's telling you, is that

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1 correct?

2 A Yeah, I mean, yes.

3 Q Okay.

4 A I mean, you know, I don't remember the  
5 conversations.

6 Q I don't expect you to.

7 A But I, you know.

8 Q Okay. And medications, you're still giving Topamax,  
9 Effexor, Vicodin, and Morphine?

10 A He's on medication, Topamax, Effexor, Vicodin, and  
11 Morphine.

12 Q Okay. Now this time under objective, is this new  
13 and different?

14 A Yeah.

15 Q Okay. So we can count on this one?

16 A There's actually a little difference, yeah.  
17 There's, I mean it's really almost the same, but it's not  
18 because there's difference.

19 Q Okay.

20 A Now this time he's got more knee tenderness. It's  
21 gone from mild to moderate to moderate. And he's also got  
22 this -- it's also now going down. It's on the dorsum of the  
23 left foot, so I've actually just kind of decided to actually  
24 tell you where exactly the hyperesthesia is. And there's also  
25 hyperpathia. And it's moderate. Mild to moderate hyperpathia

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1 is now. But I'm only talking about only the shin and the  
2 dorsum, or the foot.

3 Q Okay.

4 A Because that's the area that I'm looking at.

5 Q Okay.

6 A Okay. I'm not looking where the knee braces are.

7 Q Okay.

8 A So, I'm just making sure you know, yeah, there's a  
9 change. And I did -- I just kind of wrote down that small  
10 one, the left knee is, you know, swollen.

11 Q Okay.

12 A Again, I'm not the swelling expert of the left knee.

13 Q Okay.

14 A But I just said swollen.

15 Q Okay.

16 A And then I just kind of try to put what's going on  
17 with the left knee.

18 Q Sure.

19 A Just kind of giving you a couple of lines.

20 Q Sure.

21 A Right.

22 Q And when you say swollen, you are just looking at  
23 it, correct?

24 A Yeah, that's really just kind of basically,  
25 visualizing, oh, my gosh. It's swollen from the other side.

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1 Q Right.

2 A It looks kind of puffy. That's all.

3 Q Okay.

4 A Right. I mean I --

5 Q You're not measuring it?

6 A Right, I'm not an expert of swelling, so, you know,  
7 when I look at swelling, it's like either you've got swelling  
8 or you don't. I don't know if there's a grading system.

9 Q Okay.

10 A But I just put mild because, you know, if it looks  
11 gigantic, I say it's big swelling, and if it's mild, I guess  
12 it's mild swelling.

13 Q Okay. And what is hyperpathia?

14 A To me, a very painful response.

15 Q Okay.

16 A So, he's now having some mild to moderate  
17 hyperpathia, meaning a painful response.

18 Q Okay. This is new, right?

19 A Well, I don't know if it's new. I'm just, you know,  
20 documenting it.

21 Q It's new from the last time you saw him?

22 A New on this report, right, that it's been written  
23 down.

24 Q Right, that's what I meant.

25 A Exactly. You know, the more time you have with a

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1 patient, the more you write.

2 Q Right, okay.

3 A Exactly.

4 Q Okay. And, now, here it says, "Discussion, he is  
5 awaiting opinion from orthopedic surgery for left knee,"  
6 correct?

7 A Right, and it says approved --

8 Q Right.

9 A -- for pain relief.

10 Q Okay. This --

11 A Now approved. So it must not be improved. It's  
12 approved.

13 Q Okay. Okay. So, what that means is that in  
14 February 5, 2008, that would be almost three years ago, that  
15 his pain stimulator was approved?

16 A That's correct.

17 Q For pain relief and to be done by Dr. Schifini?

18 A That's correct.

19 Q Correct? Okay.

20 A That's, yeah.

21 Q And you're going to follow up in four months?

22 A Right, I figure that everything would be done.

23 Q Okay. And when did you see him next after February  
24 5?

25 A May 19, '08.

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1 Q And what page is that, please?

2 A Twenty-five.

3 Q Twenty-five. Okay. Now, this time when he comes  
4 in, he tells you that he saw Dr. Corvete, correct?

5 A That's correct.

6 Q And Dr. Corvete injected his left knee.

7 A That's correct.

8 Q And no improvement, right?

9 A Yeah, that's correct.

10 Q Okay. And he still has a knee brace, correct?

11 A He's always had a knee brace, so I mean he's always  
12 had that since I've seen him.

13 Q Okay. Now, this one says, "He has left knee pain.  
14 He is awaiting pain stimulator which now is improved." Is  
15 this supposed to be now approved?

16 A It looks like, yeah, he's just waiting for pain  
17 stimulator.

18 Q Okay, so --

19 A He's always been waiting for a pain stimulator. I  
20 think pretty much since February of '08, we're waiting for  
21 this pain stimulator.

22 Q Okay, so --

23 A That's pretty much, yeah, that's what's going on  
24 now.

25 Q -- it's been approved since that time?

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1           A     Yeah, it's been approved.

2           Q     Okay.

3           A     And then I basically wrote down second opinion was  
4     obtained to make sure this is the best treatment course. He's  
5     just getting second opinions.

6           Q     Okay. And then you have, "He feels tired and has  
7     sleep apnea that has helped, but feels slow in his thinking."  
8     Is there something missing from that sentence?

9           A     "He feels tired and has sleep apnea that has  
10    helped." And but basically it's a bad worded sentence, but  
11    basically I think he's on CPAP and it's helping him.

12          Q     Okay, good.

13          A     So, just --

14          Q     Good. And, now, he -- in the next paragraph it  
15    says, "He has trigger finger number one left thumb digit."

16          A     That's right.

17          Q     What does that mean?

18          A     He's been told, and he's telling me subjectively,  
19    that he has trigger finger, the left number one digit, and  
20    he's seeing Dr. Gutierrez for the trigger finger.

21          Q     Okay. Now, did you ever look at Dr. Gutierrez'  
22    records?

23          A     Not on this day. I didn't have record of view.  
24    And --

25          Q     Okay. Did you ever talk to Dr. Gutierrez?

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1           A     I have talked to Dr. Gutierrez, but I don't think we  
2 ever talked of substance about any patient actually.

3           Q     Okay.

4           A     To be honest with you.

5           Q     Okay, so let me ask my --

6           A     I don't think I've talked to him about Gutierrez, or  
7 Dr. Gutierrez about Mr. Rodriguez.

8           Q     -- question differently so it's clear for the record  
9 because I'm not looking for your personal conversations with  
10 Dr. Gutierrez.

11          A     Sure, sure.

12          Q     Did you ever talk to Dr. Gutierrez about this  
13 patient?

14          A     I don't think so.

15          Q     No?

16          A     No.

17          Q     Okay. And, now, here he tells you that he has  
18 shoulder pain and it's constant pain. I'm looking down the  
19 end of that, above record review.

20          A     Oh, he's noted three months of right shoulder  
21 discomfort. The shoulder pain started. Yeah, it's he's got  
22 some right shoulder pain.

23          Q     Okay. And he's on the same drugs? Well, actually,  
24 he's on some more now. You have that sentence, he's on  
25 Topamax, Effexor, Vicodin, and Morphine. And then, in

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1 addition, he's on Valium as needed, Albuterol inhaler as  
2 needed. He's also on Lovastatin, Cyclobenzaprine, Dulcolax,  
3 Enulose syrup, Singulair inhaler, Advair disk inhaler, and  
4 Viagra as needed.

5 A That's correct.

6 Q Correct, okay. And now objective, you note that his  
7 left knee is mildly swollen. Is that pretty much the same as  
8 what it's been?

9 A Left knee is mildly swollen, yeah.

10 Q Okay. And he has left ankle mild swelling?

11 A That's correct.

12 Q And the next sentence, good foot pulses, skin turgor  
13 is normal in feet/shin, left knee moderate tenderness, no  
14 warmth, mild to moderate. That's all the same, correct?

15 A It looks like exactly the same, yeah.

16 Q Okay.

17 A That area is the same.

18 Q Okay.

19 A And --

20 Q No sweating, normal skin turgor.

21 A That's right.

22 Q Correct?

23 A That's right.

24 Q And he has mild antalgic and fair initiation and  
25 fair arm swing. What does that mean? That's something new

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1 here.

2 A So, I'm just documenting something else. Let me  
3 just thing. Fair initiation and fair arm swing. Well, I  
4 mean, yeah, there's so many reasons I could have put that  
5 down. One, Parkinson's patients because remember he had that,  
6 you know, that whole Restless Leg Syndrome.

7 Q Right.

8 A So, even though I didn't put him on Requip, you  
9 know, when you put people on medications, they can become  
10 Parkinsonism.

11 Q Right.

12 A So, fair initiation. So, I don't think it's -- on  
13 this case, I'm just actually just now just describing how he  
14 looks a little more.

15 Q Okay.

16 A I don't think it's a -- you know, I sometimes will  
17 put down arm swing when we're looking at like a stroke patient  
18 or a Parkinson's patient, but in his case, I'm actually  
19 putting arm swing to see if he's got any kind of, you know --  
20 he's been having a limp and not moving correctly for a while.  
21 So there's so many other things that can start to occur. So  
22 we're just kind of writing down what I see, you know, just in  
23 a general way. You know, he's got something. So, I'm just  
24 kind of describing more about him because, you know, there's  
25 so many different body parts here, so I'm just expanding the

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1 objective portion.

2 Q Okay.

3 A And just kind of laying even more things.

4 Q And he's awaiting pain simulator placement?

5 A Yes, yeah.

6 Q And you changed a drug because of the side effect  
7 was weight gain, correct? Lyrica substituted to Topamax.

8 A Due to side effect of weight gain. Yeah, okay.

9 Q Correct?

10 A That's correct.

11 Q Okay. And so --

12 A Topamax is being used for diet. It's a seizure  
13 medication. They're both seizure, but Topamax is now FDA  
14 approved for migraine, for preventing migraine, for dieting  
15 off label, very bad for young women, but people like that  
16 because he can lose maybe three pounds, five pounds. It's  
17 better than gaining three pounds.

18 Q Okay.

19 A You know, it's not a major, but it's something  
20 definitely.

21 Q Okay. Okay. And the next exam is when?

22 A The next exam is 7/22/08.

23 Q And page, please, sir?

24 A Page 22.

25 Q So, he's seen on July 22, 2008, and it says he's

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1 getting therapy in his right shoulder.

2 A Yes.

3 Q And progress notes from Matt Smith, physical  
4 therapy. And he had a one week spinal cord stimulator,  
5 correct?

6 A Yes.

7 Q And there -- and he finished it and it was to reduce  
8 his left knee pain, correct?

9 A Yes.

10 Q And there is a plan for a permanent implant in the  
11 next three weeks, right?

12 A That's, yeah.

13 Q Okay. So, according to this, the trial is done and  
14 we're going to move on to a permanent implant, correct?

15 A That's correct.

16 Q Okay. And you note here he's still 75 pounds, and  
17 you said 275 compared to 200 overweight since the injury,  
18 correct?

19 A Right, but you mentioned 225 on the ER doctor's  
20 note.

21 Q Yeah, I'm just --

22 A All right.

23 Q I'm just asking you what he told you.

24 A Oh, sure, okay.

25 Q And you didn't have any reason to question it, did

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1 you?

2 A No.

3 Q No. And under the next page, under subjective,  
4 you've got, "There is continuous left wrist pain, no  
5 improvement." And it says, "Dr. Gutierrez has not seen over  
6 the last four months," correct?

7 A That's correct.

8 Q Now, do you know -- did he tell you why that was,  
9 why he hadn't seen Dr. Gutierrez over the last four months?

10 A No. Well, I mean I -- no.

11 Q Did you expect that he should have seen  
12 Dr. Gutierrez or was that just not your issue?

13 A Well, I actually -- we're still -- you know, I mean  
14 maybe Dr. Gutierrez wants to see him. Maybe he doesn't want  
15 to see him, but we're still trying to get the pain stimulator,  
16 so I think that -- you know, I'm still more focused on that.  
17 I wasn't really thinking about it.

18 Q Right. Yeah, I'm just -- again, I'm not  
19 questioning. I'm just -- some of this falls within your  
20 bailiwick and some of it doesn't, and I'm just -- so, whether  
21 he sees Dr. Gutierrez or not is not something that you have to  
22 do with, correct?

23 A Well, I mean I'd like for him to see somebody, but I  
24 figure people are busy out here. I mean, you know, I mean I  
25 don't know Dr. Gutierrez that well, to be honest with you --

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1 Q Okay.

2 A -- about why he hasn't seen him in the last four  
3 months. I don't know.

4 Q Okay. So you don't know --

5 A I'm just documenting what he's saying.

6 Q You don't know whether the failure to see  
7 Dr. Gutierrez has been because Dr. Gutierrez doesn't want to  
8 see him or the patient doesn't want to see the doctor or just  
9 hasn't seen him?

10 A Or for other reasons too, right.

11 Q Or other reasons.

12 A Exactly, exactly.

13 Q Yeah. You don't -- that's essentially not your  
14 issue, right?

15 A Well, it's not an issue. I don't know. It's always  
16 an issue, but it's not -- there's so many issues, I'm just  
17 trying to deal with one at a time.

18 Q Right.

19 A I mean there's a lot of issues here and it's just  
20 not -- you know, I mean go see the hand surgeon. You want to  
21 see another guy? See another guy. You know what I mean?  
22 Just, you know, take care of that, but that's not the issue at  
23 hand.

24 Q Right. And now objective, we've got pretty much the  
25 same thing. Knee mildly swollen, left ankle, mild swelling,

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1 good foot pulses, et cetera, et cetera, correct?

2 A Yes.

3 Q Nothing major? No major change there?

4 A No.

5 Q And no spinal spasm noted on today's exam?

6 A That's, yeah.

7 Q Bilateral APB. What's APB? It used to be all  
8 points bulletin in the old cop shows, but I don't think that's  
9 what you meant there.

10 A The median nerve for the hand strength or the carpal  
11 tunnel abnormality, abductor pollicis brevis muscle.

12 Q Okay. And bilateral hand power is five. What's  
13 that mean, good or bad or --

14 A Normal, normal.

15 Q Normal.

16 A Normal power.

17 Q So the hand power of both hands is normal?

18 A That's correct.

19 Q Correct? Okay.

20 A The APB.

21 Q Right, the hand power.

22 A Not hand, just the muscle.

23 Q The muscle power?

24 A Yeah, bilateral APB power, hand power is normal, not  
25 the grip.

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1 Q Normal?

2 A Or the rest of the fingers.

3 Q Okay.

4 A I'm just looking at the median carpal tunnel.

5 Q And, "Discussion, he's awaiting pain stimulator  
6 placement," correct?

7 A That's correct.

8 Q And it says, "He's using wrist splints."

9 A Yes.

10 Q And it says, "His pain stimulator is now approved."

11 A Yes.

12 Q And that's perhaps a repeat because his pain  
13 stimulator was approved a long time ago, wasn't it?

14 A Well, it's still in the discussion because -- and  
15 you'll see that it's always been -- you know, it just keeps  
16 going, you know.

17 Q Right. I'm just saying that's not new. It was  
18 approved before.

19 A No, no, no, I just -- yeah, it's the same thing,  
20 yeah.

21 Q Okay. And so the plan here is, "Await Dr. Gutierrez  
22 for left thumb/finger trigger finger surgery," correct?

23 A Yes.

24 Q That's -- can you say that three times real fast?

25 A Yeah.

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1 Q That's what the patient reported to you, is that  
2 correct?

3 A Yeah, I guess they're waiting and he's waiting to  
4 see Dr. Gutierrez. He hasn't seen him, you know, for four  
5 months.

6 Q Right.

7 A But I guess he's waiting. I don't know.

8 Q Okay.

9 A So, I guess they're doing something.

10 Q Okay. And now this was July 22, '08. And next  
11 visit is when, doctor?

12 A Next visit, October 27, 2008, and it's 19.

13 Q Got it? Okay. So he was seen in follow up and  
14 under subjective you have right shoulder worsening?

15 A Yeah, the right shoulder probably pain, I presume,  
16 is worsening.

17 Q Okay.

18 A Yeah, so right shoulder is worsening, yeah.

19 Q Okay. And you have, "Good results with stimulator."  
20 The stimulator trial was some time ago, wasn't it? You  
21 reported that several visits back?

22 A Yeah, there was -- well, I don't know if that was a  
23 stimulator trial. It was some kind of trial. I presume the  
24 stimulator trial just occurred, I presume, maybe two visits  
25 prior.

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1 Q I thought it was about two visits prior.  
2 A Yeah, two visits, yeah, a couple of visits prior.  
3 Q Okay.  
4 A Yeah, there was some kind of stimulator trial.  
5 Q Right, so this --  
6 A And then he had some good results, and now he's  
7 awaiting Dr. Vadar [phonetic throughout] now --  
8 Q Right.  
9 A -- to do I guess a surgery to put the stimulator in.  
10 Q So, the stimulator trial was several months before?  
11 A Yes.  
12 Q And so it was approved for a permanent stimulator?  
13 A Yes.  
14 Q And so he's waiting to get that done?  
15 A Yes.  
16 Q And right now, it's going to be done by Dr. Vadar  
17 [phonetic throughout]?  
18 A Hopefully.  
19 Q Correct?  
20 A Yeah, that's right.  
21 Q Okay.  
22 A So, it's hopefully this month.  
23 Q It's all been approved?  
24 MR. BAKER: And, Casey, just for your -- it's Vadar like  
25 in Nevada.

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1 THE WITNESS: Sorry. It's --

2 MR. BAKER: Okay.

3 THE WITNESS: That was what I was told. That's right.

4 MR. WARD: It's Vadar?

5 MR. BAKER: It's Vadar like in Nevada.

6 THE COURT: Vadar like water.

7 MR. WARD: Like Vadar and Mother? Is that --

8 MR. BAKER: That's right.

9 BY MR. WARD:

10 Q Okay, great. Dr. Vadar.

11 A That's right.

12 Q And, now, again you have on the next page,

13 "Continuous left wrist pain, no improvement. Dr. Gutierrez  
14 has not seen over the last four months." I think that's the  
15 same typo that appeared before, so --

16 A Yeah.

17 Q -- am I correct in guessing that that's just been  
18 there --

19 A Not a lot of updates, right?

20 Q -- been there for a while?

21 A I've just basically -- yeah, just kind of gone.

22 Basically on this report, it just changes on the plan.

23 Q Okay.

24 A We just waiting.

25 Q Okay. And the objective is pretty much the same,

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1 right?

2 A Yeah, I mean I wrote down he's tender on the  
3 cervical, thoracic, and lumbar paraspinal muscles throughout.  
4 There's no muscle spasm. I put that in there. And really, I  
5 guess we're just waiting.

6 Q Okay.

7 A You know, nothing --

8 Q And the objective examination is pretty much the  
9 same as what it's been before, right?

10 A Yeah, it's not really changing, you know.

11 Q Okay.

12 A It just kind of --

13 Q Kind of staying the same?

14 A Yeah, it's pretty much -- it's just there.

15 Q Okay. And, okay. And the next visit?

16 A Is February 3, '09, and that's 15.

17 Q We're going in reverse order here, I believe, are we  
18 not?

19 A Yeah, we are. It's backwards.

20 THE COURT: Mr. Ward, I wonder if we could take a short  
21 break?

22 MR. WARD: Yes, Your Honor.

23 THE COURT: Thank you.

24 MR. WARD: Absolutely.

25 THE COURT: Five or ten minutes.

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1 MR. WARD: Sure.

2 [Recess]

3 THE COURT: You can be seated. Okay, we're back on  
4 record. Mr. Ward, whenever you're ready?

5 MR. WARD: Thank you, Your Honor. I think we're almost  
6 through this, Your Honor.

7 CROSS-EXAMINATION CONTINUED

8 BY MR. WARD:

9 Q Doctor, I think we had just come back to page Bates  
10 15 for February 3, 2009, is that correct?

11 A That's correct.

12 Q Okay. And, now, under subjective, we're still  
13 waiting for the pain stimulator?

14 A That's correct.

15 Q And it says, "24/7 left knee pain that is intense."  
16 Now, is that different from what was before?

17 A Not really.

18 Q No, okay. "Left knee pain, left ankle, swelling."  
19 Now, before you said -- no, I'm sorry. "Right knee is  
20 fluctuating and doing self therapy and sleep -- does not sleep  
21 on the right side to avoid pain."

22 A Yeah, the right shoulder, right, exactly.

23 Q And, "Waiting for Dr. Vadar for the permanent  
24 implant of the stimulator."

25 A Right.

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1 Q Correct?

2 A That's correct.

3 Q Okay. And he's down to 240?

4 A That's right.

5 Q And he has right hand issues?

6 A He has some right hand issues.

7 Q Okay. And left wrist issues?

8 A Yes.

9 Q And right ankle pain?

10 A Yes.

11 Q This is the first right ankle pain, isn't it? First

12 recently, at least?

13 A That's I think the first time I've actually write

14 down that there's a right ankle pain. I write down it's

15 progressive. It's getting weak. He's putting more weight

16 onto it, yeah.

17 Q Okay. And, now, it says he's putting more weight on

18 the right foot due to left knee pain. He's had pretty much

19 constant left knee pain for the last five years at this point,

20 hasn't he?

21 A About four years and three months, I think, right?

22 Q Right, okay.

23 A Yeah, 51 months.

24 Q Okay. And, now under medications, it's pretty much

25 as it was before?

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1 A I think he's on Provigil. I'm not too sure why.

2 Q Okay.

3 A I mean it could be sleep or, you know, he's  
4 depressed.

5 Q Okay.

6 A I'm not too sure.

7 Q Now, do I see signs of a new computer?

8 A No, it's actually -- no, it's the same computer. I  
9 just don't know why he's on Provigil. Is it a different  
10 computer?

11 Q No, the next, right down below, examination, vital  
12 signs. It looked you got a new --

13 A Oh, I think it could be update software, but I don't  
14 know if I saw him -- this could be my California practice.

15 Q Oh, okay.

16 A So, I don't know actually -- I think this is still  
17 Las Vegas.

18 Q Okay.

19 A But I think they updated the computer. They do  
20 these updates every six months.

21 Q Right.

22 A And then they crash my system.

23 Q Okay, okay.

24 A It's like I don't know if my computer system is --

25 Q So there's a slight change in your form?

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1 A That's right. I guess they put vitals now.

2 Q Okay. Okay. And, now, under objective, left knee  
3 is mild swelling and left ankle is minimal swelling, correct?

4 A Yes.

5 Q What's the different between minimal and mild, other  
6 than they both begin with MI?

7 A Just my only subjective rating of how I look at  
8 swelling. There's some swelling.

9 Q Right. No, I understand. I'm just trying to find  
10 out which is higher, minimal or mild?

11 A Minimal is less than mild.

12 Q Okay, mild and then minimum.

13 A Mild is pretty good.

14 Q Okay.

15 A I mean, well, minimal is really good, and mild means  
16 pretty good because again when you're looking at clots, you're  
17 looking at severe swelling, you have stasis, no movement, you  
18 get a clot.

19 Q Uh-huh.

20 A So, the swelling itself is a joint problem, but what  
21 I'm looking for is, you know, you don't just want him to have  
22 a clot because he's got the disability. So, as long as it  
23 stays in the mild range, that's not going to -- in my opinion,  
24 not going to make the clot.

25 Q Okay.

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1           A     You know, but it can, but I won't, you know.

2           Q     Okay. Now, you have, "Good foot pulses," correct?

3           A     Yes.

4           Q     And so you checked the pulses in his feet?

5           A     Yeah.

6           Q     And you have, "Skin turgor is normal in the feet and

7     shin?"

8           A     Yeah.

9           Q     Is that right?

10          A     Yes.

11          Q     And then you have, "Left knee has persistent

12     moderate tenderness," right?

13          A     That's right.

14          Q     "And no warmth?"

15          A     That's right.

16          Q     "No warmth in the left knee."

17          A     That's right.

18          Q     Okay. So, the skin turgor is in the feet and the

19     shin and the no warmth is in the left knee?

20          A     I don't know. Maybe the warmth is in left leg. I

21     just put down normal warmth, but it's left somewhere. You

22     know, just --

23          Q     Okay.

24          A     -- it's not warm. It's not infected.

25          Q     Okay. Well, all --

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1 A That's, you know, from what I can tell.

2 Q All I'm trying to find out is --

3 A All right.

4 Q -- what you said here is, "Left knee, persistent  
5 moderate tenderness, no warmth," correct?

6 A Yeah, I don't think I've ever actually touched his  
7 knee to actually look. You know, maybe I have, but I don't --  
8 we're looking at the joint now, all right.

9 Q Okay.

10 A So, I don't know if I've actually looked at his left  
11 knee to look for actual -- I'm thinking more of infection type  
12 -- that's what I'm looking for.

13 Q Okay. And under -- on the next page, "Bilateral  
14 hand power, bilateral APB hand power is five," correct?

15 A Yeah.

16 Q That's normal?

17 A Yeah.

18 Q And under discussion, is there anything new there?

19 A There's just, "Still waiting for pain stimulator."

20 Q Okay.

21 A And I just told him to go swimming.

22 Q Okay.

23 A And do, you know, do some cardiac range of motion.  
24 He's already lost some weight. That's good.

25 Q Okay.

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1 A You know, nothing really.

2 Q Okay.

3 A Just I told him he should do range of motion,  
4 cardiac, seven days a week, twice daily, because there's so  
5 many different areas that are now injured. And I just thought  
6 it was a good idea for him to keep, you know, until he gets  
7 treated --

8 Q Okay.

9 A -- to help and, you know, I mean there's a cardiac  
10 -- you know, he's overweight for a while and that's not good  
11 for long term survival. So, you know, just in general you  
12 don't want to be overweight.

13 Q Yeah. Even at 240, he's overweight, correct?

14 A Yeah, I mean, you know, 240, he's the height.

15 Q Right.

16 A You know, he's, yeah.

17 Q Yeah. When you're 5'6?

18 A Yeah, he -- yeah, so I think I mean 240, it's  
19 overweight. He's overweight.

20 Q Yeah, yeah, and it's hard on your knees, right?

21 A Yeah, it's hard on everything in your body.

22 Q Right.

23 A I agree.

24 Q And especially your knees?

25 A I don't think it's especially. I think it's just

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1 everywhere.

2 Q Okay.

3 A You know, it could be bad for your heart.

4 Q Okay.

5 A I mean it's not good to be overweight.

6 Q Okay. And next exam is when?

7 A I think the next exam is -- I can't tell you. Do  
8 you have another date?

9 Q Well, I'm sure -- I'm not seeing anything here, but  
10 I'm sure that we have a 2010 exam.

11 A Oh, absolutely. I even went over it this morning  
12 when looking over this chart. I just saw him a couple of  
13 months ago. There's definitely more records. I may have even  
14 seen him in 2009 more times. That was still early 2009.

15 Q Okay. Do you have records from after that?

16 MR. BAKER: The last -- and that's -- this might just be  
17 an issue of when -- doctor, we're not being critical. It  
18 might just be an issue of when we collected the records.

19 THE WITNESS: Oh, okay.

20 THE COURT: I'm sorry.

21 MR. BAKER: Oh, I said, "Doctor, we're not being critical  
22 of you. This might just be an issue of when we collected the  
23 records because of discovery dot offs."

24 THE WITNESS: Oh, I understand. I mean I'm still  
25 treating him, so I --

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1 MR. BAKER: The last I have is 15, which is -- thank you,  
2 2/3/09. And that's, I think, the one we just went over.

3 THE WITNESS: I mean I would estimate I've seen him four  
4 times since 2/3 or more. And I know I saw him this year, I'd  
5 just like to note, just a couple of months ago. But I've seen  
6 him probably twice in 2010, maybe three times, or past the  
7 2/3/09, so maybe five follow ups.

8 THE COURT: Okay.

9 THE WITNESS: You know.

10 MR. WARD: Do you have the records?

11 MR. BAKER: Uh-huh.

12 THE WITNESS: I see him every four to six months.

13 MR. WARD: Do you have -- you don't have the records with  
14 you?

15 THE WITNESS: No, I didn't bring anything. I thought --

16 MR. WARD: Okay.

17 THE WITNESS: -- I'm supposed to -- I actually, no, I've  
18 never brought -- I mean I did my first time I went to trial.  
19 They said you don't use your records, so, no, I don't.

20 MR. WARD: I'm looking through here to see if I can find  
21 something other than what --

22 THE WITNESS: Gosh, I could have printed it out. I  
23 just --

24 BY MR. WARD:

25 Q Let me ask you about this while I'm looking.

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1           A     Sure.

2           Q     At Bates page 41, tell us what that is, would you,  
3 please, doctor?

4           A     This is a patient event. This is a -- well, it's a  
5 piece of paper obviously that's designed that shows that we  
6 give to the patients for seizures about what to do. There's  
7 some general instructions from the Cadwell Manufacturer when  
8 you hook them up.

9           And then what I'm more interested is I just say, "You  
10 know, since you're having some shaking and stuff, when you --  
11 you know, just tell me," I'm more looking to see if there's a  
12 -- if any kind of spell. We're not talking about seizures,  
13 just in any that you want me to look at more, I can  
14 concentrate to see what's going on on that time period.

15           So, when you do 48, 24, and 72 hour hookups,  
16 there's, you know, the patient just kind of writes down  
17 anything that's interesting, anything. Just, "You know, hey,  
18 did you blank out? Did you have a spell? Did you -- you  
19 know, did somebody say that you were not paying attention?"  
20 So I can just, you know, make sure that that's not a seizure.

21           Q     Okay.

22           A     You know, I mean we -- in addition, we also read the  
23 study, plus -- and remember it's a 48 hour study, so it's a  
24 long recorded. Plus, we also do spike analysis on that  
25 whole --

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1 Q Right.

2 A -- study.

3 Q So, what we have on here is we have a patient event  
4 diary that says it's for August 8, 2007. He had dinner at  
5 7:00. At 7:30, he's driving to his parent's house. At 1:15  
6 p.m., it's -- oh, 9:15 p.m. it's --

7 A Yeah, at 11:15 p.m.

8 Q Seven, nine? Must be nine. It's hard to read here.

9 A Yeah.

10 Q 9:15 is bedtime. 9:55 --

11 A A.m. is bathroom.

12 Q Oh, a.m.?

13 A Yeah.

14 Q Okay.

15 A The other one is 11:15 p.m. is bedtime.

16 Q Okay.

17 A 9:30, yeah, something -- there's something, yeah.

18 Q Okay.

19 A Basically, the bottom line is he fell asleep around  
20 -- he wanted to try to go to bed at 11:15.

21 Q Okay.

22 A That's what I'm gathering. And then he woke up in  
23 the morning obviously.

24 Q Okay.

25 A And he's in the bathroom at 9:55.

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1 Q Okay.

2 A I mean obviously you want to know, you know, what  
3 time did he fall asleep, what time did he wake up. You know,  
4 but you can figure that out when you're reading the study  
5 also.

6 Q Sure.

7 A The sleep waves.

8 Q And I'm trying to find -- I thought sure we had your  
9 other -- did you find it?

10 UNIDENTIFIED SPEAKER: I don't know if it's in their  
11 book, but I can bring it up.

12 MR. WARD: What's it? Do you have a Bates number?

13 UNIDENTIFIED SPEAKER: It says 87 at the bottom.

14 MR. BAKER: What are we looking for?

15 UNIDENTIFIED SPEAKER: Shaw 87, but it's not printed. I  
16 see that.

17 MR. WARD: Yeah, mine only go to 81.

18 UNIDENTIFIED SPEAKER: Mine are electronic.

19 MR. WARD: Okay. I thought I had seen it somewhere.

20 BY MR. WARD:

21 Q We're going to bring it up on the screen, doctor.

22 A Sure.

23 MR. BAKER: I don't know what we're looking at, Your  
24 Honor.

25 MR. WARD: This is from your electronic forms. They're

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1 missing something.

2 [Counsel Confer]

3 THE MARSHAL: It's not on. Oh, now it is.

4 THE COURT: Now it's off?

5 THE MARSHAL: Now it's off. It was on. Okay.

6 BY MR. WARD:

7 Q Okay. So we have -- we'll wait for that to come on.

8 While we're doing that, we've got August 10, 2010, is that

9 correct?

10 A That's correct.

11 Q Okay. Now, do you know, doctor, is that the last

12 time you've seen the patient?

13 A I think it was August 10th. I just looked at it

14 this morning.

15 Q Right, okay.

16 A And I believe it's August 10th, yes.

17 Q Okay. And here we are. Okay. And you have

18 subjective, no change in status now on Neurontin. Now, that's

19 a new entry, correct?

20 A Yes.

21 Q And there's continuous burning in the left knee,

22 that's a new entry?

23 A Yes.

24 Q And, okay. Can we go down to the next --

25 A But I don't know if it's a new entry to the

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1 beginning of 2009, but I think those are the follow ups too.

2 Q Okay.

3 A So, I just making sure you know. I don't know if  
4 it's a new entry.

5 Q Right.

6 A But it's new compared to 18 months ago.

7 Q You think that's more that are -- that we don't know  
8 where they are, but okay.

9 A Yeah.

10 Q And right hand tingling, numbness and decreased  
11 strength, correct?

12 A Yes, and dropping items, yeah.

13 Q And can we go down? We have examination.

14 MR. BAKER: I can't see. Your Honor, do you mind if I --  
15 I can't read it from that far back.

16 THE COURT: Oh, sure, move around, Mr. Baker.

17 MR. BAKER: Thank you.

18 MR. WARD: There's this and there's that.

19 MR. BAKER: Oh, okay.

20 MR. WARD: Whichever you want.

21 BY MR. WARD:

22 Q The good foot pulses and left knee, mild, that's  
23 pretty much what you had before, right?

24 A Yeah. I mean I think it's very similar.

25 Q Okay.

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1           A     It's very similar.

2           Q     And then we go down to impression and then  
3 discussion. No change in status, now on Neurontin. Actually,  
4 it looks like he's coping with the waiting process, correct?

5           A     Yeah.

6           Q     Okay. "Plan is pain stimulator being done at UCLA  
7 and continue pain medication and obtain physical therapy  
8 information from Riverside," correct?

9           A     Yeah.

10          Q     Okay. Now, the plan is different here, right? Pain  
11 stimulator being done in UCLA?

12          A     Yeah.

13          Q     It was originally going to be done by Dr. Vader?

14          A     Yes.

15          Q     And before that, it was going to be done by  
16 Dr. Schifini?

17          A     I don't know if he was doing -- he was doing  
18 something in pain.

19          Q     Okay.

20          A     I believe he -- Schifini was doing something.  
21 That's right.

22          Q     Right, okay. Could we -- do we have any more on  
23 here?

24                UNIDENTIFIED SPEAKER: No.

25                MR. WARD: No? That's it?

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1 UNIDENTIFIED SPEAKER: That's it.

2 MR. WARD: One? It's just this one report?

3 BY MR. WARD:

4 Q Okay. Now, was there a time, doctor, do you  
5 remember, that the patient called you and said that he was  
6 having problems at night at home or is that the time that he  
7 had the EEG?

8 A Well, there is -- on the 4/9, there was a note. And  
9 I think that I put actually a note in the chart.

10 Q Okay.

11 A And it was -- let me just read off the note.

12 Q What page is that?

13 A I think it's just before the EEG, at ambulatory EEG.

14 Q Okay.

15 A And he called me and he was telling me about  
16 something.

17 Q Yeah, if you find that --

18 A I put a note.

19 Q -- if you could tell me.

20 [Pause]

21 THE WITNESS: It was a telephone conversation on 10/1/07.  
22 It's Bates 33. It's --

23 BY MR. WARD:

24 Q Oh, okay.

25 A Yeah, it's 33, dated 10/1/07. It says, "Neurology

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1 telephone conversation."

2 Q Yeah, I think we didn't go over that report, so.

3 A Sure.

4 Q So, why don't we cover that? That's 10/1/2007, and  
5 that's a letter from you to Dr. Koka, correct?

6 A Yeah, I'm just trying to update him about what's  
7 going on with --

8 Q Okay.

9 A -- you know, the patient. So, you know, he's the  
10 primary care.

11 Q Okay. And you say there, "I spoke to Mr. Rodriguez  
12 by telephone today. He was last seen on September 4, 2007,  
13 and he is still having full body trembling, shaking  
14 episodically, and jerking at times at night. And I spoke to  
15 him in depth about the symptoms," correct?

16 A That's right.

17 Q And so this is, if you were talking to him on the  
18 telephone, he was somewhere other than where you were?

19 A Yeah.

20 Q So these are all things he was reporting to you?

21 A That's right.

22 Q And he said here that, "He will video record the  
23 events in a trial of low dose muscle relaxants for post  
24 traumatic muscular strain and nervous system hyperactivity can  
25 be tried, correct?"

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1 A That's right.

2 Q Now, did you ever get the video record?

3 A I don't even think there was a video done. I just  
4 told him that -- I kind of basically just reassuring him.  
5 We've already done the EEG.

6 Q Right.

7 A And I basically -- you know, I mean he's still  
8 having the jerking movements. It hasn't gone away.

9 Q Right, right.

10 A So, you know, so you're basically just trying to  
11 say, "You know, is it that much of a big deal to you?" You  
12 know what I mean?

13 Q Yeah.

14 A You know, I mean as long as the person knows that  
15 they're not having anything that they have to worry about, it  
16 could be medication side effects. It could be something like  
17 that. And so you just kind of -- he's already on medications.  
18 The last thing I want to do is put him on another medication.  
19 I'm hesitant.

20 Q Right.

21 A You know, I mean we're talking about side effects,  
22 muscle, chronic pain. A lot of patients have trembling. I  
23 see it. You know, I mean I've done EG's. There's nothing  
24 there. Just, you know, I don't -- you know, this is not a  
25 seizure obviously.

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1 Q Yeah, and you didn't --

2 A I mean I told him that, you know. So, I just -- but  
3 I'll say, "Okay, if you want me to look at it, let's go ahead  
4 and, you know, go get a camcorder if you want. You know, I'll  
5 look at it." But I'm not, you know, it just doesn't --

6 Q You didn't need it?

7 A No, I don't need it, no.

8 Q Okay.

9 A No, I'm okay just reassuring the patient that this  
10 is spinal muscular skeletal, you know.

11 Q Okay. And you had already done an EEG at that  
12 point, is that correct?

13 A A 48 hour.

14 Q Right.

15 A Right.

16 Q And it was negative for epileptic discharges?

17 A That's correct.

18 Q Correct?

19 A Yes.

20 Q Okay. And, now, on page 42, Doctor.

21 A Yes.

22 Q Bates 42, this is a nerve conduction study report,  
23 correct?

24 A Yes.

25 Q And this talks about what was done by a technician

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1 under your guidance and supervision.

2 A Yeah.

3 Q And it says, in paragraph two, it says, "Additional  
4 nerve conductions may have been performed." What does that  
5 mean?

6 A This is a standard template report that just shows  
7 that I might do additional nerve conductions on patients.

8 Q Okay. So they may have been performed or may not  
9 have been performed. This is what your report says?

10 A Well, actually it's actually additional nerve  
11 connections may have been performed when we're looking at like  
12 8 centimeter carpal tunnel. It's just -- it's something that  
13 I typed up back in 2002 and I just put on -- it's on every  
14 report.

15 Q Okay.

16 A Yeah, it's not tailored specific. The only thing  
17 you need to know is the impression, which is page two, the  
18 nerve conduction report on Bates 43. And I just -- and the  
19 disclosure is a California thing because that's just a  
20 disclosure from California or work comp.

21 Q Okay.

22 A So, we just --

23 Q So, under findings where you say, "Please see the  
24 below tables to note the values obtained during the nerve  
25 conduction study. F wave responses are non-specific in

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1 localization. In general, if a motor nerve conduction is  
2 normal in a patient with a finding of asymmetric prolongation  
3 or response, then a proximal pathology, plexopathy, or  
4 radiculopathy should be considered and other possibilities  
5 exist."

6 So, that's a standard thing on all your reports,  
7 correct?

8 A Yeah, something from 2001 training.

9 Q Right.

10 A You know, it just -- basically, you know, you always  
11 talk about procedure findings and then you give an impression  
12 when you do testing.

13 Q Right, right.

14 A So, some people like to know what the procedure is  
15 all about, so it explains it, the nerve conduction procedure,  
16 the findings. So, I try to -- and then there's a lot of what  
17 you call basically -- and it just says you don't want to  
18 commit because, remember, these reports sometimes go to  
19 surgeons, pain management. You know, so you want to make sure  
20 that they don't just -- they have an evaluation with it  
21 because, you know, these nerve studies are done all the time  
22 and people order nerve studies.

23 Q Right.

24 A You know, so and we've done thousands, so.

25 Q Right. And have we pretty much covered all of your

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1 examination and all of your things that you've done with  
2 respect to this particular patient?

3 A Right, I just -- there were a couple more --

4 Q I know we're missing --

5 A -- evaluations, but they're -- I don't believe that  
6 there was any more additional.

7 Q Right.

8 A I mean I followed him maybe every three to four  
9 months --

10 Q Right.

11 A -- between February '09 to you have the August 2010.  
12 That's this year.

13 Q Right.

14 A And maybe I saw him I think once or twice or maybe  
15 three times total --

16 Q Okay.

17 A -- in that period. That's pretty much it.

18 Q So, we may be missing a couple of reports, but you  
19 don't recall that there was anything significantly different  
20 than any of the rest?

21 A Not that I can recall, no.

22 Q Okay.

23 A Thank you, doctor.

24 Q Sure. Thank you.

25 THE COURT: Redirect, Mr. Baker?

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1 MR. BAKER: Thank you, Your Honor.

2 REDIRECT EXAMINATION

3 BY MR. BAKER:

4 Q You okay?

5 A Yeah.

6 Q How's your leg?

7 A Oh, good, good.

8 Q All right.

9 A I started exercising on it after, you know, last  
10 night. I just started moving it around.

11 Q Well, you've got time to do your upper body.

12 A Yes.

13 Q Doctor, there's been an attempt to characterize  
14 Enrique Rodriguez as a guy who gets treatment and gets  
15 treatment and just doesn't get better. You were asked that  
16 question during your direct if you recall. Do you recall?

17 A I didn't recall that question, but --

18 Q Now, you're aware that Enrique was suffering from  
19 upper extremity pain, is that right?

20 A Yes.

21 Q And the cause of upper extremity pain, it could be  
22 the -- it could be tenderness, or it could be nerve related,  
23 is that right?

24 A Yes.

25 Q And you knew that he was having pain in his upper

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1 extremity, is that fair to say?

2 A Yeah.

3 Q And you sent him to Dr. Cateris [phonetic  
4 throughout], is that right?

5 A I don't know if I sent him or Dr. Koka, the primary,  
6 but --

7 Q He went to Dr. Cateris?

8 A Yeah, he went to Dr. -- I mean I may have, I mean.

9 Q And he was given an injection of steroids into the  
10 ulna area of his arm, is that right?

11 A I think he was treating the more medial aspect of  
12 the hand, right.

13 Q No, but the injection he got, itself, from  
14 Dr. Cateris, I'll represent to you was in the ulna portion of  
15 the arm, okay?

16 A Okay, and I saw something like that, yes.

17 Q And that's contained in his records.

18 A Yes.

19 Q Now, an injection of steroids would be for something  
20 like a de Quervain syndrome or tenosynovitis, something that  
21 has to do with maybe the tendon itself, is that right?

22 A Right, inflammation. You're just stopping  
23 inflammation.

24 Q Right.

25 A That's all the injections do.

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1 Q And that didn't work, correct?

2 A Yeah, I mean I don't think he got a lot of response.

3 Q Is that surprising to you when your tests showed  
4 that his pain was medial nerve, median nerve mediated?

5 A I'm not even -- actually, Dr. Gutierrez' wasn't even  
6 -- actually his tests, he actually sent somebody, I think.  
7 They verified that, you know, I mean, which is I don't know  
8 why he did that, but that's okay. But mine's a median nerve  
9 problem.

10 Q Correct.

11 A And he's looking at something, you know, which is  
12 interesting. I mean he's a surgeon. He can do whatever he  
13 wants. I said that I agree that he should see the patient.  
14 You know, I didn't say that I agree with everything that he  
15 does. You know, I mean it's like I just say, "Go see the  
16 doctor."

17 Q My question is did he not respond to it because he's  
18 a guy who just doesn't get better or did he not respond to it  
19 because the problem was in the median nerve?

20 A Well, yeah, I mean I'm looking. I diagnosed him  
21 with it. He might also have something extra that, you know,  
22 that Dr. Gutierrez was seeing. I was just looking at the  
23 carpal tunnel. You know, and carpal tunnel syndrome, you  
24 know, when you put weight. You know, if you get an MRI, not  
25 only can you see the median nerve, but you can actually see

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1 damage to the wrist. So, there's a lot of things that you do  
2 when you put weight. I just want to make sure you understand  
3 all that.

4 Q I do.

5 A And I just think that's an important. The median  
6 nerve is just a test to check the nerve. It doesn't tell you  
7 where, you know, it is, if there's something next to it that's  
8 causing it or anything like that. You know, or did you injure  
9 two things. It doesn't tell you any of that stuff. So, I --  
10 you know, and I don't --

11 Q You were dealing with --

12 A And I think Dr. Gutierrez is -- whatever he did is  
13 fine. You know, I mean that's his own assessment.

14 Q You were dealing with the median nerve problem  
15 associated with carpal tunnel though, right?

16 A That's correct.

17 Q Okay.

18 A That's what I'm looking at, right.

19 Q So it wouldn't surprise you that an injection given  
20 to reduce inflammation in a different part of the arm did not  
21 reduce the median nerve mediated pain, is that fair?

22 A That's right. I mean --

23 Q Well, that's obviously.

24 A That's obvious that it will not. I've never seen  
25 that before. That's true. I did give wrist splints. It did

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1 not work. And that's actually in 50 percent of the patients.  
2 And plus, he still has the ideology. It's still ongoing, so  
3 you wouldn't -- it's a trial.

4 Q And talking in that vein, nowhere in your notes did  
5 you ever say that you suspected Enrique of malingering, and  
6 you've known him for four or five years now. Is that --

7 A Yeah, I don't think he is malingering. I never  
8 think he is malingering. I think he's a very down to earth  
9 person. He has just had a very bad luck.

10 Q And there were tests that you could have performed  
11 with dials and such if you suspected malingering, is that  
12 right?

13 A That's correct.

14 Q But you don't give a malingering test to someone who  
15 just, unfortunately, by no fault of his own is down on his  
16 luck, is that fair to say?

17 MR. WARD: Argumentative.

18 THE WITNESS: Well, in addition to that, in addition to  
19 that --

20 THE COURT: Noted for the record.

21 THE WITNESS: In addition to that, in general,  
22 neurologists, we actually evaluate the patients and we  
23 actually do our objective testing. That's what we do, but I  
24 have to tell you that if I thought he was malingering, I would  
25 say he's over exaggerating. And I would actually write it

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1 down in my chart, which I do in other patients. I did not  
2 think he's ever been over exaggerating his symptoms.  
3 Actually, he's been a little moody a couple of times. That's  
4 the best way of me saying it.

5 And I have talked to my staff because I said, "You  
6 know, he's in pain and that's why he will be short and snap."  
7 And, but that's been rare. And most of the time, and he does  
8 wait in my office. And I can tell you that makes people --  
9 but by talking to them, you understand that they're more  
10 focused on getting better rather than -- they understand.  
11 They just want to get better. And I find him to be very  
12 straightforward.

13 BY MR. BAKER:

14 Q And just wanting to get better?

15 A Yes.

16 Q And has done everything that he can to get better  
17 within his power?

18 A Yeah, I think so, yeah, absolutely.

19 Q And let's talk a little bit about the chronology of  
20 events. A temporary pain stimulator was approved in February  
21 of '08, is that correct?

22 A I don't know the exact dates, but, yeah, I think it  
23 was approval and it just has not been done and there's been a  
24 delay.

25 Q But there were two pain stimulators? There was a

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1 temporary pain stimulator.

2 A Temporary, right.

3 Q That was put in by Dr. Schifini, is that right?

4 A That's right. He did the temporary and that's the  
5 one that gave the 8 out of 10 back pain relief and the 10 out  
6 of 10 left knee pain relief. That's the temporary and that  
7 was a good thing. That's a spinal cord stimulator.

8 Q Then let's talk about, right.

9 A All right. That's a temporary, one week.

10 Q No, and we understand that.

11 A Right.

12 Q That Dr. Schifini put in a temporary pain  
13 stimulator.

14 A Stimulator, right.

15 Q Now, when you say approval, you mean medically  
16 approved, don't you? That a doctor said, "It's okay to have  
17 this temporary."

18 MR. WARD: Object, leading, argumentative.

19 BY MR. BAKER:

20 Q Doctor, do you mean --

21 THE COURT: Sustained as to leading. I'd ask you to  
22 rephrase.

23 BY MR. BAKER:

24 Q Do you mean that a doctor said that it was okay to  
25 get the pain stimulator?

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1           A     Well, a doctor has to give it okay because I'm not  
2 making the approval for that.

3           Q     I'm talking about the word approval because it could  
4 be approved either through medically approved or, say,  
5 financially approved. Were you talking about medically  
6 approved?

7           A     Gosh, I don't know. I thought it was financially,  
8 but it could be medically. I actually never knew. I just  
9 thought because it's not me that's actually doing that. I'm  
10 just waiting for the pain stimulator to be put in. I don't  
11 know if they were checking his heart, lungs. I always thought  
12 it was just a financial thing. That was my thoughts, but I  
13 could be wrong. I never actually delved into it. I just  
14 said, "Why are we not doing this? Why are we not doing this?"

15          Q     So, you're confused as to whether or not that  
16 approval meant approval by a doctor or if it could actually  
17 get funded, is that what you're saying?

18          MR. WARD:   Leading.

19          THE COURT:   Sustained.

20          THE WITNESS:  I mean I actually don't know. You know,  
21 remember, everything I have is based on what the patient tells  
22 me, but, you know, it could be both or it could be financial.  
23 I thought it was a financial issue, but maybe not. I don't  
24 know. I mean I never really looked at the data of why he's  
25 not getting it, but I thought that --

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1 BY MR. BAKER:

2 Q Because Enrique has testified that it was approved  
3 by his doctor. It was approved by Dr. Vader, but he was not  
4 able to get financially funded for it. Is that what your  
5 understanding of the issue was or otherwise?

6 Q Okay.

7 A Yeah, I --

8 MR. WARD: This is leading and argumentative.

9 THE COURT: That was the testimony, nonetheless.

10 THE WITNESS: Yeah, I mean I'm just -- you know, in  
11 general, I think that he was -- I had the impression that it  
12 was more of a funding issue because usually if it's the doctor  
13 doesn't like to do it, you just go to another doctor. It's as  
14 simple as that.

15 I mean you don't have to listen to one doctor's  
16 opinion. He's got a problem and he already got better eight  
17 out of ten, so that was my understanding. I never actually  
18 looked at why, you know, but that was -- and that's always  
19 what he told me.

20 BY MR. BAKER:

21 Q But you never looked at why he hadn't received the  
22 permanent pain stimulator, is that fair to say?

23 A That's right. I'm not, you know, and, yes, he did  
24 mention there was a funding issue, but I don't want to say  
25 that that's the reason because I actually don't know the

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1 doctor's notes.

2 Q Right.

3 A I actually don't know at that time when I was seeing  
4 him on these notes. So, I don't want to say why.

5 Q We get to, because this is a bench trial, we get to  
6 talk about some stuff that we ordinarily wouldn't talk about  
7 or that I ordinarily wouldn't talk about. Now, you do some  
8 lien work, is that fair to say?

9 A I do.

10 Q Okay. So, that's you, is it fair to say, taking the  
11 risk saying, "I'll provide the treatment upfront?"

12 A Yes.

13 Q Okay. But now you don't own a surgical center, is  
14 that right?

15 A I do not.

16 Q And you don't sell batteries or the stimulator  
17 package itself, is that fair to say?

18 A No, I don't.

19 Q Or the leads for that?

20 A No.

21 Q And we've heard testimony that the expense of that  
22 outside of the doctor itself could be as much as \$700,000 for  
23 a spinal cord stimulator. Now, do you know if Enrique was  
24 able to get that kind of funding, \$700,000, for the non-doctor  
25 related services?

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1           A     I don't think. I think that there was -- I think  
2 there's some notes in 2009 and 2010 that's not in this chart  
3 that talks about maybe those issues about --

4           Q     But you just don't know?

5           A     Yeah, I cannot recall, but --

6           Q     So, when you say approved for surgery, you can't  
7 tell this Court right now whether you mean approved by a  
8 doctor or approved by someone who would fund the procedure?

9           A     My understanding was that he was having some -- it  
10 was an expensive surgery. And that was my understanding.

11          Q     Okay.

12          A     And this is only from what he was telling me.

13          Q     Well, I don't want to put you into something that  
14 you're --

15          A     And, right. And that was my understanding and the  
16 numbers were very large. You know, more than -- I was like  
17 much more than that. And I just figure -- and that's why I --  
18 you know, I didn't even push for the carpal tunnel. I just  
19 figure if you have a limited amount of funding, you cannot fix  
20 the carpal tunnel for \$10,000 or \$20,000 or both sides because  
21 that's not the big issue here.

22                   The big issue is he needs the spinal cord  
23 stimulator. And if they're not going to -- if he doesn't have  
24 the funding, then what's the point of doing anything? I was  
25 frustrated. I was frustrated last year. Like I said, I was

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1 frustrated with him. And he --

2 Q And did it appear that Enrique was also frustrated?

3 A He was very frustrated.

4 Q Because --

5 A I was frustrated. We spoke.

6 Q What was your impression on whether he wanted the  
7 spinal cord stimulator?

8 A He was upset.

9 Q By the way, can we take your private plane up to go  
10 see a baseball game.

11 A No, I don't have a private plane.

12 Q You don't? Do you want a private plane?

13 A Do I want it? No, no, I can't --

14 Q Could you afford it?

15 A I could not afford it.

16 Q Is it fair to say that your experience that some  
17 patients can't always get what they want or need because of  
18 economic issues?

19 A That's true.

20 Q That saddens you, it appears?

21 A It does.

22 Q And frustrating. Would you imagine it's even more  
23 sad and frustrating for the patient? Okay. Let's talk about  
24 something that's not so emotional.

25 A Sure.

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1 Q There was -- and I believe that -- can I get you  
2 something to drink?

3 A Sure.

4 Q I've got to say that I hate to see you cry, but it's  
5 very nice to see that the community has people like you. I  
6 felt the same way.

7 We were talking about the exams and Counsel went  
8 through systematically -- systemically -- systematically --  
9 I'm making up words -- all of the exams. And you spoke about  
10 the fact that what you were looking at was the foot and the  
11 shin area, is that right?

12 A That's right.

13 Q And when you're talking about the lower extremity,  
14 the proximal is closest to your hip and the distal is closest  
15 to your toes?

16 A That's right. I was mostly just kind of looking to  
17 make sure he doesn't get a clot.

18 Q And is it fair to say that people who will get  
19 DVT's, that very often it will start to pump to a region  
20 behind or underneath?

21 A Right. The exam, on the last exam, you'll see it  
22 says, "No calf tenderness." I've gotten better on my  
23 documentation.

24 Q And you were --

25 A Because other issues that come in practice, we

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1 always document what exactly we're doing. Mostly making sure  
2 he doesn't, while he's waiting for immobilization, you don't  
3 get a secondary issue that's very life threatening.

4 Q So, if you, if later in this proceeding, it was  
5 suggested that you didn't find changes in color or temperature  
6 to the knee, that would be an unfair characterization because  
7 you were looking below the knee?

8 A Right, obviously he's got a brace, so I can't even  
9 see it. I mean he's always got a brace on. Actually, you can  
10 only see just the top of it when you kind of look at his  
11 braces. And it's always swollen. And so I'm not really kind  
12 of -- I'm just, you know, I mean if it's blue, well, hey, it  
13 looks blue. There's something wrong with it. But I'm more  
14 looking just to see if there's a complication about to come  
15 because of the immobilization.

16 Q So you were not commenting on any of the knee  
17 characteristics having to do with the obvious external signs  
18 of RSD?

19 A Right. Actually, I don't like to examine it. I  
20 stay away from that. I just kind of -- you've got the  
21 tenderness and that's enough -- and that's good enough for me  
22 to -- there's still a problem.

23 Q But you would feel, you'd put your hand on them and  
24 you would feel for temperature. Counsel spent some time  
25 talking about your wonderfully sensitive hands. Do you

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1 remember that?

2 A Yeah, I do remember him talking about that. You  
3 know, I mean if when I meant temperature, I mean I'm looking  
4 for like an infected knee, that's it.

5 Q A high fever in the knee?

6 A Yeah, I mean I'm not -- you know, I mean I don't  
7 think I'm actually the best person for tactile responses of  
8 temperature.

9 Q Right.

10 A But I try.

11 Q And you said this yourself. Do you remember saying  
12 you're not a thermometer?

13 A Right, I'm not a thermometer. Actually, sometimes I  
14 can't even feel my kids, but I don't even know, but I try. I  
15 mean I just, you know.

16 Q And did you also say, did I hear it right that you  
17 said you wouldn't be able to tell temperature changes of one  
18 or two degrees with your hands?

19 A No, I wouldn't. I can't even tell. I can tell you  
20 I can't even tell sometimes 101 degrees on my kids, so that's  
21 three degrees, and I know that because I've actually had to  
22 get a thermometer out. I can't tell. Sometimes, you know, it  
23 depends on -- I mean sometimes you get lucky and you can tell.  
24 It all depends on your feet and hands, but I'm just not -- I  
25 don't know. I mean I never trust myself to see if I'm

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1 different from other people, but.

2 Q One or two degrees would be extremely challenging?

3 A Oh, yeah, I don't think I could even do that.

4 Q And, in fact, you were only feeling one extremity,  
5 is that right?

6 A Well, I'm actually not even feeling. See, you have  
7 to understand. When you're feeling, when you're touching,  
8 he's actually only got a surface area of this much exposed.  
9 So, you actually, how would you -- you know, when it's easy to  
10 touch it, but it's hard to actually feel.

11 On the back of your hand, you try to feel, but it's  
12 hard to do. So, I wasn't really doing that. I was more just  
13 to make sure that I'm just kind of watching them. I guess  
14 that's more better the way of saying it. He's just being seen  
15 and I'm just making sure you don't have another problem.  
16 That's all it comes down to.

17 Q Let me probably ask the question that I should ask  
18 just directly. You were not checking for sympathetically  
19 mediated temperature changes between the two lower  
20 extremities, is that fair to say?

21 A I was not, not on a regular basis. You know, I  
22 don't think I did --

23 Q And if you did that --

24 A -- check, you know, because I mean definitely not in  
25 the last three years, I mean.

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1 Q And if you did that, you would use a thermometer or  
2 a temperature patch?

3 A No, I think that I mean I guess you could do a  
4 thermometer or a temperature patch. I mean I, you know --

5 Q Okay.

6 A I mean, you know, it's just a -- it's basically, you  
7 know, looking. I guess I mean I was basically just saying  
8 it's still tender. It's still got a problem.

9 Q I'm not talking. I'm asking you. If you were  
10 checking for a sympathetically mediated temperature change of  
11 one or two degrees between the left and the right knee, would  
12 you have a thermometer available to you?

13 A I don't even think I was checking for that and I  
14 don't even have a thermometer.

15 Q Hypothetically, if you would.

16 A I don't even have a thermometer available for that.

17 Q Okay. I'll leave the question.

18 A Yeah, I don't have that.

19 Q You know what, doctor? I have no further questions.  
20 Thank you.

21 THE COURT: Very well. Any follow up, Mr. Ward?

22 MR. WARD: No, Your Honor.

23 THE COURT: Well, with the thanks of the Court, doctor,  
24 you may be excused.

25 THE WITNESS: Thank you.

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1 THE COURT: Do you have some patients back at the office?

2 THE WITNESS: I do, I do. Thank you.

3 THE COURT: Quickly, before they think of some more  
4 questions, doctor.

5 THE WITNESS: Thank you. Thank you.

6 MR. BAKER: Feel better. Thanks.

7 [Designation of record concludes at 3:20 p.m.]

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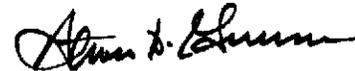
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DISTRICT COURT  
CLARK COUNTY, NEVADA

  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

WEDNESDAY, NOVEMBER 3, 2010

**REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF FORREST P. FRANKLIN**

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
Benson, Bertoldo & Baker

For the Defendant: KENNETH C. WARD, ESQ.  
Archer Norris

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MONDAY, NOVEMBER 3, 2010 AT 1:04 P.M.

[Designation of record beings at 1:04 p.m.]

THE COURT: Mr. Ward.

MR. WARD: We are, at the -- with the agreement of Mr. Baker we are calling out of order, Mr. Franklin.

THE COURT: Mr. Franklin, would you please stand, raise your right hand to be sworn by Madam Clerk.

FORREST FRANKLIN, DEFENDANT'S WITNESS, SWORN

THE COURT: Please be seated, stating your full name, spelling your last name for the record.

THE WITNESS: Forrest P. Franklin, F-r-a-n-k-l-i-n.

THE COURT: Whenever you're ready, Mr. Ward.

MR. WARD: Thank you, Your Honor. Before I start examining Mr. Franklin we have a housekeeping matter.

MR. BAKER: Actually, two.

MR. WARD: Two.

MR. BAKER: Okay. Go ahead.

MR. WARD: Mine is that Exhibit Number 68, which is Mr. Franklin's report, which is two pages, says that his full CV is attached hereto, and of course his full CV is not attached hereto. I have asked Mr. Baker to agree, and he has agreed that we may attach, simply attach these two pages to this exhibit, rather than make a new exhibit.

THE COURT: Very well. So ordered.

MR. BAKER: And the second issue was, I was speaking with

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1 the Clerk about this, and Exhibit 15 was Rancho Physiotherapy.  
2 And if the Court recalls I put the first half of it or so in  
3 through Dr. Schifini or Dr. Shannon, which left 12,000 in  
4 bills in the second half. And I recall offering and admitting  
5 the second half through Dr. Shaw. The Clerk couldn't remember  
6 one way or another.

7 So I'd either move to admit the second half of 15  
8 now, or ask the Court to recognize that it's already been  
9 offered and admitted.

10 THE COURT: Mr. Ward, do you have any objection?

11 MR. WARD: None other than the ones we've making. No, I  
12 don't have no problem with this, Your Honor.

13 THE COURT: You're also ordered.

14 MR. BAKER: Thank you, Your Honor.

15 [Court confers with Clerk]

16 THE COURT: Okay. Thank you. Now we're ready.

17 MR. WARD: Okay.

18 DIRECT EXAMINATION

19 BY MR. WARD:

20 Q Good afternoon, Mr. Franklin. And you tell me you  
21 retired a couple of years ago?

22 A A couple of months ago.

23 Q A couple of months ago. And the idea is now you've  
24 worked more hours than before you retired?

25 A Many.

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1 Q Is that kind of the way it works? I have your CV  
2 and I would like to approach the witness to show it to him, if  
3 that's agreeable?

4 A Sure.

5 Q And tell me, sir, is that your -- is that your full  
6 CV?

7 A It is.

8 Q Okay. And is that reasonable accurate to-date?

9 A Yes, it is.

10 Q Okay. And the other two documents are -- the other  
11 two pages, single document, are those your report?

12 A Yes.

13 Q And that was procured by you?

14 A For you, yes.

15 Q Yes. Thank you. Now, I'm now -- your report is  
16 Exhibit 69, if you have need to refer to it, it's back there  
17 somewhere.

18 MR. BAKER: It's in Exhibit 4 at the back. In Volume 4,  
19 sir. Volume 4, sir.

20 [Pause]

21 BY MR. WARD:

22 Q Now, tell us, sir, your educational background,  
23 please?

24 A I have a Master's Degree in Justice from the Golden  
25 Gate University in San Francisco. Bachelor's degrees in

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1 English and History from USF, University of San Francisco.  
2 And I was on the faculty of Golden Gate University for 12  
3 years at an adjunct professor in the school of management.

4 Q Okay. And that was, and let me back up and pick up  
5 the dates here. You went to Oxford, Great Britain; that was  
6 prep school?

7 A Yes, sir.

8 Q Okay. And then the University of San Francisco in  
9 -- you got a degree in '67 and then you got another degree in  
10 '67 from the University of San Francisco?

11 A The degree in '68 was a baccalaureate endorsement,  
12 so, yes.

13 Q Okay. And then you went to the -- attended the  
14 Oakland Police Academy?

15 A Yes, sir.

16 Q Graduated in 1969?

17 A Yes.

18 Q And now there's a couple year gap here before you go  
19 another degree. Were you an officer with the Oakland Police  
20 Department?

21 A Briefly.

22 Q Okay. And what period of time was that?

23 A From '68 to '70 I was actually in the San Leandro  
24 Police Department, but dispatch almost entirely, during that  
25 period of time, deployed during the student unrest, which

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1 probably everybody in the court is too young remember, at  
2 Berkeley P.D.

3 Because of continuity and process and reporting  
4 every police department in the east bay of San Francisco, or  
5 most of them went to Oakland Police Academy, so they used the  
6 same report forms, format and methodology, because of the  
7 standardization of arrest protocol at Berkeley during the  
8 student unrest.

9 Q Okay. And then you went off to Golden Gate  
10 University and that's where you got your Master's Degree in  
11 Public Administration?

12 A Yes, sir.

13 Q And then back to British Columbia?

14 A I matriculated briefly for a PhD in organizational  
15 psychology at Rutherford, yes.

16 Q Okay. And did you complete that degree?

17 A I did not, nor will I.

18 Q You decided you'd had enough education and degrees?

19 A Yes.

20 Q Okay. Now, tell us about your organizations that  
21 you are a member of?

22 A Okay. I'm Board Certified by ASIS International,  
23 which is the remainder man of American Society for Industrial  
24 Security. A certified -- a certified protection professional  
25 certificate, from that group. I'm certified as a disaster

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1 recovery planner, which is catastrophe management, Katrina  
2 intervention type stuff, by the disaster journal.

3 I'm certified by the American Board of Forensic  
4 Examiners in Homeland Security Level 3, and I'm a Fellow of  
5 the College of Forensic Examiner's Institute. I'm members of  
6 each of those organizations.

7 Q Okay. And did we cover all of your memberships?

8 A No, sir. I'm also a member of Building Owners and  
9 Managers Association where I currently preside as the Chair of  
10 the San Francisco Emergency Preparedness Committee, and caucus  
11 regularly in Washington, DC, with the international arm of  
12 that -- of that organization.

13 Q Okay. And in addition to that?

14 A I am currently on the counsel for Fire Life Safety,  
15 with ASIS International.

16 MR. BAKER: Your Honor, I'd stip to his qualifications  
17 and to the admission of his CV.

18 THE COURT: What about that, Mr. Ward?

19 MR. WARD: Sure, Your Honor.

20 THE COURT: Okay.

21 MR. WARD: I'll agree to that. And so the CV will go  
22 into evidence.

23 BY MR. WARD:

24 Q And now, on the CV are publications that you've  
25 made? And you don't have to read them, but there's a listing

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1 of your publications?

2 A Yes, sir.

3 Q Okay. And there a listing of your affiliations?

4 A Right.

5 Q Now, sir, what I would like to do, is I would like  
6 to ask you about -- you've told us about 1968 to 1970 where  
7 you were working, among other things, with riot-type  
8 situations.

9 Tell us, sir, about the employment, and as best you  
10 can do in chronological order, starting from about then, about  
11 the employment that you've had that you believe relates to  
12 security and crowd control?

13 A Well, starting with the Berkeley escapade, it was  
14 all crowd control and riot control. With respect to all of  
15 the other employments I've had, they've been in the,  
16 exclusively, in the security vector, and have related in one  
17 way or another in every instance to some sort of crowd  
18 control.

19 For example, the Embarcadero Center is a ten-acre,  
20 eight building structure, a high rise community in San  
21 Francisco, and we had festivals, block parties, huge numbers  
22 of various ethnic groups at various restaurants, and night  
23 clubs, and saloons and cabarets, that required not only  
24 modicum of, but a pretty heavy emphasis on crowd control,  
25 because in that structure all of the retail component is above

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1 ground and three-storeys up.

2 So consequently because the garage is four storeys  
3 below grade, when the folks would leave the various venues  
4 they'd have to get back to their cars, some as many as seven  
5 storeys, and were in various stages, how shall I say it,  
6 inebriation, revelry, and quite often caused a stir, and  
7 consequently crowd control was at issue, largely.

8 Q Before you move on to the next one how long were you  
9 at Embarcadero Center?

10 A Twelve years.

11 Q Twelve years. Okay.

12 A Yes, sir.

13 Q And next?

14 A Well, the very next job of any tenure that I had,  
15 not as a consultant, was as directory of security of the Trans  
16 American Pyramid, which is that tall white pointy Al-Qaeda  
17 target in China Town in San Francisco. And much of what we  
18 did there was, as is happening today as I speak to you,  
19 because of the giant victory parade, crowd control oriented.

20 We basically kept people from climbing the building,  
21 because it's a completely sequestered high-security building.  
22 Controlled access was at issue, including access into the  
23 garages, and peripheral areas, because we also had an open  
24 public park -- strike that. And open park that was private to  
25 ours, but given over to the City for daytime use, and

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1 encouraged all sorts of meetings, political referenda, folks  
2 doing their thing in groups; so again, crowd control became an  
3 issue. The --

4 Q The Trans America Pyramid is the building that  
5 everybody complained about when it was being built, and now  
6 it's the symbol of the City?

7 A It is. In addition to which the Israeli Consulate  
8 was one-half block from us and managed by the same management  
9 company, Cushman and Wakefield, and often we would have direct  
10 interface with both the police department, the sheriff's  
11 department, the SWAT teams and a tactical squad with respect  
12 to the demonstrations that would occur a block off our  
13 property, and most of the transit came through our property  
14 during those -- those four years that I was there.

15 Q And after that?

16 A Well, I retired.

17 Q Okay. Now you have been a consultant over the  
18 years?

19 A Yes, sir.

20 Q And have you had ever worked in areas where you've  
21 had crowd control with entertainment venues?

22 A Yes, sir. The Embarcadero Center there was a,  
23 because of the redevelopment agency's deal for reciprocity, a  
24 public park called Justin Herman Plaza, which is a seven-acre  
25 open area that had -- the City, the Recreation and Parks

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1 Department had jurisdiction over it, but we maintained it. In  
2 other words, we put up the dollars and they used it.

3           Everybody from Bill Graham Presents, who would have  
4 a media blast and attract 10,000 people in a couple of hours  
5 to watch U2, right down to John Denver, crooning, as well as  
6 upscale, units like ZaSu Pitts Memorial Orchestra, and  
7 goodness knows how many, in San Francisco, political  
8 demonstrations that would occur that.

9           With respect to entertainment in particular, we had,  
10 every Sunday, several orchestras, ranging from the Navy Band,  
11 the way to Pride and Joy, Pointer Sisters, and that sort of  
12 thing.

13           Clint Eastwood film, three movies there. The  
14 streets of San Francisco had 12 episodes that used part of our  
15 facility. Freebie and the Bean, it goes on and on. There  
16 were lots of movies, lots of entertainment crowd control  
17 issues, and entertainment in the raw issues.

18           Q     Okay. Now you were contacted about this case?

19           A     Yes, sir.

20           Q     And you were contacted by my office?

21           A     Yes, I was.

22           Q     And were you given a brief explanation as to what we  
23 were interested in hiring you for?

24           A     Yes, sir.

25           Q     And did you feel like that was something that you

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1 felt comfortable about, something that you knew something  
2 about?

3 A I did.

4 Q Okay. And what were you asked -- well, first of  
5 all, when were you hired; do you remember?

6 A I want to say the second quarter of this year I  
7 produced the report on the 19th of August. So that seems  
8 right.

9 Q Okay. And what were you asked to do?

10 A To develop, unless I already had one, and render an  
11 opinion with respect to the standard of care as it relates to  
12 throwing objects, memorabilia, promotional articles into  
13 crowds.

14 Q Okay. Now the concept of throwing articles,  
15 memorabilia, whatever, into crowds, is that something that you  
16 were familiar with?

17 A I have been all my security career, yes, sir.

18 Q Okay. And, I mean, you didn't say: Oh, my  
19 goodness, I've never heard of anybody doing this?

20 A Let me do it another way. I never -- I've hardly  
21 ever heard of anybody not doing it.

22 Q Okay. And so in terms of what it was you did to  
23 prepare for this case, to prepare to give an opinion and write  
24 your report, what did you do?

25 A I reviewed some documentation, some depositions that

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1 your firm had taken. I looked at a document security manual  
2 from Palms, and I formed an opinion.

3 Q Okay. And after you formed an opinion did you  
4 prepare a report?

5 A I did, it's here as Exhibit 69.

6 Q Okay. And what opinion did you come to?

7 A That throwing memorabilia as a promotional effort  
8 into crowds is not a substandard protocol.

9 Q Okay. And are you familiar with other places that  
10 throw items into crowds?

11 A I am. In fact I've initiated processes where we've  
12 thrown items into many crowds, both in the philanthropic  
13 operations, as well as completely secure venues.

14 Q Okay. And with respect to organizations that you  
15 belong to, do you belong to any large organizations?

16 A I belong to ASIS International, which has 83,000  
17 members, of which as many as 30 to 50,000 attend an annual  
18 conference.

19 Q And have you attended the annual conference?

20 A Almost every year, with very few exceptions.

21 Q And that's a security group?

22 A It is a security group.

23 Q And do they throw items, promotional items into the  
24 audience at the conference?

25 A We do that two ways: the conference is a series of

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1 breakout sessions for educational purpose. It has a series of  
2 keynote speakers like Colin Powell, and Sully, the guy that  
3 crashed the plane into -- into the Hudson River. Somebody  
4 always of repute. And they had exhibits, and the exhibits  
5 there are, I think there were 1100 exhibitors almost every  
6 year.

7           They, the exhibitors, regularly throw packages of  
8 mints, hand sanitizer, young ladies from Stanley a couple of  
9 years ago threw small basketballs. The Canadian contingent in  
10 fact has Canada Night, which is a sort of adjunct breakout,  
11 threw hockey pucks, real life hard hockey pucks into the  
12 crowd.

13           So, yes. And that's impressive to me because this  
14 is the largest security organization on the planet, so clearly  
15 there's no standard that they reached.

16           Q    Okay. And have you seen the Palms area where this  
17 incident occurred?

18           A    Yes, sir, I have.

19           Q    And was there anything about the Palms area where  
20 this occurred that you thought would preclude the tossing of  
21 promotional items to people that were there?

22           A    Well, in fairness, given the time that I saw it,  
23 which is several years after the event, unless there were some  
24 drastic architectural or structural changes, I saw nothing  
25 that would have --

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1 MR. BAKER: Your Honor, can I voir dire him on that issue  
2 before --

3 THE COURT: Yes.

4 VOIR DIRE

5 BY MR. BAKER:

6 Q You saw it several years after; is that right?

7 A I didn't see it in '04, no, sir.

8 Q When did you see it?

9 A Yesterday.

10 Q Yesterday for the first time?

11 A Yes.

12 Q And you never saw any photographs of it at the time  
13 that this -- it happened; is that correct?

14 A No. I worked entirely off the drawing that's an  
15 exhibit to Plaintiff's deposition.

16 Q And you never asked for any photographs that might  
17 have been in existence at the time?

18 A In '04?

19 Q Yes.

20 A I did not.

21 Q And you never asked for any architectural specs. to  
22 see if any construction had gone over?

23 A Let me do this: I saw deposition testimony that  
24 there were no video, VCR, DDR --

25 Q No, I understand.

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1           A     -- available, thus I didn't ask for any additional  
2 information.

3           Q     Did you see any architectural --

4           A     I did not.

5           Q     -- stats? Have you asked anybody if there were any  
6 major construction changes in the premises at the time?

7           A     I did ask if the occupancy loading had changed from  
8 whatever it was then, to 562, which it is now?

9           Q     And?

10          A     Well, nobody knows, that was yesterday.

11          Q     So nobody knows; is that correct?

12          A     I haven't had time to talk --

13          Q     So is it fair to say that you cannot state that the  
14 condition of the Palms Sports Bar when you saw it is the same  
15 as when it occurred in the accident?

16          A     That's fair.

17          MR. BAKER: Your Honor, I move to strike any testimony on  
18 that issue, based upon the fact that he cannot substantiate  
19 that it's in the same or similar condition.

20          THE COURT: Mr. Ward, do you want to respond?

21          MR. WARD: I will ask some other questions, and I will  
22 offer through another witness the foundation for that, and  
23 would request that the motion to strike on that topic be held  
24 in abeyance until I lay the foundation.

25          MR. BAKER: I think that's --

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1 THE COURT: Do you mean you'll then recall Mr. Franklin  
2 until --

3 MR. WARD: No, I meant, I will ask Mr. Franklin other  
4 questions, I won't ask him anymore specific questions relating  
5 to that. And then I will -- would request that the Court,  
6 since the testimony has already been given, that the Court  
7 hold in abeyance the motion to strike until I bring in another  
8 witness to lay a foundation.

9 MR. BAKER: I've never heard something like that before,  
10 Your Honor. I'd object to that. This witness that's on the  
11 stand right now and the foundational questions should be asked  
12 of him. He can't lay the foundation in a future witness and  
13 then have it somehow retrospectively apply to questions for a  
14 witness on the stand.

15 THE COURT: It's a bit irregular, sustain the objection.

16 DIRECT EXAMINATION CONTINUED

17 BY MR. WARD:

18 Q Mr. Franklin, did you look at the deposition of the  
19 Plaintiff?

20 A I did.

21 Q And did you look at drawings that the Plaintiff made  
22 with respect to the area where the accident occurred?

23 A I saw a drawing.

24 Q Okay.

25 A As an exhibit, yes.

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1 Q And were you able to see a general -- discern a  
2 general configuration from his drawing?

3 A Yes.

4 Q I'm going to ask you questions about this based on  
5 his drawing. You saw that before yesterday, correct?

6 A Yes.

7 Q Is there anything about this drawing in the way the  
8 conditions are set forth in the drawing that changes any of  
9 the opinions that you offered before?

10 A No.

11 Q Is the -- is the question, the testimony that you  
12 gave with respect to tossing things into crowds, does it  
13 depend upon the configuration of the facility?

14 A No.

15 Q So your opinions are not dependant upon the  
16 configurations of the Palms at the time of the accident; is  
17 that correct?

18 A That's correct.

19 Q Okay. And the document that we have, that you have  
20 explained, is your report of August 19, 2010, that is in fact  
21 your report containing all of your opinions?

22 A It is.

23 Q Okay. Now did you read the deposition of Brandy  
24 Beavers?

25 A I did.

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1 Q Did she provide any information as to her experience  
2 with whether facilities allowed items to be thrown into  
3 crowds?

4 A Yes, she did.

5 Q And what was that?

6 A She indicated specifically that Cesar's Palace, is  
7 one that I recall right off the top of my head, not looking at  
8 the depo here, allowed that, prescribed it.

9 Q Okay. Are you aware of any books on management and  
10 crowd control? Are you aware, in general, books on management  
11 crowd control?

12 A ASIS International has a tone of reference which is  
13 probably several thousand pages thick, called The Protection  
14 Of Assets Manual that articulates virtually every security  
15 protocol known to man since they came into being in the late  
16 forties. There's reference in many of those that -- to crowd  
17 control, I am sure.

18 Q Okay. Is there anything in that, that prohibits or  
19 suggests it's a bad thing to throw promotional items into  
20 crowds?

21 A I've never read anything anywhere that prohibits or  
22 inhibits or suggests that, or mandates that it shouldn't be  
23 done.

24 Q Are you familiar with any casinos, any other  
25 casinos, not the Palms, but any other casinos in town that

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1 have any written rules that proscribe the tossing of  
2 promotional items into crowds?

3 A I'm sorry, would you repeat that?

4 Q Sure. Are you familiar with any casinos in Las  
5 Vegas -- well, let me go back and make it broader.

6 Are you familiar with any facilities, anywhere, that  
7 have written rules that proscribe the -- that preclude the  
8 throwing of promotional items into crowds?

9 A No. And in fact I articulated that in number 69  
10 here, with respect to Blue Men, Cirque du Soleil and all of  
11 the ones I've ever attended anywhere, throw all kinds of  
12 things into the crowd. And fain water that's really confetti.  
13 Teatro ZinZanni in San Francisco did it. Peter Pan does it in  
14 San Francisco. All manner of stuff thrown into crowds, yes.

15 Q Okay.

16 A And the question was: did I know of any preclusion,  
17 no, I don't.

18 Q Right. Okay.

19 MR. WARD: I would offer the witness' August 19, 2000  
20 report, Your Honor.

21 THE COURT: Isn't it already in?

22 MR. WARD: It's not into evidence. I offer it into  
23 evidence.

24 THE COURT: Oh.

25 MR. BAKER: I normally --

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1 THE COURT: Any objection?

2 MR. BAKER: -- won't stip. for reports coming in, but  
3 this time is okay, Your Honor.

4 THE COURT: 68 or 69?

5 MR. WARD: It's 68. It's all part -- what we did was, I  
6 know it's a little screwy, but since counsel only stipulated  
7 to the CV at the outside, I wasn't trying to sneak it in at  
8 the same time. So that's why I offered it separately, but  
9 it's all one exhibit, 68, four pages.

10 THE COURT: 68 is admitted.

11 [Defendant's Exhibit 68 Received]

12 MR. WARD: Thank you, Your Honor.

13 I have no further questions, Mr. Franklin. Thank  
14 you.

15 THE WITNESS: Thank you.

16 THE COURT: Very well. Mr. Baker.

17 CROSS-EXAMINATION

18 BY MR. BAKER:

19 Q Good morning -- good afternoon, Mr. Franklin.

20 A Good day.

21 Q All right. Let me start with this, let's go to  
22 page 2 of your report. I need to clear something up for me.

23 A Okay.

24 Q Your last sentence, your second to last sentence  
25 says: "I would have difficulty articulating a program for

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1 tossing souvenirs, including NFL Footballs and water bottles  
2 into the patronage of Monday night football with any greater  
3 degree of alacrity than effectuated by the Defendants."

4 What does that mean?

5 A Well, it was some of the verbiage that came out of  
6 the complaint as I recall, about the effectuation of such  
7 protocol.

8 Q What does your sentence mean?

9 A That I would have trouble articulating a protocol,  
10 or throwing things -- I would have trouble writing a standard,  
11 or making a program for throwing things.

12 Q Really. Did you read any of the depositions in this  
13 case?

14 A I did.

15 Q Did you read Sheri Long's deposition?

16 A I did.

17 Q Do you know who Sheri Long is?

18 A She's the Director of Marketing.

19 Q Right. Sheri Long, she was the promotional  
20 director, marketing director; is that right?

21 A That's what I understand.

22 Q And you read that she found out that items were  
23 being thrown in another room, the Key West Room, and that  
24 pissed her off. You read that, right?

25 A So the statement that she knew of one other occasion

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1 where items were thrown yes.

2 Q Did you see here statement where she said that that  
3 created a foreseeable possibility of people being injured?

4 A I'm sorry, Counsel, you said "pissed her off"?

5 Q Yes,

6 A I didn't read that anywhere.

7 Q Did you see that she said it was inappropriate?

8 A Yes.

9 Q Did you see where she said it created a foreseeable  
10 risk of harm to patrons?

11 A She said it was a safety issue, as I recall.

12 Q She said it was absolutely a safety concern. But do  
13 you recall reading where she said it created a foreseeable  
14 risk of injury to people in the sports bar?

15 A I saw that.

16 Q Did you hear, or did anyone tell you from her  
17 testimony in this court, that she said that it was a breach I  
18 the standard of care for it to be done?

19 A I haven't seen that.

20 Q Okay. Well, did you read Brandy Beaver's  
21 deposition?

22 A I did.

23 Q And did you hear her say that -- oh, let me ask you  
24 something about Sheri Long. Did you read where Sheri Long had  
25 a meeting with her staff, including Denise something with a D.

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1 Do you remember her name, a woman named Denise. And  
2 specifically instructed Denise that promotional items were no  
3 longer to be thrown?

4 A I don't recall that.

5 Q You don't recall that in Brandy Beaver's deposition?  
6 Can I remind you?

7 A Sure.

8 MR. BAKER: Page 64 only. Would you spell that name into  
9 the record, please, Rob.

10 MR. CARDENAS: Denise Demoncas, D-e-m-o-n-c-a-s, is the  
11 last name.

12 MR. BAKER: No the quote that has to do with that -- oh,  
13 it's in Sheri Long's deposition.

14 If you'll give me just a moment.

15 [Pause]

16 BY MR. BAKER:

17 Q And I'll read it to you, and this is on page 63 --  
18 53 to 54 of the deposition. She said:

19 "Q At the time in the Key West Room when you  
20 discovered someone was throwing promotional items  
21 out into the crowd, who was it you spoke to?

22 "A I'm sure it was the marketing manager.

23 "Q Who was it at that time?

24 "A I believe it was Maureen.

25 "Q Do you remember the substance of the

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1 conversation?

2 "A No, we don't recall.

3 "Q But you discussed it wasn't safe to throw  
4 promotional items out into the crowd?

5 "A I believe that's so, right.

6 "Q For the reasons that you said there's a  
7 real safety concern?

8 "A Yes.

9 "Q And because it's foreseeable that if you  
10 throw promotional items out during Monday night  
11 football someone could get hurt?

12 "A Correct.

13 "Q And, okay, did you follow-up with a  
14 memoranda to your department?"

15 She says she doesn't remember doing that.

16 Sir, are you aware that she spoke with people in her  
17 marketing department that promotional items should not be  
18 thrown out into the crowd?

19 A I seem to recall it, yes.

20 Q Okay. Are you aware that Brandy Beavers had a  
21 meeting with Denise Demoncas after that, where they actually  
22 constructed a goal post so that promotional items could be  
23 thrown through the sports bar?

24 A Yes.

25 Q And you're aware that that occurred after Sheri Long

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1 instructed her staff that promotional items should not be  
2 thrown?

3 A Sure.

4 Q Okay. Now when Sheri Long told them, promotional  
5 items shouldn't be thrown, she was implementing, as she said,  
6 a safety protocol, a safety procedure; is that right?

7 A It could be.

8 Q Yeah. And Denise thereafter met with Brandy Beavers  
9 after being told that promotional items were not to be thrown,  
10 and constructed goals posts so that promotional items could be  
11 thrown through the sports bar; is that fair to say?

12 A That is fair to say.

13 Q Does that sound to you like a conscious disregard  
14 then of that safety procedure?

15 A It wasn't a safety procedure.

16 Q You just said it was a safety procedure, when Sheri  
17 Long said: "promotional items should not be thrown," that was  
18 a safety procedure, right?

19 A I'll concede that, then.

20 Q Okay. And so when Denise, after that time, met with  
21 Brandy Beavers and said: Hey, we got a great idea, let's put  
22 up football goal posts in the middle of the sports bar to  
23 throw promotional items, wouldn't that appear to you to be a  
24 conscious disregard of a known safety procedure?

25 A Okay.

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1 Q Okay. And so you agree to that?

2 A Yes.

3 Q All right. Now, you also read in Brandy Beaver's  
4 deposition that security guards were in the area when this was  
5 occurring; is that right?

6 A Right.

7 Q And you know who Vicki Colinga (phonetic) is, don't  
8 you?

9 A I think it's Colinga, right?

10 Q I've had trouble with that name the whole time. Is  
11 it Colinga? Who is she?

12 A She's the Director of Risk Management.

13 Q Okay. So the risk manager at the hotel, you read in  
14 her deposition that she also said it was inappropriate to  
15 throw promotional devices.

16 A Right.

17 Q And she also said that it's foreseeable that someone  
18 be hurt.

19 A Yes.

20 Q And she also said that it was inappropriate for it  
21 to be her; is that right?

22 A Yes.

23 Q And she in this court also sat and said that in a  
24 sports bar environment in a hotel, that it was beneath the  
25 standard of care to throw those promotional items; did you

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1 read that?

2 A Yeah. But there's no standard.

3 Q She's the risk manager of the hotel. Okay? When  
4 you tell people to do something for safety purposes you expect  
5 to be followed; is that right?

6 A That's correct.

7 Q And you've never worked as a risk manager in a  
8 hotel, is that right?

9 A Tangentially I have.

10 Q Have you worked in a position where you were paid  
11 and your title was risk manager of the hotel?

12 A No.

13 Q Okay. Have you ever been a marketing director for a  
14 hotel?

15 A No.

16 Q And you'll agree that when rules are set people  
17 should follow them; is that true?

18 A Sure.

19 MR. BAKER: Thank you, Your Honor. I have no further  
20 questions.

21 THE COURT: Very well.

22 BY MR. BAKER:

23 Q Oh, did you also read --

24 MR. BAKER: I'm sorry, may I, Your Honor?

25 THE COURT: Sure.

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1 BY MR. BAKER:

2 Q Did you also read where Vicki said if there were  
3 security guards in the area they should have stopped Brandy  
4 Beavers from throwing promotional devices.

5 A I don't remember seeing that. Do you want to read  
6 -- if you can read it to me I'll --

7 Q I'll read it to you. This time I have the right  
8 deposition transcript.

9 A What's this from, Counsel?

10 Q It is from Vicki Colinga's deposition, it's page 43.  
11 And, I say:

12 "Q I've read through your security manual, and  
13 in your security manual it defines it as a  
14 guideline; would that be fair to say?

15 "A It's a guideline.

16 "Q But it also compels the security officers  
17 to use what you defined as their commonsense as  
18 well; is that right?

19 "A Commonsense and experience.

20 "Q And if a security individual working at the  
21 Palms Hotel in November of 2004 saw somebody  
22 throwing promotional items into the audience would  
23 you expect that security officers are to tell them  
24 to stop doing that?

25 "A Yes."

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1 Colinga, about the foreseeability of injury; do you agree with  
2 that?

3 A No.

4 Q Do you think that it is -- that the tossing of  
5 promotional items into crowds presents a foreseeable  
6 possibility of injury?

7 A No, and let me say why. I work regularly as the  
8 Safety Coordinator for the American Diabetes Association  
9 toward a cure, in Northern California. I also founded and now  
10 direct the ALS, that's Lou Gehrig's disease to stop ALS. And  
11 at all of their gatherings, which are bicycle rides, some  
12 which are 2,000 riders strong -- strike that, 2200 riders  
13 strong, there are people who are diseased.

14 People with diabetes sometimes don't move as fast as  
15 others, particularly after a hundred mile bicycle ride, and  
16 people with ALS in wheelchairs, with tricks (sic), and  
17 inability to have any mobility whatsoever don't move very  
18 quick at all.

19 And we have, with great regularity for the last 19  
20 years for ADA, Diabetes Association, and the last five with  
21 Lou Gehrig's disease, which are crippled folks, thrown  
22 memorabilia into the bicycle crowd, which is peppered with  
23 folks in wheelchairs and folks with not a great degree of  
24 mobility. To include power bars, high fiber bars, special  
25 drinks, water bottles wrapped in t-shirts. No, I don't have a

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1 problem with that at all, and that's the reason, that's one of  
2 the reasons.

3 Q Does that mean to you that no one under any  
4 circumstances, no matter how many years this went on could  
5 ever get hurt; is that what you're saying?

6 A Absolutely not. You can get hurt doing anything.

7 Q In your opinion, with respect to whether it is below  
8 the standard of care to throw promotional items into crowds is  
9 what, sir?

10 A I know of no such standard, sir.

11 Q And so do you think it's appropriate?

12 A To throw things into -- I don't find it  
13 inappropriate at all.

14 Q Okay. So would you -- if someone came to you and  
15 asked you today, would it be something that would be  
16 appropriate to throw things into crowds, would you say it was  
17 okay?

18 A I would. And I will say -- I will say that in my  
19 visit yesterday to Palms, they now have Miller girls that  
20 proffer some sort of entertainment throughout the Monday night  
21 football, and it says on their marquee right beside the room,  
22 and I have no idea if they throw things. But not much seems  
23 -- else to have changed since then. And I would not tell  
24 anybody not to throw things into crowds.

25 MR. WARD: Okay. Thank you.

1 THE WITNESS: Yes, sir.

2 MR. BAKER: Just a couple, Your Honor.

3 RE-CROSS-EXAMINATION

4 BY MR. BAKER:

5 Q A foreseeable danger is a danger that you could  
6 preconceive happening; is that right?

7 A No. Foreseeable means it's based on similar prior  
8 events that could lead you to believe that it could repeat  
9 itself.

10 Q That's your definition of foreseeable?

11 A Based on prior similar events, yes.

12 Q Okay. Do you know that both Vicki and Sheri Long  
13 preconceived that exactly what happened to Ricky, Enriquez,  
14 could happen to somebody? They both testified to that at  
15 trial. I asked, is that injury that happened to him what  
16 raised your concern in the first place.

17 MR. WARD: I don't believe that's the testimony.

18 THE COURT: I was listening pretty carefully, and it was  
19 pretty close to that. I don't think counsel has  
20 mischaracterized that at all.

21 BY MR. BAKER:

22 Q Do you know that?

23 A No, I didn't know that.

24 Q Okay. Do you think maybe they're just a little  
25 better at determining what a foreseeable injury would be in a

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1 circumstance, than you?

2 A Well, let me make sure that I understand you  
3 correctly.

4 Q You know, I --

5 A A foreseeability is based on somebody throwing a  
6 bottle, which hits the ground, and somebody running to get the  
7 bottle after it's hit the ground and hurting another  
8 individual.

9 Now I have to really stretch to make that series of  
10 events and that number of components a foreseeable event.

11 Q Your definition of foreseeable is based upon, you  
12 know it's going to happen again, because it's happened in the  
13 past?

14 A That's not what I said. Prior similar events are my  
15 signal that something's foreseeable.

16 Q That's your signal, right?

17 A Well, I've been told by other counsel that  
18 "foreseeable" simply means it happened.

19 Q Can I ask you something? Is one day the sun going  
20 to engulf the earth?

21 A I don't think so, but I have heard of solar flares  
22 are supposed to have some damage on a petrochemical function  
23 and our electronic function.

24 Q So that's foreseeable?

25 A Who knows.

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1 Q It never happened before, though?

2 A No.

3 MR. BAKER: Okay. I don't have any further questions,  
4 Your Honor.

5 THE COURT: Anything further, Mr. Ward?

6 MR. WARD: No, Your Honor.

7 THE COURT: With the thanks of the Court you may be  
8 excused.

9 [Designation of record ends at 1:47 p.m.]

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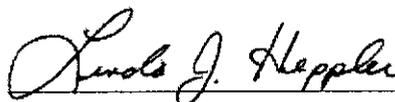
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1 ATTEST: I do hereby certify that I have truly and correctly  
2 transcribed the audio/video recording in the above-entitled  
3 case to the best of my ability.  
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LINDA J. HEPPLER, Transcriber

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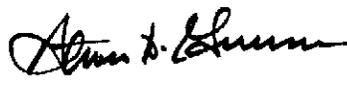
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DISTRICT COURT  
CLARK COUNTY, NEVADA

  
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ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

WEDNESDAY, NOVEMBER 3, 2010

**REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF MARIA PEREZ**

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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12 App. 2376

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Defendant's Witness(es):

None

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1                    WEDNESDAY - NOVEMBER 3, 2010 - 2:12 P.M.

2                    [Designation of record begins at 2:12 p.m.]

3                    THE MARSHAL: Please come to order.

4                    THE COURT: Good afternoon.

5                    MR. BAKER: Enrique, go ahead and take your seat. I'm  
6 sorry, Your Honor. She was nervous.

7                    THE COURT: No, no, it's quite all right. Please be  
8 seated.

9                    Okay. So, we need to ask the witness to stand,  
10 raise your right hand to be sworn by Madam Clerk over here,  
11 ma'am.

12                    MARIA PEREZ, PLAINTIFF'S WITNESS, SWORN

13                    THE CLERK: Please be seated spelling your first name --  
14 I'm sorry, stating your name, spelling your last name for the  
15 record.

16                    THE WITNESS: My name is Maria.

17                    DIRECT EXAMINATION

18 BY MR. BAKER:

19                    Q Do you have a last name?

20                    A Perez, P-E-R-E-Z.

21                    Q And, Maria, you've never been so scared in your  
22 whole life?

23                    A No.

24                    Q Okay. Remember what I said. We're at a barbecue  
25 and I'm standing in shorts and I have skinny white legs, okay?

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12 App. 2378

1 A Okay.

2 Q So, just think about that, all right?

3 A That's funny, okay.

4 Q Are you Henry's significant other?

5 A Yes, I am.

6 Q When did you first meet him?

7 A About 29 years ago.

8 Q Okay. And can you tell the Judge where you first  
9 met him?

10 A He was my neighbor and we used to roller skate  
11 together.

12 Q And is that what you started doing just right away?

13 A Right away.

14 Q Was it love at first sight?

15 A I would say so.

16 Q I heard rumor you moved in with him pretty quick 29  
17 years ago.

18 A That's correct.

19 Q Okay. And have you been with him ever since?

20 A Ever since.

21 Q Okay. I want you -- now, you know that we're here  
22 to talk about the occurrence at the Palms in 2004, is that  
23 right?

24 A That's correct.

25 Q Before we do that, would you just please tell the

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1 Judge about your life with Henry before you came to Las Vegas  
2 and Henry went to the Palms in 2004?

3 A We had a very good life. We had -- it was a  
4 beautiful home. He gave us -- gave me everything I wanted.  
5 We had a big family. We raised, along with one, my son, we  
6 had foster children, so -- or foster boys, so we were a big  
7 family and --

8 Q Did Henry used to go to their football games?

9 A Yes.

10 Q And tell me about some of the things that Henry used  
11 to do with the boys?

12 A He did everything with them. They were in football.  
13 Some were playing in football teams and some were baseball.  
14 And he did everything with them. We would go camping.  
15 Because some were foster children and were troubled, he would  
16 be at the school a lot, you know.

17 Q And you haven't had foster children for about ten  
18 years, is that right?

19 A Yeah, it's been about ten years now, yes.

20 Q Did the home feel empty?

21 A It is very empty.

22 Q Talk to the Judge about the things that you and  
23 Henry would do from that, say, ten years ago to the time that  
24 Henry came to Las Vegas and was injured at the Palms Hotel?

25 A Well, we lived a good life. He made good money. He

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1 was in real estate, so we -- I was very spoiled and we would  
2 -- I would say, "Oh, let's go for dinner at pizza," and we  
3 would go fly to Chicago or we would fly to Mexico.

4 Q Is the pizza there as good as they say?

5 A Yes, it is.

6 Q Okay.

7 A Yes, it is.

8 Q And did you enjoy traveling with Henry?

9 A Oh, very much so.

10 Q And were you traveling together and having fun  
11 together right up to the time that you came to Las Vegas and  
12 he was hurt at the Palms?

13 A That's pretty much, yes.

14 Q Did you ever go with Henry when he was looking at  
15 real estate?

16 A I have been with him, yes.

17 Q Would you explain for the Judge, please, what Henry  
18 would do when he was checking out whether or not he wanted to  
19 buy a house?

20 A Well, Henry could look at a property and decide if  
21 he wanted -- if that was one of the properties he would want  
22 to pick up.

23 Q Did he do a thorough search of the house or a  
24 thorough look at the house?

25 A He doesn't have to. He could tell what, but I mean

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1 those -- the ones that he would be extra interested in, yes,  
2 he would. There are things that he would like to look at.

3 Q Like the attic?

4 A Sure.

5 Q And do a thorough walk through?

6 A A thorough, yes.

7 Q So, if he wasn't interested, he knew right away.  
8 He'd just look at it and leave?

9 A He could look at it and knew if he wanted it, you  
10 know, without even going through it, but yes.

11 Q He would go through it?

12 A Uh-huh.

13 Q And, say in the year before the accident at the  
14 Palms Hotel, tell the Judge a bit about how you guys were.  
15 Were you happy? Were you living life?

16 A Oh, life was -- well, it was wonderful. We did  
17 everything together. We were -- I was very spoiled by him,  
18 very spoiled because he did make good money. He spoiled  
19 everyone.

20 Q Does he have a -- was he a lazy guy?

21 A No, no.

22 Q Was he the kind of guy who would just give up?

23 A No, no. As a matter of fact, he's the kind of guy  
24 that you would see at -- he works out a lot or he -- I'm  
25 sorry. He used to work out a lot. He was -- be at the gym,

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1 if not every day, it would be every other day.

2 Q Active?

3 A Yeah.

4 Q Did he have friends?

5 A Did he have friends?

6 Q Yeah.

7 A Oh, yes.

8 Q Tell the Judge about Enrique's friend, Nick.

9 A Oh, Nick is a -- Nick is a very, very special man.  
10 I'm going to guess his age.

11 Q Don't. It could be dangerous.

12 A Don't? Okay. Oh, he has always looked at Henry as  
13 like family, nephew. And they're -- because Nick is a -- let  
14 me see, a developer.

15 Q He's also a high school football coach?

16 A Oh, yes, everything. He, yeah. He --

17 Q What sort of things would Henry -- you're doing  
18 okay. What sort of things would Henry and Nick do together?

19 A You know what? They used to tease. Nick always  
20 said that Henry was his right-hand man, so playing or not,  
21 they, you know --

22 Q Did they play sports?

23 A Oh, yes, yes.

24 Q What kind of sports?

25 A Well, pretty much every -- Nick has like a

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1 racquetball court in his backyard and basketball court and --

2 Q I want to go play at Nick's house.

3 A -- a golf course. He has -- they were very --

4 Q A miniature golf course?

5 A I don't know if it was a miniature one, but he had  
6 everything there.

7 Q And would Henry and Nick enjoy that?

8 A Oh, yeah, yeah. They spent hours together when --  
9 you know, that's playing time and then there was, you know,  
10 business time.

11 Q Okay. Did Henry enjoy his playing time?

12 A Oh, sure.

13 Q Was he happy before he came to Las Vegas in November  
14 of 2004?

15 A Oh, yes, yes. You know, Henry was into  
16 bodybuilding, not just working out and staying fit, but he  
17 used to build. So, he -- yeah, he had buddies that they would  
18 get -- you know, they eat a certain way, so I have to make  
19 certain types of food and he has to eat thousands of calories.  
20 Bodybuilders do that kind of thing. And that was daily. And  
21 he did -- I'm sorry.

22 Q You ran out of stuff to say?

23 A I'm not --

24 Q Okay.

25 A -- sure what I was even saying.

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1 Q Let's talk about why you came to Vegas in 2004.

2 A Okay.

3 Q Would you explain that to the Judge?

4 A Oh, I'm sorry.

5 Q Would you explain to the Judge why you and Henry,  
6 Enrique, came to Las Vegas in November of 2004?

7 A Well, we came because it was a little celebration  
8 and I was a little ill. So, when I found out that I wasn't as  
9 ill as we thought, we decided -- we did. We came to here, to  
10 Vegas.

11 Q We have good pizza here too.

12 A It's okay. But I had some breast tumors and when  
13 things -- when it came out good, the news, we came out here  
14 for a celebration. But he --

15 Q Where did you -- where were you staying?

16 A At the Harrah's.

17 Q Okay. And did you check in at Harrah's?

18 A Yes, we did.

19 Q And then at some time, did Enrique go out? Yeah.

20 A Yes, yeah.

21 Q What was he going to go do?

22 A Let me see. After what he was -- what was he going  
23 to do? He was just going to go run the Las Vegas because he  
24 put me down to sleep because I -- and I was not feeling well.  
25 And he tucked me in and then I told him just to go out and

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1 have a good time.

2 Q Okay. Did it bother you that he was going to leave  
3 you in the hotel room?

4 A Oh, no, no. I was so glad that he was leaving me  
5 there because --

6 Q You just needed -- go ahead.

7 A So he could go out and have a good time. I just  
8 wanted to relax and sleep.

9 Q Okay. And that makes sense. Was there a time that  
10 you found out that Enrique had been injured?

11 A Yeah, I did find out.

12 Q Okay. When did that occur?

13 A I don't know what time it was, but I did see him  
14 come in.

15 Q Come into the hotel room?

16 A Yes.

17 Q Okay. Could you please tell the Judge what he  
18 looked like and how he was acting when he came into the hotel  
19 room?

20 A He was very crippled. He was very crippled. He had  
21 something on his leg, some type of leg stabilizer with like a  
22 cast type and crutches and he was in bad shape.

23 Q Okay. Did you put him to bed that night?

24 A Yes, I did.

25 Q And how was he feeling?

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1 A He was bad.

2 Q Okay.

3 A He was in a lot of pain.

4 Q What hurt him?

5 A Especially his leg.

6 Q Okay. You say especially. Were there other things  
7 that were hurting him?

8 A Oh, his -- yes. Well, I had to lay him down and to  
9 roll him over, but his leg was especially bad.

10 Q And how do you know that?

11 A How do I know what?

12 Q How bad his leg was.

13 A Oh, oh, he was bad. I had to help him.

14 Q Have you ever seen him like that before?

15 A No.

16 Q Had he ever hurt his knee before?

17 A He has -- I've never seen him, no, never.

18 Q So, was this scary for you then?

19 A It was terrible.

20 Q Okay. Well, what did you guys do? Did you go out  
21 and party on the town the next day?

22 A Oh, no, no.

23 Q Well, what'd you do?

24 A I had -- no. No, I had to take -- we had to go  
25 home. We had to -- no, he was in very bad pain. He could not

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1 even -- he could not drive. He could hardly walk. No, he was  
2 -- it was bad.

3 Q Was he complaining at that time of pain in his neck  
4 or in his back?

5 A Not, you know, no, not really because his leg was  
6 killing him, but I know the pain he was in because I had to  
7 roll him over. I had to get him undressed.

8 Q Is he a complainer?

9 A No, he's not. You would never know he -- no, no, he  
10 does not complain about pain. As a matter of fact, even when  
11 I'm in pain, he'll tell me not to say -- just to deal with it  
12 because he doesn't -- no, he's not one --

13 Q So, even if he wasn't saying things to you because  
14 he doesn't believe in complaining about pain, did you observe  
15 him to be in pain?

16 A Yes, yes. Even now, last night, even now when he's  
17 asleep, he cries in his sleep.

18 Q What type of pain do you observe him to be in?

19 A Well, he -- the type of pain? We cannot -- he is --  
20 we can't even sleep close together because he thinks that I'm  
21 going to touch him or something or he feels -- oh, a lot of  
22 the time he thinks that I'm going to put the sheet on him or  
23 he thinks he feels the sheet or --

24 Q What happens if you put the sheet onto his knee?

25 A No, yeah. He's very jerky, no.

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1 Q Does it hurt him?

2 A Yes, but he doesn't say. He just -- but yeah,  
3 he's --

4 Q Okay. As a person, in terms of enjoying his life  
5 and living, how is Enrique now after the accident as compared  
6 to how he was before?

7 A Our life is totally different now, totally. Oh,  
8 God, no. Excuse me. It is so different. He can't even  
9 hardly walk now. I mean before, you know, you could run and  
10 play and roll around and -- I mean just him and I.

11 Even if we were just to play, roll around, let's  
12 hang out on the floor or in bed, just enjoying each other's  
13 company. No, that doesn't happen no more.

14 Q Does he have --

15 A You can't -- that can't happen.

16 Q Why?

17 A Well, normally he was the type to sleep on his  
18 stomach. No, that can't happen anymore.

19 Q Because of his knee?

20 A Yeah, he is -- he won't tell you how bad his pain  
21 is, but if you -- well, as a doctor, if you were to ask him,  
22 "Okay, describe your pain." He will tell you, you know, this  
23 -- he'll describe it. But, you know, with friends and  
24 company, he won't say nothing.

25 And I have -- there's been many, many times when he

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1 is at home because I give him his medication and stuff. I can  
2 -- he will not think I am behind him and I can look straight  
3 at his face and see him crying. And that is the honest to  
4 God's truth.

5 Q Is he strong now like he was before this happened at  
6 the Palms?

7 A No, it's not the same no more. He was into  
8 bodybuilding. Now he just stays. It's a physical act -- let  
9 me see. What is it? He's trying to stay active only just so  
10 that if something doesn't break down. I don't know the proper  
11 term.

12 Q That's okay. Is he happy like he was before the  
13 accident?

14 A Oh, no. Nothing is the same no more.

15 Q No?

16 A Nothing.

17 Q Like what?

18 A Well --

19 Q Can he play sports anymore?

20 A No, no, no, no. He's -- if you watch him walk, he  
21 doesn't even -- he can't even have a normal walk anymore only  
22 because he thinks that his leg is going to buckle or, I don't  
23 know. He thinks that -- I mean I understand the pain, but  
24 he's afraid. He's afraid that he would fall.

25 Q The pain is that bad?

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1           A     That, yeah, he won't take the risk. When walking on  
2 a -- like on a lawn, even walking through the house, it's, you  
3 know, no, he's very, very cautious.

4           Q     Are you aware of a time when he started to  
5 experience pain in his neck and his back?

6           A     You know what? I've heard and seen when he has.  
7 What I -- the memories I have and the memories he has are  
8 different. I saw -- a long time ago, I saw it coming, but --

9           Q     The neck and back pain?

10          A     Yes, but he -- all he would talk about is or be real  
11 careful about is his leg.

12          Q     Is his knee?

13          A     Or, yeah, his knee.

14          Q     Okay. Maria, this is a hard question to ask you,  
15 but if someone was to suggest Enrique is faking this so that  
16 he could get money from a lawsuit, what would you tell them?

17          A     That is not true. You know what? As a matter of  
18 fact, one time somebody mentioned that just in the  
19 conversation. Henry said he would rather have his life back.

20          Q     Thank you. No further questions.

21          MR. BAKER: Your Honor, can I approach?

22          THE COURT: Sure.

23          THE WITNESS: I'm sorry.

24          THE COURT: That's fine.

25          MR. BAKER: Maria, you can imagine Casey in shorts too

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1 with skinny legs, okay?

2 THE COURT: Are you ready to proceed, ma'am, or do you  
3 want to take a --

4 THE WITNESS: Yes, no, no.

5 THE COURT: Okay. Okay. Mr. Ward?

6 MR. WARD: I have no questions, Your Honor.

7 THE COURT: All right.

8 MR. WARD: Thank you.

9 THE COURT: Then with the thanks of the Court, you may  
10 step down, ma'am.

11 MR. BAKER: May I?

12 THE COURT: Sure.

13 MR. WARD: Your Honor, I respectfully ask permission for  
14 Mr. Rodriguez and Maria to be able to leave the courtroom.

15 THE COURT: Sure. Why not?

16 MR. BAKER: Why don't you guys go?

17 MR. WARD: We're done, aren't we?

18 THE COURT: I think so.

19 MR. BAKER: I don't have any matters before the Court.

20 MR. WARD: Yeah, I think we're done.

21 MR. BAKER: Okay.

22 THE COURT: Okay. So, let's go off record while we talk  
23 about our schedule for tomorrow.

24 [Designation of record concludes at 2:31 p.m.]

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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.

*Crystal Thomas*

CRYSTAL THOMAS, Transcriber

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Nicholas Tavaglione..... 3

Defendant's Witness(es):

None

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1 Q And how long have you resided in Riverside?

2 Seventy-nine years last spring.

3 Q Oh really?

4 A Yes.

5 Q You look great.

6 A For an old man.

7 Q Can you tell the Judge, please, some of your  
8 community affiliations in Riverside? What do you do?

9 A Well -- in the community I do a lot of things.

10 Q Like --

11 A I'm involved with the community college on their  
12 board. I'm a former grand jurist. I'm a former planning  
13 commissioner. I formed little league sports in Riverside  
14 years ago and I was -- modestly I was alumnist of the year and  
15 very -- I've been very civic-minded and --

16 Q Thank you.

17 A -- that's been my -- and I've been in development.

18 Q And before development or maybe even contemporaneous  
19 with it. Were you a high school football coach?

20 A Yes. I was.

21 Q What high school and for how long did you coach?

22 A I was -- I coached at a Catholic School called Saint  
23 Frances. And then I coached at Riverside Polytechnic High  
24 School.

25 Q Can I call you Coach?

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1           A     You can call me whatever you want, as long as it's  
2 nice.

3           Q     Okay. And how did you get to meet Enrique?

4           A     Well that happened through coaching. He has --

5           Q     If you can explain to the Judge.

6           A     I'm sorry, again. He was my grand -- one of my  
7 grandsons was involved in football. And one of his children  
8 were involved in football. And we just came together and the  
9 kids were friends. And my house was kind of an open house,  
10 because it had everything you'd want for kids. Because I --  
11 that was my primary. I mean I used to have kids over there --  
12 I'd have 1000 from all over the community. And -- because my  
13 wife and I loved to do that.

14                     And so he was there and, you know, the kids were  
15 there and just --

16           Q     Maria testified yesterday and she said you had a  
17 racquetball court at your house.

18           A     Yes.

19           Q     A basketball court.

20           A     Yes.

21           Q     She said a golf course. You couldn't have a golf  
22 course in your house.

23           A     I had an 18-hole miniature golf course.

24           Q     So this was the place to play, wasn't it?

25           A     Well it was good for the kids.

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1 Q And you knew Enrique before he came to Las Vegas in  
2 November of 2004?

3 A Oh, yeah.

4 Q And were you his friend?

5 A I hope so.

6 Q Do you socialize with him?

7 A I socialized with him mainly through the schools and  
8 the kids and that type of thing.

9 Q Tell us about Enrique before November of 2004. What  
10 kind of a man was he? Was he physical?

11 A He was a beast. I mean, he was really, really -- I  
12 mean, he participated in all the athletic events we had at my  
13 house. And when I say that I mean that we had like 18  
14 different events. We had play days and it was a fun place.  
15 And he was very active at all the events.

16 Q Did you play racquetball with him.

17 A I wasn't very good at racquetball. I tried not to  
18 play racquetball too much.

19 Q How about basketball?

20 A Yeah. We'd shoot hoops. Yeah.

21 Q Who was better?

22 A Well that depends who you're asking.

23 Q That makes total sense. Could you tell us about him  
24 in terms of his personality?

25 A I mean he was very vibrant and outgoing, good

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1 personality.

2 Q Okay.

3 A You know, people liked him.

4 Q Maria described him as a body builder. Is that  
5 true?

6 A Well, yeah. He wouldn't have the muscles he had by  
7 just walking down the street, that's for sure.

8 Q Okay. And did you know him, say in the year before  
9 he came to Las Vegas in November of 2004?

10 A Oh, yeah.

11 Q And how was he then?

12 A I mean he -- you know, he used to come over to the  
13 house and I sold the house, but I still --

14 Q Kept recreation rights?

15 A Yeah.

16 Q Okay.

17 A And so we could go over there and, you know, fool  
18 around play a little basketball and -- I'm sorry. I keep  
19 turning that way.

20 THE COURT: That's all right, sir.

21 BY MR. BAKER:

22 Q That's okay. Did he seem to you like a happy  
23 person?

24 A Well he was very -- more than happy. He was very,  
25 you know, just outward good personality.

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1 Q Okay. And his relationship with Maria. Could you  
2 tell us a bit about that?

3 A I guess I could sum it up by saying -- my wife would  
4 say to me, "Why don't you treat me that way?" You know, but I  
5 mean -- okay. I'm not going to elaborate. I just --

6 Q Well, go ahead.

7 A Well, no. It's just that, you know, I'm in such a  
8 different world of having phone calls constantly and I'm  
9 involved in a lot of community things and --

10 Q Well, speaking about that --

11 A I mean, I love my wife, I'm sure, as much as he did.  
12 It was just -- I was just too involved, but I'm slowing down.

13 Q We're going to seal this part of the transcript,  
14 don't worry.

15 A Okay.

16 Q Speaking about your phone calls and the things that  
17 you do. Did you know Enrique professionally before November  
18 of 2004?

19 A Yes. I did.

20 Q And could you explain that to the Judge, please?

21 A Well how I met him was, like I say, we were very  
22 involved and we knew a lot of people. And through some  
23 gathering I met Enrique and we became friends. And --

24 Q Are you aware what his profession was before  
25 November of 2004?

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1           A     Oh, yeah.

2           Q     What he did for a living?  What did he do for a  
3 living?

4           A     Well, he would book for properties, mainly houses.  
5 And kind of more or less foreclosure, depressed properties.  
6 And he would ask me to go with him on short rides, just you  
7 know, maybe a half-hour or whatever and look at the properties  
8 and give him my thoughts and ideas of what -- you know, what I  
9 felt he could do with them.

10                     But that, you know, didn't happen all the time  
11 because he learned what to do and so he kind of, you know --

12           Q     Was he --

13           A     I had to -- I didn't have to go with him, because he  
14 knew what he was doing.

15           Q     Okay.  And that was really my question, did he know  
16 what he was doing?

17           A     Yeah.

18           Q     Was --

19           A     He definitely knew.

20           Q     Was he making a living?

21           A     He was making better than a living.

22           Q     Well, what do you mean by that?

23           A     Well, I mean he had a nice home and, I mean, if you  
24 can judge a person by their home.  Sometimes you can't but --

25           Q     If we could judge you by your home, you would be a

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1 summer camp director, but -- right?

2 But really and seriously, did it appear to you, from  
3 what you could see that he was financially secure?

4 A Yeah. Because he would always chip in to help  
5 because we had barbeques like every Friday before a game and  
6 if it was a Thursday. But mainly on Fridays we'd walk up  
7 Central Avenue to Gary Rawlings's home and we'd have a big  
8 steak, you know, dinner for the kids. They all came and ate  
9 and then they went with the coaches.

10 Q Now you're aware that he was involved in an incident  
11 at the Palms Hotel in November of 2004?

12 A Yes.

13 Q And when was the first time you saw him after that?

14 A No. I don't believe I could tell you exactly the  
15 timing on when I saw him after.

16 Q The first time --

17 A I know it was --

18 Q Go ahead.

19 A You know, I would see him often. So I don't know if  
20 he'd had it two months ago. I probably sometime during that  
21 two months. You know, I mean there wasn't a long period of  
22 time that we didn't either talk to each other or see each  
23 other, but to give you an exact date or timing I couldn't do  
24 that.

25 Q That's fair enough. How did he appear to you the

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1 first time you saw him after this incident?

2 A I was shocked, actually.

3 Q Why?

4 A He was walking worse than I should be walking as an  
5 old man. He just -- he wasn't good.

6 Q Did he appear to be in pain to you?

7 A Yeah.

8 Q You say you were shocked. Was it a marked change?

9 A Oh, yeah.

10 Q Describe it to me, sir.

11 A Well I mean you take a guy like Henry that's always  
12 been very active, moving around and you know if we would meet  
13 out at the football practices we'd be throwing the ball and --

14 Q This was before?

15 A Yeah. And when he came down and normally he would  
16 come upstairs to my office. My wife said, well Henry's down  
17 here. So I went down. And I said -- and usually he'd just  
18 walk in the house and walk upstairs. Because that's the way  
19 we are. And but he just was hurting.

20 I mean his -- you could tell he was hurt. And that  
21 -- you know, the first time that he told me, you know I said,  
22 "What the heck's wrong with you?" And so then we started  
23 going into it. It was obvious that he was hurting. And if --  
24 you can tell, I mean, I just came through a terrible episode  
25 myself, but -- being hit by a truck, but you know he was

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1 hurting.

2 Q And did your friendship continue over the years?

3 A Oh, yeah. Never had a --

4 Q And would you continue to see him from 2004 up to  
5 present?

6 A Sure.

7 Q Would you tell the Judge what you observed about him  
8 physically during that period of time, please? Did he  
9 continue to look like he was in pain to you? You're smiling.  
10 Go ahead and tell me, sir.

11 A Well he put a lot of weight on. And, you know,  
12 obviously that tells me one thing, that I can tell you  
13 personally, too. He just -- you could tell that he wasn't --  
14 when not around me even, he couldn't be doing much.

15 Q Okay.

16 A You know, or he wouldn't be in the physical  
17 condition that he appeared to be in. But as far as hurt goes,  
18 you know, hurt to me is, you know, how do I feel inside. Am I  
19 hurting bad? And you would see him grimace once and a while,  
20 but you know, you can't tell what another people -- another  
21 people -- excuse me, another person is feeling inside.

22 Q How about in terms of his personality? Did that  
23 change after the incident in November of 2004?

24 A Oh, yeah. I mean, you know, he wasn't jumping  
25 around and being happy.

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1 Q I mean this is really a guy that before this  
2 incident was literally jumping around and being happy?

3 A He was very -- had a great personality.

4 Q How has he changed?

5 A Well, I mean, to me I think he tries to make me feel  
6 like that he's feeling great. But you can tell he's not.

7 Q How can you tell that?

8 A Well, I mean he doesn't move good. He doesn't have  
9 good conversations. You know, I mean we usually would sit  
10 down and talk for, you know, a half-hour, 45 minutes and go  
11 over things and it just -- it just isn't the same.

12 Q Have you noticed changes in his concentration and  
13 his mental abilities?

14 A I, you know, that's a hard question. Henry's always  
15 been pretty sharp, very sharp. I haven't got into real detail  
16 with him on any --

17 Q Deals?

18 A Yeah. Or mathematical things. You know, my  
19 questions to him are "How you feeling?" "How's Maria?" And  
20 then we'd talk about the kids and, you know.

21 Q What changes have you seen in Henry's life as a  
22 result of this incident at the Palms hotel in 2004?

23 A Well I --

24 MR. WARD: Object, calls for speculation.

25 MR. BAKER: I've asked what he'd seen, Your Honor.

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1 MR. WARD: That's --

2 THE COURT: It's pretty open-ended.

3 MR. WARD: And it's argumentative.

4 THE COURT: It's a pretty open-ended question as long as  
5 the witness isn't speculating I think he can answer.

6 Overruled.

7 MR. WARD: May I for the record simply explain why I'm  
8 objecting, Your Honor?

9 THE COURT: Sure.

10 MR. WARD: I don't object to his asking what Henry was --  
11 what Mr. Rodriguez was feeling. But his question was, "How is  
12 he feeling as caused by the incident at the Palms Hotel?"  
13 That's the basis for my objection to his question.

14 THE COURT: That's not what I recall the question was.

15 MR. BAKER: I think I asked what changes had he seen in  
16 his life since the incident at the Palms Hotel in 2004.

17 THE COURT: Then --

18 MR. BAKER: I think that was my question, and I'll  
19 happily make that my question.

20 THE COURT: You may answer the question.

21 THE WITNESS: Okay. May I have the question?

22 BY MR. BAKER:

23 Q What changes have you seen in Henry's life since the  
24 incident at the Palms Hotel in 2004?

25 A Well, as far as my connections with Henry or

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1 associations with him, you know, he's just not Henry. And  
2 he's just -- he's not active. He's, you know, limping and  
3 that's not him. You know, and he doesn't really like --  
4 there's not much of a -- I don't know. It just -- he just  
5 isn't him.

6 He just -- he -- just appears to be in pain when  
7 he's walking and like he even makes me feel at times that he  
8 might even be embarrassed because he's not able to get up and  
9 go do things. I mean, he just isn't him. I wish I could give  
10 you a better definition, but he just isn't.

11 Q I think your inability to say it might be saying a  
12 lot.

13 Coach, let me ask you a question. If it was  
14 suggested to you that Henry is faking this, and that he's  
15 living this life in order to get money from some lawsuit, how  
16 would you respond to that?

17 A Kindly. I would say that's -- I would say --  
18 there's no way Henry wants to be the way he is today. I mean,  
19 he's a young man. Me, I'm different, you know. I don't -- I  
20 just -- there's no way that he would want to be limping around  
21 and -- no.

22 Q If someone would suggest that he's faking for the  
23 money --

24 A No. It's bull. Oh, excuse me. I'm sorry.

25 Q You scared me for a second. I have no further

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1 questions, Your Honor.

2 THE COURT: Okay.

3 THE WITNESS: I'm sorry, Your Honor.

4 MR. BAKER: No. No. You stopped right in time.

5 THE COURT: Mr. Ward?

6 MR. BAKER: Oh, would you like me to move my stuff?

7 MR. WARD: That's what I was thinking.

8 CROSS-EXAMINATION

9 BY MR. WARD:

10 Q Tavaglione.

11 A Tavaglione is --

12 Q Tavaglione.

13 A Yeah, but you can --

14 Q No. No. I'm trying to trying to say it right.

15 A It's actually Tavaglione.

16 Q Tavaglione.

17 A That's where the g comes in.

18 Q Okay. Tavaglione? Is that close enough.

19 A Just anything. It doesn't matter.

20 Q Okay.

21 A I've been called by everything.

22 Q Okay. You've known Mr. Rodriguez for over 20 years?

23 A Yes, sir.

24 Q And you've been friends, right?

25 A Yes, sir.

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1 Q You like him?

2 A Yes.

3 Q He likes you?

4 A Well, I would hope to think he does.

5 Q And the way you got to know him was through the  
6 sports of the kids?

7 A Yeah. That was pretty much and -- I mean, I had  
8 seen him at real estate functions, but you know, then the kids  
9 were there and he was at practice and that's how we got to  
10 know each other better.

11 Q And he had a -- he had a child that was at least one  
12 that was playing football?

13 A Yes.

14 Q On your team?

15 A Well, I was very involved with the team. Yeah.

16 Q Okay. And so you'd get together with that team?  
17 You'd get together with Mr. Rodriguez with events related to  
18 that team?

19 A At the games?

20 Q Anywhere.

21 A Sure.

22 Q Okay. And now, Mr. Rodriguez's son who was involved  
23 was a foster child. Is that correct?

24 A You know, I believe so. But I never -- you know, he  
25 had two or three different. And I wasn't sure if he had a

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1 child or not himself.

2 Q Okay.

3 A I didn't.

4 Q Okay.

5 A But I know he did have a foster child.

6 Q Okay. But your situation with Mr. Rodriguez was not  
7 so close that you knew whether those kids that were playing  
8 football were his foster kids or his actual kids. Is that  
9 correct?

10 A Well, I know one of them definitely was --

11 Q Okay.

12 A -- a foster.

13 Q But how about the other two?

14 A Well I don't know if there were two or another  
15 one --

16 Q All right.

17 A But I'm not sure about that one.

18 Q Okay. And when is the last time Mr. Rodriguez had  
19 foster kids?

20 A I don't have that answer.

21 Q No idea?

22 A If I told you it would be a guess.

23 Q Okay. I'm not asking you to guess, I'm just trying  
24 to find out what you know and what you don't know.

25 A Okay.

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1 Q And you don't know. Is that correct?

2 A I don't know the exact date.

3 Q Was there a time that Mr. Rodriguez gained weight?

4 A From my observation. Yes.

5 Q All right. And when was that?

6 A Well, I really never noticed his large gain in  
7 weight until after the accident.

8 Q Okay. So your understanding was that he didn't gain  
9 weight until after the incident. Is that correct?

10 A Well, I would say that that's probably partially  
11 true. I also would like to comment that, you know, most of us  
12 sometimes will put on a little weight and then lose it again.  
13 So, but the most intense weight period that I have noticed has  
14 been since he's definitely not been doing anything.

15 Q Okay.

16 A Since the accident.

17 Q Now, how tall do you think Mr. Rodriguez is?

18 A He's -- I'm not a specialist but I think that he's  
19 probably about five foot, nine or something like that.

20 Q And what do you think he weighed about the time of  
21 this accident?

22 A I can't answer that question.

23 Q Do you have any guesses?

24 A No. I'd rather not.

25 Q Okay. But you think that he gained weight for the

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1 first time that you experienced after this incident.

2 A Largest weight that I've ever seen that he's had has  
3 been after the accident.

4 Q Do you think Mr. Rodriguez, before this accident,  
5 could have weighed as much as 225 pounds?

6 A You know, I -- I mean --

7 MR. BAKER: Your Honor, it's obvious --

8 THE WITNESS: -- there's always that possibility.

9 MR. BAKER: It's obviously asking him to speculate.

10 THE COURT: I understand. Agreed. Sustained.

11 BY MR. WARD:

12 Q What I'm trying to find out is you said that he  
13 gained weight. You said that he gained weight after the  
14 accident. So I'm just trying to find out what you thought  
15 that he would have weighed before the accident. Are you  
16 telling you don't have any idea?

17 A Well, I'm not guessing what somebody's weight is.  
18 All I can tell you is he was fit. He had more weight after  
19 his accident, considerably. And you know, I never looked at  
20 any friend whether they're heavy or not heavy. All I'm saying  
21 is that after the accident he couldn't do anything. He  
22 therefore put on a lot of weight. And I could tell he put a  
23 lot of weight on. I mean, I've had the same problem.

24 Q Okay. Now, you weren't the one who introduced  
25 Mr. Rodriguez to real estate. Is that correct?

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1 A No.

2 Q He was buying some houses before he met you, or  
3 before you met him?

4 A Yes. I believe he was. When I met him that's what  
5 he was doing.

6 Q Sure. And -- but somewhere along the line you got  
7 together with him for real estate investments. Isn't that  
8 true?

9 A When you say got together with him, sir, what are  
10 you implying?

11 Q Well, I'm not implying anything.

12 A Okay. Well, I'm sorry, what are you asking of me?

13 Q Here's what -- let me ask it another way.

14 You would from time to time go out with  
15 Mr. Rodriguez to look at houses?

16 A Yes.

17 Q I take it you did that more than once?

18 A Yes.

19 Q And I would -- would I be correct in assuming that  
20 sometimes Mr. Rodriguez would drive and sometimes you would?

21 A That would be true.

22 Q Okay. Most of these homes you looked at with him  
23 were single family dwellings right?

24 A Yes.

25 Q And how many houses do you suppose you looked at?

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1 A That would be hard.

2 Q More than five or ten?

3 A Yes.

4 Q Okay. Fifty?

5 A Well, I would be guessing.

6 Q Yeah. I'm not looking for you to guess. I'm trying  
7 to get some --

8 A I can't give you an exact answer. All -- you know,  
9 if he'd call me up and want to go look at something, you know,  
10 or wanted to look at three or four in a day, you know, I'd  
11 just take the time to go with him and do it.

12 But how many times did he call me? I don't know.  
13 How many houses did I look at? I honestly want to tell you  
14 that I was doing million dollar construction jobs. And  
15 normally I wouldn't even, you know, take the time. But I  
16 liked Henry. I liked what he was doing and what he stood for.  
17 So I didn't mind taking the time to do it. So again, I never  
18 kept track of that kind of stuff.

19 Q Okay. When you would go look at a house, what would  
20 you look at? Would you kind of look at it -- first drive by  
21 the house and just look at the outside and see what it looked  
22 like?

23 A Well, that all depends. There were houses that I  
24 did just drive by with him. There were houses that we got out  
25 and walked through and some of that stuff.

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1           Q     Right.  So you would -- it would be more than one  
2 thing.  You might first look at it.  If you decided you didn't  
3 want to look any further, you just keep going.  If you decided  
4 you did want to look further then you'd get out of the car and  
5 go into the house?

6           A     Yes.  That's true.

7           Q     And you'd take a look at the general condition.  
8 Now, were you sometimes investing in real estate as well?  
9 Buying some house?

10          A     Individually?

11          Q     Yeah.

12          A     I didn't do that too much, because -- well, at the  
13 start when I met Henry I did that before, but my -- I had  
14 larger developments, you know, apartments and subdivisions,  
15 that type of thing.

16          Q     How would Mr. Rodriguez find these houses that you  
17 were going to look at?

18          A     Well, I don't know.  I would guess though --

19          MR. BAKER:  Your Honor, if he doesn't know then it's  
20 asking for speculation.

21          THE WITNESS:  I just don't know.

22          THE COURT:  Right.  Sustained.

23          THE WITNESS:  There's many ways.

24          BY MR. WARD:

25          Q     Let me ask you a different question.

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1           The number of times that you rode with Mr. Rodriguez  
2 in the car on the way to look at a house, the number of times  
3 you talked to Mr. Rodriguez about this, did you ever find out  
4 where he was getting these homes that you were looking at?

5           A     I couldn't really -- I really didn't pay attention  
6 to that part of it. He'd just call me and say I want you to  
7 look at this and give me your opinion.

8           Q     Did you ever tell him, here's a good place to find  
9 homes that you might want to consider?

10          A     I may have said that.

11          Q     What kinds of places would you tell him? Would you  
12 quote real estate brokers, internet, foreclosure sales, what  
13 kinds of things would you talk about?

14          A     We probably hit all of them.

15          Q     Okay. And when did Mr. Rodriguez have to stop  
16 having children that were playing on the football team that  
17 you were talking about?

18          A     In the -- you mean the dates?

19          Q     Years. Approximate years. I mean, like 20 years  
20 ago, ten years, five?

21          A     Somewhere between 15 and 20.

22          Q     So it was 15 or 20 years ago that you were seeing  
23 Mr. Rodriguez at these football games.

24          A     Yeah. That would be about right.

25          Q     So, you haven't been seeing him at the football

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1 events in the last 15 to 20 years.

2 A I've been to a few football games, but not like I  
3 used to.

4 Q Okay. How many times have you see Mr. Rodriguez at  
5 football events in the last ten years?

6 A In the last ten years? I don't know, you know, it  
7 would be a guess if I told you, but I don't know.

8 Q Not as many as before?

9 A No. Because I didn't go either.

10 Q Okay. So you weren't seeing him as often in the  
11 last ten years as you had been seeing him the ten years before  
12 that.

13 A Well you've got to bear in mind that the games were  
14 only one game a week, so --

15 Q Right. I'm not criticizing, I'm asking.

16 A I would say -- I'm not sure that I didn't see him as  
17 much, because he would stop by my house just to -- just as a  
18 friend to talk, so, I don't think that I would hang it on just  
19 seeing him at the football games.

20 Q How often per week or month or year would you see  
21 Mr. Rodriguez, in the last ten years.

22 A My door is always open and I don't keep track.  
23 People come and it's not like I have an appointment to meet  
24 them. They can come on over whenever they want to come over.

25 Q When -- at the time this accident occurred, where

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1 did Mr. Rodriguez live?

2 A Let's see -- I think at that time he was living in  
3 Nevada.

4 Q Okay. So at the time of the accident he was living  
5 in Nevada. Do you remember where?

6 A I don't know exactly if he was living in Nevada, but  
7 I believe that he was living in Nevada.

8 Q Okay. I'm just trying to find out to the best of  
9 your recollection.

10 A Okay.

11 Q Henry -- Mr. Rodriguez was your friend.

12 A Right.

13 Q You cared about him.

14 A Yeah, certainly.

15 Q And so it's your recollection that at the time of  
16 this event he was living in Nevada. Did he ever move back to  
17 California?

18 A I'm -- yes. I mean, to the best of my -- I don't  
19 know if he moved back, but I know that he was at his mother's  
20 and father's when he called me several times. I don't know  
21 that he legitimately -- legally moved back to California or  
22 not. I mean, he might have still been at a residence here,  
23 and was spending time in California because of his medical  
24 conditions.

25 Q All right. I'm not trying to get into where he had

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1 his driver's license or those kinds of things. I'm just  
2 asking generally when you would see him --

3 A And I --

4 Q -- where you understood that he was living.

5 A That was -- I know that he was at times in Nevada,  
6 at times in California. But where his residence was as far as  
7 legalities or whatever it is, I don't know.

8 Q And now, how many times did you actually invest with  
9 Mr. Rodriguez?

10 A Henry's deals were, you know, I was -- his deals  
11 were -- and I don't mean to be rude, were just things that,  
12 you know, if he wanted some investor on a quick deal or  
13 something then I would in -- you know, I would invest with  
14 him. You know, and there were, you know, little amounts. I  
15 don't even remember how much. I mean, maybe I'm a poor  
16 business man, but you know, a friend walks in and says he  
17 needs something I normally would just give it to him, without  
18 paper. And I would get in trouble with my wife about that,  
19 but that's the way it is.

20 Q Yeah, but what I'm trying to find out is how many  
21 times did you invest with him? Not how many different times?

22 MR. BAKER: Your Honor, I know that I spoke very briefly  
23 about [indiscernible] \*\*01:37:57.

24 THE COURT: Maybe so, but I think Counsel is entitled to  
25 explore this area.

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1 MR. WARD: Thank you, Your Honor.

2 BY MR. WARD:

3 Q Here's the question, and before we ask any further  
4 -- what I'm trying to find out, sir, is not how much money did  
5 you invest. I'm trying to find out how many times --  
6 approximately how many times you invested in Mr. Rodriguez's  
7 real estate investments.

8 A I wish I could give you an honest answer. I can't  
9 tell you. I could say ten, in my own heart know that maybe it  
10 was 15 or 20, or maybe -- you know, but I know it was quite a  
11 few.

12 Q Okay. And when you invested in properties would you  
13 actually go out and look at those properties or would you just  
14 rely on Mr. Rodriguez?

15 A I didn't look at all of them because I trusted him.

16 Q You looked at some of them?

17 A Yes.

18 Q Would it be fair to say that you did not have  
19 information about Mr. Rodriguez's financing?

20 A Financing as --

21 Q Finances.

22 A I know, but in regards to a specific plan or if he  
23 had a dollar or a million dollars?

24 Q Right.

25 A No. I really didn't care. I liked him. And my

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1 theory, as dumb as it may sound, was I've loaned out a lot of  
2 money to a lot of people and not got anything back. I've  
3 always got back what I gave Henry.

4 Q Oh --

5 A But I don't care if I get my money back. When I  
6 loan money, it's gone. And that way I'm not going to be upset  
7 about it, if I don't get it back.

8 Q I'm concerned there might -- maybe some  
9 misinterpretation. So let me try to explain, sir.

10 I'm not questioning whether you loaned him any money  
11 or why or anything like that. What I'm asking about is that  
12 you were asked on direct examination about his financial  
13 condition. About -- and you testified that you thought he was  
14 probably financially sound. He lived in a nice house,  
15 et cetera, et cetera, et cetera.

16 The reason I'm asking this question is I have a lot  
17 of close friends. I don't know anything at all about how much  
18 money they have. I don't ask them how much money do you make?  
19 I don't ask them how much they have in the bank. And I'm just  
20 trying to find out if that's the same with you, that you  
21 didn't ask Mr. Rodriguez how much money he had in the bank.  
22 You didn't have any personal knowledge about his finances.  
23 When you answered that you thought he was financially secure  
24 essentially what you're saying is he lived in a nice house.  
25 And you figured that was okay. Is that right?

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1           A     Well, in my own mind I felt that he was financially  
2     stable.

3           Q     Sure.

4           A     And based on our conversations that varied from one  
5     thing to another, I didn't feel that I had to ask a lot of  
6     personal questions.

7           Q     Right. And so you never asked to look in his  
8     checking account.

9           A     Never.

10          Q     And you never asked to look in savings account. And  
11     you never asked him how much he paid for his house. And you  
12     never asked him how many stocks he owned.

13          A     I don't know if I didn't ask how much he paid for  
14     his house, but I didn't ask any of those other questions.

15          Q     Okay. Well let me take out how much he paid for his  
16     house. What I'm asking, sir, is you didn't try to stick your  
17     nose into his financial business. Did you?

18          A     Well, I only stuck my nose into maybe asking the  
19     questions of how much are you paying for the house. What's it  
20     going to take to get it fixed up? And you know, what's the  
21     profits going to be out of it.

22          Q     Right, but --

23          A     And --

24          Q     I'm sorry.

25          A     That would be about all I would ask.

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1 Q Right. And that all relates to the purchase of an  
2 investment house. Right?

3 A Yeah.

4 Q Right.

5 A Of course.

6 Q What I was saying is you didn't ask about his  
7 personal financial information.

8 A No.

9 Q Right. And you don't have any solid opinions about  
10 his personal financial information. Isn't that true?

11 A I just -- I didn't feel that I had to ask.

12 Q I didn't think you would. But that's why I'm  
13 asking. Now, do you know when Mr. Rodriguez sold his last  
14 house?

15 A I don't. No.

16 Q Let me ask you this, if you found out that the last  
17 house that Mr. Rodriguez sold was approximately nine to ten  
18 months before this accident occurred, would you have any  
19 knowledge about that?

20 A Well he didn't tell me everything he did.

21 Q Right. So you wouldn't have any knowledge as to why  
22 he wasn't buying houses for nine to ten months before this  
23 accident occurred. Isn't that true?

24 A Yeah. I don't know.

25 MR. WARD: Thank you. No further questions.

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1 THE COURT: Redirect?

2 MR. BAKER: No further questions, Your Honor.

3 THE COURT: Very well, with the thanks of the Court, sir,  
4 you may be excused. You may be excused.

5 THE WITNESS: I'm sorry.

6 THE COURT: Yeah.

7 THE WITNESS: Thank you very much.

8 THE COURT: Safe trip.

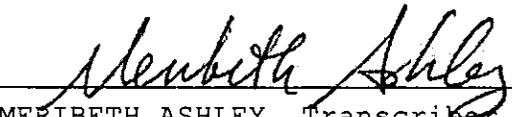
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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

  
MERIBETH ASHLEY, Transcriber

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

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**APPELLANT'S APPENDIX**  
**VOLUME 11**

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**ATTORNEYS FOR APPELLANT**

CHRONO INDEX

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83.	Partial Transcript- Bench Trial (Dr. Louis Mortillaro)	11/9/10	15	2895 - 3004
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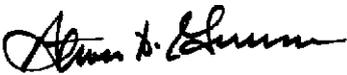
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DISTRICT COURT  
CLARK COUNTY, NEVADA

  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
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Plaintiff, )  
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v. )  
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FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MONDAY, NOVEMBER 1, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. RUSSELL SHAH  
VOLUME I

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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None

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None

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1 MONDAY, NOVEMBER 1, 2010 AT 9:11 A.M.

2 [Designation of record begins at 9:11 a.m.]

3 THE MARSHAL: Please come to order. Department 10 is now  
4 in session, the Honorable Jessie Walsh presiding.

5 MR. WARD: Good morning, Your Honor.

6 MR. BAKER: Good morning, Your Honor.

7 THE COURT: Good morning. Please be seated. Okay.

8 We're back on record. Looks like everybody is here. And our  
9 next witness is.

10 MR. BAKER: Is Dr. Russell Shah, Your Honor.

11 THE COURT: Is Dr. Shah?

12 MR. BAKER: Yes, Your Honor.

13 THE COURT: Dr. Shah, would you please stand and raise  
14 your right hand to be sworn by Madame Clerk?

15 DR. RUSSELL SHAH, PLAINTIFF'S WITNESS, SWORN

16 THE CLERK: Please be seated, stating your full name,  
17 spelling your last name for the record.

18 THE WITNESS: Sure. Russell Jayendra Shah,  
19 R-U-S-S-E-L-L. My middle name is, well, Jay. And the last  
20 name is Shah, S-H-A-H.

21 DIRECT EXAMINATION

22 BY MR. BAKER:

23 Q Doctor, good morning. How are you feeling?

24 A Good.

25 Q How's your foot?

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1 A Much better, thank you.

2 Q It's my understanding you have a ripped Achilles  
3 tendon?

4 A That's right.

5 Q At any time you feel like you need to -- I don't  
6 know if you want to stretch a ripped Achilles tendon. But if  
7 you need to move or get comfortable, please just ask the  
8 Judge.

9 A I'll be okay. Thank you.

10 THE COURT: Ouch. I would say so. Just let us know if  
11 you need a break, sir.

12 THE WITNESS: Sure, absolutely. Absolutely.

13 BY MR. BAKER:

14 Q Doctor, would you quickly -- well, not so quickly,  
15 would you take the Judge through your education?

16 A Sure. I'm sorry. I'm a neurologist practicing here  
17 in Las Vegas. I went to Long Beach State University, and then  
18 I went down to the Caribbean in the mid-1990s, down at the  
19 American University of the Caribbean. Then I went to do some  
20 research for about a year, and that was in Chicago. Then I  
21 went to Northwestern University of Evanston Hospital, and I  
22 decided to become a psychiatrist.

23 And then in the middle of that, I met a neurology --  
24 a neurologist and Nick Vick [phonetic]. And he inspired me,  
25 and I became a neurologist. And instead of switching from

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1 Northwestern, I went to Rush University, which is a great  
2 program in neurology.

3 And then after three years of neurology residency, I  
4 decided to do a fellowship, and I did in electro- -- clinical  
5 neurophysiology, which is actually EMG's and epilepsy.

6 So I did my fellowship there, and then I did a  
7 couple months in critical care neurology at UCLA, because I'm  
8 from Los Angeles and I wanted to come back. And my wife was  
9 practicing there.

10 Q What type of doctor is your wife?

11 A She's a nephrologist. She's was actually a year  
12 ahead of me. So she already had a job a Santa Monica UCLA.  
13 And then, after about a year in the first group, which was  
14 private practice neurology and neuro rehab, which was part of  
15 UCLA -- it was a brain injury rehab unit at Daniel Freeman at  
16 Englewood, California. That's my first. And I was employed  
17 by the group of physicians, and then they somewhat broke  
18 apart.

19 And I went into private practice in 2001, just before  
20 9/11. And then I got very busy in practice, and I was a  
21 hospitalist neurologist for the next six years. And in the  
22 meantime, in 2004, I was trying to do my EMG subspecialties.  
23 And I started coming into the Las Vegas market in 2004. And I  
24 was going back and forth for five years. And I finally closed  
25 down my Long Beach office and, completely, I'm out as of a

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1 year-and-a-half ago. And my brother is here. He's a  
2 cardiologist in town. So I decided to come out here.

3 Q Your parents must be not proud at all.

4 A Yeah, they --

5 Q Your brother is a cardiologist. You're a  
6 neurologist, and you're married to a nephrologist.

7 A You should ask my dad. He says: Never educate kids.  
8 They never talk to the family. They just keep working, so --  
9 so he just wants us to go by a liquor store or something --  
10 totally --

11 Q Okay. I'm sorry for interrupting you. I was just  
12 impressed.

13 A That's all right. So I'm a full-time practice  
14 physician here in the Las Vegas area, right here in Charleston  
15 and between Rancho and Valley View. I have my own office, and  
16 it's building up and we're excited, and very busy actual  
17 practice.

18 Q As part of being a neurologist, do you perform EMG  
19 and nerve conduction velocity tests?

20 A Yes, actually, that's my subspecialty. And I've  
21 slowed down. I only do about two or three procedures a day  
22 now. I used to do quite a few at multiple locations,  
23 hospital, you know, just -- but that's actually the bread and  
24 butter of neurology. We do nerve and muscle testing.

25 Q And as a neurologist, you're trained and familiar

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1 with the care and treatment of RSD, Complex Regional Pain  
2 Syndrome, Causalgia, and other neurologically mediated  
3 pathologies?

4 A That's correct. Yeah, that's part of the training.  
5 Yes, absolutely.

6 Q And you're a treating physician for Enrique  
7 Rodriguez?

8 A I have been for quite some time now, since 2006.

9 Q Many years now.

10 A More than four years. That's right.

11 Q And you know Enrique.

12 A I know him very well, yes.

13 Q And you've reviewed other doctor's medical records  
14 in terms of your care and treatment of Enrique Rodriguez, is  
15 that correct?

16 A I have, yes.

17 MR. BAKER: At this time, Your Honor, I'd like to admit  
18 him as a treating physician but also qualify him as an expert  
19 in neurology, neurologically mediated diseases, those  
20 diagnostic tests to determine neurologic injury and related  
21 matters.

22 THE COURT: Any objection, Mr. Ward?

23 MR. WARD: Your Honor, I don't have any objection to his  
24 expertise, his qualifications. I don't have any objection to  
25 admitting him as an expert as a treating physician. He was

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1 not disclosed as an expert in this case. I object to anything  
2 that falls under the routine expert disclosure.

3 MR. BAKER: Your Honor, that's the argument that we've  
4 been making throughout trial.

5 THE COURT: Right. But, Mr. Ward, your objection is  
6 noted for the record.

7 MR. BAKER: And do you want a standing objection or are  
8 you more comfortable objecting each time? I mean I'm very  
9 happy to stipulate to a standing objection.

10 MR. WARD: I don't care. I just want to make sure I put  
11 it on the record.

12 THE COURT: I understand. The objection is noted for the  
13 record. The motion is granted.

14 MR. BAKER: Thank you, Your Honor.

15 BY MR. BAKER:

16 Q Now you've been treating Enrique, as you said, for  
17 the last several years, is that right?

18 A Yes, since about -- more than four years now.

19 Q And you're aware that before he saw you, he went to  
20 see a doctor named Dr. Ferrante in Los Angeles?

21 A Yes, he did.

22 Q And Dr. Ferrante came up with a differential  
23 diagnosis of complex regional pain syndrome? Or actually, at  
24 that time --

25 MR. WARD: Objection, leading.

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1 THE COURT: Sustained.

2 BY MR. BAKER:

3 Q Did Dr. Ferrante come up with any sort of diagnosis  
4 on a differential basis?

5 A Yes. One of the differentials in his thought was  
6 that the patient had symptoms consistent with RSD, which is  
7 Reflex Sympathetic Dystrophy.

8 Q He sent him out to a Dr. Miller?

9 A Yes, he did.

10 Q Did Dr. Miller perform an examination?

11 A Yes, he did.

12 Q Can you explain to the Court what Dr. Miller's  
13 findings were?

14 A Sure. Dr. Miller actually had made the diagnosis of  
15 complex regional pain syndrome based on criteria. There are  
16 six criteria. The patient, at that time, had five of the six  
17 criteria. With regard to the left knee, Dr. Miller said that  
18 the skin was glossy. There was swelling with edema. There  
19 was decreased hair loss. There was hypersensitivity to touch,  
20 and also that there was cold sensitivity to temperature.

21 So there are -- complex regional pain syndrome has  
22 different ways of diagnosing the --

23 Q Uh-huh.

24 A -- disorder, because there is no lab test they can  
25 just draw. It's a clinical diagnosis. So he actually

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1 examined the patient. He hit the criteria. When I saw him,  
2 he actually looked like he had that also, except he was  
3 missing one other criteria, but he had already been treated.  
4 So I had seen him just a few months later. But he still  
5 looked like, right away, wow, this looks really bad. So --

6 Q Now this is a clinical diagnosis by Dr. Miller?

7 A It is a clinical diagnosis, yes.

8 Q And just for the record, at that time, did Henry  
9 evidence allodynia, which is everything causes you pain?

10 A Yes.

11 Q And hyperesthesia, which is pain unrelated or  
12 greater than the trauma?

13 A Absolutely.

14 Q Skin changes, is that correct?

15 A That's right. He had skin changes too.

16 Q Were there hair changes as well, hair pattern  
17 changes at that time?

18 A Right, there was hair loss.

19 Q And a difference in temperature, is that correct?

20 A Right. He had cold sensitivity, right.

21 Q And Dr. Schifini spoke to us about the temperatures  
22 because it's sympathetically mediated disease, RSD?

23 A That's right. One of the components of RSD is the  
24 sympathetically mediated. That's right. There are other  
25 components too.

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1 Q The Judge understands, but we still need to make a  
2 record.

3 A Sure.

4 Q Would you go through and explain what the  
5 sympathetically mediated component observed by Dr. Miller was?

6 A Right. So the sympathetic would be when a person  
7 has hyper- -- the sympathetic nervous system is the fight or  
8 flight reaction of your body. And you get -- you'll see the  
9 adrenaline pump on your heart. You'll see a person diffusely  
10 sweating.

11 Q Dry mouth?

12 A I'm sorry?

13 Q Dry mouth?

14 A Dry mouth, sweating, but you'll also -- you'll see  
15 changes of color and -- to the actual blood vessels. They'll  
16 constrict or dilate. The sympathetic nervous system is  
17 necessary for pain modulation. So a person, you just even  
18 touch the skin, they jump, and they're very upset. You can't  
19 even examine the person, and you can't even touch them. And  
20 they won't even let anybody touch them. And the vessels, the  
21 blood vessels get affected by the sympathetics, because they  
22 constantly constrict or -- and or dilate to a degree that  
23 doesn't even make sense as to like how you would actually be  
24 able to -- you couldn't reproduce that. And it just has to do  
25 with the whole nervous system being hyper or over -- just

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1 totally disregulated and just constantly firing. That's the  
2 worst part of complex regional pain syndrome.

3           When I was trained, it was Reflex Sympathetic  
4 Dystrophy. They keep changing the name, so -- because they've  
5 tried -- actually, in 1994, they actually -- 1995, mid-1990s,  
6 that's when they actually started making all the different  
7 categories. So it was very -- even difficult even by program  
8 director back in the '90s when trying to define what exactly  
9 is complex regional pain syndrome. We just knew it when we  
10 saw it.

11           Q     Is it a painful condition?

12           A     I would -- yeah, it's very painful.

13           Q     And does medical literature suggest that the pain is  
14 over what you would expect from the mechanism of injury?

15           A     Right. I mean it's basically a person has some  
16 underlying pathology, some kind of injury. But you just --  
17 you know, you can't even examine it. Like they have a bad  
18 joint, you can't even touch it, because they won't let you  
19 touch it. It's just so painful to touch it.

20                     Actually, I had one patient -- I'll just tell you.  
21 I couldn't -- I had -- he wouldn't let me come within four  
22 feet of him. That was at Tri-City Hospital down in Long  
23 Beach. And I -- and she -- and it was a post -- it was right  
24 after surgery. She had surgery, and then she wouldn't even  
25 let me touch her. It was a consultation, and I couldn't even

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1 come close to her.

2 MR. WARD: I would object and move to strike examples of  
3 other patients unless they directly relate to this patient.

4 THE COURT: On what basis since this is a bench trial?

5 MR. WARD: Because it's irrelevant, and because  
6 everything is taking a lot longer, and we're trying to get  
7 done. It is the undue consumption of time.

8 THE COURT: Mr. Baker.

9 MR. BAKER: Your Honor, that's not really a basis for an  
10 objection, but I'll assume the hat.

11 THE COURT: Overrule the objection for the record.

12 Let's move on.

13 MR. BAKER: Thank you, Your Honor.

14 BY MR. BAKER:

15 Q Now that was a clinical diagnosis, is that right,  
16 made in the office?

17 A That's correct.

18 Q And it met the AMA guidelines, or did it not, for a  
19 person having Reflex Sympathetic Dystrophy at the time?

20 A I don't know if there was an AMA guideline, but it  
21 met the guidelines.

22 Q Okay.

23 A Yes.

24 Q And do you concur with Dr. Miller's diagnosis of  
25 RSD, at least at that time?

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1           A     Yeah. I actually -- I wanted the guy to get  
2 treated. Yes.

3           Q     Did you agree with that diagnosis when you found  
4 that Dr. Miller had come to a diagnosis of RSD?

5           A     Oh, yes, absolutely.

6           Q     Now there's also a matter of diagnostically, in  
7 terms of lumbar sympathetic blocks determining the existence  
8 of an RSD, is that true?

9           A     One component of RSD. That's correct.

10          Q     Is that the sympathetic component?

11          A     That's correct.

12          Q     Did Dr. Miller perform a lumbar sympathetic block on  
13 Enrique Rodriguez?

14          A     Yes, he did.

15          Q     Could you explain to the Judge the procedure and  
16 what the results of the procedure were?

17          A     Actually, I can't tell you the procedure or what he  
18 exactly does. All I know is he does a procedure that blocks  
19 the sympathetic discharges in the low back area, and the  
20 patient did well with that.

21          Q     And what does doing well mean in terms of a  
22 diagnosis of RSD?

23          A     That means that one of the components of the complex  
24 regional pain syndrome, RSD, one of the components of the  
25 sympathetic, the pain, the burning sensation, the -- is now

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1 alleviated. It's just -- it's a good thing.

2 Q And were there other changes that were noted? Did  
3 he have a temperature response to the sympathetic nerve block?

4 A I cannot remember.

5 Q It's already in evidence. It's not important at  
6 this point.

7 A That's fine. I can't remember everything. I just  
8 remember he had a very good response to that.

9 Q Is there a diagnostic and a therapeutic component to  
10 the lumbar sympathetic block?

11 A Diagnostic is if, obviously -- well, all procedures,  
12 I mean if it works, it's diagnostic too. I mean that's in any  
13 procedure. Therapeutic, of course, it's therapeutic, because  
14 the patient is getting better. I mean you're going to do the  
15 block on pretty much every -- I mean a lot of people get the  
16 block. I mean that's something that we just do.

17 Q So based upon the fact that the block itself is  
18 efficacious, did Dr. Miller cement his diagnosis of RSD for  
19 lack of a better word?

20 A Yeah. No. I mean everything was very consistent  
21 with that diagnosis. I thought -- I agreed with it. I said  
22 okay, he's -- we got, you know, at least rid of one component  
23 of it. That's good. Now I mean it's all correct.

24 Q When is the first time -- and why don't you grab  
25 Exhibit 3 behind you? It's Exhibit Binder 3. Is Bates Stamp

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1 Number 80 -- or Bates Stamp Number 76 your first visit?

2 THE COURT: Which exhibit?

3 MR. BAKER: I'm sorry, Your Honor. It's Dr. Shah's  
4 records, Exhibit Number 49, Exhibit Book 3.

5 THE COURT: Thank you.

6 MR. BAKER: Bates Stamp Number 76.

7 BY MR. BAKER:

8 Q Is that your first office visit?

9 A That's correct.

10 Q What was your understanding of the mechanism of  
11 injury that brought Henry to your office?

12 A Oh. Well, it's basically a history and plus all the  
13 other history. But he was at the Palms Casino, and a lady  
14 dived to get some kind of things that they were throwing in a  
15 football and hit Mr. Rodriguez on the left knee leg area, and  
16 he kind of fell backwards onto other people. And at that  
17 time, he had excruciating pain. He was in a lot of pain. And  
18 he -- the ambulance came and picked him up from the casino,  
19 and they took him to the hospital on that day. And he had a  
20 whole bunch of different complaints. But I think the  
21 overwhelming one was the actual left knee was it looked like  
22 it was really bad.

23 And then he went to the emergency room, and they  
24 gave him -- he couldn't walk, and they had to give him  
25 crutches. So he had really injured his -- it looks like they

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1 were focused on the left knee.

2 Q Now you're not an orthopedic knee expert, is that  
3 right?

4 A No, I'm not.

5 Q But you do treat patients with RSD arising from the  
6 lower extremities?

7 A Yes, I have.

8 Q And would you inform the Judge what the medical  
9 literal suggests with respect to the areas of your body which  
10 are most likely to develop RSD upon a traumatic event?

11 A I mean I've seen areas on all -- I don't know which  
12 areas, but joints get injured quite a bit. And those are the  
13 ones I've seen and, of course --

14 Q The extremities?

15 A -- hand. And hands. Yeah, extremities and -- yeah,  
16 usually -- yeah, I mean I've seen one full body RSD case.  
17 I've seen one RSD of the ears. But by far, it's always joints  
18 and the hands.

19 Q And RSD can proliferate through your body?

20 A Yes, it can. It can spread.

21 Q And that's something you want to avoid, is that  
22 correct?

23 A Yes.

24 Q Because you don't want pain through your whole body?

25 A That's correct, yes.

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1           Q     Is therapy recognized as the best modality to  
2 prevent the proliferation of RSD?

3           A     I don't know if it's -- I mean it's the first line  
4 of treatment right away. Everybody -- I don't know if it's  
5 the best line, but I -- it responds to a lot of mobili- --  
6 immobile -- no. Mobilization means movement and physical  
7 therapy. So a lot of therapy is supposed to be done right  
8 away, and pain medications should be given to keep the person  
9 very flexible. You don't want to immobilize.

10          Q     Do you have an opinion whether Henry currently  
11 suffers from a neurologically mediated pain disorder in his  
12 left leg?

13          A     The RSD.

14          Q     Well, does he have RSD now?

15          A     Yeah, he has -- he still has complex regional pain  
16 syndrome. He still has it. Once you have it, it doesn't go  
17 away. What happens is at the beginning, you would try to get  
18 him into remission. And if you don't get him into remission  
19 within 90 days, then the chance of getting him into remission  
20 is extremely poor. That means it just goes away. Basically,  
21 the pain goes away. Is he going to get better by himself?  
22 And so, you have -- there's a time amount. And right now,  
23 he's been having it for way over four years since I've known  
24 him. So he basically has to get treatment now for it. He's  
25 not going to make remission spontaneously. That's in --

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1 Q He --

2 A -- the literature. That's pretty much accepted.

3 Q So is it your opinion to a reasonable degree of  
4 medical probability that as we sit here today, Henry suffers  
5 from complex regional pain syndrome?

6 A Yes.

7 Q Okay. Now at a point in time, it was called RSD,  
8 and now it's being called complex regional pain syndrome. So  
9 could you explain to the Judge what the reason was for that  
10 change?

11 A Okay. So there were -- because this is such an  
12 unusual devastating kind of process that occurs, and every  
13 field of medicine gets into it. Now keep in mind, a  
14 neurologist first saw it. And one of the few doctors -- an  
15 orthopedic doctor starting seeing it.

16 Pain management started out in the '80s as a  
17 subspecialty. So they started dealing with it because there's  
18 big -- lots of pain. So you have to understand there's a lot  
19 of different fields of medicine looking into this. And at the  
20 actual term, just to let you know, is complex regional pain  
21 syndrome, because they wanted to just get a broad -- there  
22 were so many subtypes and so many different subspecialties in  
23 medicine making the same diagnosis with different terminology  
24 that they decided let's just call it complex regional pain  
25 syndrome. And to make sure everybody is happy, they actually

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1 made subtypes of RSD and Causalgia. And they also have a  
2 third type now, type three. But they've done that just so  
3 that everybody is happy, that we'll have one name for this  
4 entire process.

5 And so, if it's complex regional pain syndrome --  
6 and he's the symptoms of the classic. So he's got type one,  
7 which is complex regional pain syndrome, Type One RSD, which  
8 is the subtype, and then there's type two and then there's a  
9 type three. And it just has to do with different features of  
10 what we find on his clinical exam.

11 Q Are you aware that Dr. Schifini performed a lumbar  
12 sympathetic block as well?

13 A Yes.

14 Q And are you aware that there was no reduction in his  
15 pain after Dr. Schifini's lumbar sympathetic block?

16 A Yes, I was.

17 Q How was that significant to you with respect to  
18 whether or not now we're dealing with an RSD or a complex  
19 regional pain syndrome?

20 A Right. He has the complex regional pain syndrome,  
21 RSD. It's the same thing. It's just that he -- you know,  
22 they -- there procedures of stopping the sympathetic is one  
23 component. You like to try to stop that. They've done a good  
24 job. There's no more treatment for that. I think the problem  
25 lies in there's a whole bunch of tissue information. There's

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1 a whole bunch of pathways that get disrupted. Actually,  
2 there's like multiple. And there's a whole bunch that they  
3 actually don't know about, but there's a hypothesis.

4 But so you want to try to get rid of a sympathetic  
5 one, because that's very painful. But I think the classic  
6 one, A evidence -- type A evidence is the spinal cord  
7 stimulator. That's the one now that he would need. And  
8 that's treatment of choice from what's accepted right now.

9 So I mean the sympathetic is good. It's -- you got  
10 rid of one, and I think it was a good thing. But I think that  
11 he's not going to benefit from that type of treatment modality  
12 anymore. You can do as many sympathetic blocks as you want.  
13 You're not going to get anymore response out of that. He's  
14 still having a lot of pain. You just get the other -- you  
15 just get the treatment that he needs.

16 Q And you're aware that Dr. Schifini placed a  
17 temporary pain stimulator in Henry?

18 A Yes, I am.

19 Q What was the result of the temporary pain  
20 stimulator?

21 A I think he had a 80 to 100 percent relief of  
22 reduction of pain. He had 80 percent reduction of pain I  
23 believe, and he had -- he was looking at two components.  
24 There's the pain reduction, and I think it was 80 or 100  
25 percent. And there was another component, and it was 80 or

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1 100 percent. One was 100 and one was 80. So it was  
2 incredibly good.

3 Q If I --

4 A And that was a good response.

5 Q If I suggested to you that it was 100 percent  
6 reduction of pain in the knee, immediate 80 percent reduction  
7 in the back --

8 A Right.

9 Q -- but then the back didn't have long-lasting  
10 relief, would that be consistent with your review of the  
11 records?

12 A Yes, that's -- yeah, that sounds about right. And I  
13 remember it was 80 to 100 percent, and I thought hey, this was  
14 really good. And obviously, it worked, so that was really  
15 good. So I think that was in 2007. I mean they did that a  
16 long time ago, and -- yeah.

17 Q And the fact that it worked is consistent with the  
18 fact that RSD was the pain causing mechanism?

19 A The -- I mean he has a diagnosis of complex regional  
20 pain syndrome, RSD, and the spinal cord stimulator works. And  
21 that is the mechanism, and that's why the spinal cord  
22 stimulator is working. That's correct.

23 Q Let me tell you why I'm phrasing my questions like  
24 this.

25 A Yes.

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1 Q Okay. Because you're looking at me fine. And the  
2 reason is is there's an expert that's going to come into this  
3 case that said he does not have a complex regional pain  
4 syndrome. And the way you're responding is it's obvious to  
5 you that there's a complex regional pain syndrome. How would  
6 you respond to a hired expert who came into this case and said  
7 he is not suffering from regional pain syndrome?

8 MR. WARD: Objection, it's argumentative.

9 THE COURT: Overruled.

10 BY MR. BAKER:

11 Q Do you understand my question?

12 A I understand the question. I'd be surprised if  
13 there was a guy like that that wants to come and tell you  
14 that. This was the first thing I saw from four feet, five  
15 feet away from this guy. It was obvious he was suffering from  
16 RSD. That was my first thought, and I just said oh, my gosh.  
17 This is such a mess.

18 And when I saw him on July 2006, I think I -- I was  
19 just stunned at how bad this was. I mean this look -- and  
20 right away in my mind, I was already thinking he's not going  
21 to get better. So I mean you always want to give hope to your  
22 patient --

23 Sorry, Mr. Rodriguez.

24 But I always want to give hope to people, because  
25 that's what you always do. But I mean he -- you -- he was

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1 really swollen up. He was very -- quite symptomatic. So I  
2 don't know -- I mean, I know that there's -- I mean, I've been  
3 his treating doctor for four years. I've been saying the same  
4 thing from the first note. I've always thought -- you know, I  
5 think I even wrote down -- I said we need to get a second  
6 opinion. We need to try anything, because this is looking  
7 really bad.

8 Q Well, let's go to -- now isn't that hope available  
9 in the form of a permanent pain --

10 A Spinal cord stimulator. Right, of course.  
11 Absolutely. Absolutely.

12 Q That's the hope for him right now?

13 A Right, absolutely. No, I mean he -- I think he -- I  
14 think the last -- I mean back in '06, in four months, I was  
15 already trying to refer him out. I mean I was his treating  
16 doctor. I was referring him out to everywhere just to try to  
17 get him taken care of. I mean --

18 Q Okay. Let's go to that first visit.

19 A Yes.

20 Q On that first visit, what did your examination note?

21 A I'm sorry?

22 Q What did your examination note?

23 A Well, I mean I did my own history, examined the  
24 patient.

25 MR. WARD: What page are we on and what Bates stamp?

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1 MR. BAKER: It is Exhibit 49, volume three, Bates Stamp  
2 Number 76.

3 MR. WARD: Okay.

4 THE WITNESS: Right. So on the first day I saw him --  
5 and I still remember the first couple of visits with this guy,  
6 Mister --

7 BY MR. BAKER:

8 Q Why do you remember it?

9 A You don't get -- you -- it's something that you just  
10 feel sorry for when you see a patient with these types of  
11 problems, because you know that they're in -- you're -- I've  
12 seen some bad situations. I mean it's a pretty bad disease  
13 process.

14 So when I saw him -- people have lots of different  
15 complaints, but if -- they don't even care about -- yeah, I'm  
16 sure he had back pain going down the right leg. He was having  
17 neck pain going down to the left shoulder, the right arm. He  
18 had developed carpal tunnel, because he was holding the  
19 crutches. And to be honest with you, all he was looking at is  
20 the left knee. And if I couldn't fix this left knee and the  
21 pain in the left knee region, he was never going to get  
22 better.

23 Q In your experience, is it unusual for a patient to  
24 focus their treatment on the area that's most painful?

25 A Absolutely. And he -- that's -- even I thought -- I

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1 said don't worry about everything else. I mean we're going to  
2 have to take care of this left knee.

3 Q Well, now that you brought it up, is it typical for  
4 doctors to focus their treatment course towards the most  
5 painful area that a patient is demonstrating?

6 A Yeah, I think most -- I would 99 percent of all good  
7 treating doctors that I've ever met focus on the main issue.  
8 You don't start -- you only -- and especially when it's  
9 totally overwhelming a patient.

10 Q So you've spoke about -- and did Henry seem totally  
11 overwhelmed by pain to you?

12 A Yes, he was.

13 Q Does that affect your mood and disorder -- your  
14 mood?

15 A It does.

16 Q And if Henry exhibited memory problems or problems  
17 with emotional ability or defensiveness, is that something  
18 that you've seen in people with RSD and complex regional pain  
19 syndrome?

20 A Yes, it does.

21 Q That behavior wouldn't surprise you?

22 A No. Actually, I expect it, I mean especially with  
23 the type of pain you get in RSD. Like I said, it's very  
24 common.

25 Q And there's a constellation of medicine that's also

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1       been prescribed to Henry to try to deal with this terrible  
2       pain, is that fair?

3           A       That's correct. He's been -- yeah, he has been  
4       prescribed some medications. And the key here is to get rid  
5       of the pain. I mean if we focus on getting rid of the pain,  
6       that would really make a difference in the quality of his  
7       life.

8           Q       And can those medicines also affect your emotional  
9       affect?

10          A       Yes, they can. They all have side effects and they  
11       all give you -- a lot of them give irritability and mood  
12       swings and just a lot of behavioral issues with these  
13       medications.

14          Q       Could it affect his ability to respond -- I don't  
15       want to say appropriately -- but to respond in an emotionally  
16       non-labile way to questions that are asked of him when he's on  
17       the stand. Do you understand my --

18          A       Yeah, I mean these medications really can affect you  
19       thinking wise, your behavior. I have seen that with  
20       Mr. Rodriguez. I have seen him -- I've actually seen him in  
21       my Long Beach office. So I actually saw him even before I  
22       closed down. I mean he -- you know, because --

23          Q       You ever see the movie "What About Bob?"

24          A       No, but I'm -- because remember, I'm -- when I was  
25       practicing here, I lived out -- actually, when I started

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1 seeing him, I actually lived in Long Beach. So I didn't  
2 actually live here. And I wanted him to go out. And I  
3 actually don't -- I know Dr. Miller and I know -- because I  
4 got trained also at UCLA. So I kind of know what's out here  
5 in Las Vegas and what's out there.

6 So I was actually saying gosh, you know, this is --  
7 I wanted him to come to the doctors -- I was more familiar  
8 with the doctors in the Long Beach area. So, obviously, I  
9 wanted him to come out and get the best of care, because I  
10 want -- you know. So I said Las Vegas is good, but, you know,  
11 obviously, there's ten times more people in southern  
12 California and there's more specialists. So we -- you know,  
13 so I was encouraging him to go, and I was giving him a list of  
14 names of all the -- because, you know, if you don't stop this  
15 process, it just doesn't get better.

16 Q You're talking about RSD?

17 A Right, complex regional pain syndrome. If you don't  
18 stop the process, it just does not get better. And so, you  
19 kind of know early on. I mean I've been doing this for a long  
20 time, seeing a lot of patients. You just know. Oh, my gosh,  
21 this guy, he's going to go into this way and this is the  
22 doctors that need to see him right away. And we're going to  
23 have to do a lot of therapy, which he did a lot of therapy. I  
24 encouraged him to do therapy. I said just keep doing therapy.  
25 Keep doing therapy. Don't worry. Max out. Do more therapy.

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1 And he did.

2 I mean I kept telling him. I wrote him  
3 prescriptions and said just keep doing therapy because just in  
4 case there's a way to get better. You know, don't worry about  
5 the literature. Let's go out of the literature. Let's just  
6 talk about trying to get you in remission. Let's -- you know,  
7 it's hope.

8 Q Now you spoke to us a little bit ago, and you said  
9 that you treated Henry for his hands, his arms, his neck and  
10 his back. Okay.

11 A That's correct. I did assess --

12 Q Let's --

13 A -- him right away, yes.

14 Q Let's kind of categorize, and I think that it will  
15 help us put things into perspective, okay?

16 A Sure.

17 Q Now you treated Henry for carpal tunnel syndrome, is  
18 that right?

19 A I did.

20 MR. BAKER: And, Your Honor, if I could approach the  
21 witness?

22 BY MR. BAKER:

23 Q I'd like to show you what's called F-P- -- well,  
24 it's Wellness Center Number 6.

25 MR. BAKER: And it's already been admitted evidence, Your

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1 Honor.

2 THE COURT: Very well.

3 BY MR. BAKER:

4 Q This is a record generated in the course of Henry's  
5 treatment in February of '05, about three months after the  
6 accident.

7 A Okay.

8 Q There's handwritten notations made on that  
9 particular exhibit. Do you see?

10 A Yes.

11 Q And could you read for the Judge, please, what it  
12 says right here? Begin with "also."

13 A "Also some numbness in right hand and fingers.  
14 Wondering if use of cane aggravates."

15 Q Okay. Is it fair to say that there's medical  
16 notations that Henry is suffering from numbness and tingling  
17 in his fingers as early as February of '05?

18 A Yes, February 1st, '05. Yeah.

19 Q And he noted himself that he wondered if it was  
20 being caused by the cane?

21 A Yes.

22 Q Can using a cane cause numbness and tingling in your  
23 fingers?

24 A Yeah, it's actually really common. A lot of people,  
25 they actually just put too much pressure on when they're

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1 trying to lift themselves up, and they get carpal tunnel.

2 So it's just because he's also gaining weight. He  
3 had already gained 70, 80 pounds by the time I saw him. That  
4 was on my first day. I was really concerned about that. And  
5 he's having a lot of immobility. He's not moving around. His  
6 left -- he's already gone through some procedures on his left  
7 knee. He's also trying to get out of bed, moving around, just  
8 kind of putting pressure. And he's going to have both sides  
9 eventually. I mean it's just a obvious thing. If you don't  
10 get rid of one problem, you get other problems that just keep  
11 coming on.

12 Q Is that a normal cascade?

13 A Yeah, it's actually -- it just -- we call it  
14 derivative injuries, just -- if you limp, you get the low back  
15 pain and then you get the neck pain. It just keeps  
16 progressing. You get depressed, you know. And if you're  
17 constantly putting weight to lift yourself help, the hands are  
18 not supposed to do that. You get the -- you get just an  
19 irritated nerve. That's all carpal tunnel is, just an  
20 irritated nerve. And the best thing to stop it is to stop the  
21 etiology, the cause of the problem, obviously.

22 In his case, he's got a multitude of problems. In  
23 addition to the cane, it's -- could be the weight gain now  
24 going on. In addition to that is the -- you know, the  
25 swelling in his body from complex. Swelling also causes

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1 carpal. So you have to actually address all issues. I  
2 started treating him right away. I just gave him wrist  
3 splints, which is the first line of treatment. It's actually  
4 22 bucks, and a lot of people use it. It's a very common  
5 thing. And I explained to him how to use it, and he tried it.  
6 Did not work for him. He did not get better. I documented  
7 it. And I just said well, you know, it's only your hands, you  
8 know. I hate to say that to somebody, but he also gained --  
9 remember, it's not the biggest problem he ever had.

10 None of the -- actually, none of the other issues he  
11 has is a big issue. It was actually the pain. Everything  
12 else is a derivative secondary issue. We've always focused on  
13 that. We know that he has other issues. He has pain going  
14 down his right leg. He's got -- obviously, he's got a  
15 positive EMG for that. He's got a pain going down the right  
16 arm. He had a negative EMG for that.

17 So, you know --

18 Q We'll get into that.

19 A Right.

20 Q Let me ask you this question first. Is it your  
21 opinion to a reasonable degree of medical probability that the  
22 complex regional pain syndrome was caused by the traumatic  
23 insult at the Palms Hotel?

24 A Yes, it was.

25 Q Now second, is it your opinion to a reasonable

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1 degree of medical probability that Henry has carpal tunnel  
2 syndrome?

3 A Yes, it is.

4 Q And is it your opinion to a reasonable degree of  
5 medical probability that that mechanism you described in using  
6 the canes, and changing the canes, and switching to crutches  
7 is the cause of that carpal tunnel syndrome?

8 A Yes.

9 Q And that is also, to a reasonable degree of medical  
10 probability, caused by the traumatic insult to his knee at the  
11 Palms Hotel?

12 A Yes.

13 Q Now let's talk a little bit about the nerve  
14 conduction velocity test that you did and the EMG that you  
15 did, because -- are those different tests or the same thing?

16 A They're totally different. So --

17 Q Would you start with the EMG, which you said was a  
18 normal test?

19 A Of the upper extremities, it was a normal study.  
20 That's right.

21 Q Explain just for the record again. She knows. But  
22 for the record, what the EMG tests for and what the  
23 significance of a normal study is?

24 A Sure, okay. So what I do, all patients get an EMG  
25 nerve conduction study. And EMG nerve conduction studies are

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1 the goal standard for physiologic testing of nerve and muscle.

2           Okay. So there's two components to all the EMG  
3 nerve -- and it doesn't make a difference what you call it,  
4 the nerve test or the muscle test, the needle study. You  
5 always do both components. We always start off doing the  
6 nerve testing on everybody. And the nerve testing is really  
7 straightforward. And sometimes technicians will do it, but I  
8 did it in his case.

9           Okay. So you'll stimulate by putting some  
10 electrodes, and then you'll receive some -- have a receiving  
11 electrode. You have a very small electrical stimulation.  
12 I'll turn it off to zero at the beginning. Do you feel  
13 anything? No. And then I'll just start to increase the  
14 stimulation. And you'll get a nice wave response that it has  
15 a norm lithology and a certain amplitude and latency, because  
16 you're looking at nerves. It's like electrical conduction.  
17 And you'll do a whole bunch of those on the right arm and left  
18 arm to compare, to see if there's any focal slowing.

19           If there's pressure on the nerve, the transmission  
20 of the nerve goes slow, and that's all. And so, in his case,  
21 he has slowness right here across the right wrist. So that  
22 doesn't necessarily mean that's carpal tunnel syndrome. That  
23 just means that he has an abnormality at that level. But on  
24 the other side he didn't have a problem. So now you have a  
25 slowing. He's got clinical features of it. And so, now you

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1 make the clinical diagnosis of carpal tunnel syndrome. So he  
2 had what we called I think a mild to moderate carpal tunnel  
3 syndrome. And --

4 Q That was a long time ago.

5 A That was a long time ago.

6 Q What happens with continued use of the assisted  
7 walking devices?

8 A Right, it progressively worsens over time. Also, in  
9 addition, right away, I also gave him wrist splints. He was  
10 refractory to treatment. In other words, he did not get  
11 better from that treatment. So it's actually easily -- what  
12 happens is there's more and more pressure constantly at the  
13 wrist. And what ends up happening is the person will  
14 eventually not use the right hand. They'll start to use the  
15 left hand more often. So 40 percent of the people who have  
16 symptomatic carpal tunnel on one side always check the other  
17 side, because they'll start to develop it.

18 Also, during surgery, because a lot of people  
19 actually just get it release, there's a period of time of six  
20 to 12 weeks that you are unable to use the right hand, because  
21 they need to -- for the scars and stuff. So what happens is  
22 during that time, the vast majority of the asymptomatic side  
23 becomes symptomatic. So it's very common to actually have --  
24 now we haven't said that for him, but I'm just trying to tell  
25 you that when you do the surgery, you have to think nobody can

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1 actually use the right hand.

2 So in his case, when that one is immobile, he's  
3 going to be using the left hand more. So, you know, it's just  
4 something that we see in all the patients.

5 Q Is Henry taking a required carpal tunnel surgery?

6 A Yeah, he's going to have to have carpal tunnel  
7 surgery.

8 Q On which arm?

9 A The right hand.

10 Q And is that your opinion to a reasonable degree of  
11 medical probability?

12 A Yes, it is.

13 Q Would you inform the Court what the cost of the  
14 carpal tunnel surgery will be?

15 A Yeah, 12 to 14,000.

16 MR. WARD: Object.

17 THE COURT: On what basis?

18 MR. WARD: There's no evidence that he's qualified to  
19 talk about the cost of carpal tunnel surgery. I don't think  
20 he's indicated that he does carpal tunnel surgery.

21 THE COURT: Some clarification.

22 MR. BAKER: Sure.

23 BY MR. BAKER:

24 Q Doctor, do you refer people for carpal tunnel  
25 syndrome all the time?

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1           A     All the time.

2           Q     Are you familiar with the cost of carpal tunnel  
3 surgery in this community?

4           A     Absolutely.

5           Q     Surgical costs plus the cost of the facility and  
6 anesthesia?

7           A     Yes.

8           MR. BAKER: Your Honor, may I ask the question?

9           THE COURT: I think so.

10          BY MR. BAKER:

11           Q     What will the cost of his carpal tunnel surgery on  
12 his right hand be?

13           A     Twelve to 14,000, including anesthesia. Usually, a  
14 surgical center fee and a basic orthopedic doctor. And this  
15 is a basic surgery. So most -- it pretty much is bread and  
16 butter. Anybody can do it.

17           Q     Do most people go for physical therapy after carpal  
18 tunnel surgery?

19           A     After six weeks, for strengthening, they do  
20 occupational therapy. O is above P, so occupational therapy  
21 not physical therapy. Yes. And they'll do that for  
22 strengthening in the hand, right.

23           Q     And are you familiar with the costs of that in this  
24 community?

25           A     I am, yes.

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1 Q And do you frequently refer people for O above P  
2 occupational therapy?

3 A All the time.

4 Q And what's the cost of that going to be?

5 A Roughly about \$1000 to \$2000. That's -- usually,  
6 that's all they need.

7 Q And are the need and the cost associated with both  
8 the surgery and the result in therapy, reasonable,  
9 necessarily, and causally related to the subject trauma and  
10 the Palms Hotel?

11 A Yes.

12 Q And is that your opinion to a reasonable degree of  
13 medical probability?

14 A Yes.

15 Q Now before we do anything else, let me put your  
16 records in. So -- and then we'll talk about more of your  
17 treatment. Is Exhibit 49 your chart in this matter?

18 A Yes, it looks like my chart, yeah.

19 Q And that contains information with respect to the  
20 care and treatment you rendered to Henry as a result of the  
21 injuries he sustained at the Palms Hotel?

22 A That's correct.

23 Q And was that treatment reasonable, necessary, and  
24 causally related to the subject accident?

25 A Yes, it is.

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1 Q And is that your opinion to a reasonable degree of  
2 medical probability?

3 A Yes, it is.

4 Q What has your bill for your services thus far been?  
5 I can tell you what I think it is, and you can tell me if  
6 that's what it has --

7 A There's a statement all the way at the end of -- and  
8 it says 26,323.60.

9 Q And those are your charges for the reasonable,  
10 necessary, and causally related services?

11 A Those are my charges. But I have to tell you that I  
12 don't see -- I don't know if that's -- I mean I presume that's  
13 -- I don't actually have my billing, so I don't actually know  
14 if that's -- there's a gap. I don't know if that --

15 Q Let me help you.

16 A -- what the --

17 Q For a period of 7/11/06 to 2/03/09, we have 27,500.  
18 Is that reasonable, necessary, and causally related to the  
19 subject accident?

20 A Yes.

21 Q On a single visit of 11/04/09, we have \$425. Does  
22 that comport with your understanding of your treatment of this  
23 patient?

24 A Those -- yeah, that's fine. Yes.

25 Q And would that single office visit be reasonable,

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1 necessary, and causally related to the subject accident?

2 A Yes. Everything I've done on Mr. Rodriguez is  
3 because of his injury. I'll just tell you. And I've seen him  
4 -- the problem is I saw him -- I was -- he was California.

5 Q I'm just doing it to get there --

6 A Yes.

7 Q -- here.

8 A Actually, yeah. And that's why -- because when he  
9 came to California, I was managing him there too. I was  
10 actually sending him out to places in California also with the  
11 UC system just to try to -- you know, and try to get him some  
12 care.

13 Q Another office visit of 08/10/10 for \$375. Do you  
14 see that?

15 A I think that's about right. I mean it should be  
16 about right.

17 Q Are all of the costs that we talked about, the  
18 27,500 plus the 425 plus the 375, reasonable, necessary, and  
19 causally related to the subject accident?

20 A Yes, everything is -- I thought was secondary to --  
21 yes, it was from the accident.

22 Q Okay.

23 A I've been treating him only for the accident.

24 Q And that's your opinion to a reasonable degree of  
25 medical probability?

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1           A     Yes, it is.

2           Q     All right. Now -- I'll get to the Rancho bill  
3 afterwards.

4                     Okay. Have we discussed all of your care and  
5 treatment of Henry with respect to his carpal tunnel syndrome?

6           A     Yes.

7           Q     Okay. Now you also treated him for his back, is  
8 that correct?

9           A     I did.

10          Q     And you treated him for his neck, is that right?

11          A     I did.

12          Q     Now Henry wasn't hit in the neck or the back as far  
13 as you know in respect -- in terms of the direct traumatic  
14 insult?

15          A     Not that I know of, no. I saw -- there's other --  
16 remember, I started seeing him in July '06. I was -- you  
17 know, as -- you know, when I looked at Dr. Miller's notes, he  
18 has a little different history. You know, he was saying that  
19 the -- so there is a little variation of history. He actually  
20 says that -- and he saw him earlier than I did. Remember, as  
21 a person is seen over time, you always try to go back to the  
22 doctors who saw him initially, because they have a better  
23 history. There's less time difference.

24                     So Dr. Miller had seen him before. And he has a  
25 little -- he actually notes that in his history and that when

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1 the patient fell onto a gentleman, he was actually -- they  
2 talked about the ambulance and, you know, paramedics coming to  
3 take him to the hospital, left knee. But at that time, he  
4 also had neck pain. And you know -- so -- but I don't know --  
5 so there is a history before my history that does say neck  
6 pain. So I -- you know, so I just want to -- but I don't know  
7 -- and he also said left shoulder pain too. There was also a  
8 mention of left shoulder on a history prior to mine.

9 Q So it would be unfair to say that you're the first  
10 doctor that he complained of neck or back pain too?

11 A No, not at all. I'm not the first doctor.  
12 Actually, if you look at the time, I'm actually 18 months out  
13 from the -- I mean, I saw him in July '06. His injury is on  
14 November '04. So you have to kind of look at other doctors  
15 who have taken histories before, because people forget what  
16 exactly happened. They start to focus on a lot of things.  
17 And they've also -- so you have to kind of look at all the  
18 doctors and say what exactly happened. You know what I mean?

19 All I know is when I took him, I -- you know, the  
20 first day when he comes in, I don't expect -- I'm more  
21 focusing -- but he's giving me some history, just giving me an  
22 overview of what happened 18 months ago.

23 Q Uh-huh.

24 A You know, so that's -- and, you know, a progression  
25 and what we're looking at. That's how I get my history.

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1 Q So let's talk about his back.

2 A Okay.

3 Q Okay. Is it your opinion that Henry was  
4 experiencing back pain when he saw you on the first visit?

5 A Yes, he was having back pain, and it was going down  
6 his right leg.

7 Q And what type of back pain was he experiencing and  
8 what did the diagnostic tests show with respect to his lower  
9 back?

10 A Okay. So he had low back pain and it was radiating  
11 down his right leg. We call it sciatica in -- you know, and  
12 so, right away I decided we should -- so the standard of care  
13 when you have a patient with back pain going down the right  
14 leg is you get a simple radiographic film. I like MRIs. So  
15 he already had an MRI of the low back. It doesn't show a  
16 tumor. And then you basically do a nerve and muscle test to  
17 see how much pressure onto the nerve root.

18 The nerve root, if you irritate the nerve root on the  
19 outside of the nerve rate -- nerve root, you'll get shooting  
20 pain --

21 Q Before you go into it -- I'm sorry.

22 A Yes.

23 Q Are there two components of the nerve roots, one  
24 being basically the skin and one being the core?

25 A Right. So on the anatomy of the low back, the root

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1 -- they call it like a tree. The root of the nerve grows into  
2 branches, and then goes into the end muscles, the muscles like  
3 your gastrots and different muscles in your leg.

4 So there's two components to that actual root. On  
5 the outside of the root is a protective sensory mechanism. So  
6 you -- if you irritate the outside of the nerve root, you get  
7 -- people have complained of pain, numbness, tingling,  
8 shooting pains, pins and needles. And it goes down their leg,  
9 and that's why they're actually there in the office, to  
10 actually evaluate.

11 Q But isn't that pain complaint actually a health  
12 complaint with respect to if that nerve is still dead or  
13 alive?

14 A Right. It's actually irritating the outside of the  
15 nerve root, and it's actually a protective mechanism. It's  
16 not a healthy complaint, because that's actually the only  
17 reason people show up to my office.

18 Q With respect to the health of the nerve root I mean.

19 A Right. The only reason people come is because  
20 you're irritating the outside nerve root. In diabetics, they  
21 don't actually feel -- they lose that. So you no longer have  
22 that protective mechanism. So they don't even know when  
23 something is actually touching the nerve root.

24 So the actual core of the nerve root, which we call  
25 the axons, A-X-O-N-S, actually grow and they innervate the

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1 organs, let's say the leg. So when you have axonal damage --  
2 and the axons are necessary to keep tone in the muscle. If  
3 you actually cut off or damage the axons -- let's say a Polio  
4 patient, the virus actually hits the axons. So what happens  
5 is you'll see the muscles atrophy. Luckily, they don't have  
6 any pain in Polio patients, because the outside of the nerve  
7 root is still protected, and that's the pain transmitters.  
8 There are no pain transmitters within the axon of the nerve  
9 root. The axon nerve root, all it does is grow into the  
10 nervation of muscles. There are no pain fibers.

11 Therefore, by definition, a patient would not be  
12 able to actually -- the reason you actually do the test is to  
13 actually see if there's any axonal nerve damage. The reason  
14 is if you see axonal nerve damage, it tells you not only is  
15 the pathology touching the outside of the nerve root and  
16 irritating it, swelling, irritation, bumping into the outside  
17 of the nerve root, causing a transmission of pain, but you're  
18 actually putting pressure onto the nerve root and the axons  
19 are dying off and denervating those end muscles.

20 And that is -- and what they'll do is they'll become  
21 weaker. And of course, that's the indication and that's when  
22 we decide okay, this person needs surgery now, because that is  
23 actually without symptoms. The person actually doesn't  
24 complain of anything, except they actually just become weak in  
25 their leg or in their arm. So it is an objective test to see

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1 if there's a axonal denervation to the nerve root.

2 Now I have to tell you that most patients don't  
3 really care about all that. They just want to know, hey, I  
4 have pain. I want to get rid of it. But when I tell them, I  
5 say, you know, that's -- pain is technically not an indication  
6 from a neurologist to actually have surgery. Only if you have  
7 axonal denervation, that's when you're actually supposed to  
8 decompress that nerve root to actually have the procedure  
9 done.

10 Q Is that because it will lead to atrophy?

11 A Right, atrophy. You'll start to fall down. You'll  
12 get a foot drop over time, because you're actually killing --  
13 you know. And if you think about it, if you do it long enough  
14 and you put pressure onto the nerve, you might actually lose  
15 the protective mechanism and you don't actually feel the pain,  
16 but they'll start to atrophy. That's because you're actually  
17 -- and that's why EMG's are done.

18 Q Important.

19 A That's why they're done. That's the goal standard,  
20 yes.

21 Q Now are you aware that at the time that he came to  
22 see you that Henry had an antalgic gait?

23 A He did. He was -- basically, he could --

24 Q He limped?

25 A He limped. He limped.

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1 Q And had he been limping for 18 months?

2 A I don't know. He was limping on the day I saw him,  
3 and he was -- you know, he's been limping from all the records  
4 I've -- I mean he's been having pain and -- you know, since --  
5 all the records I see.

6 Q And so, do you have experience with patients of  
7 yours who limp and they use assistive devices, who begin to  
8 suffer from lumbar pain?

9 A Right. It's called, yeah, just a derivative injury.  
10 And it's just very common. And the longer the injury is to  
11 the left knee and when you're walking asymmetrically, it's  
12 very bad. They have so many articles about mechanical  
13 stability, posture.

14 But basically, your body is very good at keeping  
15 yourself upright. The way God made us is we're all upright.  
16 But if we constantly have to overcompensate and we have a  
17 asymmetric not a symmetric gait, or we're constantly -- then  
18 we're going to have secondary issues. The whole spine is  
19 going to be compensating, and it's going to cause pain and  
20 pressure throughout the entire spine.

21 Q You say you've seen this before. It's very common?

22 A It's very, very common. In fact --

23 Q It's very, very common.

24 A Yeah. I could actually tell you I used to see up to  
25 ten patients with -- in a day. But that was because I was

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1 seeing orthopedic cases. When you do EMG nerve conduction  
2 studies, you have to understand that a lot of people, if you  
3 get arthritis patients, you're going to see complications of  
4 arthritis. If you're going to see knee injury patients, all  
5 you're going to see is complications, derivative injuries of  
6 that knee. If you have patients that have epilepsy, you're  
7 going to see patients that are very depressed. That's the --  
8 that's -- and you have to know that. Otherwise, you can't be  
9 a treating doctor. You got to know what's the other  
10 complications of any kind of diagnosis.

11 When you have a knee problem, it is extremely common for  
12 people to have low back pain. And then the whole --

13 Q Is that why Henry is experiencing low back pain?

14 A Yeah, I think -- that's why he's got a continued low  
15 back pain. And it's been going on since four-and-a-half years  
16 -- four-and-a-quarter years since I've seen him, and even  
17 before that. And he actually had back pain touching off the  
18 disc or irritating the disc and putting pressure, and it was  
19 going down his right leg, even when I saw him on the first  
20 day, on July 11th.

21 Q Is --

22 A And that's why I went ahead and did nerve testing on  
23 him.

24 Q And is the fact that Henry's pain is caused by that  
25 compensatory and postural process that you discussed with us,

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1 is that your opinion to a reasonable degree of medical  
2 probability?

3 A Absolutely.

4 Q Now I'd like you to go in your Exhibit 49, and  
5 please turn, if you would, to page 58.

6 A Yes.

7 Q You're at 58?

8 A Yes.

9 Q Would you go to number four, and tell me as early as  
10 11/25/2006 what you thought these postural and mechanical  
11 changes with respect to his knee were going to result with  
12 respect to his back? Are we looking at the same page?

13 A Oh, yeah. Okay. 11/29/06. You said 11/25.

14 Q I'm sorry.

15 A That just -- yeah. No problem.

16 Q I've been having this problem the whole trial.

17 A Sorry. It's just my mind. Anyhow, number four,  
18 spine surgery lumbar eventually after left knee, as his right  
19 leg radicular complaints will progressively worsen and as he  
20 is not getting his left knee problem solved.

21 Q So is it fair to say you foresaw as much as --

22 A Four years ago.

23 Q -- four years ago almost this month that Henry was  
24 going to need back surgery because of his unresolved knee  
25 problems?

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1           A     Well, that's the day I wrote it. I actually figured  
2     that out on the day I did my EMG study, before that. Just to  
3     let you know, I just happened to put it on paper on 11/29/06.  
4     But on the day I did the EMG needle study, you know, I -- see,  
5     what happens is I do my follow-up first, then I do my EMG  
6     study on the same day.

7           Then the next visit I go through the data and then I  
8     put the -- just -- but around that time. I already -- you  
9     know, when I stuck him with the needle in the muscles, you see  
10    the denervation. You already know what's going on. You're  
11    already figuring out what's going on for him.

12          Q     And it is opinion -- your opinion to a reasonable  
13    degree of medical probability that he will require a lumbar  
14    surgery due to the trauma he sustained at the Palms Hotel?

15          A     Oh, yes, absolutely.

16          Q     What kind of surgery is he going to need?

17          A     I can't tell you right now. I can't tell you the  
18    type.

19          Q     Okay.

20          A     Because I'll tell you the -- there's a couple  
21    reasons. On that day, there could be one type. It's been  
22    four years. Nothing is -- you know, and you don't do -- you  
23    don't -- he has to have -- when they want to decide, they'll  
24    have to decide what type of surgery based on his current  
25    anatomy, because the last thing you can do -- or the worst

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1 thing you can do, and I see it done all the time,  
2 unfortunately, in California, they do one level, because they  
3 want to go ahead and do a second surgery, which is absolutely  
4 insane.

5 Q Are you talking a discectomy or a fusion?

6 A No, I'm actually talking about multiple levels, one  
7 level, two level. Because his MRI done before I saw him, on  
8 his lumbar spine, shows multilevel discopathies, which means a  
9 whole bunch of different disc abnormalities.

10 In itself, one disc could be causing the problem. But  
11 when you fix it, you might have to actually stabilize multiple  
12 levels. So that's a whole different issue. So --

13 Q Is it your opinion to a reasonable degree of  
14 probability that he'll require at least a one-level lumbar  
15 fusion?

16 MR. WARD: Object. This patient -- this doctor is not an  
17 orthopedist, lack of expertise in this particular area as to  
18 what surgical procedures will need to be done.

19 THE COURT: Let's have some foundation, Mr. Baker.

20 BY MR. BAKER:

21 Q Have you seen many, many people with discogenic  
22 injuries?

23 A Yes, I have.

24 Q Have you seen many, many people with discogenic  
25 injuries with neurological involvement?

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1 A Yes, I have.

2 Q And those type of people undergo the type of  
3 radiculopathy that you've described in Henry, is that right?

4 A That's correct.

5 Q And you refer these people to orthopedists, is that  
6 correct?

7 A Yes, I do.

8 Q And --

9 A Spine surgeons or neurosurgeons, right.

10 Q Or neurosurgeons.

11 A Spine orthopedic and neurosurgeons, right.

12 Q You consult and you communicate with either the  
13 spine or the neuro in the scope and course of their treatment,  
14 is that right?

15 A That's correct.

16 Q And recommendations are made back and forth with  
17 respect to the particular patient?

18 A That's correct.

19 Q And on many, many occasions when you've diagnosed a  
20 obvious lumbar radiculopathy, your patient has gone on to have  
21 surgery, is that correct?

22 A That's correct.

23 MR. WARD: Object, leading.

24 BY MR. BAKER:

25 Q And have you stayed --

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1 THE COURT: Sustained.

2 BY MR. BAKER:

3 Q Have you stayed in communication with the doctors  
4 with respect to the ongoing treatment of those patients?

5 A Yes, I have.

6 Q And have you been made -- notified of whether or not  
7 they've had lumbar surgery with respect to the radicular  
8 complaints?

9 A Yes, I have.

10 Q And have you had the opportunity to discuss the  
11 surgery with your patients both before and after undergoing a  
12 lumbar fusion?

13 A Yes, I have.

14 Q And have you had the opportunity to review bills  
15 associated with single and multilevel lumbar fusions?

16 A Yes, I have.

17 Q Okay. And is it your opinion to a reasonable degree  
18 of probability that based upon your diagnostic findings and  
19 your long experience, and your education and training, that  
20 Enrique Rodriguez will require at least a one level lumbar  
21 fusion?

22 MR. WARD: I renew my objection. This man is very well  
23 qualified as a neurologist. He is not a neurosurgeon. He is  
24 not an orthopedic surgeon. He can talk to a lot of people.  
25 He was not disclosed as an expert in this case to come in and

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1 talk about back surgery. He wasn't disclosed as an expert in  
2 this case for anything. And I don't think that this fits the  
3 qualifications and the requirements.

4 THE COURT: Any response?

5 MR. BAKER: Yes, Your Honor. We briefed the Court  
6 extensively about both NRS and the common law associated with  
7 the scope of a treating physician's ability to comment upon  
8 diagnoses, prognoses. And even in the Prabhu v. Levine  
9 standard of care, he is not a retained expert. And by virtue  
10 of the fact that in case law, Nevada recognizes that he is an  
11 expert, and a foundation has been laid with respect to his  
12 knowledge, familiarity with both the procedures, the  
13 circumstances that the procedures under, and the cost of the  
14 procedure, it's respectfully suggested that he should be able  
15 to answer the question.

16 THE COURT: Overrule the objection. I think he can  
17 answer this particular question, but I don't want him to get  
18 too far afield out of his area of expertise.

19 MR. BAKER: I'll keep --

20 THE COURT: The Court is going to hear from other  
21 surgeons with respect to this issue though.

22 MR. BAKER: I don't --

23 MR. WARD: May I just add one quick comment for the  
24 record, Your Honor? The differentiation here, among other  
25 things -- and I understand the Court's objection [sic], and

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1 I'm not trying to waste the Court's time renewing this  
2 continually. But we've been talking about doctors talking  
3 about treatment by other people. We're not in that area at  
4 this point. We're talking about a diagnosis in things that he  
5 thinks people will recommend not treatment that -- he's not  
6 commenting on treatment that's been given. He's talking about  
7 what treatment doctors will recommend. That's my difference,  
8 Your Honor.

9 THE COURT: I understand the nature of the objection. I  
10 think he can answer the question as it was posed.

11 BY MR. BAKER:

12 Q Is it your opinion to reasonable degree of medical  
13 probability that he'll require at least a one-level lumbar  
14 fusion associated with the injuries he sustained at the Palms  
15 Hotel?

16 A I don't want to say one-level lumbar fusion.

17 Q I said at least.

18 A Yeah. It could be a fusion or laminectomy. I can't  
19 tell you -- but that's the minimal. That's correct.

20 Q Would they perform a laminectomy without fusing a  
21 lumbar intervertebral area?

22 A I can't tell you that. It's beyond my scope. I  
23 cannot tell you that.

24 Q That's very fair, and I appreciate that.

25 A Yes.

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1 Q Are you familiar with the cost of a laminectomy?

2 A Yes, I know the cost of a basic lumbar surgery. We  
3 do that all the time. And the cost is 100 to \$120,000.

4 Q Does that include --

5 A That includes the surgeon, the facility fees,  
6 hospital fees, anesthesia fees. That is the actual accepted  
7 rate in the Las Vegas community.

8 Q And would those charges be reasonable, necessary,  
9 and causally related to the injuries Henry sustained as a  
10 result -- at the Palms Hotel?

11 A Yes, it is.

12 Q And is that your opinion to a reasonable degree of  
13 medical probability?

14 A Yes.

15 Q Let's talk now -- you've described the issues with  
16 respect to his back. And I want to understand how the neck  
17 pain can be associated with the injuries that Henry sustained  
18 at the Palms Hotel in Las Vegas.

19 A Right. So --

20 Q If you'd just tell the Judge.

21 A Right. I think it just has to do with the way the  
22 person is walking. They're not symmetric. And it's very  
23 common that if you have six months of low back pain you'll  
24 start to develop neck pain and cervicogenic headaches. In  
25 fact, that's a very common thing we see in our practice all

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1 the time. And we just call -- we just basically give them  
2 muscle relaxants and tell them listen, if you get rid of the  
3 asymmetric walking or the low back pain, you'll get rid of  
4 your neck pain and headaches.

5 And so, we call that a derivative injury, and it's -- the  
6 literature is up to 70 percent of people who have chronic low  
7 back pain more than six months will develop neck pain and neck  
8 pain related headaches. So --

9 Q And doesn't the literature also suggest -- and I  
10 don't know if we're saying the same thing. But if you look at  
11 people complaining of neck pain, 70 percent of those people  
12 will also comment and complain of lower back pain?

13 A No, now --

14 Q It's the other way.

15 A It's the other way around. It's the low back pain  
16 will give you the neck pain. There are a lot of people that  
17 have neck pain, but I don't think -- I can't - it's not 70  
18 percent of the people with neck pain develop -- chronic neck  
19 pain develop low back pain. I see just probably a very small  
20 percentage.

21 Actually, I think in my practice, I -- you know,  
22 just -- I would say it's much lower, less than five percent.  
23 So that's the other way around. But it's very -- if you have  
24 a limp and a walk, you'll see the -- and you have low back  
25 pain, actually, I'll automatically even ask now for -- you

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1 know, because I'll just assume -- it's just such a common  
2 thing -- that do you have any neck pain? Do you have any  
3 headaches in the back right here? And they'll -- you know,  
4 and a lot of people -- and it'll be -- always be usually a  
5 minor complaint compared to the major complaint, obviously.  
6 You know, I mean it just fills the paper, you know, but it's  
7 not the major complaint.

8 Q Now Henry had the temporary spinal cord stimulator,  
9 is that right?

10 A That's correct.

11 Q And do you have an opinion whether he should be  
12 afforded a permanent spinal cord stimulator?

13 A I told him for more than two years that I've been  
14 waiting for the spinal cord stimulator. I want him to have  
15 it. I want this guy to get better. Yes.

16 Q Okay. Do you think it'll work?

17 A I think it would work. I think we need to have it  
18 right away. I've been very frustrated.

19 Q We all have.

20 A I have been frustrated.

21 Q Will that spinal cord stimulator cure his back pain?

22 A No, but I mean -- it's not going to cure his back  
23 pain, but it's going to make his quality of his left -- he  
24 needs to have it done. I mean -- you know, I mean, no, it's  
25 not going to get even rid of his walk. He's still going to

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1 actually have a limp. But his quality of life is just going  
2 to be significantly better. It just gets rid of a pain,  
3 believe it or not. It's just a -- technically, a spinal cord  
4 stimulator is just a pain -- stops this pain. It doesn't get  
5 rid of the actual problem. It doesn't get rid of your knee.  
6 It doesn't get rid of your -- the way it looks. You know, it  
7 doesn't do any of that stuff. I mean it's just going to  
8 basically get rid of the pain.

9 Q So --

10 A And he's still going to have a walking asymmetry.  
11 He's still going to have -- you know, hopefully, he'll have  
12 the strength that he doesn't have to, you know, use a cane.  
13 It's unlikely. It's been so many years now. I mean, you  
14 know, but -- you know, I mean you want to just start treating  
15 one thing at a time.

16 Q So questions arise from that. One is is he going to  
17 have complex regional pain syndrome for the rest of his life?

18 A Yeah, absolutely. That -- the treatment -- he's got  
19 it for the rest of his life. I mean he --

20 Q and the second question is he going to require the  
21 back surgery that you testified with [sic], regardless of  
22 whether he reached -- he receives the permanent pain  
23 stimulator?

24 A Yes.

25 Q Okay. Let me put some bills into evidence through

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1 you and see if there's something else that I need to think  
2 about. Would you go into volume one, which is behind you. Go  
3 to Exhibit Number 15, which is the Rancho Rehab in California  
4 bill. Thank you for explaining to us that you were seeing him  
5 in California as well.

6 A Yes.

7 Q The Rancho bill, the testimony in this case has been  
8 -- was kind of split into three parts. One was Dr. Nork had  
9 referred. The second was Shannon had referred. And the third  
10 you had referred.

11 The evidence has been --

12 MR. BAKER: And I'm sorry, Your Honor. I'll wait.  
13 That's Exhibit 1 -- excuse me. Volume one Exhibit 15 if I'm  
14 reading it correctly.

15 THE COURT: Okay, thank you.

16 BY MR. BAKER:

17 Q Okay. The evidence has been and the Court has heard  
18 that the total of the bill was \$23,323. Of that amount, Dr.  
19 Nork's bill, which is in evidence, was 6,783. Shannon's,  
20 which is in evidence, is 4,150. And that leaves a remainder  
21 of 12,895, which was between 6/3/09 and 11/2/09. And it is  
22 Govind Koka referring -- and you were working with Govind Koka  
23 to try to get Enrique better. Is that fair to say?

24 A Yeah. Actually, I've been working with pretty much  
25 every physician on this case for Mr. Rodriguez. And I have

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1 listened to him, and he always tells me what's going on. And  
2 he actually called me also, and we've talked and -- about  
3 just, you know, to see -- to make sure he's getting treated  
4 continuously.

5 Q Thank you for that.

6 A Yes.

7 Q And was the treatment rendered by Rancho between  
8 6/3/09 and 11/12/09 reasonable, necessary and causally related  
9 to the incident at the Palm?

10 A I don't see the bill of the Rancho -- am I looking  
11 at the -- I'm looking at '05, and '06, and '07, and '08. I  
12 may have -- I did see a whole bunch. I mean I prepared for  
13 trial, so I mean I did look at everything.

14 Q Yeah.

15 A I just don't see '09 here. It was -- he should be  
16 getting therapy. I mean I just don't see the bill in this.

17 Q If the record contains a bill of \$12,895 referred to  
18 by you and Dr. Koka --

19 A Yes.

20 Q -- would that be reasonable, necessary, and causally  
21 related to the accident?

22 A Here's the bill, and the answer is yes. It's always  
23 been, and I am still his treating doctor. And I think until  
24 he gets the spinal cord stimulator, he should continue active,  
25 motion, range of motion of the joint and his -- that -- you

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1 know, because remember, otherwise -- you know what I mean?  
2 You have to do. You know, he's -- you've got to keep doing  
3 it. Otherwise, it's going to get worse. It actually can  
4 worsen.

5 Q Let me make this just for the record. I have a  
6 responsibility to this court to ask certain buzz word type of  
7 foundational things for you.

8 A Okay.

9 Q And I know that you're asking why do I keep asking  
10 you these questions. And it's because if I don't, I'll get in  
11 trouble, okay?

12 A I'm sorry. Okay.

13 Q So was the care and treatment rendered to Enrique  
14 Rodriguez, upon your referral to Dr. Koka, reasonable,  
15 necessary, and causally related to the subject accident?

16 A Yes.

17 Q To a reasonable degree of medical probability?

18 A Yes.

19 Q And was the resulting bill generated through your  
20 and Dr. Koka's referral of \$12,895 reasonable, necessary, and  
21 causally related to the subject accident?

22 A Yes, it is.

23 Q To a reasonable degree of medical probability?

24 A Yes, it is.

25 Q And I might have forgotten. I have a tendency to do

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1 this. At some point in time, I might have asked you questions  
2 to reasonable degree of probability instead of medical  
3 probability. Each time I asked that question, did you  
4 understand it was to a reasonable degree of medical  
5 probability?

6 A Yes.

7 Q And were your answers to a reasonable degree of  
8 medical probability?

9 A Absolutely.

10 Q Okay. And did I put --

11 MR. BAKER: I'm sorry. I put Dr. Shah's Exhibit 48 into  
12 evidence already?

13 THE CLERK: Yeah.

14 MR. BAKER: Now we're done with the Rancho bill.

15 THE CLERK: Exhibit 48?

16 MR. BAKER: Yes.

17 THE CLERK: Billing statement from Thomas Vader.

18 MR. BAKER: I'm sorry.

19 THE CLERK: That's the billing statement from Thomas  
20 Vader.

21 MR. CARDENAS: Dr. Shah is 49.

22 MR. BAKER: Dr. Shah is 48.

23 MR. CARDENAS: 49.

24 MR. BAKER: 49?

25 THE WITNESS: I'm 49.

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1 MR. BAKER: Dr. Shah is 49. Okay.

2 THE CLERK: That's not in evidence.

3 BY MR. BAKER:

4 Q Doctor, when you turn to Exhibit 49, is that your  
5 care and treatment of Enrique Rodriguez?

6 A That's correct.

7 Q And was your treatment reasonable, necessary,  
8 causally related?

9 A Yes, it was.

10 Q To a reasonable degree of probability?

11 A Medical probability, yes.

12 Q And I remember reading the 27,000 and then 375 and  
13 then the 385 into record. That's all reasonable, necessary,  
14 and causally related to the subject accident?

15 A Yes, it is.

16 Q To a reasonable degree of probability.

17 A Yes.

18 MR. BAKER: Move to admit, Your Honor.

19 THE COURT: Any objection?

20 MR. WARD: No, Your Honor.

21 THE COURT: 49 is admitted.

22 [Plaintiff's Exhibit 49 Received]

23 BY MR. BAKER:

24 Q If you would turn to 44.

25 MR. BAKER: And, Rob, what volume is that in, please?

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1 MR. CARDENAS: Volume three.

2 BY MR. BAKER:

3 Q It's in volume three.

4 MR. BAKER: Thank you.

5 BY MR. BAKER:

6 Q And is this for care and treatment rendered to  
7 Enrique at Matt Smith, which is also Valley Rehab? Yes?

8 A Matt Smith is that Valley Rehab? I don't know that.  
9 I think that's a separate -- that's another one too.

10 Q Okay. We'll get to --

11 A Matt Smith is with Tom Brooks. And they just  
12 merged, and they'll like Kelly Hawkins here in town.

13 Q I get so confused these days.

14 A Right. Matt Smith is a totally different -- I think  
15 they're competitors.

16 Q Well, if you'd look at 44.

17 A Yes.

18 Q Is his therapy associated with the care and  
19 treatment of Enrique Rodriguez for the injuries that he  
20 received at the Palms Hotel?

21 A That's correct.

22 Q And is that treatment reasonable, necessary, and  
23 causally related to the incident at the Palms Hotel?

24 A Yes, it is.

25 Q And is that your opinion to a reasonable degree of

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1 probability?

2 A To medical probability, yes.

3 Q Thank you.

4 A Yes.

5 Q And if you turn to page 63 of that exhibit.

6 A Yes.

7 Q There's a bill that you can see totals \$31,300.

8 A Yes.

9 Q Is that reasonable, necessary, and causally related  
10 to the subject accident?

11 A Yes, it is.

12 Q To a reasonable degree of medical probability?

13 A Yes, it is.

14 MR. BAKER: Move to admit 44, Your Honor.

15 THE COURT: Any objection?

16 MR. WARD: No, Your Honor.

17 BY MR. BAKER:

18 Q If you turn to --

19 THE COURT: 44 is admitted.

20 [Plaintiff's Exhibit 44 Received]

21 MR. WARD: Other than the ongoing objections I've -- that  
22 I'm making, I won't.

23 BY MR. BAKER:

24 Q If you could turn to 45.

25 THE COURT: Noted for the record.

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1 MR. BAKER: I'm sorry, Your Honor. Did I --

2 THE COURT: Mr. Baker, you've got to give us a little  
3 chance to finish our sentence here --

4 MR. BAKER: I know.

5 THE COURT: -- time to time.

6 MR. BAKER: My parents said that I didn't really start  
7 speaking till I was three and haven't really shut up since.

8 THE COURT: Oh, I see.

9 BY MR. BAKER:

10 Q Is 45 an upright MRI bill?

11 A Yes, it is.

12 Q And is that -- the services with respect to that MRI  
13 reasonable, necessary, and causally related to the subject  
14 accident?

15 A Yes, it is.

16 Q To a reasonable degree of probability?

17 A Yes.

18 Q And the bill for that is what?

19 A I have a bill of \$7,500 for three uprights.

20 Q And are those bills reasonable, necessary, and  
21 causally related to the subject accident?

22 A Yes, it is.

23 Q To a reasonable degree of probability?

24 A Yes.

25 MR. BAKER: Move to admit 45, Your Honor.

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1 THE COURT: Any objection to 45, Mr. Ward?

2 MR. WARD: No additional ones, Your Honor.

3 BY MR. BAKER:

4 Q You also said Dr. El Kannich [phonetic], is that  
5 right?

6 THE COURT: 45 is admitted.

7 [Plaintiff's Exhibit 45 Received]

8 THE WITNESS: Dr. El Kannich?

9 BY MR. BAKER:

10 Q Yeah, if you turn to Exhibit Number 46, please.

11 A Okay.

12 Q There are no medical records. Do you know what this  
13 bill is for?

14 A It looks like he did a consultation on 9/2/08. It  
15 was a comprehensive consultation. I think he did a x-ray of  
16 the low back. Then he also did a follow-up. So he did a  
17 consultation and follow-up.

18 Q Is that consult and follow-up, given Enrique's  
19 condition, reasonable, necessary, causally related to the  
20 subject accident?

21 A Absolutely.

22 Q To a reasonable degree of probability?

23 A Yes.

24 Q And the bill is a whopping \$785?

25 A 785 plus 240. There's two bills.

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1 Q Okay. Could you read both bill amounts into the  
2 record, please?

3 A Sure, \$785, and that's one bill, dated -- he signed  
4 9/16/08. And then on 10/1/08, he signed a bill for \$240.

5 Q Were both of those bills reasonable, necessary,  
6 causally related?

7 A Yes.

8 Q And is that to a reasonable degree of probability?

9 A Yes.

10 MR. BAKER: Move to admit 46, Your Honor.

11 THE COURT: Any objection?

12 MR. WARD: No additional ones, Your Honor.

13 THE COURT: Noted for the record. 46 is admitted.

14 [Plaintiff's Exhibit 46 Received]

15 BY MR. BAKER:

16 Q If you want to go over to 50. And what you said is  
17 that you wanted physical therapy, physical therapy, physical  
18 therapy for this patient, is that true?

19 A That's correct.

20 Q And is Kelly Hawkins [phonetic], as contained in  
21 Exhibit Number 46, part of that physical therapy regimen?

22 A Yeah, I know I -- he pretty much went to pretty much  
23 everybody that can help him. That's right. And I encouraged  
24 him to do that, so -- any case. And yes, and --

25 Q Was that reasonable, necessary --

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1 A -- Kelly Hawkins is, yeah.

2 Q -- and causally related to the subject accident?

3 A Yes, it is.

4 MR. BAKER: Give me a second to check my charges sheet,  
5 please.

6 BY MR. BAKER:

7 Q Which one did you say Kelly Hawkins -- I might have  
8 the center down rather than Kelly Hawkins.

9 A Okay.

10 Q Who -- is Kelly Hawkins known as Kelly Hawkins?

11 A Known as Kelly Hawkins. Yeah, I mean that's  
12 different from Valley. Right. Matt Smith, Valley, Kelly  
13 Hawkins, all different. They're all competing against each  
14 other and have different therapists.

15 Q Was the treatment at Kelly Hawkins reasonable,  
16 necessary, and causally related to the subject accident?

17 A Yes, it is.

18 Q To a reasonable degree of medical probability?

19 A Yes, it was.

20 MR. BAKER: Move to admit 50, Your Honor.

21 THE COURT: Any objection to 50 other than those noted?

22 MR. WARD: No, Your Honor.

23 THE COURT: 50 will be admitted.

24 [Plaintiff's Exhibit 50 Received]

25 ///

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1 BY MR. BAKER:

2 Q If you'll turn to 46. We've discussed the fact that  
3 pharmacological management is necessary for Henry's condition.  
4 Is that fair to say?

5 A Chronological management --

6 Q No, no, pharmacological.

7 A Pharmacological. I'm sorry.

8 Q I'm sorry. Chronological? Okay. And if you turn  
9 to 47, please.

10 A Okay, 47, yes. Okay.

11 Q And you've received 47 previously?

12 A Yeah, the Walgreen's records.

13 Q And were the drugs that were prescribed to Henry  
14 reasonable, necessary, and causally related to the subject  
15 incident?

16 A Yes, it was.

17 Q And is the billing amount \$25,138.86? If you'll  
18 look at Walgreen's 75.

19 A Okay, that's correct.

20 Q Is that bill reasonable, necessary, and causally  
21 related?

22 A Yes, it was.

23 Q To a reasonable degree of medical probability?

24 A Yes, it is.

25 Q Just a couple more, and then we can speak about this

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1 of import. If you would look at 34, please. And that might  
2 be in the previous volume.

3 [Counsel Confer]

4 MR. WARD: What records are we looking for Jonathan?

5 MR. BAKER: This is Nevada Imaging Centers. It is volume  
6 number two, Exhibit 34.

7 MR. WARD: Okay.

8 BY MR. BAKER:

9 Q Were these also diagnostics associated with the care  
10 and treatment of Enrique Rodriguez?

11 A Yes, they were.

12 Q And was that treatment reasonable, necessary,  
13 causally related to the subject incident?

14 A Yes, they are.

15 Q To a reasonable degree of probability?

16 A To a medical probability, yes.

17 Q And -- thank you. And if you look at page 3, could  
18 you read out the billing amount, please?

19 A Sure, 5,270.

20 Q Reasonable, necessary, causally related to the  
21 subject incident?

22 A Yes, but, actually, I apologize, 5,278.80. And yes,  
23 that's the correct number.

24 Q And that's reasonable, necessary, causally related?

25 A Yes.

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1 Q To a reasonable degree of medical probability?

2 A Yes.

3 Q Okay. Now, Dr. Gutierrez is a hand doctor in town,  
4 an orthopedic surgeon?

5 A Yes.

6 Q And did you send Henry for a visit with Dr.  
7 Gutierrez? Or did he see Dr. Gutierrez to your understanding?

8 A Yes, I mean he's a hand surgeon, hand orthopedic  
9 surgeon, obviously, again, for the hand symptoms.

10 Q And if you turn to 35, are these Dr. Gutierrez's  
11 medical records with respect to the care and treatment of  
12 Enrique Rodriguez?

13 A Yes, they are.

14 Q In fact, do his test results corroborate what your  
15 test results were?

16 A Yeah, he -- I guess he has an in-house doctor that  
17 does nerve studies of the upper extremity, and that person  
18 agreed to whatever I said. That's correct.

19 Q Yeah. Is -- what's Dr. Gutierrez's bill? We have  
20 billing in the amount of \$3,294. Is that consistent --

21 A Yes.

22 Q -- with what you're reviewing?

23 A I think so. Yeah, that's about right, because  
24 they're all broken down here.

25 Q Are those bills reasonable, necessary, and causally

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1 related to the subject accident?

2 A Yes.

3 Q To a reasonable degree of medical probability?

4 A Yes, they are.

5 MR. BAKER: Move to admit --

6 MR. CARDENAS: 35.

7 MR. BAKER: I'm sorry?

8 MR. CARDENAS: 35.

9 MR. BAKER: 35, thank you.

10 [Counsel Confer]

11 MR. BAKER: Move to admit 35, Your Honor.

12 THE COURT: Any objection to 35 other than your standing  
13 objection?

14 MR. WARD: No, Your Honor.

15 THE COURT: Very well, so ordered. 35 is admitted.

16 [Plaintiff's Exhibit 35 Received]

17 BY MR. BAKER:

18 Q All right, doctor, that's what's called  
19 housekeeping. And it's not very exciting, but it let's me  
20 sleep at night if I make sure that I check off the boxes on  
21 the sheet.

22 Let's go back to talking to Henry a little bit.

23 A There's Valley Physical Therapy.

24 Q What exhibit is that, Valley Physical Therapy?

25 A That I don't know, but that's a big --

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1 MR. BAKER: Would you find Valley Physical Therapy.

2 THE COURT: Let's take about a five-minute break,  
3 Mr. Baker, if you don't mind.

4 MR. BAKER: That'd be great, Your Honor.

5 THE COURT: Thank you.

6 NOVEMBER 11, 2010 AT 10:44 A.M.

7 THE MARSHAL: Please come to order.

8 THE COURT: Okay, we're back in session.

9 Whenever you're ready, Mr. Baker.

10 Please be seated.

11 MR. BAKER: Thank you, Your Honor.

12 DIRECT EXAMINATION (CONTINUED)

13 BY MR. BAKER:

14 Q Thank you. Just a couple more records, and then  
15 we'll get back to the heart of the matter, doctor. If you'd  
16 turn to Exhibit 29.

17 MR. BAKER: And that's contained, Your Honor, in volume  
18 number two.

19 THE COURT: Thank you.

20 BY MR. BAKER:

21 Q Do you see that these are bills associated with Dr.  
22 Miller's treatments, anesthesia bills? If you go to -- it's  
23 Olympic. It's 29, volume two. Exhibit 29, volume. I can't  
24 see. Are you looking at me?

25 A Yeah.

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1 Q All right.

2 A But that's just his -- only the anesthesia. That's  
3 part of the surgical center at Wilshire.

4 Q True.

5 A It actually keeps going to Exhibit 30.

6 Q Okay. And I believe that Exhibit 30 is already into  
7 evidence.

8 A Okay. Maybe not.

9 Q So what does 29 --

10 THE COURT: Is that right, Madame Clerk.

11 THE CLERK: Correct.

12 BY MR. BAKER:

13 Q -- in addition to 30, in terms of cost? Is it \$1500  
14 if you look at page 1?

15 A Oh, page 1. The cost was \$1500.

16 Q Reasonable, necessary, causally related to the  
17 subject incident?

18 A Yes, it is.

19 Q To a reasonable degree of probability?

20 A Yes, it is.

21 MR. BAKER: Move to admit 29.

22 THE COURT: Any objection to 29?

23 MR. WARD: No, Your Honor.

24 BY MR. BAKER:

25 Q And by the way --

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1 THE COURT: 29 is admitted.

2 [Plaintiff's Exhibit 29 Received]

3 MR. BAKER: Thank you, Your Honor.

4 BY MR. BAKER:

5 Q By the way, I was looking at the date of that. And  
6 I believe that you testified earlier that Dr. Miller had seen  
7 Enrique before you. Is it more accurate to say he saw Enrique  
8 within the course of your treatment of Enrique?

9 A Early on, yes.

10 Q Does that --

11 MR. WARD: Object, leading.

12 THE COURT: Sustained.

13 BY MR. BAKER:

14 Q When with respect to the treatment did Dr. Miller --  
15 when with respect to your treatment of Enrique did Dr. Miller  
16 see him?

17 A I know when I saw him in my Long Beach he was seeing  
18 Dr. Miller. And because we even had conversations about him,  
19 because Dr. Miller is a very busy pain management doctor, and  
20 I was asking -- but I've never met Dr. Miller, but I have  
21 shared patients with him in Los Angeles and in Englewood and  
22 in Long Beach. So somewhere around 2008 he came to see me in  
23 Long Beach, 2007ish.

24 Q Regardless, does any of that chronology have  
25 anything to do with you agreeing with Dr. Miller's diagnosis

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1 of RSD with respect to this patient?

2 A No, no. Actually, no. It's just the -- when I  
3 started seeing him, no. You know, he had to go see a lot of  
4 different people, and that's fine. I mean, you know, it's  
5 great that he's seen Dr. Miller. It's good that he was  
6 already with another pain management doctor before he then  
7 came and saw me. And I think I was trying to get other  
8 opinions here to actually get him better. So -- and then he  
9 moved, I think, to California. So he saw some doctors in  
10 California. And I practiced and lived in Long Beach in 2006  
11 late. I moved here in 2007. So somewhere around 2006/7.

12 Q Okay. That's fine. It was just, again, for  
13 housekeeping.

14 A It is.

15 Q Turn to Exhibit 36. Yesterday, or before the  
16 weekend, I put into evidence part of Dr. Koka's bills. This  
17 appears to be the Urgent Care bill, if you look to 36 --

18 MR. BAKER: -- which would be in volume two, Your Honor.

19 THE COURT: Exhibit 36, Mr. Baker?

20 MR. BAKER: Yes, Your Honor.

21 THE COURT: Thank you.

22 BY MR. BAKER:

23 Q Are these Urgent Care bills associated with Enrique  
24 Rodriguez's care and treatment by Dr. Govind Koka?

25 A By Dr. Koka and Doctor -- actually, it says Dr.

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1 Jorgensen.

2 Q Dr. Jorgensen was actually --

3 A Yeah, is billing --

4 Q -- my mother's hospice doctor.

5 A Oh, I understand. He's a geriatric physician. I  
6 know. I know Dr. Koka and Dr. Jorgensen own Advanced Urgent  
7 Care at the -- next to St. Rosanna. So --

8 Q Was his treatment --

9 A I don't know who saw him. One of his PA's must have  
10 seen him. You know what I mean? Because I don't think they  
11 actually see the patients themselves, so --

12 Q Right.

13 A But --

14 Q Is the treatment reasonable, necessary, causally  
15 related to the subject incident?

16 A Sure, absolutely.

17 Q To a reasonable degree of probability?

18 A Absolutely.

19 Q And what was the amount of that bill?

20 A One is \$74, and the other one is 239. So --

21 Q Are both of those bills reasonable, necessary, and  
22 causally related?

23 A Yes, absolutely.

24 Q Reasonable degree of medical probability?

25 A Yes.

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1 MR. BAKER: Move to admit, Your Honor, 36.

2 THE COURT: Any objection to 36?

3 MR. WARD: No additional ones, Your Honor.

4 MR. BAKER: That actually kind of gave me the chills for  
5 a second there --

6 THE COURT: 36 admitted.

7 [Plaintiff's Exhibit 36 Received]

8 MR. BAKER: -- seeing his name.

9 BY MR. BAKER:

10 Q All right. Doctor, I'm going to ask you two  
11 scenarios. And if you could explain this to the Judge as  
12 concisely or in as much detail as you'd like. The two  
13 questions are going to be, one, what is Enrique Rodriguez's  
14 prognosis if he does get the spinal cord stimulator?

15 And the second will be what is his prognosis if he  
16 does get the spinal cord stimulator?

17 So if you could start with the first. What do you  
18 see in his future if he gets the spinal cord stimulator with  
19 respect to his medical care, treatment, and quality of life.

20 A If he gets the spinal cord stimulator?

21 Q First.

22 A Okay. First of all, he needs the spinal cord  
23 stimulator. So that's the only option I can think of. He  
24 needs that, so he can at least reduce the amount of pain he's  
25 having. And if he doesn't have -- I'll just tell you. The

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1 only difference -- that makes the difference, the spinal cord  
2 stimulator, is that it's not -- he's going to get a treatment  
3 that is class one level A supported, which is cost effective,  
4 by the way, by the NINDS -- and they actually published it --  
5 compared to here, just take more pain morphines, take a  
6 morphine pump, take just morphine, which is going to, you  
7 know, mess up -- you know, get all the side effects, and you  
8 can get anorexia. You can get all these ridiculous side  
9 effects with -- more on a pain medication. It is not going to  
10 give him full relief. It's not going to change his gait.  
11 It's going to change his limp. It's not likely to make  
12 anything better from that point of view, because he still has  
13 a problem in the left knee region.

14 All it's going to do is reduce the pain. And it is  
15 actually the treatment of choice.

16 Q Is there anything else out there?

17 A Well, actually -- okay. There -- that is the  
18 treatment of choice, but that may not be the only thing he  
19 needs. And you know, and I -- you know, and I've talked to  
20 him about it, but a lot of -- you know, in addition to the --  
21 you know, the spinal cord stimulator and more therapy, a lot  
22 of these patients will end up getting a pain pump that is put  
23 in, again, is given intrathecal into the epidural space. And  
24 again, it's all published about the benefit of adding the pain  
25 pump to your individual's spinal cord stimulator.

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1           We never talked about that, because it's just not  
2 being talked about. But I have to be honest with you. He's -  
3 - and that's why -- and those things are expensive. Let's  
4 just -- everybody knows that. So I mean that's -- those are  
5 expensive things. So the spinal cord stimulator has been the  
6 delay of the century, so on this patient that's the only --  
7 and I -- actually, there's a time that I actually did not want  
8 to see Mr. Rodriguez anymore. I gave up. I just said I'm not  
9 going to see you anymore, because nothing is changing here.  
10 There's nothing going on here.

11           And that's a really sad thing to -- for me to say,  
12 because -- and that's why I've actually -- you know, and it's  
13 really kind of just to watch this guy come in year after year  
14 and just like waiting and doing nothing. So, you know, it's  
15 really kind of just to watch this guy come in year after year  
16 and we're waiting and doing nothing. So it just felt like  
17 okay, do therapy, but it's not really the treatment.

18           The real treatment he needs is a spinal cord  
19 stimulator. It is actually cost effective. It's been  
20 published. It is the correct thing to do. So that's -- from  
21 an ethical moral thing, you have to do that. Okay.

22           All right. The --

23           Q     Will he continue to have back pains in the way that  
24 you described?

25           A     I'm sorry. Say that again.

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1 Q He'll continue to have back pains in the way you  
2 describe?

3 A Absolutely. He's still going to have the back pain,  
4 still going to have a limp. He's still going to have pain  
5 going down the right arm. He still may not have strength. Of  
6 course, you're going to try him rehabilitation and strength.  
7 But you have to understand that all you're doing with the  
8 spinal cord stimulator is getting rid of pain, just like the  
9 sympathetic nerve block that was done originally and then a  
10 second trial by two different pain management doctors. That  
11 was getting rid of one component of the pain.

12 But that's done. Now you have to get rid of the  
13 second component with the spinal cord stimulator. But even  
14 after that, you actually need to get a pain pump in smaller  
15 percentage, but not like one percent, not 50 percent.  
16 Probably 10 to 20 percent actually get a pain pump actually  
17 get a pain pump. So that's why we -- that's not -- you can't  
18 just say he's going to get a pain pump after this. I can't  
19 say that, because it's less than 50 percent, you know, from --  
20 but if they do add it, that's all been published. That's  
21 where he's at right now.

22 And if you don't do that, then, basically, you don't  
23 do it. You just give him pain medications. He's still going  
24 to need to get all the rest of the stuff done, because he's  
25 not going to get better. He's not getting better. It's been

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1 four years since I started treating this guy, and he's just  
2 not improving. So he's still got the limp. He's still going  
3 to have headaches. You know, he -- when he first came to me,  
4 he was actually having pain going down the right arm.

5 I -- you know, what is that? I mean he's got an  
6 MRI. He's got some disc bulges. He's got sensitization.  
7 We're not even putting that in there, because I'm hoping that  
8 some of the things that are not crushing the nerves will  
9 somehow get better. I don't even know that is true. But I  
10 can't say he's going to get worse, because we're still on  
11 square one still. I've always been on square one, getting the  
12 spinal cord stimulator in this guy, and then we'll see how  
13 he's doing.

14 And remember, he's -- I've been pretty much just,  
15 you know, seeing if he gets depressed, see if he -- you know,  
16 see how his family is. We talk about my kid. My son was  
17 sick. So we're talking. You know, he knows about my family.  
18 We talk about chronic pain and disabilities in life. And, you  
19 know -- and I've -- he's a good patient.

20 Q Is Enrique Rodriguez totally disabled today?

21 A Yeah, he's completely 100 percent -- he's  
22 permanently disabled. He's 100 percent disabled. He's on  
23 pain medications. He's got a limp. He gets fatigued. I've  
24 seen him sweat profusely in my office. He sits there. He's  
25 -- a couple times he's been upset at my staff, but I also have

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1 a long wait. I've seen his behavior.

2 I actually had people -- you know, you get people who  
3 have chronic pain. You know that they can't sit in your  
4 office for a long time. You know, sometimes I was running  
5 three hours behind two weeks ago. I'll just tell you, I was  
6 just like kept apologizing to all my patients. I don't like  
7 that. I don't like to do that. And he's actually waited a  
8 long period of time. And I actually say to the staff go get  
9 him something to drink, do something for him. I've apologized  
10 to him when I've been late to him a couple times. You know,  
11 just common courtesy. You know what I mean? He's in pain.  
12 He can't sit. He's always shifting weight. He's always  
13 shifting his weight in my seat. That's really objective.  
14 When you see somebody kind of shifting weight when you're in a  
15 seat, you kind of know that, you know, you can always blast  
16 him with more pain medication, so he doesn't feel the pain,  
17 but it's always the discomfort of the spine.

18 Q Is it your opinion that he's totally and permanently  
19 disabled to a reasonable degree of medical probability?

20 A Yes.

21 Q And is that as a direct and proximate result of the  
22 injuries he sustained at the Palms Hotel?

23 A Yes.

24 Q And is that your opinion to a reasonable degree of  
25 probability?

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1 A Medical probability, absolutely.

2 Q Doctor, is Enrique Rodriguez going to live the rest  
3 of his life in pain?

4 A Hopefully not. I won't say that to him. No, I'm  
5 going to give him pain medications. We're going to give him  
6 pain medications. He's going to be comfortable.

7 Q Okay. Thank you for your help.

8 A Yes, absolutely.

9 MR. BAKER: I'll pass the witness, Your Honor.

10 THE COURT: Very well.

11 Ward, what are you doing over there?

12 MR. WARD: I'm trying to -- I'm moving.

13 THE COURT: Okay then.

14 MR. WARD: Your Honor, I'm moving to the podium.

15 THE COURT: Very well. Whenever you're ready, sir.

16 MR. BAKER: Mr. Peak [phonetic] informed me very loudly  
17 during a trial, Your Honor, that it's not a podium. It's a  
18 lectern. And I looked up lectern. Couldn't find it.

19 MR. WARD: Your Honor, I'm moving to this wooden thing.

20 THE COURT: Okay, no problem, Mr. Ward.

21 [Pause]

22 CROSS-EXAMINATION

23 BY MR. WARD:

24 Q Good morning, doctor.

25 A Good morning.

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1 Q You are -- you started seeing Mr. Rodriguez when?

2 A On July 11th, 2006.

3 Q And it was apparent to you right away that he had  
4 RSD, correct?

5 A I thought about it right away.

6 Q And --

7 A Definitely in my differential, yes.

8 Q Yeah. And in fact, I believe you said that you  
9 could tell from four feet away that he had RSD, right?

10 A No, but you could tell in some patients from a long  
11 distance. They don't even want to touch you. But from also  
12 from looking at him a couple times and kind of looking --  
13 seeing what he's -- how he's moving and what he's doing with  
14 the leg, you can actually kind of say oh, my gosh, this is a  
15 bad pain syndrome.

16 Q Right, yeah.

17 A Not the actual diagnosis of RSD, because you have to  
18 actually look at it and examine it.

19 Q Let me help. My guess is you don't want to still be  
20 here on Friday --

21 A On Friday?

22 Q -- testifying from the witness stand.

23 A I'm happy to.

24 Q Okay. Well --

25 A Well, my patients will not like it, because I have

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1 patients at 1:00, but --

2 Q What I want to do, doctor, is I want to ask you some  
3 questions that I believe you can answer yes or no.

4 A Okay.

5 Q And I'm looking for yes or no answers, because I  
6 think I've got a limited amount of time.

7 A Okay.

8 Q Okay. Didn't you testify from the witness stand  
9 that you're sitting in right now that you could tell from four  
10 feet away that Mr. Rodriguez had RSD?

11 A Did I say that? Then I said that. I'm sure -- you  
12 know what I mean -- to actually make a diagnosis, you have to  
13 examine the patient, ask questions, take a history, look at  
14 the person. But if I said that, sure.

15 Q Right. Yeah, you said --

16 A You know --

17 Q You said his condition was so extreme that you could  
18 tell from four feet away that he had RSD, correct?

19 A I guess that's a superlative -- my daughter says  
20 that's a superlative statement. I guess -- you know,  
21 obviously --

22 Q I'm trying to get yes or no. Isn't that what you  
23 said or not? Do you deny having said that or did you say it?

24 A I said that, yes.

25 Q Okay. You said that?

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1 A Yes.

2 Q Thank you. And that was the very first time you saw  
3 him? Yes or no.

4 A I believe 7/11/06 is the first day I saw him.

5 Q Okay. And that's the day that you made that, you  
6 could tell from four feet away that he had RSD, isn't that  
7 true?

8 A I thought about it, yeah.

9 Q Okay. Well, are you now questioning whether you  
10 could see from four feet away and turning this into you  
11 thought about it? Are you changing your testimony?

12 A No. Sometimes you write things and sometimes you  
13 don't write things, because you never make a diagnosis on the  
14 first day. You know, it's just -- you know, a patient -- you  
15 just -- you don't like to actually commit to anything. That's  
16 just the way it is in medicine.

17 Q But you remember Mr. Rodriguez, correct?

18 A I do.

19 Q You remember him very well.

20 A I do.

21 Q So you remember even when you don't write things  
22 down?

23 A Yeah.

24 Q But it's your practice, isn't it true, to write  
25 things down?

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1 A Of course, everything is written down, absolutely.

2 Q Correct. In fact, that's the custom and practice in  
3 the medical communities to write things down, isn't it?

4 A Absolutely.

5 Q When people do examinations and they find something,  
6 they write it down.

7 A Yeah.

8 Q Yes. That's what doctors do.

9 A Absolutely.

10 Q That's what the custom and practice requires that  
11 they do.

12 A That's correct.

13 Q Correct?

14 A That's correct.

15 Q And you've looked at other treating physicians in  
16 this case, have you not?

17 A Oh, yes, I have.

18 Q And so, one of the things that you were concerned  
19 about was what condition did Mr. Rodriguez report right after  
20 the injury, isn't that true?

21 A Yeah, I mean you like to get information --

22 Q Yes or no?

23 A -- and find out what -- yeah, of course. I have  
24 reviewed --

25 Q I'm asking yes or no.

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1 A Yes.

2 Q Yes, that's true?

3 A Yes.

4 Q You're interesting in seeing what he reports right  
5 after the injury?

6 A That's correct.

7 Q And so, you went back and looked at his first  
8 treating physician's records.

9 A I looked at some of the treating physician's  
10 records.

11 Q Yes or no. Did you go back --

12 MR. BAKER: That's not a yes or no.

13 THE COURT: Let me interject something here, because I'm  
14 not sure the witness understands. If the question can be  
15 answered in yes or no, do so, sir. If it cannot be answered  
16 yes or no, then please tell Mr. Ward that, so he can rephrase  
17 his next question.

18 THE WITNESS: Oh, okay.

19 THE COURT: All right. Let's continue on that basis.

20 BY MR. WARD:

21 Q Yeah. Here's my yes or no question. Did you go  
22 back and look at the original treating physician? Yes or no.

23 A No.

24 Q No. Did you go back and look at his second treating  
25 physician? Yes or no.

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1           A     I don't know.

2           Q     Did you go back and look at his first physical  
3 therapy notes?

4           A     I may have.

5           Q     You don't know?

6           A     Actually, I don't know if I looked at the first  
7 physical -- I don't know.

8           Q     Okay. It would be significant to you if the  
9 findings by the original doctor were different from what  
10 Mr. Rodriguez told you they were, isn't that true?

11          A     Yeah, it might, absolutely.

12          Q     Okay. So -- but you didn't go back and look at the  
13 original treater?

14          A     I don't -- I think he went to the hospital. I don't  
15 think I looked at the hospital note. That's the original  
16 treater I presume you're talking about. I don't have the  
17 hospital note. So the answer is you're right. I don't have  
18 the original treater's note. I just know based on what the  
19 patient told me and from the other doctors that have seen him.  
20 But the answer is I have not seen the original treater's note.

21          Q     Okay. Let me ask you this. Have you ever, at any  
22 time, seen anything in the records that seem to you to be  
23 inconsistent and not explained them?

24          MR. BAKER: Objection, vague.

25          THE COURT: Ask for some clarification, Mr. Ward.

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1 MR. WARD: Sure.

2 BY MR. WARD:

3 Q You've gone back and -- well, let me go back and  
4 start here. You were retained, initially, to see  
5 Mr. Rodriguez, were you not?

6 MR. BAKER: Your Honor, object to the characterization.  
7 He wasn't obtained.

8 THE COURT: Very well, sustained.

9 THE WITNESS: Doctor --

10 THE COURT: Ask you to rephrase it.

11 MR. WARD: Sure.

12 BY MR. WARD:

13 Q How did you get to say --

14 MR. WARD: I didn't -- by the way, I didn't say by a  
15 lawyer.

16 MR. BAKER: Okay. Then I'm cool.

17 MR. WARD: I thought, perhaps, he was retained by  
18 Mr. Rodriguez. Maybe retained is the wrong word.

19 BY MR. WARD:

20 Q How did Mr. Rodriguez get to see you?

21 A Dr. Govind Koka saw him for a consult.

22 Q Okay. So doctor -- the doctor asked you to examine  
23 Mr. Rodriguez.

24 A That's correct.

25 Q Correct?

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1 A Yes.

2 Q And so, you saw Mr. Rodriguez for the first time  
3 about two years after the accidents?

4 A About 18 months, about a year-and-a-half, yes.

5 Q Okay.

6 A Yes.

7 Q Okay. Now you're a -- you specialize in pain  
8 management, do you not?

9 A No.

10 Q What do you specialize in?

11 A General neurology.

12 Q Okay. So you don't specialize in pain management?

13 A No.

14 Q Now the -- you have the -- your report from your  
15 first examination of Mr. Rodriguez?

16 A Yes.

17 Q And tell me, sir, what is -- tell me, doctor, what  
18 is the date of that report?

19 A July 11, 2006.

20 Q And from looking at the exhibits, can you tell me  
21 the Bates Number?

22 A Sure, it's volume three. Number 49 is the section,  
23 and 76.

24 Q So page 76?

25 A 76 is the number on the bottom right.

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1 Q Okay. Now -- so we have a neurology evaluation, and  
2 it says date of evaluation 7/11/2006, correct?

3 A That's correct.

4 Q And that is a letter that's written to Dr. Govind  
5 Koka, correct?

6 A That's correct.

7 Q And you reported to Dr. Koka that the patient was in  
8 intense pain and had sweatiness due to pain, when the  
9 paramedics took him to the local hospital and x-rays were  
10 done, correct?

11 A Yeah. I mean whatever -- this is coming from the  
12 patient, yes.

13 Q Yeah. That's what you wrote down?

14 A That's what I wrote down.

15 Q That's what the patient told you.

16 A That's correct?

17 Q What x-rays? What parts of his body were x-rayed?

18 A I don't know.

19 Q I take it you would expect the doctor at the  
20 emergency room to do a thorough examination?

21 A I would expect him to do whatever he is supposed to  
22 do.

23 Q Okay.

24 A Yes.

25 Q And you wrote note that the first three days he had

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1 left shoulder trapezes and upper back pain, correct?

2 A Yes.

3 Q And you don't find -- you have never seen any  
4 indication of upper back trapezes and left shoulder pain in  
5 the year -- written down in any of the records in the year  
6 2004, isn't that true?

7 A No, I haven't looked at any document produced, I  
8 think, in the year 2004. So there's --

9 Q So --

10 A -- no way for me to actually -- yeah, absolutely,  
11 you're right, I think.

12 Q Okay.

13 A I don't think I've seen a document in 2004. I don't  
14 think -- I think I've seen a therapy note, but I can't  
15 remember to be honest with you.

16 Q But you've seen lots of records, right?

17 A I have.

18 Q And you could have gone back and looked at those  
19 records?

20 A I could have.

21 Q And you haven't?

22 A I have not.

23 Q Okay. You've relied on what the patient told you.

24 A Absolutely.

25 Q Correct?

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1 A Yes.

2 Q Has the patient ever told you that -- anything that  
3 you found significant in your treatment of him that you  
4 thought didn't make sense in terms of his physical condition,  
5 or when symptoms appeared, or anything like that?

6 A That didn't make sense to me or --

7 Q Yeah, to you.

8 A -- didn't make sense?

9 Q To you.

10 A Not that I can recall.

11 Q Anything that was inconsistent that you said gee, I  
12 don't understand this?

13 A I mean I don't understand everything, because I'm  
14 not an expert in everything. So, you know, I mean -- you  
15 know, but I -- no.

16 Q Okay. You're aware that the patient got treatment  
17 in the year 2004.

18 A I have, yes.

19 Q And you're aware he didn't get any better?

20 A Since -- yeah, he did not get -- he may have gotten  
21 somewhat better, but other things have occurred.

22 Q Okay.

23 A Yes. I mean --

24 Q You were aware that he had treatment in 2005.

25 A Yes.

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1 Q And he was largely unresponsive to that as well?

2 A He did not -- that's right. He did not get better  
3 form, I think, two arthroscopies. That's right.

4 Q Now when did you next -- oh, let's see. This first  
5 examination, you said that -- let's see. Your impression is  
6 that left knee strain with two surgeries, correct?

7 A Yes.

8 Q And lumbar strain with radiculopathy into the right  
9 leg, correct?

10 A That's correct.

11 Q And how do you diagnose that?

12 A The first one is based on the patient's history.

13 Q Okay.

14 A Left knee strain, and the two surgeries at least.

15 Q Uh-huh.

16 A The strain is actually when you press -- you try to  
17 examine that area that's a muscle area. Okay.

18 Q And the patient tells you it hurts.

19 A Right, exactly. It's all subjective. Right.

20 Q Right, so --

21 A It's based on history. Everything is subjective.

22 Q Okay.

23 A The second impression, the lumbar strain  
24 radiculopathy means you have a finding on a clinical exam that  
25 looks like there's a low back issue.

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1 Q Right.

2 A And the patient is complaining of pain going down  
3 the right leg.

4 Q Right. So --

5 A So that's just a clinical diagnosis.

6 Q So the second part of that is the patient complains  
7 of pain?

8 A The patient complains of pain. And also, you're  
9 looking at how they complain. And then you try to do physical  
10 findings to see if there is objective -- more objective. And  
11 then, of course, that's -- you know, as you assess that  
12 symptom that he has.

13 Q And you can't see pain.

14 A I cannot visualize pain.

15 Q No. And the -- you said your impression is  
16 bilateral carpal tunnel syndrome, correct?

17 A Yes.

18 Q And you can't see that either, isn't that true?

19 A In his case, no, I cannot see -- I cannot visualize  
20 the syndrome.

21 Q Okay. And you said left shoulder strain, correct?

22 A That's correct.

23 Q And you can't see that either, right?

24 A No, you can't see -- I mean it's an exam.

25 Q Yeah, and --

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1 A You exam but --

2 Q And the patient complains of pain.

3 A Well, they don't -- and it's also not just they  
4 complain of pain. It's also when you examine, you're also  
5 doing palpation, objective tenderness evaluations. You're  
6 seeing if they're have an overreaction, under-reaction.

7 Q Can you see tenderness?

8 A Yeah, that's -- tenderness, there's a subjective and  
9 an objective component to it.

10 Q Of tenderness?

11 A Yes.

12 Q An objective component of tenderness?

13 A How a person, after you see them, you get trained to  
14 examine them. You go ahead and press the muscles, and you see  
15 how their reaction is. And you -- and then based on that --  
16 like I said, there's a subjective and objective component.  
17 You actually make a diagnosis. There's tenderness to this  
18 muscle.

19 Q You ever find that the patients learn what these  
20 things are about after awhile?

21 A There are a lot of educated patients, yes.

22 Q Right. And they know what to say sometimes, right?

23 A Sometimes, yeah, absolutely.

24 Q Okay. Did you ever have any reason to doubt  
25 anything that Mr. Rodriguez told you during any of his

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1 examinations?

2 A No.

3 Q No. How about his weight gain? What'd he tell you  
4 about weight gain?

5 A He told me that he had gained 70 or 80 pounds of  
6 weight.

7 Q Right. He told he weighed 200 pounds at the time of  
8 the accident, isn't that correct?

9 A You know, I didn't have -- I don't know if I wrote  
10 down exact pounds. He gained 70 pounds since the injury, or  
11 even more.

12 Q Yeah. He told you that he weighed 275, and at the  
13 time of the injury he weighed 200, correct?

14 A Is that what I said later on another document?

15 Q That's what you said at page 9.

16 A Page 9. Page 9?

17 Q Page 0 --

18 A 79?

19 Q Bates Stamp 0-9.

20 A Oh, 0-9?

21 THE COURT: It must be a different document. I'm looking  
22 at a health insurance counter form, 0-0-9.

23 MR. WARD: I apologize. Maybe I wrote down the wrong  
24 one. Let me --

25 [Pause]

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1 MR. WARD: I'm sorry, 19. I apologize.

2 THE WITNESS: Thank you.

3 BY MR. WARD:

4 Q I can't read my own writing. I've got 0-1-9, and  
5 I've got the one crowded up against the zero.

6 A Yes, in 2008, October 27, 2008. He is 75 pounds,  
7 275 compared to 200, overweight since the injury.

8 Q Okay. And do you think it's accurate that he  
9 weighed 200 pounds at the time of the injury?

10 A I wasn't there at the time of the injury.

11 Q Right.

12 A I mean that's what he said he is. He was overweight  
13 at the time of the injury. Two hundred is not normal for him.

14 Q Okay.

15 A So he's now really overweight.

16 Q But he told you that he was in good physical  
17 condition at the time of this accident, isn't that right? Is  
18 that what he told you?

19 A Yeah. He didn't have a knee problem at the time of  
20 the injury, and he was in good condition.

21 Q Yeah.

22 A But he's overweight, obviously.

23 Q Yeah. Well, let me advise you that he's -- that the  
24 doctor said he weighed 225 pounds at the time of this  
25 accident. That would be overweight even more, would it not?

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1 A Yeah.

2 Q And what -- and I want you to assume that he's been  
3 225 pounds for a number of years before this accident. What  
4 effect does that have on the knees? Have any effect on the  
5 knees?

6 A How old is he?

7 Q He's about 46 or seven, somewhere in that area?

8 A Well, if -- it might have something to do with the  
9 knees. It can affect -- if you're overweight for a long  
10 period of time, you can develop big giant bone osteoarthritis.

11 Since I'm quite in the high category of weight right  
12 now, I'm quite familiar with that. I don't -- you don't  
13 necessarily have to have it. But it also makes it difficult  
14 for injuries to get better when you have a trauma. So you  
15 always worry about osteoarthritis in people who are  
16 overweight. Obviously, there's a big difference between 225  
17 and 275, you know. So that's definitely going to cause more  
18 big bone arthritis. And you'll see pain in both knees,  
19 shoulders, low back, everywhere, maybe, depending --

20 Q Ongoing overweight, is it good for the knees or bad  
21 for the knees?

22 A No, it's not good for the knees.

23 Q Okay. How about ongoing overweight, it is good for  
24 the back or bad for the back?

25 A Not good for the back.

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1 Q And now, the next time you saw Mr. Rodriguez -- oh,  
2 wait. Let me go back here a second. I apologize here. We  
3 were back on page 76, is that right?

4 MR. BAKER: Let me see. Was that 7-6?

5 MR. WARD: I think it was 76. I want to go back to where  
6 I was.

7 THE WITNESS: That's correct, 76. You're right.

8 BY MR. WARD:

9 Q 76?

10 A 76.

11 Q Thank you. And so, your findings at that time was  
12 that he had the items that we just talked about and that had  
13 ringing of the ears, is that correct?

14 A That's correct.

15 Q Now when did ringing of the ears show up for the  
16 first time in his records?

17 A I can't recall.

18 Q A couple years after the accident?

19 A I can't tell you.

20 Q Okay. Do you specialize in that condition?

21 A I've only seen a thousand people with ringing of the  
22 ears, but I don't know if I specialize in it.

23 Q Okay.

24 A I don't consider -- I'm a neurologist, but I treat  
25 people with Tinnitus, which is ringing of the ears. I don't

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1 specialize in it. I guess a thousand patients, some people  
2 might say you could specialize in it. Nobody really does. I  
3 mean I know that, because nobody really get better with  
4 ringing in the ears. So -- but that's a non-treatable thing  
5 anyhow.

6 Q Nobody gets better. Once they've got it, they've  
7 got it.

8 A Yeah. Usually, if it doesn't spontaneously go away  
9 within six months, it goes -- it's completely gone. You can  
10 get it from stress, from a trauma. You can get it from  
11 medications, aspirin toxicity.

12 Q Uh-huh.

13 A It makes no difference. A lot of people get it, but  
14 you just deal with it.

15 Q Okay. And if you got it from trauma, you get it  
16 right away?

17 A No. You could actually get it later on in trauma,  
18 or you can get it from medications from the trauma.

19 Q Okay. But from trauma, you can have trauma, and  
20 then a couple years from now, you've got ringing of the ears?

21 A I've never seen that. I've only seen it like three  
22 months and six months.

23 Q Okay.

24 A You know, just onset. But --

25 Q Okay. And but it -- once you get it, it doesn't get

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1 any better?

2 A No, but you can cope with it. You know, we -- you  
3 know, most people just kind of deal with it. It's not -- you  
4 know, just -- you know, if you think about it, all those -- if  
5 you go down to Indiana and you to those toll booths, cha-  
6 ching, cha-ching, cha-ching, pretty much that's the number on  
7 work comp injury in all the toll booth operators in Indiana  
8 State, if you ever go. They all have ringing of the ears. So  
9 they just get used to it. Some of them want to kill  
10 themselves. That's a few patients of mine. But most of them  
11 deal with it.

12 Q Now isn't it true that in your first examination  
13 here, you didn't make any reference to RSD?

14 A That's correct.

15 Q Okay. What's the second date -- date of the second  
16 examination?

17 A I don't know if -- do you have 8/9 as my second?

18 Q 8-9, is that the second one?

19 A I thought there was one between, but maybe not. I  
20 don't see anything here on the chart.

21 Q Let's go to the 8/9, which appears on Bates Number  
22 71.

23 A I have it under Russell Jay Shaw, MD, 00040. It's  
24 like -- it's after the Bates Stamps I guess. Well, actually,  
25 you have it there --

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1 MR. BAKER: Is that on Defendant's?

2 THE WITNESS: Okay. It's in two sections, yeah. 71,  
3 you're right.

4 BY MR. WARD:

5 Q Okay.

6 MR. BAKER: Thank you.

7 BY MR. WARD:

8 Q Now at 71, you have that he has constant left knee  
9 pain, correct?

10 A That's correct.

11 Q Okay. And that he complains of lower back pain?

12 A Yes.

13 Q And he complains of cervical pain?

14 A Yes.

15 Q And complains his right hand is numb with all  
16 fingers?

17 A Yes.

18 Q And you think this is all related to the accident,  
19 isn't that true?

20 A Yes.

21 Q And that's he's anxious all the time?

22 A Yes, he is anxious all the time.

23 Q Okay. And he described to you that he got Tinnitus  
24 shortly after the accident, isn't that correct?

25 A He says shortly after the injury. That's right.

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1 Q Yeah. So that would suggest that it wasn't drug  
2 related, isn't that true?

3 A No, because after -- you know, he's in pain. He's  
4 taking medications.

5 Q How long do you consider shortly?

6 A I don't know. Shortly means whatever the patient  
7 says, shortly. I don't know what shortly is.

8 Q Two days?

9 A Shortly could be four months. I mean we're talking  
10 about a 18 month history.

11 Q I know. I'm --

12 A I have no idea.

13 Q What I'm asking you, doctor, is your opinion that  
14 you get -- that you can get Tinnitus from taking medication.  
15 How long do you have to take the medication? Are you telling  
16 me if I take pills today, that I may have Tinnitus tomorrow  
17 from those pills?

18 A You could.

19 Q Okay.

20 A Yes. Or you can wait two years and get it too.

21 Q Has that been your experience that patients get  
22 Tinnitus the day after they take something?

23 A I've had a few, yeah, absolutely.

24 Q And it never gets any better?

25 A No. Sometimes they do get better. But, you know,

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1 it usually gets better within -- my experience is after six  
2 months or three -- if it doesn't spontaneously go away, it's  
3 not going to go away.

4 Q Okay. And your opinion was that he developed sleep  
5 apnea?

6 A Uh-huh.

7 Q And that was related to the accident, correct?

8 A Waking.

9 Q Well, and you relate the waking to the accident, do  
10 you not?

11 A That's correct.

12 Q Okay. So in your opinion, he got sleep apnea from  
13 the wake -- from the accident, isn't that right?

14 A Yeah.

15 Q Okay. He ever have sleep apnea before?

16 A He might have.

17 Q Do you know?

18 A No.

19 Q And your impression is pretty much the same as  
20 it was last time?

21 A Yes.

22 Q And where -- which number is RSD under impressions?

23 A It's not there.

24 Q Oh, it's not there.

25 A No.

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1 Q Oh, okay. And when's the next -- date of your next  
2 examination?

3 A 8/18/06.

4 Q Okay. And what's the Bates Number on that?

5 A 60.

6 Q And at the beginning, you said that you saw him on  
7 8/18/2006 for a follow-up, correct?

8 A That's correct.

9 Q And you listed spinal stenosis lumbar?

10 A Spinal stenosis lumbar.

11 Q I'm looking at page 1 of your report.

12 A Oh, I guess that's what my billers have listed. I  
13 didn't list that. They must just check off billing.

14 Q So in the -- when you do a report, the problem list  
15 doesn't mean anything?

16 A Yeah, I don't know. Actually, it's this new  
17 computer system. He doesn't have a brachial neuritis. I  
18 guess we have to educate our biller, so --

19 Q Okay.

20 A Sorry.

21 Q So let's look at impression. You have right lumbar  
22 radiculopathy with positive EMG, correct?

23 A Yeah. I have to tell you that after four years of  
24 looking at this, I actually should be looking at this,  
25 shouldn't I? Nobody has ever told me this. I guess my biller

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1 is actually writing down diagnoses that don't exist.

2 Q Okay. Well, you can take it up with them. I'm not  
3 going --

4 A I appreciate you telling me. I actually did not  
5 know. I was like wow. You're right. That is pour form.  
6 Okay, I'm sorry. Go ahead. I'm sorry.

7 Q And on page -- Bates page 61, under objective, you  
8 have examination unchanged from last week, correct?

9 A Yeah.

10 Q And under objective, you have antalgic gait.

11 MR. BAKER: Your Honor.

12 THE COURT: Yes.

13 MR. BAKER: I'm sorry to interrupt during -- but if we're  
14 going to read into the record what's contained on it, the next  
15 note is his left knee is mildly swollen in that same  
16 assessment.

17 MR. WARD: I'm not reading this. I'm asking questions.

18 THE COURT: You'll have a chance to follow up, Mr. Baker.

19 MR. BAKER: Sure.

20 BY MR. WARD:

21 Q You have, under objective -- and objective means  
22 what, objective as compared to subjective or objective what  
23 your goal is? Objective has two different meanings. I'm  
24 trying to find out how you use it.

25 A Subjective is what the patient complains of.

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1 Objective is what you actually visualize and see.

2 Q Okay. So if I do this across the room, what you  
3 saying is it's objective that I have a limp?

4 A That's a limp. I would agree.

5 Q Okay. But you don't know whether it's real or  
6 whether I'm just doing it?

7 A No, I mean you can't. No, exactly. You're right.

8 Q So it's objective from the standpoint it's something  
9 you can see.

10 A Something you can see and it looks the correct way.  
11 It's not over exaggerated. It's not under. It looks -- and  
12 remember, you're kind of --

13 Q Uh-huh.

14 A -- watching this person during the interview.

15 Q Right.

16 A And you're watching them, how they walk in and out  
17 of the room.

18 Q Uh-huh.

19 A So, yes, absolutely.

20 Q And at no time did you ever see Mr. Rodriguez behave  
21 in a way that was inconsistent with what you found on  
22 examinations, correct?

23 A No.

24 Q Okay. And under impressions, you have right lumbar  
25 radiculopathy, correct?

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1 A That's correct.

2 Q Right carpal tunnel?

3 A Yes.

4 Q Left knee pain?

5 A Yes.

6 Q Weight gain?

7 A Yes.

8 Q And you don't have RSD, correct?

9 A That's correct.

10 Q No reference to RSD in your report at all, is there?

11 A That's correct.

12 Q And this is your third report?

13 A That's correct.

14 Q And this was after the time that it was clear to you

15 from as far as four feet away that the man had RSD?

16 A That's correct.

17 Q But you didn't write it down?

18 A No.

19 Q Okay. And your next examination is what?

20 A I did a study -- okay. Well, that's good. My next

21 exam I think is November of 2006, November 29th, 2006.

22 Q And the Bates Number, sir, please?

23 A 000056, 56.

24 Q 5-6?

25 A 56.

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1 Q And this time you have, again, impression, three  
2 things this time?

3 A Yes.

4 Q Do not include RSD, isn't that true?

5 A That's correct.

6 Q Okay.

7 A Can I explain or no? I think -- if that would help  
8 you.

9 Q I didn't -- I'm just asking whether --

10 A That's fine.

11 Q -- you did that.

12 A That's fine.

13 Q Okay. Your -- the attorney will have an opportunity  
14 to ask you follow up questions. And you considered -- so your  
15 plan for him at the time was continue sleep apnea treatment,  
16 correct?

17 A I actually don't do sleep apnea treatment. I would  
18 have to send out to a specialist that does sleep apnea. But  
19 obviously, you know, there's so many different types of  
20 treatment.

21 Q Doctor, do you have -- can you see page 58, Bates  
22 page 58?

23 A Oh, that's right. It says continue sleep apnea with  
24 CPAP machine. He got it from another doctor. I don't give  
25 out CPAPs.

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- 1 Q Page 58, your report says plan, correct?
- 2 A That's correct.
- 3 Q And down at the bottom, you have signed it?
- 4 A Yes.
- 5 Q And under plan, number one is Dr. Wong is scheduled  
6 to see him in Los Angeles, correct?
- 7 A That's correct.
- 8 Q Who's Dr. Wong?
- 9 A He's a spine orthopedic surgeon. I think he's  
10 chairman and chief at UCLA.
- 11 Q Okay. Did Dr. Wong --
- 12 A Jeffrey Wong.
- 13 Q -- ever see him?
- 14 A I don't know. I don't see any -- I mean unless  
15 there's something in the notes.
- 16 Q I don't have any records from Dr. Wong. Have you  
17 seen any records from Dr. Wong?
- 18 A I have not seen -- at least I don't think so. I  
19 don't know.
- 20 Q Okay. And you talked about continuing sleep apnea  
21 treatment, correct?
- 22 A Yes.
- 23 Q And you talked about considering a bypass  
24 consultation for extreme obesity, correct?
- 25 A That's correct.

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1 Q You talked about considering spine surgery, correct?

2 A Yes. I actually said spine surgery lumbar  
3 eventually --

4 Q And you --

5 A -- after left knee, right.

6 Q And you made the note that the wrist splints weren't  
7 helping, correct?

8 A That's correct.

9 Q And you didn't make any reference to RSD in this  
10 report, isn't that true?

11 A Well, I have in the discussion section. But you  
12 have to understand that you still look at the left knee. You  
13 can't make the diagnosis of RSD unless you absolutely know  
14 there's no underlying pathology. That's why I was I was  
15 pushing for him to go from Dr. Shannon to a different knee  
16 person. And that's why I can't make the diagnosis, because  
17 it's not right to make -- all the textbooks, you have to make  
18 sure there's no underlying pathology that explain the  
19 symptoms.

20 Q So what --

21 A That's why I wanted to get a second opinion. And I  
22 did that on my 8/18 note.

23 Q So what you said here, he has seen a specialist in  
24 Los Angeles which noted possible RSD, correct?

25 A That's right. This is what he's telling me. I

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1 don't have the records. Right.

2 Q Okay. So you make reference to the fact that  
3 somebody else noted possible RSD, but you didn't make any  
4 reference that you were convinced that -- for well over a year  
5 that he'd had RSD, isn't that right?

6 A I have to make sure the left knee joint has got no  
7 underlying explainable item that could be causing and  
8 mimicking and giving you the type of pain symptoms that he's  
9 having. And it has to be done. That's why I, in the last  
10 visit, I told him to go get a second opinion from a doctor  
11 that he was already treating and they already procedures. I  
12 said I want more opinions here.

13 Q But you never said in any of your reports that he  
14 possibly has RSD, correct?

15 A I don't -- I have to look at all my reports. I'm  
16 sorry.

17 Q Okay.

18 A I'm sorry. You know --

19 Q The first time it appears is when someone tells you  
20 that someone in Los Angeles noted possible RSD, correct?

21 A The first time that it's -- this is what it says,  
22 yes.

23 Q Yeah. And who is that specialist in Los Angeles who  
24 noted possible RSD? Can you tell me that?

25 A Actually, I don't know. On this day, I actually

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1 didn't have the name of the doctor.

2 Q Okay. Well, do you know about Dr. Ferrante?

3 A I know Dr. Ferrante.

4 Q Okay. And you've looked at all the records in this  
5 case, right?

6 A That's correct.

7 Q Okay. And why did you look at all the records in  
8 the case? Do you customarily, for your patients, look at all  
9 of the records from all of their treating doctors?

10 A Sometimes.

11 Q And you did in this case?

12 A I don't think I saw all of them. I didn't see the  
13 ER visit. You know, I mean I just -- I look at things that  
14 are at hand.

15 Q Okay.

16 A You know, I can't -- this is a very complex case. I  
17 mean and when he comes to me, there's also an emotional -- I  
18 spend time with him just on an emotional level. You know what  
19 I mean? I mean there's a lot of issues here.

20 Q So you looked at all of the records except those  
21 that he had for right after the accident, isn't that right?

22 A I've looked at Dr. Ferrante's. I mean I don't have  
23 the ER records. I don't know if I'm missing anything else.

24 Q Right. And you said it's really important to find  
25 out about what the doctors said or what he complained about

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1 right after the accident, isn't that right?

2 A Well, I think it's important, absolutely.

3 Q Right. Right. And so, instead, you relied on what  
4 Mr. Rodriguez told you.

5 A Right. Now you know I don't have Dr. Ferrante's  
6 notes on this day. When you're saying -- I just started  
7 getting Dr. Ferrante's notes now.

8 Q Okay.

9 A I don't actually have any of his notes, even on this  
10 day.

11 Q Didn't have his report?

12 A No.

13 Q Okay.

14 A No, I'm actually just treating him here as a patient  
15 and trying to figure out who's doing what and why is this guy  
16 not getting better, and getting a second opinion. The main  
17 person who was treating him at this time was Dr. Shannon from  
18 what I'm gathering. And she's done some procedures, and I  
19 wanted him to go see another knee person for a second opinion.

20 Q Okay. So you thought that he was seeing  
21 Dr. Shannon, and you wanted him to see another knee person.

22 A Absolutely.

23 Q Correct?

24 A Yes.

25 Q Well, did you ever look at Dr. Shannon's records?

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1 A Now -- I don't know. I can't remember.

2 Q Okay. So you don't know if he was seeing some other  
3 orthopedist at this period of time, isn't that right?

4 A No. I mean at this time, I'm just talking to my  
5 patient, and he's telling me this is what's going on. And I  
6 said okay, fine.

7 Q Okay.

8 A I'll let you go see this other guy.

9 Q Okay.

10 A So I gave him names and I said okay, you know. I  
11 lived in Los Angeles at this time. So -- and he was coming  
12 out to L.A. So I was trying to get him the guys I knew. See,  
13 I'm in practice, and I know a lot of guys in Los Angeles,  
14 because I'm familiar with those guys. I don't know the guys  
15 here.

16 Q Okay. And you referred him to a Dr. Gutierrez, did  
17 you not?

18 A I know Dr. Gutierrez. I don't know if I made the  
19 referral of his primary, Dr. Koka, did. Maybe I did --

20 Q Okay.

21 A -- because of that right hand.

22 Q Well, let me put it this way. You're aware that he  
23 went to see Dr. Gutierrez, correct?

24 A That's correct.

25 Q In fact, you just testified that everything Dr.

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1 Gutierrez said was reasonable and necessary and related to  
2 this accident, isn't that right?

3 A Yeah, his opinions, absolutely.

4 Q And you said all of Dr. Gutierrez's charges and  
5 everything were necessary and related to this accident,  
6 correct?

7 A That's correct.

8 Q I want to direct your attention to the records of  
9 Dr. Gutierrez. And we have it under -- what I want to bring  
10 up is FP-0698. We're going to bring it up on the screen and  
11 on there.

12 MR. BAKER: What exhibit is it?

13 MR. WARD: I'm sorry, what?

14 MR. BAKER: What exhibit it?

15 [Counsel Confer]

16 MR. WARD: 35.

17 MR. BAKER: 35. And what Bates Number?

18 MR. WARD: 699 I believe or 698. Let me see here.

19 MR. BAKER: Mine only goes up to --

20 MR. WARD: 699.

21 MR. BAKER: 699?

22 MR. WARD: FP-699.

23 MR. BAKER: In Exhibit 35?

24 MR. WARD: Let me help you.

25 ///

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1 BY MR. WARD:

2 Q Can you see the document here?

3 A Yeah.

4 Q It's Dr. Rodriguez's records -- or Dr. Gutierrez's  
5 records, correct?

6 A Yeah, it looks like -- yes.

7 Q Okay. And you testified that all of his treatment  
8 that he did was reasonable and necessary and causally related  
9 to this accident?

10 A Yeah.

11 Q Correct?

12 A Yes.

13 Q And that all of his charges were reasonable and  
14 necessary and causally related to this accident?

15 A That's correct.

16 Q Now you wouldn't do that if you didn't know what  
17 kind of treatment he did, would you?

18 A That's true.

19 Q Okay. And so, you're eminently familiar with what  
20 kind of treatment he gave and what records he has?

21 A Yes.

22 Q So you're familiar with this record?

23 A I can't recall it, but it's there.

24 Q Does it appear to be Dr. Gutierrez's records?

25 A It says encounter note by Robert Gutierrez. That's

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1 correct.

2 Q Okay. And you looked at those records. So does  
3 this look like when they looked like when you looked at them?

4 A I can't recall.

5 Q Well, can you recall whether everything he did was  
6 reasonable and necessary?

7 A Yeah, I think so.

8 Q You can recall that?

9 A He's a good doctor.

10 Q You can -- well --

11 A He's not going to do anything that's not reasonable.

12 Q Well, wait. The question is not whether he's a good  
13 doctor. The question is whether all of the treatment that he  
14 rendered in this situation was reasonable and necessary and  
15 caused by the accident, not whether he was a good doctor.

16 A Yes.

17 Q So you're able to say that?

18 A Yeah.

19 Q And you're able to remember that?

20 A Yeah. I think the patient was fine, then sees the  
21 guy with the right hand. He finds a trigger finger or  
22 whatever. He's got carpal tunnel.

23 Q Okay.

24 A He should take care of everything.

25 Q Okay. So --

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1 A I mean just like everybody else does.

2 Q So you know what he -- so you're familiar with these  
3 records?

4 A Yeah. I don't remember this one, but now I'm seeing  
5 it. Yes.

6 Q I mean you couldn't offer that opinion without  
7 knowing what kind of treatment he gave, could you?

8 A That's correct.

9 Q Okay. So let's take a look here and see. What is  
10 the chief complaint here?

11 A Chief complaint -- well, it just says follow-up  
12 note. He doesn't really -- he doesn't -- it says here for  
13 reexamination of trigger thumb following injection into the  
14 tendon sheath.

15 Q Okay. So this note relates to his thumb, isn't that  
16 correct?

17 A It goes to trigger thumb following injection to  
18 tender sheet [sic]. Yes.

19 Q So it relates to his thumb?

20 A Yes.

21 Q And so, according to this record, the onset date is  
22 November 22, 2004, isn't that correct?

23 A That's correct.

24 Q So the suggestion is that the thumb problem started  
25 on November 22, 2004?

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1           A     Even before that, because he's already had an  
2 injection as a follow-up.

3           Q     November 22, 2004 is the date of the accident.

4           A     Okay.

5           Q     So you're suggesting it -- the problem started even  
6 before the accident?

7           A     No, I'm suggesting that -- I don't know if this is  
8 even a correct date.

9           Q     Well, how do you know then if it's all reasonable  
10 and necessary and related to the accident if you don't know  
11 whether the problem was before the accident?

12          A     He had right carpal tunnel, and Dr. Gutierrez is a  
13 right-hand release person. And of course, when you have  
14 carpal tunnel, you have injury of the wrist. You can also  
15 have tendons getting tight. And I just think that -- and I --  
16 just kind of knowing how reports are generated, I suspect that  
17 there's a date error. That's all I'm just saying. I mean I  
18 just kind of know in that community. I'm not trying to blame  
19 Dr. Gutierrez's notes, because I -- look at my -- how my notes  
20 are. I have diagnoses that don't even have diagnoses.

21          MR. WARD: Move to strike based on non-responsive and  
22 speculative.

23          MR. BAKER: I think he's confused as to the question,  
24 Your Honor. So I'm going to object to the whole as vague.

25          THE COURT: Object to what?

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1 MR. BAKER: The whole line of questioning is vague.

2 THE COURT: Well, I don't know that it's vague. Motion  
3 to strike is granted. Let's proceed, Mr. Ward.

4 BY MR. WARD:

5 Q Now let's go to 700, two pages down. Can you see  
6 that?

7 A Yes.

8 Q And it says here for reexamination of the ulnar  
9 nerve symptoms and wrist pain, correct?

10 A Yes.

11 Q And still tender but minimally to slight --

12 A Okay.

13 Q -- area, no Watsons tests, correct?

14 A Yes.

15 Q No instability noted. So that means that he looked  
16 for --

17 MR. WARD: What happened? Did our projector die?

18 MR. BAKER: Our screen is still okay.

19 UNIDENTIFIED SPEAKER: Our screens are okay. It's just  
20 the projector.

21 MR. WARD: Okay. Is there -- does this thing get too  
22 hot or should I --

23 THE COURT: I don't know. It's never happened before.

24 MR. WARD: I didn't touch it.

25 [Pause]

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1 MR. WARD: It's Number 27 in your book if you're  
2 interested.

3 Okay. If it's on everybody's screen, if we can continue  
4 on from the screen.

5 THE COURT: Sure.

6 BY MR. WARD:

7 Q And so, now he has -- he recommended an injection,  
8 is that correct?

9 A Yes.

10 Q And the injection was given, and there was no  
11 positive response from the patient, isn't that right?

12 A Is that true? I mean is that correct?

13 Q You're the one who's offered the opinion that all of  
14 his treatment is reasonable and necessary and relates to the  
15 accident.

16 A I don't know if he got better or not.

17 Q Okay. Well, let me read from under the discussion.  
18 It says --

19 MR. BAKER: What page are we on?

20 UNIDENTIFIED SPEAKER: 77.

21 BY MR. WARD:

22 Q -- D/C. Discontinue, correct?

23 A I think -- or discharge, depending on --

24 Q Okay.

25 A -- yes.

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1 Q Discharge, discontinue, whichever --

2 A Yeah.

3 Q -- from care given that I cannot recommend a write  
4 arthroscopy given symptoms and lack of response to injection.

5 A Okay.

6 Q Does that suggest to you that an injection was given  
7 and he didn't respond?

8 A Yes.

9 Q So he was given an injection and he didn't get any  
10 better, right?

11 A Yes.

12 Q Okay. So the injection that was given was one that  
13 should have made the condition better if, in fact, that was  
14 the problem that he had, isn't that true?

15 A If, in fact, it was the condition that he actually  
16 had. That's correct.

17 Q Okay.

18 A If that was the correct diagnosis. That's correct.

19 Q And now, let's move down to 701.

20 MR. BAKER: Is that the next page?

21 MR. WARD: Next page, 700, 701.

22 UNIDENTIFIED SPEAKER: 28. It's 28 in our book.

23 MR. BAKER: Now I've got the order.

24 MR. WARD: Okay.

25 ///

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1 BY MR. WARD:

2 Q And it says recommend observation for all nerve  
3 symptoms, isn't that correct?

4 A That's correct.

5 Q Okay. And so, he recommends that any treatment is  
6 not related to the wrist injury and pain, isn't that true?

7 A I'm sorry. Say that again.

8 Q Well, let me read it for you.

9 A What'd he say.

10 Q Do you see where it says discussion?

11 A Yes.

12 Q Do you see where it says recommend observation for  
13 ulnar nerve symptoms?

14 A That's correct.

15 Q The next sentence says for CTS symptoms,  
16 observation, and treat under private insurance given, not  
17 related to wrist injury and pain, correct?

18 A That's correct.

19 Q And he says discussed with the patient. He  
20 understands and agrees, correct?

21 A That's correct.

22 Q And he says I cannot find correlation between injury  
23 and nerve complaints, given no change in nerve findings and  
24 complaints.

25 A That's correct.

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1 Q Correct?

2 A That's right.

3 Q Okay. Now let's go to page 704. And we have here  
4 physical examination. Do you see that?

5 A Yes.

6 Q And he has ear, nose, mouth, and throat, correct?

7 A Yes.

8 Q And you would expect that Dr. Gutierrez would  
9 conduct a thorough examination, would you not?

10 A Not really, but I'm sure he would, maybe sometimes.

11 Q So you don't think he conducts thorough  
12 examinations. Is that what you're telling us?

13 A I think his -- he probably has some assistants. He  
14 is a hand surgeon, you know. So I think he would probably  
15 just have assistants.

16 Q So you think when it's in Dr. Gutierrez's records,  
17 that he doesn't know what's there?

18 A Well, I think he might know what's there, but he's  
19 relying on other people, because I think that's how -- that's  
20 reasonable, you know, from --

21 Q Okay. And it says hearing is normal, right?

22 A Yes.

23 Q It doesn't say Tinnitus, does it?

24 A No.

25 Q So you would expect, I gather, that if a patient

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1 said to anyone, whether it was a doctor or a -- an assistant,  
2 that I've got ringing in my ears, that the person who was  
3 taking that history would write it down?

4 A No.

5 Q Oh, you wouldn't?

6 A No, I wouldn't.

7 Q Oh, okay. You would think they would put normal --  
8 it's normal for people who have ringing in the ears?

9 A They do it in my office sometimes. I have to  
10 correct them.

11 Q Doctor, is it your expectation that every time you  
12 find something in these records that is inconsistent, that you  
13 just discount it?

14 A No, I'm just trying to explain to you since you're  
15 asking. And, you know, you're asking me what I think about  
16 notes from Dr. Gutierrez. I'm going to tell you. I mean I  
17 work in the community. I know exactly what people write down  
18 and what they don't and how templates are. I mean I can tell  
19 you -- I mean I'm not the person on templates too. So I'm not  
20 trying to say I'm better. He's a hand surgeon. He's got a  
21 lot of people working in his office. I've called him on  
22 numerous cases on the cell phone. I've seen the counter. I  
23 see if he remembers the patients when I talk to him  
24 personally. I know his -- he's a very good hand surgeon.

25 Q And it does say hearing is normal, correct?

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1 A That's correct.

2 Q And if we look at page 705, we see normal color,  
3 correct?

4 A Normal color, yes.

5 Q Skin warm --

6 MR. WARD: I'm starting right at the top.

7 MR. BAKER: Thank you.

8 BY MR. WARD:

9 Q Skin warm and dry?

10 A Yes.

11 Q Normal hair distribution in scalp, eyebrow, face,  
12 correct?

13 A Yes.

14 Q There's no reference to abnormal hair growth or  
15 distribution or anything, is there? Isn't that true?

16 A That's correct.

17 Q Okay. And under musculoskeletal, he has normal  
18 gait, isn't that correct?

19 A Yes.

20 Q And he has no ataxic gait, isn't that correct?

21 A That's correct.

22 Q And he has no motor deficits, correct?

23 A That's correct.

24 Q Normal muscle strength?

25 A That's correct.

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1 Q No tremor?

2 A That's correct.

3 Q No atrophy?

4 A That's correct.

5 Q And under neurological, it has no sensory deficit  
6 with normal touch sensation, correct?

7 A That's correct.

8 Q Now that's not allodynia, is it, normal touch  
9 sensation?

10 A That's correct.

11 Q Okay. And now you saw Dr. Ferrante's report,  
12 correct?

13 A I did.

14 Q Who was it that referred the patient to  
15 Dr. Ferrante?

16 A I think it's Dr. Talbert.

17 Q Is that what you think?

18 A Yeah. I think they were corresponding. Ferrante  
19 and Talbert were -- Talbert was corresponding to each other.

20 Q Now can you tell us why the report is not directed  
21 to Dr. Talbert?

22 A I don't -- I have to look at the report again. It's  
23 going to somebody. I thought it was going to Talbert.  
24 Talbert was writing to Ferrante.

25 Q It's under UCLA.

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1 MR. WARD: What exhibit number do we have?

2 [Counsel Confer]

3 BY MR. WARD:

4 Q Okay. Can you see -- can you read that?

5 A Yes.

6 Q Who's it written to?

7 A This one is going to doctor -- Mr. Weber.

8 Q Okay. Who's Mr. Weber?

9 A He's an attorney at the Law Offices of Benson  
10 Bertoldo Baker Carter Smith.

11 Q Okay. And there's -- it's not directed to a doctor,  
12 is it?

13 A No.

14 Q And Dr. Ferrante, is he someone that you ever talk  
15 to?

16 A No.

17 Q So you don't know what he said or thought or found  
18 other than what is in his report, isn't that right?

19 A Yes.

20 Q Okay. Now are you aware that Dr. Schifini said that  
21 Dr. Ferrante concluded that the patient had RSD? Are you  
22 familiar with that?

23 A No.

24 MR. BAKER: That misstates his testimony, Your Honor. I  
25 can tell you what Dr. Schifini said. He said that

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1 Dr. Ferrante saw signs indicative of RSD, multiple signs, and  
2 sent him out for a lumbar sympathetic block, which confirmed  
3 RSD to Dr. Miller.

4 MR. WARD: And I can play the testimony from Thursday.

5 THE COURT: All right. Let's do that then.

6 MR. WARD: May I --

7 THE COURT: Do you need a few minutes to cue it up?

8 MR. WARD: May I withdraw this question? I'm going to --

9 I'll do it at lunch time --

10 THE COURT: Okay.

11 MR. WARD: -- and show it to Dr. Schifini [sic].

12 THE COURT: Fair enough.

13 MR. WARD: Sure.

14 BY MR. WARD:

15 Q Now take a look at Bates Stamp 3 of that report.

16 [Counsel Confer]

17 BY MR. WARD:

18 Q It's Exhibit Number 25 if you want to look at it in  
19 paper, but we're bringing it up on the screen. And I'd like  
20 to look at the top half of that page. Do you see that?

21 A Yes.

22 Q Do you see your name mentioned?

23 A Yes.

24 Q And it says you evaluated the patient on 9/12/06,  
25 correct?

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1           A     That's correct.

2           Q     And your final diagnosis regarding the knee included  
3 the possibility of RSD?

4           A     That's correct.

5           Q     Correct. You didn't examine the patient on 9/12/06,  
6 did you?

7           A     I don't see a record.

8           Q     And if you did, you'd have a record, correct?

9           A     Probably, yeah. I mean yeah, you'd have to have a  
10 record.

11          Q     Okay. So -- and none of your reports that predate  
12 this report say that you found the possibility of RSD, isn't  
13 that true?

14          A     That's correct.

15          Q     Okay. So this statement isn't correct, is it?

16          A     No, that's -- that may not be an inaccurate  
17 statement though, because what I -- when I saw the patient,  
18 the reason I asked for a second opinion before this, on August  
19 18th, '06, was to see if there's any underlying possibility  
20 that Dr. Shannon is incorrect about the left knee, because if  
21 it's not, and I would have told the patient I'm really  
22 concerned about something else going on. And that is why he's  
23 got this in his mind too.

24          Q     Well, wait. You don't know what Dr. Ferrante has in  
25 his mind, do you?

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1           A     No, I'm -- but he's getting this from the history of  
2 the patient.

3           Q     How do you know that?

4           A     Isn't this an evaluation from the patient?

5           Q     Well, I'm just asking you, doctor, what you know.  
6 Do you know where he's getting this information?

7           A     No.

8           Q     But the information that's in this report that says  
9 Dr. Shah evaluated the patient on September 12th, '06 is  
10 incorrect, isn't that right?

11          A     Yeah, I mean I don't see a note in my chart --

12          Q     Right.

13          A     -- on this, saying that I have seen the patient on  
14 9/16/06.

15          Q     And his -- and it -- where it says his final  
16 diagnosis regarding the knee included the possibility of RSD,  
17 that's not correct either, is it? You don't have any reports  
18 before the date of this that say final diagnosis is RSD.

19          A     No, but it doesn't say it's based on a report.

20          Q     Well, how --

21          A     I mean I tell my patients things. Patients also  
22 tell Mr. Weber. Mr. Weber may have confirmed. I mean I'm  
23 talking to the patient, trying to get him better.

24          Q     So you made a final --

25          A     I mean --

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1 Q You made a final diagnosis that -- regarding his  
2 knee, that he had the possibility of RSD, and you did not put  
3 it in your report or in your chart, is that right?

4 A You can't. You don't actually have -- you have to  
5 actually rule out that there's underlying pathology to the  
6 left knee before you make that diagnosis.

7 You cannot make a diagnosis of RSD unless there's --  
8 that is -- that it is the -- on the complex regional pain  
9 syndrome, the caveat is you cannot make a diagnosis if there's  
10 something going on on the left knee. I'm not a left knee  
11 expert. I was hoping there was something in the left knee. I  
12 said wait a second. If there's something in the left knee,  
13 maybe that's causing the pain generator. That's the reason on  
14 my 8/18 note I said go get a second opinion, because if  
15 they're telling you there's nothing going on in the left knee,  
16 that's a bad thing.

17 Q So --

18 A So I'm going to be telling the patient why it's  
19 important that he's compliant, why he's got to go to all these  
20 doctors.

21 Q So, in your opinion, it would be inappropriate for a  
22 doctor to say that the patient possibly has this?

23 A No, I've been talking to the patient. You know, I  
24 mean I talk to my patients.

25 Q I'm not talking about talking to the patient. I'm

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1 talking about putting in the report. It would be  
2 inappropriate for the doctor to put -- be inappropriate for  
3 you to put in your report he possibly has RSD.

4 A Yeah, it would be very bad, because --

5 Q Okay.

6 A -- remember, I don't want to put down RSD, because  
7 if I did, it's like telling -- it'll give an open checkbook to  
8 a pain management doctor.

9 Q Okay. So you could --

10 A You never do that. That's the wrong thing you could  
11 do.

12 Q You couldn't do that. That would be inappropriate.

13 A Right. So that would be probably wrong.

14 MR. BAKER: I'm sorry.

15 BY MR. WARD:

16 Q That would be --

17 A That's correct.

18 Q -- below the standard of care?

19 A Well, it would be a wrong thing, because he's going  
20 to doctors outside, and I want them to give independent second  
21 opinions.

22 MR. BAKER: Your Honor, is he asking him these questions  
23 in his capacity as a neurologist as opposed to a pain  
24 management doctor or somebody of a different element? Because  
25 I think that that's where -- objection vague as to from who's

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1 perspective he is asking him these questions, in terms of  
2 which specialization.

3 THE COURT: Mr. Ward.

4 MR. WARD: I'm asking this doctor just from this doctor's  
5 experience.

6 MR. BAKER: My question is is his ask --

7 MR. WARD: This is cross-examination. This is not you  
8 ask questions about him when he's wearing this hat or you ask  
9 questions about him when he's wearing this hat. He's a  
10 witness. I'm asking him questions about what he does.

11 MR. BAKER: Well, then lack of foundation, Your Honor,  
12 because if you're asking him what he does, you have to ask him  
13 from the perspective of neurologist.

14 THE COURT: Overrule the objection. You'll have a chance  
15 to reexamine him, Mr. Baker.

16 MR. BAKER: Okay.

17 BY MR. WARD:

18 Q Now let's go to page 5 of the report of  
19 Dr. Ferrante, under assessment, the top half. Do you see  
20 that?

21 A Yes.

22 Q And he says it is possible that the patient has  
23 complex regional pain syndrome, correct?

24 A That's correct.

25 Q Okay. So you think that's bad that he put in it's

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1 possible?

2 A No, I think he's actually quite accurate. If you  
3 see the second sentence, it states that however, the physical  
4 exam is more consistent with a chronic knee pain.

5 Q Well, you said that you can't put in possible.

6 A This is a pain management doctor. I'm a  
7 neurologist. There's a difference.

8 Q Ah, I see. I see. Now this doctor examined the  
9 patient, did he not?

10 A Yeah, he did.

11 Q And he had an opportunity to look at the hair  
12 growth?

13 A I presume he examined him completely, whatever he  
14 does.

15 Q It's referred to, isn't it, that the patient told  
16 him he had abnormal hair growth?

17 A I don't know what the patient told him. I actually  
18 -- I'm sorry. I have to -- the monitor doesn't show me the  
19 whole thing.

20 Q Okay.

21 A I can -- we can see what the history shows.

22 Q Okay. Well, let's go up above -- since we're on  
23 this page, under assessment -- we have the word assessment.  
24 And then up at the top, we have extremities. Do you see that?

25 A Yes.

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1 Q The last sentence begins with a word that begins  
2 with a letter O.

3 A Ochemosis [phonetic].

4 Q Yeah, what's that?

5 A Some kind of fungus.

6 Q Yeah. That's not RSD, is it, fungus?

7 A No, fungus is not RSD. It's seen in complex  
8 regional pain syndrome, but it's not RSD. RSD is Reflex  
9 Sympathetic Dystrophy.

10 Q And you don't think fungus is caused by RSD, do you?

11 A It -- like I said, in complex regional pain  
12 syndrome, it does say fungus -- people will actually have  
13 fungus. But I didn't -- I don't say -- I'm not -- I don't  
14 even know why he has fungus. I mean he could have -- there's  
15 other causes of fungus. I mean --

16 Q Is he --

17 A It's athlete's foot, right?

18 Q Is it your opinion that the fungus he has in his  
19 toenails is caused by RSD?

20 A I have no opinion right now. I can't tell you.

21 Q And after Dr. Ferrante examined him and did all  
22 these things, he did not conclude that the patient had RSD,  
23 did he?

24 A No, he said it's just -- it's possible. He thought  
25 it was a mechanical left knee thing.

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1 Q He said it's possible.

2 A Right.

3 Q But he said, however, his physical exam is more  
4 consistent with chronic knee pain, correct?

5 A That's right.

6 Q So all of the things that were present that you used  
7 to diagnose RSD were also present for Dr. Ferrante, isn't that  
8 correct?

9 A Yeah. I mean I presume it's almost the same period  
10 of time. I'm seeing him the same time, so --

11 Q Sure.

12 A -- whatever -- you know, I'm doing it from a  
13 neurology perspective. He's doing it from a pain management  
14 perspective. That's right.

15 Q Well, when you do it, allodynia is allodynia, isn't  
16 it?

17 A Allodynia is -- right, is pain.

18 Q Right.

19 A Right.

20 Q Right. Whether you're a neurologist or whether  
21 you're a pain management specialist, allodynia is allodynia.

22 A No, no, that's not true. Pain management  
23 definitions and their examinations and treatment is totally  
24 different from the scope of neurology. Just like reflexes.  
25 When I do a two out of four reflex, another person might see a

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1 three out of four reflex. Another person might have a  
2 hyporeflexia. Totally different training. So that's a very  
3 important thing.

4 He's the pain management doctor. He's looking at it  
5 from his perspective. And this is his assessment. I'm  
6 looking at it from a neurology perspective.

7 Q Isn't allodynia some abnormal pain that's so bad  
8 that you can't stand being touched even?

9 A That's correct.

10 Q Okay.

11 A That's correct.

12 Q And that's the definition for a neurologist?

13 A That's a general definition. But the way we  
14 interpret it on a clinical exam is totally different.

15 Q Isn't that the definition for a neurologist?

16 A That's correct.

17 Q And isn't that a definition for a pain management  
18 specialist?

19 A Yes.

20 Q Okay. And change in toenails is the same thing,  
21 whether it's a neurologist or a pain management specialist?

22 A I would think so, yeah.

23 Q Change in hair growth?

24 A Change in hair growth, absolutely.

25 Q Okay. And Dr. Ferrante saw all of those and still

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1 didn't conclude that it was RSD, did he?

2 A No, he actually thought it was more the left knee.

3 Q Yeah, more --

4 A He said it's still in the possibility, but he  
5 still --

6 Q He said --

7 A He's still thinking on exam, he really believes  
8 there could something wrong with the left knee.

9 Q Well, you don't know what he's thinking, do you?

10 A That's what it says.

11 Q You know what he's saying.

12 A Well, same thing. I presume he's writing and  
13 thinking the same thing.

14 Q Okay.

15 A Unless, you know, maybe he's not, but --

16 Q Okay.

17 A But he's not really a treating doctor, but --

18 Q And he used the word however, correct?

19 A That's right.

20 Q However, the exam is more consistent with chronic  
21 knee pain, correct?

22 A That's correct.

23 Q And says, at that time -- at this time, we do not  
24 have sufficient objective information from which to make a  
25 definitive diagnosis, isn't that correct?

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1 A That's correct.

2 Q And then says if the pain continues or worsens, I  
3 suggest that the patient undergo bone scans, correct?

4 A That's right.

5 Q And he recommends some other things, but the very  
6 first thing he says are bone scans.

7 A That's right.

8 Q Correct?

9 A That's right.

10 Q And you can't fake bone scans, can you?

11 A I don't think so. I mean --

12 Q No, okay.

13 A -- that's a nuclear test.

14 Q Okay. And so, the patient underwent bone scans,  
15 correct?

16 A I think he had a bone scan.

17 Q Right. And the bone scans were completely normal,  
18 weren't they?

19 A I don't think it showed anything.

20 Q Right.

21 A But I don't know what it shows.

22 Q Right. So then we have an objective test that  
23 doesn't show anything. So we just ignore that, right?

24 A Yeah, but -- yes, we're ignoring that.

25 Q Okay.

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1 A Absolutely.

2 Q We just ignore those things that don't fit with our  
3 diagnosis.

4 A We're -- we have a clinical diagnosis, and we're  
5 doing testing to support or disprove that clinical diagnosis.  
6 That's correct.

7 MR. WARD: Your Honor, it's 10 after 12:00. I'm not  
8 going to be done for a while. Does Your Honor wish that I  
9 continue or --

10 THE COURT: I say we take a break, Mr. Ward.

11 MR. WARD: Okay.

12 THE COURT: Is 1:15 adequate for lunch for everybody?

13 MR. BAKER: Yeah, more than. I have -- I'm sorry, Your  
14 Honor. I have Dr. Schifini coming back at 1:00/1:30 too.

15 THE WITNESS: I also have patients booked continuously  
16 now.

17 THE COURT: For this afternoon you mean?

18 THE WITNESS: Oh, yeah. Actually, there's a patient  
19 there right now, 11:30, for a history.

20 THE COURT: Oh, boy. So can we bring this witness back  
21 another day if we have Dr. Schifini returning?

22 MR. BAKER: We --

23 THE COURT: I mean when can we bring him back?

24 MR. BAKER: I mean I think you -- here's -- I have talked  
25 with Casey that I'm not going to call Dr. Koka. I'm not going

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1 to call Kathleen Hartman [phonetic], his life care planner.  
2 I'm not going to call Baker. My fear is that we're not going  
3 to be able to get the case done this week. And it's been  
4 somewhat of a scheduling --

5 THE COURT: Oh, I kind of speculated about this myself.

6 MR. BAKER: Well, and I --

7 THE COURT: So --

8 MR. BAKER: -- tried to trim it. And if we could get  
9 this witness and Dr. Schifini done today, I think we can get  
10 it done this week.

11 THE COURT: But I thought this witness said he has  
12 patients this --

13 MR. BAKER: He does.

14 THE COURT: -- and Dr. Schifini is apparently planning to  
15 be here.

16 MR. BAKER: Yeah. So I guess there's nothing we can do  
17 about that.

18 THE COURT: Are you booked all afternoon, doctor?

19 THE WITNESS: Yeah. After 6:00 p.m.

20 THE COURT: After 6:00 p.m.?

21 MR. BAKER: No, the county doesn't like paying overtime.

22 THE WITNESS: Okay. Well, I'm good until 8:00 tomorrow,  
23 or 8:30. I'm seeing patients -- I have such a busy practice.  
24 I have to be honest with you. I'm booked up to November.  
25 Everybody has been rescheduled. We had to cancel four

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1 procedures this morning.

2 THE COURT: Wow. Well, that's a good thing for you  
3 you're so busy. But my question is when can you come back so  
4 we can conclude the examination?

5 How much, ballpark? Do you have any idea, Mr. Ward?

6 MR. WARD: I would guess another hour.

7 THE COURT: Another hour? Mr. Baker will have some  
8 follow-up I imagine.

9 MR. BAKER: Not so much so far.

10 THE COURT: So when can you come back? Do you know  
11 offhand? Or will you need to check and let Mr. Baker know?

12 THE WITNESS: I mean I'd like to give at least one day  
13 notice to patients. I mean, obviously, that would be always a  
14 good thing --

15 THE COURT: Right.

16 MR. WARD: -- to do that. You know what I mean? I can  
17 explain to them, call them up personally.

18 THE COURT: Do you have patients booked every afternoon  
19 this week?

20 THE WITNESS: Yes.

21 THE COURT: Well, then I'll guess you'll have to  
22 coordinate with Counsel.

23 But, Mr. Ward, my question is given the schedule of  
24 these respective witnesses, do you have any objection to  
25 letting this witness go for the afternoon and resuming with

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1 Dr. Schifini, who apparently has cleared his schedule?

2 MR. WARD: No, Your Honor. I understand he's -- I mean,  
3 you know, we all like it some other way.

4 THE COURT: I know.

5 MR. WARD: But we can't. And so, of course. Of course,  
6 I'm not going to insist that he leave all of his patients  
7 sitting. Of course, not.

8 THE COURT: Mr. Baker.

9 MR. BAKER: I'm with you guys.

10 THE COURT: Any thoughts on when we can bring Dr. Shah  
11 back?

12 MR. BAKER: Can I talk to someone smarter than me?

13 THE COURT: Sure.

14 MR. BAKER: Monique.

15 Does the clerk keep the same schedule always, the  
16 mornings of the -- Tuesday, Wednesday, Thursday?

17 THE COURT: Tuesday, Wednesday, Thursday are pretty much  
18 out of the question. But we can start at 1:00 every day this  
19 week if that helps any. And we do have all day Friday.

20 [Pause]

21 MR. BAKER: If the continued cross and redirect take two  
22 hours or less, we could move Dr. Shah -- well, but you have  
23 patients scheduled you said and you need at least a day to  
24 call them.

25 THE WITNESS: Yeah, but I'm going to reschedule

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1 everybody.

2 MR. BAKER: Because we were talking about Tuesday at  
3 1:00, but today is Monday, right?

4 THE WITNESS: I think Tuesday at 1:00, I can go to the  
5 office and start calling people. At least, you know, they're  
6 -- I'm booked until 8:00 tomorrow. So it doesn't make a  
7 difference. So you just have to tell me, hopefully, a real  
8 time estimate. Like, you know --

9 MR. WARD: I have two people that I can't play around.  
10 And that is I have a doctor who'll be here at 9:00 on Friday  
11 morning.

12 MR. BAKER: So --

13 MR. WARD: I have a witness who's flying in from Japan,  
14 who will be here at 4:00 on Thursday.

15 MR. BAKER: And you figure you have another hour on  
16 cross?

17 MR. WARD: That's my guess.

18 MR. BAKER: And I will not have an hour on redirect. So  
19 Tuesday at 1:00. If we can do it, we can do it.

20 THE WITNESS: I'll make it happen. There's a deposition  
21 I have at 1:00 on Tuesday tomorrow, but I'll -- I'm sure I can  
22 tell them that --

23 MR. BAKER: That's with Dave Riddle [phonetic]?

24 THE WITNESS: I have no idea to be honest with you, but I  
25 can cancel that or change it.

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1 MR. BAKER: Okay. If that accommodates the Court.

2 THE COURT: One o'clock then tomorrow afternoon.

3 THE WITNESS: Okay. I'll be here at 1:00 tomorrow.

4 THE COURT: Okay, thank you, sir.

5 Okay. See everybody else at 1:15.

6 [Designation of record concludes at 12:09 p.m.]

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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.

  
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ANTOINETTE M. FRANKS, Transcriber



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TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ,	)	
	)	
Plaintiff,	)	CASE NO. A-531538
	)	
v.	)	DEPT. X
	)	
FIESTA PALMS LLC,	)	
	)	
Defendant.	)	
_____	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 2, 2010

**REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF ENRIQUE RODRIGUEZ  
VOLUME III**

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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Bench Trial

Plaintiff's Witness(es):

Enrique Rodriguez (Continued)..... 3

Defendant's Witness(es):

None

1                   TUESDAY - NOVEMBER 2, 2010 - 3:21 P.M.

2                   [Designation of record begins at 3:21 p.m.]

3                   THE COURT:   Who's the next witness, Mr. Baker?

4                   MR. BAKER:   Enrique Rodriguez on cross-examination.

5                   THE COURT:   Okay, very well.   Please come forward, sir.

6                   THE CLERK:   Has he been previously sworn in?

7                   THE COURT:   Yes, but since it's a new day, you'll have to  
8 re-swear him.

9                   THE CLERK:   Okay.

10                  THE COURT:   Sir, please remain standing so we can  
11 re-swear you since it's a new day.

12                  ENRIQUE RODRIGUEZ, PLAINTIFF'S WITNESS, SWORN

13                  THE CLERK:   Thank you.   Please be seated.   State your  
14 name and spell it for the record, please.

15                  THE WITNESS:   My name is Enrique Rodriguez,  
16 E-N-R-I-Q-U-E.   Last name is R-O-D-R-I-G-U-E-Z.

17                  THE COURT:   Thank you.   Whenever you're ready, Mr. Ward.

18                  MR. WARD:   Thank you, Your Honor.

19                                   CROSS-EXAMINATION

20 BY MR. WARD:

21                  Q     Good afternoon, Mr. Rodriguez.

22                  A     Good afternoon.

23                  Q     At the time of the accident, which was November 22,  
24 2004, you lived in what town?

25                  A     In Hemet, California.

1 Q Hemet is next to Riverside, near Riverside?

2 A Yes, it is, Riverside County.

3 Q Okay. And then did you move from Hemet? Do you  
4 still live in Hemet?

5 A No, I don't.

6 Q Okay. So you moved from Hemet?

7 A Yes.

8 Q Approximately when did you move from Hemet?

9 A I don't recall when. It was a couple of years  
10 after.

11 Q Okay. Do you remember what year, 2006, 2007?

12 A No, I don't.

13 Q No? Okay. Where did you move to?

14 A Eventually, I moved out to Las Vegas.

15 Q Okay. So, do you remember what year you moved to  
16 Las Vegas?

17 A I don't recall.

18 Q Why did you move to Las Vegas?

19 A I moved to Las Vegas. At that time, I was having a  
20 lot of my doctors out here and physical therapy and it was  
21 more convenient at that time.

22 Q Okay. Now, in 2005, you came under the treatment of  
23 Dr. Shannon?

24 A I believe so, yes.

25 Q Okay. It was Dr. Shannon who performed the surgery

1 on you?

2 A In 2005?

3 Q Uh-huh.

4 A Yes.

5 Q Okay. Dr. Shannon was here in Las Vegas, correct?

6 A Correct.

7 Q Okay. And your physical therapy was in California  
8 at that time?

9 A I don't recall.

10 Q Okay. And so you think that sometime about 2006 you  
11 moved to Las Vegas?

12 A I don't recall what year I moved to Las Vegas.

13 Q Okay. Do you still live in Las Vegas?

14 A No.

15 Q When did you move away from Las Vegas?

16 A I'm going to guess about a year-and-a-half ago.

17 Q Okay. So that would be sometime in the year '08?

18 A I believe so, yes.

19 Q Okay. And so did you live in Las Vegas or the Las  
20 Vegas area fairly continually from sometime about 2006 until  
21 about 2008?

22 A I would believe around there.

23 Q Okay, okay. So, if I just kind of summarize this.  
24 At the time of this accident, you lived in Hemet. Sometime,  
25 perhaps a couple of years later, you moved to Las Vegas.

1 A Uh-huh.

2 Q And sometime a couple of years after that you moved  
3 away from Las Vegas.

4 A Correct.

5 Q So, in '08 when you moved away from Las Vegas, where  
6 did you move to?

7 A Back to -- I moved back to -- when we left back in  
8 -- when we left from Las Vegas, my -- the place that I was  
9 living at, the owner lost his home, so we had to leave.

10 Q Yeah, I'm just trying to find out where that town  
11 is.

12 A So, we temporarily went to live with one of my sons  
13 up north because we didn't have a place to live.

14 Q What town?

15 A That was up in the Fresno area.

16 Q Okay. So when you moved away from Las Vegas  
17 sometime about 2008, you moved generally to the Fresno area?

18 A Temporarily.

19 Q Okay. And about how long did you live in the Fresno  
20 area?

21 A Just a couple of weeks.

22 Q Okay. And then where did you move to?

23 A And then we were basically homeless.

24 Q What town were you mostly living in?

25 A I went to the Riverside area.

1 Q Okay. So sometime in about 2008, after you left  
2 Fresno, you moved back to the Riverside area?

3 A Yes.

4 Q And have you been pretty much in the Riverside area  
5 from that time up until now?

6 A Yes.

7 Q For the last two or three years?

8 A Yes.

9 Q Okay. And so during this period of time that you  
10 were living in Hemet for the first couple of years. Hemet for  
11 the first couple of years after this accident, you had to come  
12 to Las Vegas every time you had a doctor's appointment in Las  
13 Vegas, is that correct?

14 A Yes.

15 Q Okay. So every time you saw Dr. Shannon you had to  
16 drive over to Las Vegas to see her?

17 A Correct.

18 Q Okay. And so any physical therapy that you had in  
19 Las Vegas during that time, you had to drive over to Las Vegas  
20 for that?

21 A No, because when I had physical therapy at Rancho  
22 Physical Therapy. They had a facility in Hemet.

23 Q Okay. So you were having physical therapy -- when  
24 you were living in Hemet, you were having physical therapy in  
25 Hemet?

1 A Correct.

2 Q Okay. So, now you moved to Las Vegas sometime in  
3 '06. And, Mr. Rodriguez, I'm using '06 for convenience. I  
4 know you said you don't know exactly whether it was '06 or  
5 wherever, but somewhere about that time, right?

6 A Correct.

7 Q Okay. So, in about '06 you now became pretty much  
8 living in Las Vegas?

9 A Okay.

10 Q And so anything that you did in California for  
11 purposes of treatment, at that period of time, you had to  
12 drive from Las Vegas back to California, is that correct?

13 A Yeah, I did a lot of driving.

14 Q Okay. You did a lot of driving?

15 A Correct.

16 Q Put a lot of miles on the car, right?

17 A Correct.

18 Q Okay. And that was driving back and forth between  
19 Las Vegas and California for purposes of treatment?

20 A Correct.

21 Q Okay. And did you ever come to Las Vegas or go back  
22 and forth for any reason other than medical treatment?

23 A It was typically medically.

24 Q Okay. But sometimes you'd do it for other things or  
25 never for other things?

1 A No, it was typically for medical purposes.

2 Q Okay, okay. And, now, were you able to drive during  
3 this period of time?

4 A Yes.

5 Q Okay. So, it wasn't -- your spouse's name is Maria?

6 A Maria, yes.

7 Q It wasn't -- Maria didn't have to do all the  
8 driving, correct?

9 A She did most of the driving.

10 Q Okay. But you were able to drive, right?

11 A If necessary, yes.

12 Q Okay. And you told your doctors you were able to  
13 drive, right?

14 A Did I tell my doctors?

15 Q Right.

16 A If they asked.

17 Q Right. If they asked, you told them you were able  
18 to drive, right?

19 A Yes.

20 Q Okay. And, now, how did you spend your typical day  
21 during this period of time? Did you ever have anything you'd  
22 consider a typical day?

23 A Not -- what period are we talking about?

24 Q Any -- if you can give me any time between November  
25 20, 2004 and today. Just give me a period of time and tell me

1 what your typical day was.

2 A Typical day is being tired, is being frustrated,  
3 being sad, not being active, not having a good memory.

4 Q Let me explain what I'm looking for, and I don't  
5 mean to --

6 A Okay.

7 Q -- interrupt you. I want you to answer your  
8 question if I haven't given you an opportunity to answer it  
9 all.

10 A Okay.

11 Q But what I'm looking for is I want you to tell me  
12 what you did, what you actually did. I'm not asking about how  
13 you felt.

14 A Okay.

15 Q It's about what you did.

16 A Sticking to my physical therapy, making a point to  
17 do my physical therapy, to make it in to physical therapy, to  
18 keep my body moving, to make that a point of my life, physical  
19 therapy. To get up and do physical therapy no matter how I  
20 felt.

21 Q Yeah. About how often did you do -- did you go to  
22 physical therapy?

23 A I try to do it at least three times a week.

24 Q Okay. So, three times a week. Now, was that every  
25 week out of the year? I mean, did you go to physical therapy

1 150 times a year or --

2 A I would say I tried to do it three times a week --

3 Q So you --

4 A -- very religiously.

5 Q So you believed you went to physical therapy 150  
6 times a year?

7 A I wouldn't say 150 whatever.

8 MR. BAKER: Your Honor, is that assuming that there are  
9 450 days in a year?

10 THE COURT: Well, yeah. Ask your -- rephrase the  
11 question, please.

12 MR. WARD: There's 52 weeks in a year, right?

13 MR. BAKER: Fifty-two, 150.

14 MR. WARD: Fifty-two times three is 156.

15 MR. BAKER: I only have ten fingers and ten toes. Your  
16 Honor, object to the form.

17 THE COURT: I'll ask you to rephrase, Mr. Ward.

18 MR. WARD: Sure.

19 BY MR. WARD:

20 Q Here's all I'm trying to find out. You said you  
21 went to physical therapy about three times a week.

22 A Uh-huh.

23 Q Now -- were you objecting?

24 MR. BAKER: Oh, no. I'm sorry.

25 ///

1 BY MR. WARD:

2 Q Okay. You said you went to physical therapy about  
3 three times a week. Now, if you went to physical therapy  
4 every week, that would be about 150 times a year. So, what  
5 I'm trying to find out is did you go to physical therapy about  
6 150 times a year or did you not go every single week? I'm  
7 just trying to find out.

8 A Well, there were times that physical therapy was  
9 closed or that I couldn't make it because I might have got  
10 sick.

11 Q Sure.

12 A But three times a week was my goal.

13 Q Okay. So you think you went to physical therapy  
14 more than 100 times a year?

15 A Absolutely.

16 Q Okay.

17 A Yes.

18 Q Okay. And, now, on those days that you didn't go to  
19 physical therapy, if you went three times a week, there's four  
20 days you're not going, correct?

21 A Uh-huh.

22 Q What'd you do on those four days, your typical day?

23 A Get out of bed. Fortunately, I have a prescribed  
24 hospital bed at home that's remote control that lifts me up.  
25 So, most of the times when I wake up, it's hard to get out of

1 the bed, so I'm one of the lucky ones that has a bed that  
2 helps me get out of bed.

3 And I get out of bed and there's not much that I  
4 could do, you know. I can't walk out the front door and go  
5 jogging, so everything is limited. There's -- my whole life  
6 is limited now. So, whether I get on the computer, watch  
7 something on the computer, watch TV, it ain't what it used to  
8 be, you know. It ain't as easy as going to watch the kids go  
9 play football or because the body just don't feel like it  
10 anymore.

11 Q Do you ever use the computer?

12 A Yes.

13 Q And how often do you use the computer?

14 A Not as often as I used to because the -- it's just  
15 different than before I was injured.

16 Q Okay, right. What prevents you from using a  
17 computer today?

18 A Well, it's not like anything prevents me. It's just  
19 maybe the anxiety or the thrill of being the computer or maybe  
20 the stuff that's on the computer. It's just maybe the stuff  
21 that's on the computer, it's not the same that the excitement  
22 it used to bring me, the happiness it used to bring me, so.

23 Q Did you ever look at real estate on the computer?

24 A No.

25 Q No? How about back in 2004? Did you ever look at

1 real estate on the computer?

2 A My life was real estate.

3 Q So, did you look at real estate on the computer?

4 A Absolutely.

5 Q Okay. Did you spend a fair amount of time finding  
6 houses on the computer?

7 A I was, whether it was a computer or whether it was  
8 the newspaper, I was on top of my game in real estate.

9 Q Okay.

10 A That was my life.

11 Q Right. And now one of the great things about real  
12 estate was you didn't have to work very many hours, isn't that  
13 right?

14 A For me myself?

15 Q Right.

16 A No, not necessarily.

17 Q I'm not -- I don't understand your answer, so I'm  
18 going to ask it differently and see if I can -- are you  
19 telling me that you spent a lot of hours doing real estate or  
20 you did not spend a lot of hours doing real estate?

21 A For me as an investor, I spent as many hours as I  
22 needed to do real estate.

23 Q Right. And how many hours a week typically would  
24 that be that you spent doing real estate?

25 A Well, every transaction was different, but there

1 were some that were quicker than others. And being that I was  
2 an investor, I would use the escrow department or title  
3 company, so they would do a lot of the work that I didn't have  
4 to do.

5 Q Right. The escrow or title company would do things  
6 so you wouldn't have to do that part of it, right?

7 A Correct.

8 Q And in terms of any time you did any refurbishing of  
9 the houses that you purchased, you could have that done by  
10 outside people, correct?

11 A Correct.

12 Q You'd hire people?

13 A Correct.

14 Q To do things like painting and cleanup and stuff  
15 like that?

16 A Correct.

17 Q Okay. And you could hire people to climb into  
18 attics and under the house and do things like that for doing  
19 inspections, couldn't you?

20 A Most of the times, I like to take part in doing that  
21 myself initially. If I drove through a neighborhood and saw a  
22 house, I would like to be part of that, to see what I was  
23 looking at.

24 Q Sure. You'd want to be able to actually be there  
25 physically and look at the house from the outside?

1 A Correct.

2 Q And you'd actually want to be there physically to  
3 look at the house from the inside if there was an opportunity  
4 to take a look at it at the inside, correct?

5 A Correct.

6 Q Okay. But you didn't always crawl under the house,  
7 did you?

8 A Not if there wasn't a place to crawl into.

9 Q Right. You were -- you've been a big man for quite  
10 a while, haven't you?

11 A You can say so, yes.

12 Q Okay. And it's not as easy for big men to crawl  
13 under houses as it is for little guys?

14 A I always got the job done that I needed to.

15 Q Right, okay. But you didn't have to crawl under  
16 every single house, did you?

17 A Not if there wasn't a place to crawl into, correct.

18 Q Right. And you didn't have to go into the attic of  
19 every single house?

20 A I'd like to take a look into attics if it was  
21 necessary.

22 Q Sure, which means you could climb up a step ladder  
23 and look in the attic with a flashlight?

24 A No, actually at the size that I've always been, I  
25 had no problem getting in there.

1 Q Okay. So you'd like to be up there and see what was  
2 there?

3 A Absolutely.

4 Q Okay. But you could hire someone else to do that,  
5 couldn't you?

6 A If need be, yes.

7 Q Okay. And you'd still be able to see the inside of  
8 the house?

9 A If I hired somebody?

10 Q No, if you -- you've been physically able to walk  
11 into a house, haven't you, for the last five or six years?

12 A For the last five or six years when I've been  
13 injured?

14 Q Uh-huh.

15 A I have been in so much pain, I have problems just  
16 walking down a curve. I have problems just driving. I have  
17 problems just sleeping. I have problems just putting a sheet  
18 over my leg. That question that you just asked me about going  
19 into a house and doing this real estate, that is like for me  
20 to do, is very, very difficult, if not almost impossible.

21 Q So, it's been almost impossible for you to even walk  
22 into a house?

23 A For business purposes, yes.

24 Q Well, is there a difference between ability to walk  
25 into a house for business purposes and ability to walk into a

1 house for some other purpose?

2 A Well, when you're doing it as a business and you  
3 want to do it correctly, you're dealing with buyers. You're  
4 dealing with sellers. You're dealing with contracts. You're  
5 dealing with trying to do things right and ethical. I'm not  
6 capable of a good phone conversation, to be honest with you.

7 I'll give you an example right now. I just called  
8 somebody in California and if it wasn't for Maria there, I'm  
9 telling them on the voice message I've been in trial for two  
10 days. And then Maria hears the phone conversation. She taps  
11 me on the shoulders and says, "No, this is two weeks now."

12 That, to me, is the way sometimes I'm thinking and  
13 that's not the way to leave a voice message and it sure ain't  
14 the way to run a business. And she had to clear and clarify  
15 that and say, "No, you're going on two weeks, on two days."  
16 That was just a message that I was leaving a friend on their  
17 voicemail. I'm not trying to do that on purpose. If I can't  
18 even leave that, that bothers me.

19 MR. BAKER: Your Honor, can we take a break.

20 THE COURT: Do you want a short break?

21 MR. BAKER: Could I just have permission to approach?

22 THE COURT: Sure.

23 [Counsel and Client Confer]

24 MR. BAKER: Is it okay that I'm just talking to him?

25 THE COURT: Sure.

1 [Counsel and Client Confer]

2 MR. WARD: Did you want to take a break?

3 THE WITNESS: No, I'm okay. I'm okay.

4 MR. BAKER: And I didn't speak to him about anything. I  
5 know we know. I just --

6 THE COURT: Okay. Is it your desire to continue?

7 THE WITNESS: Yes.

8 THE COURT: Okay. Mr. Ward?

9 BY MR. WARD:

10 Q Thank you, Your Honor.

11 A Okay.

12 Q Now, in your business, when you would sell a house,  
13 you typically used a real estate broker, did you not?

14 A There were sometimes that I did.

15 Q Well, you said that you're not a licensed real  
16 estate broker, isn't that true?

17 A Correct.

18 Q Okay. So, when you sold a house, you typically used  
19 a real estate broker, correct?

20 A Sometimes I did.

21 Q Okay. And when you bought a house, there was  
22 oftentimes a real estate broker?

23 A Pardon me.

24 Q When you bought a house, there was oftentimes a real  
25 estate broker?

1 A Sometimes there were, sometimes there weren't.

2 Q Okay. And when there wasn't a real estate broker,  
3 there would be an escrow company?

4 A There would always be an escrow company.

5 Q So in every purchase there was an escrow company and  
6 they would do the papers, right?

7 A Correct.

8 Q Paperwork?

9 A Correct.

10 Q Okay. And the escrow company would arrange for  
11 things like termite inspections?

12 A Correct.

13 Q And inspection companies to do things?

14 A Correct.

15 Q And if there was work that needed to be done, they  
16 would arrange for that to be done?

17 A Correct.

18 Q And sometimes you would arrange for your own work to  
19 be done?

20 A Correct.

21 Q Predominantly you were the brains of the outfit,  
22 right?

23 A Correct.

24 Q You took courses, did you not?

25 A Correct.

1 Q And you learned how to do this?

2 A Correct.

3 Q Okay. And you learned how to buy houses?

4 A Correct.

5 Q And you learned how to sell them?

6 A Correct.

7 Q And sometimes you would do things like flip houses?

8 A Correct.

9 Q Tell me, sir, what does that mean, to flip a house?

10 A Well, I think that's a term that became popular  
11 because of TV. So, it's just a term that I used. TV brought  
12 it into the mainstream. It's basically buy a house, fix it  
13 up, refurbish it, and then resell it, so it's just kind of a  
14 flip.

15 Q Right.

16 A That's basically what it means.

17 Q And sometimes you'd even buy a house and not do  
18 anything and sell it, right?

19 A If I was fortunate enough to run into that great  
20 opportunity, I think we would all love that.

21 Q Right.

22 A Yes.

23 Q And you did that from time to time?

24 A Yes.

25 Q And you did that because you knew what you were

1 doing?

2 A Not typically because I knew what I was doing. It  
3 was just the luck of the opportunity.

4 Q Okay. Okay. But you had to buy it at the right  
5 price. You had to know what the right price was to buy it at,  
6 didn't you?

7 A That was part of it.

8 Q Because if you bought -- if you paid too much money  
9 for it, you'd get burned.

10 A Well, pretty much, yeah, that's correct.

11 Q Okay. And by that, I'm sort of speaking in slang.  
12 I don't mean to do that.

13 A Yeah.

14 Q If you paid too much for the house and couldn't sell  
15 it for more than you paid for it, it wasn't good?

16 A Yeah, it wouldn't be good for anybody.

17 Q Right, okay. And so you learned pretty much how to  
18 avoid doing that?

19 A I tried my best to do my due diligence.

20 Q Correct. And so you would do research and check  
21 neighborhoods and find out comparables and all of the kinds of  
22 things that went with selling real estate, buying and selling  
23 real estate.

24 A Correct.

25 Q Right. And that included doing your research and

1 doing a lot of this stuff on the computer, right?

2 A Correct.

3 Q I mean you didn't spend a lot of time driving up and  
4 down the street in front of a house trying to find out about  
5 the neighbors, did you?

6 A Everything was incorporated.

7 Q Sure, but what I mean is, sir, having done this for  
8 a while, you might drive into the neighborhood to see what the  
9 neighborhood looked like, but you wouldn't go up and down  
10 trying to figure out what each house on the block was worth?

11 A Everything, you still had to put your research, so  
12 yeah.

13 Q Sure, right. And the research would be mostly  
14 finding out about other sales, correct?

15 A Correct.

16 Q That's how you find comparables. You find out what  
17 houses have sold.

18 A Correct.

19 Q You can't tell that from driving up and down the  
20 street because the for sale signs aren't in the yards anymore.

21 A Correct.

22 Q Right? You've got to do it some other way.

23 A Well, I haven't done it in all these years, so I  
24 don't know what's really --

25 Q Right.

1 A -- going on in today's market.

2 Q Okay. I understand that you haven't done it  
3 recently, but actually nobody's been doing a lot of it  
4 recently, isn't that true?

5 A 2004 was the last time I did it, so.

6 Q Right, I understand. But you have some awareness of  
7 the real estate market, don't you?

8 A From 2004 to right now?

9 Q Right.

10 A You know, to be honest with you, my mind is not even  
11 there, to be honest with you.

12 Q I understand. Here's what I'm looking for. Just  
13 tell me this. I believe that in general in the last few years  
14 the real estate market hasn't been very good. Is that -- do  
15 you have some understanding about that or not?

16 A Well, I guess it would depend on what side of the  
17 fence you're on.

18 Q Okay. Okay. Now is there -- when you buy a house  
19 that you're going to sell, how would you typically do it?  
20 Here's -- let me tell you what I'm looking for.

21 A Okay.

22 Q Because I've never been a real estate investor, so I  
23 truly don't know how this is done. But like when you -- when  
24 I bought houses before to live in, I go see a house that's got  
25 a sign in the front or I look in multiple listings or I do --

1 look in ads in the paper or I do something to see what various  
2 houses are and find a house that maybe I want to go look at.  
3 Is that how you would buy your houses or would you buy your  
4 houses from banks or how would you find out about it?

5 A I think you pretty much explained a great source  
6 like that.

7 Q Okay.

8 A Yeah.

9 Q So an investor like you would buy it pretty much  
10 like an end-user like me?

11 A Yeah, but there would be other approaches. I can  
12 advertise looking for properties or I also could use the  
13 internet.

14 Q Uh-huh, uh-huh. And most of the brokers have  
15 properties online now?

16 A Now at this time, I don't know, no.

17 Q Well, they've had properties online for a number of  
18 years, haven't they?

19 A Well, from 2004 and to now, I'm sure a lot has  
20 changed. A lot is different.

21 Q Right. Back in 2004, they had properties online,  
22 didn't they?

23 A Yes.

24 Q Okay. So, before your accident you could do  
25 research for purchasing properties and finding comparables

1 online?

2 A Correct.

3 Q Okay. And then when you would buy the house, would  
4 you have to get a mortgage on the house that you'd buy?

5 A Every property would be different.

6 Q Okay. Sometimes you'd pay cash for the houses?

7 A They would be different.

8 Q Most of the time you'd take out a loan on the house?

9 A Sometimes you can assume a loan.

10 Q Okay.

11 A Like I said, every situation is different.

12 Q And then you would look at the house and decide what  
13 you needed to do. And then, if necessary, you would hire  
14 somebody to do it?

15 A Correct.

16 Q And then you'd put it on the market to sell?

17 A Typically that's the way it was.

18 Q Okay. And the last house you sold was in February  
19 of 2004?

20 A I believe so, yes.

21 Q And that was the house you lived in?

22 A Correct.

23 Q How long had you lived in that house?

24 A I believe I recall six months, four months.

25 Q Four to six months?

1 A I believe.

2 Q So that house was in Hemet?

3 A That was in Hemet.

4 Q Okay. And so and before the four to six months that  
5 you lived in that house in Hemet, did you live in another  
6 house in Hemet?

7 A I don't recall where I was at before that.

8 Q Okay. Were the houses that you were buying and  
9 selling, were these mostly houses that you were living in?

10 A No.

11 Q No? The house in Hemet was kind of unusual?

12 A I would say so, yeah.

13 Q Okay. Generally, you were not living in the houses  
14 that you were buying and selling for purposes of your real  
15 estate investment?

16 A Correct.

17 Q Okay. And so the house that you lived in before  
18 Hemet, did you own that or did you rent that or --

19 A I don't recall.

20 Q You don't recall?

21 A No.

22 Q Okay. Thank you, sir.

23 MR. WARD: I don't have any further questions.

24 THE WITNESS: Thank you.

25 THE COURT: Just a moment.

1 THE WITNESS: Oh.

2 THE COURT: I don't know if Mr. Baker has any.

3 THE WITNESS: Oh, I forgot.

4 THE COURT: Mr. Baker?

5 MR. BAKER: No questions, Your Honor.

6 THE COURT: Okay. Thank you, sir. You may step down.

7 THE WITNESS: You're welcome. Thank you.

8 [Designation of record concludes at 3:55 p.m.]

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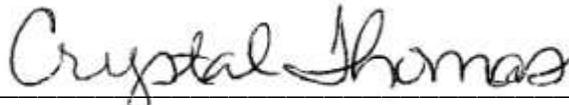
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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.



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CRYSTAL THOMAS, Transcriber

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

**\* \* \* \***

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

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**APPELLANT'S APPENDIX**  
**VOLUME 10**

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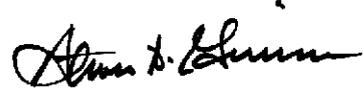
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DISTRICT COURT  
CLARK COUNTY, NEVADA



CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 28, 2010

**REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. JOSEPH SCHIFINI**

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
Benson, Bertoldo & Baker

For the Defendant: KENNETH C. WARD, ESQ.  
Archer \* Norris

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10 App. 1811

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Defendant's Witness(es):

None

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DEFENDANT'S:

None

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1                    THURSDAY, OCTOBER 28, 2010 AT 1:34 P.M.

2                    [Beginning Of Portion Designated For Transcription]

3                    DR. JOSEPH SCHIFINI, PLAINTIFF'S WITNESS, SWORN

4                    THE CLERK: Please be seated, stating your full name,  
5 spelling your last name for the record.

6                    THE WITNESS: Joseph Schifini, S-C-H-I-F-I-N-I.

7                    EXAMINATION

8 BY MR. BAKER:

9                    Q     Dr. Schifini, would you introduce yourself to the  
10 Court? I'm Joseph Schifini.

11                    A     I'm Joseph Schifini.

12                    Q     What area do you practice?

13                    A     I'm an anesthesiologist, practicing in pain  
14 management.

15                    Q     And would you please explain to the Judge your  
16 education with respect to that current procedure?

17                    A     I grew up here in Las Vegas, went to --

18                    Q     You grew up in Las Vegas?

19                    A     Yes.

20                    Q     Born and raised?

21                    A     I was born in California, but moved here when I was  
22 two. My parents sort of made me come with them, but -- so I  
23 went to school here, got a scholarship to UNLV. I have a  
24 minor in biology -- excuse me, a major in biology and minor in  
25 chemistry. I attended medical school at the University of

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1 Nevada School of Medicine up in Reno. I completed that in  
2 four years, and then pursued an anesthesia residency as a  
3 requirement. For the anesthesia residency, you have to do a  
4 year internship in something. It's usually either internal  
5 medicine or surgery. I chose the internal medicine route, did  
6 that for a year at UMC here, and then did a three-year  
7 anesthesia residency in southern California at UC-Irvine,  
8 where I served my last year as chief resident and multiple  
9 rotations in pain management. I came back here to Las Vegas  
10 to start my private practice, which from the beginning was  
11 primarily pain management, in the summer of, like the 90  
12 percent range. The other 10, 20 percent is the traditional  
13 anesthesiology-type role, where you put patients to sleep.  
14 And then, as my sort of employment situation progressed, it  
15 became 100 percent pain management, probably about seven or  
16 eight years ago. So what I'm doing now is basically looking  
17 at diagnoses and treatment of complex painful conditions,  
18 oftentimes associated with either the spine or the  
19 extremities.

20 Q Does that include neurologically mediated disease?

21 A Yes.

22 Q Does that include diseases, such as causalgia,  
23 complex regional pain syndrome and RSD?

24 A Yes.

25 Q All those things are somewhat different, as we'll

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1 explain to the Court, as I've tried to say?

2 A They're similar, but there's major differences  
3 between them.

4 MR. BAKER: I'm going to have him accepted by this Court  
5 as a treating physician, qualified as an expert in the areas  
6 of pain management, including neurologically mediated disease  
7 and the modalities of which are used to treat those diseases.

8 THE COURT: Any objection?

9 MR. WARD: No, Your Honor.

10 THE COURT: So ordered.

11 BY MR. BAKER:

12 Q Now, you've reviewed all the medical records in this  
13 case. Is that fair to say?

14 A I have. Yes.

15 Q And you're aware of the manner in which Mr.  
16 Rodriguez was injured?

17 A Yes.

18 Q Would you explain to the Court, please, your  
19 understanding of this injury?

20 A My understanding of it is that Mr. Rodriguez was at  
21 the Palms Casino, watching or observing -- I believe it was a  
22 football game, some sort of sporting event on one of the big  
23 screen TVs. During the course of these events -- he was more  
24 kind of interested in the sporting event -- but during the  
25 course of the events, there was a promotional sort of giveaway

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1 with one of the Palms girls or something that was occurring,  
2 where I've seen a couple different accounts of -- whether or  
3 not they were throwing something into the crowd, whether it  
4 was a water bottle wrapped with a t-shirt, or some sort of  
5 promotional item that was being thrown into the crowd by a  
6 girl who was blindfolded and being spun around and she was  
7 meant to throw these things out into the crowd. During the --  
8 one of the tosses of the items, one of the items was coming  
9 towards Mr. Rodriguez and another patron of the casino dove  
10 for the item, the promotional item, striking Mr. Rodriguez in  
11 the area of his knee. And based on the contact with his knee,  
12 he became unstable and fell into the gentleman who was  
13 standing next to him.

14 Q And when was the first time that you saw Mr.  
15 Rodriguez?

16 A The first consultation was November 26, 2007.

17 Q And I would refer you to a Bates number, but as  
18 we've talked about, I've brought the non-Bates stamped  
19 documents. However, someone from my office is coming down.  
20 And if they get in quick enough, perhaps we can do something  
21 about that. And your last visit was November 26th, 2007?

22 A That is correct.

23 Q And are you referring to -- well, that's really  
24 strange because mine is Bates stamped.

25 THE COURT: Kept the good stuff for yourself, did

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1 you, Mr. Baker?

2 MR. BAKER: I did, Your Honor. Your Honor, can I  
3 suggest or ask the Court if we can take three minutes, and if  
4 the Court would copy this, this would go much quicker?

5 THE COURT: Sure. Why not?

6 MR. BAKER: Thank you. Do you have an old copier?

7 THE BAILIFF: I have one piece.

8 THE COURT: Pretty good copier, actually.

9 MR. BAKER: Oh, my goodness.

10 THE COURT: Wouldn't get that done in the office  
11 copier, but there's a big one out in the hallway.

12 MR. BAKER: Sorry about that.

13 THE COURT: No problem.

14 BY MR. BAKER:

15 Q So what do you want to talk about?

16 A War and peace, I guess.

17 Q Same.

18 THE COURT: This bench witness -- can we Bates stamp  
19 as well? How many Bates stamps do we need? Two?

20 MR. WARD: Mine's not Bates stamped.

21 THE COURT: Okay.

22 [Off the record at 1:41 p.m.]

23 [Proceeding resumed at 1:57 p.m.]

24 BY MR. BAKER:

25 Q You had just finished discussing your understanding

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1 of the mechanics of the injury; is that correct?

2 A That's correct.

3 Q And he first visited you November 26, 2007; is that  
4 correct?

5 A Yes.

6 Q But you're aware that prior to seeing you he had  
7 seen a variety of other physicians in the Los Angeles area; is  
8 that correct?

9 A That's my understanding, yes.

10 Q And is it your understanding he saw Dr. Ferrente  
11 [phonetic]?

12 A Yes. Who is Dr. Ferrente, and what area of medicine  
13 does he practice?

14 A Dr. Ferrente is the Chairman of the Anesthesia  
15 Department at UCLA in southern California. He's a pain --  
16 he's a pain management anesthesiologist like I am, but he's  
17 actually chairman of the department there. He was at a  
18 different school I believe in Texas, prior to that, where he  
19 was chairman there and he was recruited to be the department  
20 head at UCLA. And he has seen Mr. Rodriguez in relation to  
21 this injury.

22 Q And if you would turn to Exhibit Number 25. It's in  
23 the book in front of you.

24 A Yes.

25 Q Do you have that?

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1           A     Yes.  Oh, Exhibit 20 -- all right.  I thought you  
2 meant 25 of what we have.  Okay.  I'm there.

3           Q     Did Dr. Ferrente do an examination of Mr. Rodriguez?

4           A     Yes.  It appears he did an examination on November  
5 14th, 2006.

6           Q     And as Chairman of the Department of Pain Management  
7 at UCLA, to your knowledge he studied RSD causal to a complex  
8 regional pain syndrome and a variety of neurologically  
9 mediated pathologies?

10          A     Yes, that --

11          MR. WARD:  Object; hearsay.

12          THE WITNESS:  Dr. --

13          MR. BAKER:  It's not a statement, Your Honor.

14          THE COURT:  Mr. Ward, what was that?

15          MR. WARD:  Hearsay.  This witness is going to testify as  
16 to qualifications.  And presumably he's going to testify as to  
17 qualifications and presumably he's going to testify as to  
18 findings, and I think it's all hearsay.

19          MR. BAKER:  Your Honor, we dealt with that issue  
20 yesterday when I gave you the problem case and the remainder  
21 of the cases in yesterday, your ruling was that the doctors  
22 were allowed to refer to information that they had reviewed.

23                   He's been qualified as an expert, under the Omastat  
24 [phonetic] case that I handed you yesterday.  Not Omastat,  
25 that was -- but you know the one I'm talking about.  But

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1 yesterday you've already ruled on the same issue.

2 MR. WARD: And I don't believe the case says that, but I  
3 will -- I'm not going to argue it anymore, and I'll simply  
4 note my objection.

5 MR. BAKER: A continuing objection is stipulated to, Your  
6 Honor.

7 THE COURT: Very well, noted for the record. Please  
8 proceed.

9 BY MR. BAKER:

10 Q If you go to page five of Exhibit 25, would you  
11 discuss with the Court what Dr. Ferrente's [phonetic] was of  
12 Enrique Rodriguez?

13 A Dr. Ferrente, during that visit, said it is possible  
14 that the patient has complex regional pain syndrome, or  
15 regional sympathetic dystrophy. However, his physical  
16 examination is more consistent with a chronic knee pain of a  
17 mechanical nature. Furthermore, we don't have sufficient  
18 objective information for which to make a definitive  
19 diagnosis.

20 He goes onto say that if the pain continues or  
21 worsens, he suggests that the patient undergoes bone scans,  
22 lumbar sympathetic blocks, trial of clonidine patches and  
23 neurontin, all of which are geared towards dealing with nerve-  
24 type pain or neurogenic pain of a nature consistent with  
25 complex regional pain syndrome.

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1 Q And I believe that the Court's familiar with the  
2 syndrome. But would you explain to the Judge, for the record,  
3 please, what RSD is? Incidentally, is it true that  
4 sympathetic component was discovered by a scientist named Walt  
5 Cannon [phonetic], who also happens to be the name of a pretty  
6 famous lawyer in Las Vegas?

7 A It is.

8 Q Okay.

9 A Reflex sympathetic dystrophy, or more appropriately  
10 termed complex regional pain syndrome is oftentimes discussed  
11 in an acronym, RDS or CRPS. The term RSD is a term that seems  
12 to have applied during the earlier dysfunction stages of this  
13 syndrome, which is not very well understood.

14 It's been a complex syndrome and involves almost  
15 some very detailed neurologic pathways and understanding of  
16 that. But in a simplistic way, it used to be thought that all  
17 pain associated with nerves that didn't go away in a short  
18 period of time, or an expected period of time, was to be  
19 labeled RSD. If it seemed like nerve pain, it was electrical.  
20 It was numbing, it was tingling. If you have hyperesthesia,  
21 which means, you know, painful touch of skin, or things like  
22 that, it was thought that, you know, you sprain your ankle,  
23 you potentially stretch the nerve.

24 We expect that to be better in two to four weeks.  
25 But a year and a half later, you're still having pain in that

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1 ankle, we do an MRI and there's no obvious finding for a  
2 defect in that particular area, oftentimes, the patient was  
3 labeled as having RSD or reflex sympathetic dystrophy. The  
4 important portion of that word is the S part, where we thought  
5 that the sympathetic nerve system was the primary component,  
6 that was maintaining that uncomfortable feeling. Well, around  
7 the time of 2006, 2007, the diagnosis of this syndrome sort of  
8 changed. And there was a lot of discussion as to whether or  
9 not you had to have a sympathetic component to have this  
10 syndrome.

11 And so, the name changed from RSD or reflex  
12 sympathetic dystrophy, to complex regional pain syndrome, type  
13 1 and type 2. And they divided it up to whether or not you  
14 injured a major nerve or a minor nerve. And that sort of  
15 replaced the terms RSD, and then another term called  
16 causalgia, which is a term that dates back to one of the early  
17 wars, where soldiers injured a femoral nerve or a very large  
18 nerve in their body, and they had something called causalgia,  
19 due to a nerve injury.

20 So what they discovered, basically, was that the  
21 sympathetic component was unnecessary to diagnose a patient  
22 with RSD, because they've now changed the name to complex  
23 regional pain syndrome, kind of indicating that the pain  
24 syndrome isn't only a component of the sympathetic nervous  
25 system, although that sort of is the original thought. That

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1 can be a component, but it's not an essential component. You  
2 don't have to check that box to make that diagnosis.

3           So the idea is that there's nerves in your body that  
4 you can feel, sensory nerves. There's motor nerves that allow  
5 you to move things. And then, there's autonomic nerves that  
6 sort of have the inner workings of your body -- your heart  
7 rate and your fingernail growth and your hair growth and  
8 things like that, and that somehow, an injury, no matter how  
9 minor or major the injury is, if you screw up those nerves or  
10 you mix up maybe the sensory nerves with a sympathetic nerve  
11 component, when your body is trying to increase the blood flow  
12 to your leg, you may sense that as a sensory kind of a  
13 component, as a painful condition.

14           And that pain may be there without, really,  
15 something stimulating it. It might just be something that  
16 your body's doing as a normal finding because you've --  
17 instead of having that -- the nerves all lined up correctly,  
18 you might kind of screw them up a little bit. So when your  
19 body's intending to send one signal, your body's actually  
20 recognizing that signal as a painful condition. So in the  
21 diagnosis part of it, sympathetic nerves are a component of  
22 it, but they're no longer necessary to confirm the diagnosis.

23           Q     And with respect to just one thing you said, the  
24 autonomic nervous system can be both sympathetic and the  
25 parasympathetic nerve groups?

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1 A Yes.

2 Q And this particular is mediated through the  
3 sympathetic nervous system?

4 A Yes.

5 Q Which is that flight or fight type of reaction,  
6 control --

7 A Yes. It's kind of the stuff you associate with  
8 adrenaline or epinephrine or something like that, the response  
9 that would increase your blood pressure, increase your heart  
10 rate, increase your awareness, dilate your pupils, that sort  
11 of thing.

12 Q Would you please turn to page 006? Is the treatment  
13 received by Dr. Ferrente reasonable, necessary and possibly  
14 sustained in the --

15 A Yes.

16 Q And that's your opinion to a reasonable degree of  
17 medical probability?

18 A Yes.

19 Q Certain times during this trial, I might ask you to  
20 a reasonable degree of probability. Will you understand that  
21 I mean to a reasonable degree of medical probability?

22 A Yes.

23 Q And you'll answer each of the questions,  
24 probability, to a reasonable degree of medical probability?

25 A Yes.

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1 Q Okay. That's just called covering myself. But how  
2 much was the bill in this particular case?

3 A It appears to be \$1,500.

4 Q Was that bill reasonable, necessary and causally  
5 related?

6 A Yes.

7 Q To a reasonable degree of medical probability?

8 A Yes.

9 Q Now, one of the things that Dr. Ferrente recommended  
10 was a sympathetic nerve block --

11 A Yes.

12 Q -- to the lower extremity. Is that correct?

13 A And is that one of the gold standard ways of  
14 diagnosing a reflexive sympathetic dystrophy?

15 A It is one of the standard ways to diagnose this  
16 syndrome. Well, it's --

17 Q What does it do?

18 A It's a way to diagnose this syndrome. The  
19 sympathetic component doesn't sort of rule out all the other  
20 potential components of it.

21 Q Like causalgia or complex regional pain syndrome?

22 A Yes. And so again, the name has changed. So the  
23 sympathetic component, they're trying to downplay a little bit  
24 in saying, yes. It's a component, but it's not the only  
25 component. You can have a complex regional pain syndrome

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1 without a sympathetic component. It's most commonly included,  
2 but it's not absolutely necessary.

3 But a sympathetic blockade involves placing a  
4 needle, instead of an epidural, which is placed in the -- sort  
5 of the back part of the spine, this is placing a needle  
6 farther or deeper inside the patient's body into the front of  
7 the spine. So the needle goes into the front of the spine,  
8 typically, at one, two or three levels, depending on the  
9 doctor's preference. But the needle will be placed into an  
10 area right next to the two big blood vessels that carry blood  
11 to the lower portion of the body, the aorta, essentially, and  
12 the fena cava.

13 So you'll place a needle into this particular area,  
14 to deposit a local anesthetic or a numbing medicine like the  
15 dentists use, into the area where there's a big bundle of  
16 nerves. It's kind of like a train station for all the  
17 sympathetic nervous system that carries signals for the lower  
18 part of the body. When we're talking about the lumbar spine,  
19 it's a different bundle of nerves for the neck and the upper  
20 extremities.

21 But in the lumbar spine, there's a big bundle of  
22 nerves that sits, kind of over three different vertebral  
23 bodies -- L2, L3 and L4. You place a needle in that  
24 particular area under x-ray guidance, typically at a surgery  
25 center so you're watching on a television screen while you're

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1 placing that needle. You inject some dye in there. You  
2 outline the bundle of nerves that you recognize. You want to  
3 make sure that you're not in any blood vessels that are in  
4 that neighborhood. And by injecting the dye, you've confirmed  
5 the needle placement. You then inject a large volume of local  
6 anesthetic or numbing medicine.

7           Now, this numbing medicine doesn't anesthetize the  
8 nerves that would go to the leg, like the nerves, like a  
9 pregnant woman would get during an epidural. It anesthetizes  
10 only the sympathetic component of the nerves, and it blocks  
11 all the transmission in that area. The thought is that if you  
12 anesthetize those nerves, and there is a sympathetic  
13 component, you've blocked that, and you can see if the  
14 patient's pain gets better, if their movement is better, and  
15 basically, are they able to function better while these nerves  
16 are anesthetized. So essentially, you're blocking the nerve  
17 spot to be the major component of discomfort in that way.

18           Q     And when you're performing a sympathetic nerve  
19 block, if you -- it's to be diagnostic as an RSP, what will  
20 happen?

21           A     What will happen if you're looking at an RSD-type of  
22 syndrome or a very sympathetic remediated pain, is what we  
23 oftentimes call that, is if you block those nerves, the  
24 patient oftentimes will describe stiffness in the joint. You  
25 all of a sudden can now move that joint more freely. They're

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1 not guarding it anymore. The pain level decreases. But the  
2 things that you will notice is that the leg heats up. You're  
3 going to increase the blood flow there, which is an indication  
4 that you've done an adequate block.

5 You're going to notice that there's no motor or  
6 sensory changes. There might be improvement in the pain, but  
7 it's not like the leg is dead. You can still move the leg,  
8 just like you did before. We're only blocking the sympathetic  
9 component, not the sensory or the motor components of it,  
10 which is very specific for that bundle of nerves. So you  
11 should notice that the range of motion improves, the patient's  
12 ability to function improves, and the pain level drops  
13 significantly during the time frame that that's occurring.

14 Q What's onychomycosis? Let me spell that for you.  
15 It is O-N-Y-C-H-O-M-Y-C-O-S-I-S? Does that have to do with  
16 analysis?

17 A Yes. It is. It's a fingernail or toenail sort of  
18 appearance. It's either a ridge -- or it's kind of an odd-  
19 looking toenail or fingernail.

20 Q Now, there are some diagnostic hallmarks of RSD  
21 aren't there?

22 A Yes.

23 Q And there are five or six recognized hallmarks?

24 A There are all sorts of different definitions for it,  
25 but there are typically some categories where you would want

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1 to look at -- that are kind of similar in most definitions.

2 Q Is it onychomycosis?

3 A Yes. So that's --

4 Q I had to do it.

5 A -- the odd-looking toenails or fingernails,  
6 depending on if we're talking about upper or lower  
7 extremities. You know, there's shiny skin, meaning that the  
8 skin has been stretched, so the skin will look different.  
9 There's decreased range of motion, aesthesia or hyperalgesia  
10 where you're touching something, and like, if you touched  
11 somebody very lightly across, you know -- touched like the  
12 hairs on their arm or their hand, that's typically not viewed  
13 as a painful situation.

14 But sometimes, just the blowing of an air condition  
15 over somebody's extremity will cover it up. So oftentimes,  
16 patients will wear things over an area so that they're sort of  
17 covering it up from any of those fine little motions and  
18 things like that. So there are a few different kind of  
19 hallmarks of this that you want to look at when you're  
20 evaluating a patient for it.

21 Q What's allodynia?

22 A Allodynia is sort of pain to, sort of light touch,  
23 something that would normally be considered -- I don't want to  
24 use the word pleasurable, but not painful -- is now considered  
25 painful.

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1 Q And did Dr. Ferrente refer Mr. Rodriguez to a Dr.  
2 Miller for sympathetic nerve blocks?

3 A Yes. He did.

4 MR. BAKER: Before we go there, I move to admit Exhibit  
5 25, Your Honor.

6 THE COURT: Any objection other than those noted, Mr.  
7 Ward?

8 MR. WARD: No, Your Honor.

9 THE COURT: So ordered. 25 is admitted.

10 [Plaintiff's Exhibit 25 Received]

11 BY MR. BAKER:

12 Q Who is Dr. Miller?

13 A Dr. Miller is a pain anesthesiologist that  
14 Dr. Ferrente referred to -- similar in training to myself and  
15 Dr. Ferrente -- to perform these lumbar -- the nerves that sit  
16 in front of the spine.

17 Q And I'd like to ask you to turn to Exhibit 42.

18 A I think I need a different book.

19 Q I think it's in the next log behind you, volume  
20 three.

21 A Okay.

22 Q Is it 42?

23 A Yes.

24 Q What date was he referred to go see Dr. Miller?

25 A Looks like March 7th, 2007.

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1 Q And if you'll turn to page 11 --

2 A Yes.

3 Q -- did Dr. Miller come to a diagnostic impression  
4 with respect to Mr. Rodriguez?

5 A Yes. On page 11, it's noted that Dr. Lawrence  
6 Miller felt that Mr. Rodriguez was suffering from complex  
7 regional pain syndrome of the left lower extremity.

8 Q And if you'll turn to page 22, what were Dr.  
9 Miller's examination findings?

10 A Dr. Miller noted temperature and color changes,  
11 edema or swelling, atrophic changes in the hair and nail  
12 growth patterns, impaired motor function, so stiffness in the  
13 joint, and then hyperpathia or allodynia, which is the painful  
14 sensation of touch, and then pseudo-motor changes, which  
15 involve changes of vascular supply or sweating. So you may  
16 notice that a hand is very sweaty, versus the other hand is  
17 not. That's an unusual finding. That's the findings that he  
18 diagnosed with him, which led him to believe that the  
19 diagnosis of complex regional pain syndrome existed in Mr.  
20 Rodriguez.

21 Q Now, this was a clinical diagnosis. Is that fair to  
22 say?

23 A Yes.

24 Q And do you agree with that diagnosis based upon  
25 those six findings?

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1 A Yes.

2 Q But then, he was sent out for a diagnostic  
3 examination. Is that true?

4 A The diagnostic examination was the lumbar  
5 sympathetic blocks that we discussed before.

6 Q When were they conducted? If you'll go to 27 --

7 A Okay. It looks like the first one was April 18th,  
8 2007.

9 Q The second?

10 A And the second one appears to be -- well, I think  
11 March 14th, 2007 was the first one. April 18th, 2007 was the  
12 second one.

13 Q And was it reasonable, necessary and causally  
14 related to the injuries Enrique sustained at the Palms, to  
15 conduct those sympathetic blocks?

16 A Absolutely.

17 Q And with respect to the examination?

18 A Yes.

19 Q And are those your opinions to a reasonable degree  
20 of probability?

21 A Medical probability, yes.

22 Q Thank you. What was the result in the sympathetic  
23 blocks?

24 A With both injections, Mr. Rodriguez noted complete  
25 relief of his symptoms in his left lower extremity, indicating

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1 a significant sympathetic component to his pain, indicating  
2 that his presumptive diagnosis of complex regional pain  
3 syndrome, or RSD, was correct.

4 Q And so, it was diagnostic for our stay?

5 A Yes.

6 Q And do you agree with that opinion --

7 A Yes.

8 Q -- to a reasonable degree of medical probability?

9 A Yes.

10 Q And what was Dr. Miller's bill in this case? If you  
11 can, turn to 4208.

12 MR. BAKER: I'm still having that problem, Your Honor.

13 THE COURT: Me, too, Mr. Baker.

14 BY MR. BAKER:

15 Q Page eight?

16 A It looks like \$1,470.11.

17 Q And were those bills reasonable, necessary and  
18 causally related to the subject incident --

19 A Yes.

20 Q -- to a reasonable degree of medical probability?

21 A Yes.

22 MR. BAKER: Move to admit 42, Your Honor.

23 THE COURT: Any objection to 42, Mr. Ward?

24 MR. WARD: Hearsay, Your Honor.

25 THE COURT: Okay. As on the Court's previous ruling, the

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1 objection is overruled. The item is admitted, 42.

2 [Plaintiff's Exhibit 42 Received]

3 BY MR. BAKER:

4 Q Now, where was the sympathetic blocks conducted?

5 A They were conducted at a UCLA-affiliated surgery  
6 center called the Wilshire Surgery Center, Incorporated, in  
7 Beverly Hills, California.

8 Q That's Wilshire Surgical Center?

9 A Yes.

10 Q Would you turn to Exhibit 30, please? You might  
11 want to leave that on the ground near your feet.

12 A Okay.

13 Q I assume this is a surgery you wouldn't want to do  
14 in a kitchen or something of the sort?

15 A No. It's not. Because of the potential  
16 complications with this procedure, you want to do this at a  
17 facility that you can deal with complications.

18 Q Was it reasonable, necessary and causally related to  
19 the Palms incident, to do these lumbar sympathetic blocks at a  
20 surgical center?

21 A Yes.

22 Q And particular, at Wilshire?

23 A Yes.

24 Q And that's your opinion to a reasonable degree of  
25 medical probability?

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1 A Yes.

2 Q And if you'll turn to pages 399 and 300 [sic] --

3 A Which exhibit?

4 Q -- of Exhibit number 30 --

5 A Were there that many pages in number 30?

6 Q Yeah. It's the last two pages before 31. You're  
7 not seeing it?

8 A No. I've got 121 -- okay. All right. It's under  
9 the Defendant's supplements. Okay. I'm sorry. Yes. I'm  
10 there now.

11 Q And the record will note to thank the Defendants for  
12 supplementing the bill. You're familiar with customary  
13 charges for surgical centers?

14 A I am. Yes.

15 Q And for the first block, would you state to the  
16 Court what the amount charged for the block was?

17 A The first block --

18 Q Which would be on 299? Are you not seeing it?

19 A No. Yeah. There's a surgery that was performed on  
20 04/21/06. The balance there was \$17,991. And then, the  
21 next --

22 Q And you would presume that that's a charge for the  
23 surgery performed on the 18th?

24 A Yes.

25 Q And was that charge reasonable, necessary and

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1 causally related to the injury at the Palms?

2 A Yes.

3 Q And is that your opinion to a reasonable degree of  
4 medical probability?

5 A Yes.

6 Q And with respect to the second block --

7 A The second block was -- the charges were \$8,260.

8 Q And we -- actually, what's confusing you and why  
9 you're looking at me funny is, we have those in reverse order,  
10 don't we?

11 A Yes.

12 Q So at the page 300, it's the first block. Is that  
13 right?

14 A Yes.

15 Q And the charge for that is how much?

16 A \$8,260. And the second one is \$17,991.

17 Q And were both of those charges reasonable, necessary  
18 and causally related to the subject accident?

19 A Yes.

20 Q And is that your opinion to a reasonable degree of  
21 probability?

22 A Yes.

23 MR. BAKER: Move to admit 30, Your Honor.

24 THE COURT: Any objection to 30?

25 MR. WARD: Just hearsay, Your Honor.

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1 THE COURT: Noted for the record.

2 MR. WARD: And the lack of foundation.

3 THE COURT: Noted for the record. 30 will be admitted.

4 [Plaintiff's Exhibit 30 Received]

5 BY MR. BAKER:

6 Q Now, are you aware that the patient was also sent to  
7 see Dr. Cravetti [phonetic]?

8 A Yes. An orthopedic surgeon. Yes.

9 Q And Dr. Cravetti is an orthopedic surgeon in the  
10 area?

11 A Yes. In Las Vegas.

12 Q Do you know who referred him to Dr. Cravetti?

13 A I believe he was originally referred to Dr. Cravetti  
14 by either Dr. Coca [phonetic] or myself. I don't know the --  
15 I can't remember the exact timing.

16 Q But you were working with Dr. Coca in attempting to  
17 get Enrique back to health at this time, weren't you?

18 A Yes.

19 Q Okay. And what was the purpose for sending Enrique  
20 to Dr. Cravetti?

21 A It was the same concern that Dr. Ferrente had, that  
22 I had. I evaluated Mr. Rodriguez as to whether or not he had  
23 any mechanical component to his knee pain, that was  
24 contributing or maintaining the CRPS or the RSD-type syndrome.  
25 So --

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1 Q Would you explain what you mean by that?

2 A Well, yeah. I would --

3 Q Were you worried if it --

4 A I was just about to.

5 Q I'll be quiet. I'm going to go sit.

6 A Essentially, if you have something that's constantly  
7 irritating a particular area or nerve, unless you address the  
8 original problem, you're not going to get rid of the secondary  
9 problem, which is the RSD or the CRPS. So if there's an  
10 ongoing knee issue in the patient, or other issues that are  
11 going on, in this particular case the knee issue, unless you  
12 verify that there's no problem with the knee that can be  
13 corrected, you're treating sort of symptoms, if you will, or  
14 secondary problems, but you're ignoring the first problem.

15 And you'll never get rid of the secondary problem  
16 unless you address the first one. So the purpose of going to  
17 Dr. Cravetti as an orthopedic specialist was to determine --  
18 is there anything else surgically that needed to be addressed  
19 in the knee? Or are we now dealing with a knee that was  
20 relatively stable, from a surgical point of view, you know,  
21 short of a knee replacement, and now we're dealing with the  
22 secondary problem, which becomes in a sense, the primary  
23 problem. Because you've surgically corrected the primary  
24 problem.

25 You've kind of gotten rid of that one essentially.

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1 Now, you're dealing with the remainder of the issues. So the  
2 secondary problem is now the primary issue. So we wanted Dr.  
3 Cravetti to evaluate Mr. Rodriguez to make sure that we could  
4 address everything, that we've checked all the boxes before we  
5 just start looking to correct the pain with other modalities,  
6 such as this spinal cord stimulator that I'm sure we'll talk  
7 about in the near future.

8 Q Now, with respect to you working with Dr. Coca, what  
9 was your joint effort?

10 A Well, I mean, our joint effort was to confirm a  
11 diagnosis, come up with a treatment plan, and without input  
12 from an orthopedic surgeon, that treatment plan was  
13 incomplete.

14 Q And give me a second to find the exhibit for  
15 Dr. Coca. Would you turn to Exhibit 36, please?

16 A Okay.

17 MR. WARD: What number was that?

18 THE WITNESS: 36.

19 MR. BAKER: No. I'll do that at a later time. Let's  
20 keep going to your treatment.

21 THE WITNESS: Okay.

22 BY MR. BAKER:

23 Q When was the first time that you saw Enrique  
24 Rodriguez?

25 A November 26th, 2007.

1 Q And I believe that your medical records are Exhibit  
2 32. Is that right?

3 A I think she said 42.

4 Q Would you please turn to 42? Can I have a second?  
5 You got it?

6 A Got it right here.

7 MR. BAKER: All right. Mine's in the book. This is  
8 what's called schlepping, Your Honor.

9 THE COURT: I've heard of this.

10 BY MR. BAKER:

11 Q When was your first visit with Enrique?

12 A November 26th, 2007.

13 Q Your exhibit is actually 41.

14 A Okay.

15 MR. BAKER: Your Honor, I'd direct you to 41.

16 THE COURT: Thank you.

17 BY MR. BAKER:

18 Q On the first time that you saw him, what were your  
19 clinical observations?

20 A Examination-wise?

21 Q Yes.

22 A During the examination, he was 5'6", 244 pounds. He  
23 was alert, oriented, well groomed, pleasant, cooperative,  
24 moderately obese. He had some limitations in range of motion  
25 of his cervical spine. Essentially, the examination was more

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1 focused on musculoskeletal and neurological issues. But  
2 coming from the head down, he had some range of motion losses  
3 in his cervical spine.

4 He also had some tenderness and spasm to palpation  
5 over the back area of his neck and upper back. His upper  
6 extremities in the examination was normal, except for  
7 bilateral positive tenilsign [phonetic], which is an  
8 indication of a carpal tunnel-type syndrome, where you tap  
9 somebody on the wrist and they will get these electrical  
10 shocks that shoot out into their hand. So essentially, you're  
11 creating some tension on the nerve, and then tapping over it,  
12 which creates a sensation. In the normal individual without  
13 carpal tunnel, even with a typical response -- because the  
14 nerve's not so tight. So -- and his head and neck, he had  
15 decreased range of motion, some spasm.

16 In his upper extremities, he had the symptoms of  
17 carpal tunnel on examination, and the findings of carpal  
18 tunnel. In his examination of his lower back, or his trunk  
19 area, he also had some spasm throughout his lumbar spine. But  
20 he had more significant limitations of range of motion in his  
21 lumbar spine, about half of normal, in both flexion and  
22 extension, so both bending forward or bending back were about  
23 half of normal.

24 The major findings, not that we're discounting  
25 those, but the major findings were present in his lower

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1 extremities. He had an antalgic gait, which means he sort of  
2 walked like an old person. He had a hinged brace over his  
3 knee, so it was kind of a protective mechanism over his knee  
4 from his previous injury, and surgeries that he had had up to  
5 that point.

6 He had some scars over his knee from the surgery.  
7 And then, he had a tremendous amount of tenderness, to even  
8 light touch, the allodynia or hyperesthesia that we talked  
9 about before, over his left knee, specifically over the  
10 kneecap area. That was the major focus of that. Besides the  
11 gait abnormalities that he had when he was walking, he also  
12 had some decreased strength when swatting down, which requires  
13 a lot of power derived from your quadriceps or your thigh  
14 muscles.

15 He had difficulty doing that. The reflexes in his  
16 lower extremities were absent, kind of indicating that he had  
17 sort of a spinal injury associated with this, and that, at  
18 that point, I didn't know necessarily what to make of that.  
19 But he did have some cold sensitivity, which is one of the  
20 hallmarks of reflex sympathetic dystrophy, or CRPS.

21 Sometimes, the reflex hammer alone, which usually  
22 has a metal stand, or a metal handle and then a rubber kind of  
23 ball or a triangle at the end, sort of like a tomahawk, if you  
24 take just the -- if you hold the end of it, the tomahawk part,  
25 the triangle part, and you just touch a patient with the

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1 handle, which should be sort of room temperature, but metal  
2 always feels colder than room temperature -- if you just touch  
3 that one somebody who has RDS, they will become sensitive. He  
4 was sensitive to that type of sensation. Light touch was  
5 sensitive for him.

6           And then, we went ahead and looked at temperature  
7 differences. And a lot of doctors just measure temperature by  
8 touching somebody. And you can tell if somebody's hot or  
9 cold, but if I had you touch somebody and said, is that 78.5  
10 degrees or 82.3 degrees, it would be very difficult for you to  
11 distinguish between those two. So when I do evaluations for  
12 patients who are describing symptoms similar to what Mr.  
13 Rodriguez was, I'll take out an infrared thermometer, which is  
14 oftentimes used in different settings. Like, mechanics use  
15 them to touch something and go, is that going to be real hot  
16 before I touch it, so that it's sort of a safety mechanism.  
17 We use it in the medical field to isolate specific  
18 temperatures.

19           He had a difference in temperatures from the right  
20 versus the left. The right leg had more blood flow to it than  
21 the left did, which is another one of those indicators of  
22 complex regional pain syndrome, or RSD. He had some swelling  
23 or edema in his lower extremity.

24           He also had some shiny skin over the knee and the  
25 foot area, in that extremity, due to the swelling or

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1 stretching of the skin. It creates sort of a shiny  
2 appearance. Like, if you look at the -- somebody's skin in a  
3 regular light, and it's almost as if they put lotion on just,  
4 you know, parts of their skin, because it stretches out. He  
5 had joint stiffness, and then he had some changes in his  
6 toenails at that time. So all indications were that he had a  
7 sympathetically maintained pain, or RSD CRPS. So it looked  
8 like the diagnosis that had been made, prior to me evaluating  
9 Mr. Rodriguez, were correct.

10 Q I'm going to give you a little more information.  
11 Mr. Rodriguez testified on the stand that he was having  
12 strange hair growth patterns. Is that a condition commonly  
13 associated with RSD?

14 A It is. Yes.

15 Q And if you turn to page -- you know, I haven't asked  
16 you, and I should. Would you describe for the jury, the type  
17 of pain that's reported, both by patients and by the medical  
18 literature, with respect to somebody who's suffering from  
19 causalgia, RSD or complex regional pain syndrome?

20 MR. WARD: Object on the grounds of relevance, unless it's  
21 related to this patient, something that this patient has told  
22 him about.

23 THE COURT: Could you rephrase the question, Mr. Baker?

24 MR. BAKER: Sure.

25 ///

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1 BY MR. BAKER:

2 Q What kind of pain did Enrique report to you? Is  
3 that consistent with the medical literature in your experience  
4 with other RSD sufferers?

5 A Well, the type of pain that this patient in  
6 particular described to me was constant, daily, aching,  
7 burning, numbing, pins and needles, shooting, stabbing and  
8 tingling-type pain. So what he was describing was very  
9 electrical sort of sensations that -- the way patients  
10 describe certain things kind of lead you to believe that  
11 you're either dealing with a musculoskeletal problem, a bony  
12 problem or a nerve problem.

13 All of the words that he used to describe his pain,  
14 other than aching, will be very consistent with a CRPS or a  
15 nerve-related condition. The aching seemed to be referred to  
16 some of the other body parts, the neck and the low back that  
17 we discussed briefly during the examination. That's the --  
18 that word was attributed to something else, but the particular  
19 words that people usually give to a particular category of  
20 pain, and all of the words that he was using, led me to  
21 believe that a nerve source was the primary source of his  
22 pain.

23 He talked about his average pain score in another  
24 descriptive mechanism, where he described it as being a nine  
25 out of ten, with a high of ten out of ten. So he's in very

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1 severe pain.

2 Q And I'm sorry. Is that consistent with the medical  
3 literature in your experience, with other RSD patients?

4 A Yes. Absolutely.

5 Q And in fact, is that kind of definitional for RSD?

6 A I mean, severe pain, whether it's a nine out of ten  
7 or a seven out of ten, sort of doesn't matter. It's sort of  
8 in that severe pain category. Yes. That is -- severe pain is  
9 very characteristic.

10 Q Kind of life-changing pain?

11 A Yes.

12 Q And is that your opinion to a reasonable of  
13 probability, medical?

14 A Medical probability? Yes.

15 Q Thank you. If you'd turn to page number two of  
16 Exhibit 40, and go to the bottom section, there are certain --  
17 under where it says RSD diagnosis, AMA 5th, there's an actual  
18 RSD diagnosis set forth by the American Medical Association?

19 A There is. And that's one of the diagnoses for it.  
20 In my practice, I do a lot of workers' compensation  
21 evaluations. And so, this is the guide or the guidelines that  
22 they use to confirm the diagnosis. But some of the other  
23 things I discussed in the examination are characteristic and  
24 defined by other groups. So I didn't want to just define him  
25 by the AMA.

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1           But there's the International Association for the  
2 Study of Pain and various other groups that have come up with  
3 these diagnoses, which are not necessarily included in the AMA  
4 diagnosis. So the cold sensitivity, the light touch, things  
5 like that, are characteristic of a kind of inclusion of a  
6 variety of different diagnoses or, sort of, inclusion criteria  
7 for this diagnosis. So it's not just limited to the AMA.  
8 They just have to be one of the ones that the industrial, sort  
9 of, patients are defined by.

10           Q     And if we go to that particular -- would it be fair  
11 to call this a guideline?

12           A     Yes.

13           Q     Let's look at it. On that day, under number one, he  
14 exhibited no changes in his skin color. Is that true?

15           A     That is correct.

16           Q     Is it true that the symptoms associated with RSD are  
17 dynamic? They're not static? You can show some of them one  
18 day, and not others on another day?

19           A     Absolutely.

20           Q     And if you look at two, skin temperature change, and  
21 you discussed that change in skin temperature that you did  
22 with a laser thermometer?

23           A     Yes.

24           Q     Okay. If somebody just did a temperature check with  
25 their hands, would that be consistent to the standard of care

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1 in those examinations diagnostic as RSD?

2 A Absolutely not.

3 Q Okay. And again, you noted temperature changes.  
4 Temperature change something you can fake?

5 A No.

6 Q Did Enri ever appear to you to be a malingerer?

7 A No.

8 Q Enrique, Enri -- you know I'm talking about the same  
9 person? If he was a malingerer, or if there were any signs of  
10 him malingering, you would have put it in your record?

11 A Yes.

12 Q And you saw none of that. Is that right?

13 A No.

14 Q His skin wasn't exhibiting any dryness or  
15 overwetness on that day?

16 A Not on that day.

17 Q But there are texture changes under number -- I  
18 can't read that. Would you?

19 A Number five. Yes.

20 Q And would you describe what texture changes that  
21 was?

22 A That's with the shiny skin that I was describing to  
23 you earlier, where the skin is sort of stretched. And so, you  
24 lose the little wrinkles that are in the skin, and it becomes  
25 almost like you're overstretching a balloon.

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1 Q By the way, he suffered from edema, did he not?

2 A Yes.

3 Q If it was suggested that in the course of his  
4 treatment, Enri had not suffered edema, would you disagree  
5 with that?

6 A Absolutely.

7 Q Okay. And would you help me out here? Would you  
8 just go down the list and tell me the positive findings?

9 A Yeah. I mean, and again, these are just the  
10 positive findings in this AMA category. The other things to  
11 be included in this, you know, are the tenderness to light  
12 touch, the cold sensitivity and the swelling that's in that  
13 particular area.

14 But the -- where we left off was this skin texture  
15 changes with the shiny skin. He didn't show any atrophy of  
16 the fingertips or the -- excuse me -- I guess they're called  
17 toetips. But the ends of the toes sometimes will shrink down  
18 because the blood flow is not as adequate to that area, so  
19 you'll shrink the muscle and you'll get some narrowing. I did  
20 not notice that on examination. That's --

21 Q With respect to that shrinking, is that known to  
22 cause ingrown toenails?

23 A It can cause ingrown toenails just because of the  
24 fact that you're taking something of a certain size -- your  
25 toenail doesn't shrink in size, but the skin around it will,

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1 and it will become tighter, so therefore, the nail is all of a  
2 sudden too big for the toe.

3 Q And please continue.

4 A There was joint stiffness in, not only his knee, but  
5 his ankle area with passive movement. So basically take your  
6 knee, show me what range of motion you had. And even when I'm  
7 moving it with, you know, against gravity, you could see that  
8 just -- little small movements of it were difficult.

9 And it was almost that it was just so tight in that  
10 particular area, that that's why I marked that it was a  
11 positive finding on him. And then, clearly, he had some nail  
12 changes that were present on examination on that particular  
13 day. I didn't notice any hair growth patterns. And then, the  
14 final category, according to the AMA, would be the bone skin  
15 or x-ray findings. And at that point, he had not had one.

16 Q And if it was a negative bone scan, would that rule  
17 out RSD?

18 A No.

19 Q Okay. Could you explain to the Judge why not?

20 A A bone scan is one of the criteria for diagnosing  
21 RSD or CRPS. If it was a criteria that could be used alone,  
22 we wouldn't need the other, you know, ten things that are on  
23 this list. We would just order bone scans on everybody. But  
24 the timing of the bone scan, the radiologist who reads the  
25 bone scan is very dependent. But bone scans basically will

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1 show increased blood flow to a particular area of injury,  
2 which is kind of a degenerative change. But on RSD patients,  
3 you may get blood flow to a particular area and then you never  
4 get that medication, which is kind of a radioactive type of a  
5 -- it's a nuclear medicine study -- you never get that to be  
6 efficiently taken away from the area. So you may note when  
7 you take a picture three hours later, you may still note that  
8 the knee or the ankle is still lit up on the scan. So it's an  
9 important. It's oftentimes something I just use for  
10 completeness. My diagnosis is typically made before I even get  
11 to that point. And that's why I put that as the last thing on  
12 -- this is, you know, a form, this Page 2 of Exhibit 41, is a  
13 form that's contained in all of my charts. So I use that form  
14 kind of in the order of the priority of things that I'm  
15 checking, so the bone scan is sort of at the end. If it's  
16 present, that's a bonus. But if it's not present, it doesn't  
17 bother me either way.

18 Q What doesn't bother you either way?

19 A If a bone scan has been ordered or not. I ordered  
20 it for completeness sake. Dr. Furante [phonetic], the  
21 chairman at UCLA, had recommended it. So -- he felt it was  
22 important. So I wasn't going to disagree with him.

23 Q You're aware that Henry ultimately had a bone scan  
24 which was negative.

25 A Yes, that's correct.

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1 Q Is that meaningful to you in context of what you  
2 just told us?

3 A No.

4 Q Does it mean that he doesn't have RSD?

5 A No.

6 Q That's your opinion to a reasonable degree of  
7 probability?

8 A Medical probability, yes.

9 Q Yes, thank you. And it's recognized that the  
10 absence of one of the AMA guideline criteria does not rule out  
11 this particular ruling? Is that --

12 MR. WARD: Object. Leading.

13 BY MR. BAKER:

14 Q Does the absence of the guideline line items rule  
15 out the diagnosis of RSD?

16 A No. You're looking at the big picture here. And  
17 it's clear -- the picture becomes more clear the more positive  
18 findings that you have. But the absence of one or another  
19 does not.

20 Q Were you pretty clear that he had RSD or some sort  
21 of neurologically mediated pain syndrome?

22 A Yes.

23 Q And do you still believe he does?

24 A It wasn't only me who believed he did but there are  
25 multiple doctors throughout the records before I even met Mr.

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1     Rodriquez that believed it, including Dr. Furante, the  
2     chairman at UCLA, whom I've heard lecture. I've read articles  
3     he's written. So I mean, he's very well known and recognized.  
4     If he didn't believe that the diagnosis was likely, I would  
5     have had reason to question it. But not only did I look at  
6     other doctors who documented very adequately that this is a  
7     complex reasonable pain syndrome, I had my own opportunity to  
8     evaluate and treat Mr. Rodriquez. And I came to a similar  
9     conclusion.

10           Q     Before we move on to your treatment course, would  
11     you turn to Exhibit 38. You spoke to me, did you not, about  
12     Dr. Cravetti [phonetic]?

13           A     Yes, I did.

14           Q     And you informed us you wanted to make sure there  
15     was no mechanical component associated with his pain?

16           A     Yes, that was my concern.

17           Q     And you've reviewed the bills of Dr. Cravetti?

18           A     I have.

19           Q     Was Dr. Cravetti's examination reasonable and  
20     necessary and causally related?

21           A     Yes.

22           Q     To a reasonable degree of medical probability?

23           A     Yes.

24           Q     I'll give you a few seconds to open up your --  
25     that's okay. That's what I was doing earlier.

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1 A I am at 38.

2 Q And the billing amount was \$700 as set forth on  
3 Cravetti 1?

4 A That is correct.

5 Q Is that bill reasonable and necessary and causally  
6 related to the subject to a reasonable degree of medical  
7 probability?

8 A Yes.

9 MR. BAKER: I move to admit 38, Your Honor.

10 THE COURT: Any objection?

11 MR. WARD: Hearsay, Your Honor. Lack of foundation.

12 THE COURT: Noted for the record. Overruled.

13 BY MR. BAKER:

14 Q And you're aware at the same time he was seeing Dr.  
15 Thowgott [phonetic]. Is that true?

16 A Yes. Dr. Thowgott is an orthopedic spine surgeon.

17 Q And would you turn to Exhibit Number 39, please.

18 THE COURT: When you moved for admission of 38, was it  
19 just for this one page?

20 MR. BAKER: It's for -- yeah.

21 THE COURT: The one page, 000001?

22 MR. BAKER: Is that all there is?

23 THE COURT: Well, there's a whole lot of pages behind it.

24 MR. BAKER: No. No. No. I move for the admission of  
25 the entirety of the Exhibit 38.

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1 THE COURT: I'm just going to --

2 BY MR. BAKER:

3 Q You've reviewed the entirety of Exhibit 38?

4 A Yes, I have.

5 Q And that's sets forth his examination and treatment,  
6 prognosis, diagnosis, and treatment course?

7 A Yes.

8 Q And that was reasonable, necessary and causally  
9 related to a reasonable degree of medical probability?

10 A Yes.

11 Q And the bill as well?

12 A Yes.

13 Q To a reasonable degree of medical probability?

14 A Yes.

15 MR. BAKER: Move to admit 38, Your Honor.

16 MR. WARD: Objection. Hearsay. Foundation.

17 THE COURT: Noted for the record. 38 will be admitted.

18 [Plaintiff's Exhibit 38 Received]

19 BY MR. BAKER:

20 Q And at the same time he was treating with  
21 Dr. Thowgott. Is that right?

22 A That is correct.

23 Q When you were seeing Enrique, was he not only  
24 complaining of the RSD related pain to his knee, but also  
25 cervical lumbar and other pains?

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1 A Yes, he was.

2 Q And was Dr. Thowgott seeing him for all of those  
3 issues?

4 A He was, yes.

5 Q And you've reviewed the file of Dr. Thowgott?

6 A I have.

7 Q And if you'll turn to Page 8, Dr. Thowgott comments  
8 on Dr. Miller's treatment in California, is that right?

9 A That is correct.

10 Q And does Page 8 of Exhibit Number 40 -- 39, does Dr.  
11 Thowgott believe -- state his belief that an RSD diagnosis is  
12 reasonable?

13 A Yes.

14 Q Okay. And was Dr. Thowgott's treatment of Henry  
15 reasonable, necessary, and causally related to the subject --

16 A Yes.

17 Q To a reasonable degree of probability?

18 A Yes. Medical probability, yes.

19 Q Of medical probability? Thank you. And if you turn  
20 to Page 3, does that set forth Dr. Thowgott's bill? 3 of  
21 38 -- 39.

22 A Yes. \$4,154.50.

23 Q Is that bill reasonable, necessary and causally  
24 related to subject event?

25 A Yes, it was.

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1 Q To a reasonable degree of medical probability?

2 A Yes.

3 MR. BAKER: Move to admit the entirety of 39, Your Honor.

4 THE COURT: Same objection, Mr. Ward?

5 MR. WARD: Yes, Your Honor.

6 THE COURT: Same ruling noted for the record.

7 MR. WARD: I'm not surprised, of course. Lest you're not  
8 surprised.

9 THE COURT: No. 39 will be admitted.

10 MR. BAKER: I'd be surprised in a bad way.

11 [Plaintiff's Exhibit 39 Received]

12 BY MR. BAKER:

13 Q Dr. Schifini, did you set Enrique on a treatment  
14 course?

15 A I did.

16 Q What did that treatment course include?

17 A We talked to Mr. Rodriguez about -- kind of the  
18 risks, the benefits, the options and the alternatives, as is  
19 usual during my consultations. So we kind of go over  
20 different things after I evaluate the patient and the records  
21 that we look at. But the specific recommendations for him  
22 following that office visit was to repeat the lumbar  
23 sympathetic block. The repeating of the block was just for my  
24 own satisfaction that we're repeating the block. We're sort  
25 of checking things again in a different way. Other than Dr.

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1 Miller, he had two of these lumbar sympathetic blocks before.  
2 We were going to check and see if there was a large  
3 sympathetic component to his pain or if we were just dealing  
4 with more of a nerve issue at that point. So the plan was to  
5 repeat a third lumbar sympathetic block before moving on to  
6 things that had been recommended by myself and Dr. Thowgott  
7 and I believe other doctors regarding a spinal cord  
8 stimulator. So before we were going to -- talked to him about  
9 something that we were going to implant into him potentially  
10 forever and ever, we were trying to solve his problem in a  
11 different more simple way, a more conservative way.

12 Q And did you perform a sympathetic block?

13 A We did on November 30th, 2007.

14 Q Where did you perform the sympathetic block?

15 A The block, I believe was performed at the Las Vegas  
16 surgery center.

17 Q Can you explained to the judge -- have you already  
18 talked about what performing a sympathetic block entails?

19 A I did. But we'll kind of go through it just --

20 Q What did you do?

21 A -- very quickly. We repeated the same injection  
22 where we're putting a needle in front of the spine to block  
23 those nerves.

24 The main reason we do these things at surgery center is -  
25 - the reason why Dr. Miller, prior to me doing it, did it at

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1 a surgery center is because of the proximity of the needle and  
2 the large volume of local anesthetic into an area where there  
3 are two large blood vessels. If you inject into those blood  
4 vessels, the patient can have a seizure. They can have a  
5 stroke. They can have an arrhythmia of their heart, which  
6 oftentimes, based on the local anesthetic we use is not a  
7 rhythm of the heart that is easily able to be shocked. You've  
8 seen patients, you know, on TV be shocked with defibrillators.

9 We do these things at surgery centers for safety reasons.  
10 We also are doing them for both diagnostic and therapeutic  
11 purposes.

12 Sometimes when you do one of these injections, you can  
13 actually reset these nerves so that the things that were kind  
14 of hooked up incorrectly can go back to the same way. I  
15 oftentimes describe it to patients -- depends on the age of  
16 the patient -- if they've ever played a pinball machine and  
17 you've tilted the pinball machine, it's kind of how I think of  
18 RSD. Sometimes you can reset the pinball machine. You put in  
19 another quarter or throw out another ball into the whole mix.  
20 Sometimes these lumbar sympathetic blocks will allow you to  
21 reset things.

22 But you want to do it in a safe place, which requires the  
23 use of X-ray equipment and fluoros -- which is called  
24 fluoroscopy, as well as the surgery center where we have all  
25 the resuscitative measures available to us.

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1 Q So this is a risky procedure?

2 A Absolutely, yes.

3 Q And he's undergone it three times now?

4 A Yes.

5 Q Okay. What was the result of your sympathetic  
6 block?

7 A When we did the sympathetic block for him on  
8 November 30th, 2007, the injection was performed adequately.  
9 We measured the responses for the nerves and we actually --  
10 there's a picture in the chart. It's part of my chart. But  
11 essentially, we place a needle in front of the spine to look  
12 at that and then we document certain things in the recovery  
13 room. So we do this in kind of an operating room type  
14 setting. And then the patient will go out on a gurney to a  
15 recovery room where they'll be evaluated by myself to see if  
16 they have any motor or sensory changes. If a patient has a  
17 motor or sensory change, it indicates that you're blocking  
18 different nerves which may lead you to a wrong conclusion.  
19 Mr. Rodriguez, following this injection, had zero motor or  
20 sensory changes, which means we put it in the right spot. He  
21 did have changes in the temperatures in his left lower  
22 extremity. Following the blockade of these nerves, we would  
23 expect an increase in blood flow. So you're taking something  
24 that's typically colder and now you're warming it up by  
25 increasing the blood flow by blocking these nerves. He had an

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1 appropriate increase in temperature which we would expect.  
2 But unfortunately he had no relief of his pain which led me to  
3 the conclusion that the sympathetic component of his pain was  
4 no longer a major player. That doesn't necessarily mean he  
5 doesn't have the CRPS or RSD but it makes the diagnosis less  
6 likely. It doesn't get right of the diagnosis of CRPS or RSD.

7 Q Let's turn to Page 39 of Exhibit 42.

8 MR. BAKER: And the reason I get confused, Your Honor, is  
9 I guess someone's trying to save money, and on these tabs,  
10 there's different numbers on both sides. I would have spent  
11 the money.

12 BY MR. BAKER:

13 Q Are you in Exhibit 42?

14 A I am -- or 41, I think.

15 Q 41.

16 A And Page 30.

17 Q Page 30.

18 Q Did you -- 39.

19 A 39?

20 Q Right. I got you.

21 A Okay.

22 Q Did you send a letter to Dr. Cocha [phonetic] with  
23 respect to your diagnostic findings of your sympathetic nerve  
24 block?

25 A I did.

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1           Q     And let me ask you, it says, "It's just a brief  
2 letter to inform that I saw your patient Enrique Rodriquez  
3 today in follow up, one week after his initial left lumbar  
4 sympathetic block. As you may recall, he did not receive any  
5 immediate relief despite adequate block indicating that he's  
6 no longer suffering from the sympathetically mediated pain."  
7 Can you explain what you meant by not suffering from the  
8 sympathetically mediated pain?

9           A     Again, that's sort of a sub-set of RSD and CRPS.  
10 And I'm sorry this is so confusing. But it's takes a while to  
11 kind of get used to all these terms. But sympathetically  
12 maintained or mediated pain is a specific sub-set of the RSD  
13 or more appropriately, the term is CRPS now. If you have a  
14 significant component of that leading to some of these  
15 diagnoses, you would expect somebody to receive complete  
16 release of their pain following this so -- following this  
17 block. So you can treat that successfully. Dr. Miller did  
18 twice before. He noted that Mr. Rodriquez had complete relief  
19 of his pain following these injections which indicates a large  
20 sympathetic nerve mediated component of the pain. What my  
21 diagnosis was at that point was that that component was fairly  
22 minor, if at all present. And now we're dealing with  
23 potentially something else going on which is either the  
24 mechanical knee pain which both I and Furante, the chairman at  
25 UCLA, were concerned about, or that he was dealing with some

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1 other peripheral nerve kind of issue affecting that lower  
2 extremity, which can also maintain this diagnosis of CRPS or  
3 RSD.

4 So essentially what I did was rule out the diagnosis  
5 of sympathetically maintained pain. And I think in my  
6 dictation, there's sort of error because, again, during this  
7 timeframe was the transition between the terms and nobody had  
8 really said, everybody we're all using this term now versus  
9 this one. So what this should have said is really more we've  
10 -- you know, his RSD component of this was successfully  
11 treated rather than the RSD in the CRPS or the complex regions  
12 pain syndrome. So I think I misstate something in my record  
13 there from December 6th, 2007.

14 Q But you were still communicating with Dr. Cocha?

15 A Yes.

16 Q And if you could turn to Exhibit 37. I'm looking on  
17 the -- are you looking --

18 A Oh, I'm sorry. I thought you said Page 37. So  
19 Exhibit 37.

20 Q Right.

21 A Okay.

22 Q Is Exhibit 37 Dr. Cocha's records and bills?

23 A Yes, it is.

24 Q And was the treatment by Dr. Cocha reasonable,  
25 necessary and causally related to the subject incident to a

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1 reasonable degree of medical probability?

2 A Yes.

3 Q And could you tell me what Dr. Cocha's bill was?

4 A It appears Dr. Cocha's bill -- final bill was  
5 \$3,389.60.

6 Q And is that bill reasonable, necessary and causally  
7 related to the subject incident to a reasonable degree of  
8 medical probability?

9 A Yes.

10 Q And that's your opinion to a reasonable degree of  
11 medical probability?

12 A Yes.

13 MR. BAKER: Move to admit the entirety of 37, Your Honor.

14 MR. WARD: Foundation, hearsay, Your Honor.

15 THE COURT: Noted for the record. 37 will be admitted.

16 [Plaintiff's Exhibit 37 Received]

17 BY MR. BAKER:

18 Q What was your plan for Enrique now that the  
19 sympathetic aspect of his -- well, before I ask you that, did  
20 you believe he was still suffering from a neurologically  
21 mediated pain syndrome?

22 A Yes.

23 Q Even if the sympathetic component of it had been  
24 successfully treated?

25 A Yeah. Again, that's, as I've described, that's just

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1 kind of one piece of the puzzle that at that point or at that  
2 moment anyway appeared to be successfully treated.

3 Q What did you intend to do with him now? Was Henry  
4 still in pain?

5 A Oh, absolutely. I mean, the pain unfortunately  
6 hadn't changed even though we potentially successfully treated  
7 one component of it, the pain was still very severe.

8 Q The severe pain that's recognized in the medical  
9 literature?

10 A Yes.

11 Q So what were you going to do? How were you going to  
12 help him?

13 A Well, we were during that timeframe -- I believe  
14 that was the timeframe that we were talking about sending him  
15 to Dr. Cravetti to rule out a --

16 Q Mechanical?

17 A -- a mechanically component -- or mechanical  
18 component of his left knee pain before we take upon a  
19 procedure which truly is meant to cover up and treat the  
20 problem. But more to cover it up because what we were talking  
21 about next or considering next was a spinal cord stimulator  
22 placement which was something that, I suppose in theory can  
23 treat a problem. But the, you know, 99 percent of the reason  
24 to put one in is cover up something that you can't treat in  
25 another way.

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1 Q What does it do?

2 A A spinal cord stimulator is something that we  
3 utilize in patients who have surgically treated pain that  
4 there's no more surgery that can be done or the surgery can be  
5 done may lead to a worse problem. For example, you know, Mr.  
6 Rodriquez might have been offered a knee replacement surgery.  
7 But based on his age and other factors, he was not necessarily  
8 thought to be a good candidate for a knee replacement surgery  
9 to correct some of his problems. Which in my experience,  
10 probably wouldn't have corrected them because he has RSD. Any  
11 surgical intrusion to that extremity can flare it up and make  
12 it even worse than it is at that particular component. So  
13 that was felt not to be a good sort of course of action. So a  
14 spinal cord stimulator was thought to be a good course of  
15 action. We discussed it with the patient. Kind of went over  
16 the risk, benefits, options, and alternatives that we  
17 discussed before.

18 But the way this works is it's a device that's thought  
19 of -- if you want to think of it as a filter. It's placed --  
20 wires are placed in the patient's spine to block the  
21 transmission of pain signals coming up from a lower extremity  
22 or an upper extremity depending on the situation. In this  
23 particular situation, it's leg and knee pain. So basically  
24 you're creating an electrical filter. So as the pain signals  
25 are coming up through the nerve roots, the spinal cord and

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1 then ultimately would go up to your brain and Mr. Rodriguez  
2 would say, gee, why is my knee hurting, or, you know, things  
3 like that. Gee, this accident was a long time ago, why is it  
4 still hurting. We can block the signals potentially as they  
5 are coming up through that area and sort of filter them out.

6           So for example -- this is just an example. Let's  
7 say he has a pain signal coming up ten times a second. But I  
8 can stimulate these wires to send signals up to his brain at,  
9 you know, 150 times a second. I'm overwhelming his brain --  
10 down the same nerve paths that the pain signals are coming,  
11 I'm overwhelming his brain with signals that I'm generating  
12 from these little wires that are placed in the epidural space  
13 right next to the spinal cord. And what his brain is seeing  
14 and feeling is a sort of more pleasant tingling sensation in  
15 the area which is pain. So basically you're replacing a  
16 painful condition with something more pleasurable. If you are  
17 able to do that, the patient will improve their function,  
18 decrease their medications. They'll decrease their pain  
19 scores. Everything will seemingly improve. And the sort of  
20 the thing that we talked about before, like, the decrease in  
21 temperature in that extremity that was present on his  
22 examination. By stimulating the -- what they call the dorsal  
23 columns of the spinal cord, you're actually stimulating the  
24 improved blood flow into that particular area. And you may  
25 reverse some of the damage done by the RSD or the CRPS by

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1 improving a lot of the things and kind of reversing that  
2 signal. Well, that works when the machine on. When the  
3 machine is off -- you can turn it on. You can turn it off.  
4 Up, down. But if it's off, he's cured and his pain is gone,  
5 his pain will come back to the level it was. So patients  
6 typically don't turn it off. They want to keep it on all the  
7 time, which requires maintenance and battery changes and  
8 things that associated with it. But essentially it's an  
9 electrical filter creating a filtration of pain signals going  
10 up the spinal cord going up to the brain.

11 The device is placed as a trial. Sort of like you  
12 would buy a car. It's a test drive. You test drive the  
13 device. We do it over a three to five day period. I think he  
14 had a four-day trial of this. So it's not a placebo effect.  
15 We're not putting this in and saying, "Do you like it?" Yes.  
16 You like it. Okay. Let's put it in permanently." It's, "We  
17 want you to go home and try this and make sure you like it,  
18 for four days, five days. And then come back to me and tell  
19 me how it changed your life in a positive way before we're  
20 recommending something to be put in permanently?"

21 Q Did you place it?

22 A Yes. We placed the trial spinal cord stimulator on  
23 July 14th, 2008.

24 Q Where did you do that?

25 A At the same facility, the Las Vegas Surgery Center.

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1 Q And could you describe the procedure, itself. Is it  
2 a surgical procedure?

3 A Yes. It's done in the operating room. You -- when  
4 you do typical injections, they're done in kind of an  
5 operating room, a sterile environment. It's not specifically  
6 an operating room. It's usually a room dedicated for pain or  
7 spinal injection procedures. This particular procedure is  
8 actually done in the operating room setting because you're  
9 going to leave something -- a foreign substance in a person's  
10 body for several days.

11 They're not in a hospital setting so that you can't watch  
12 them and observe them and put them on antibiotics and make  
13 sure that they get hooked up to IVs and stuff. We're  
14 encouraging him to go home and do his normal stuff afterwards.  
15 So we do this in more of a sterile environment like the  
16 operating room.

17 So a full sterile prep and gown and surgical preparation  
18 goes on just like a regular operation. And under X-ray  
19 guidance, same X-rays that -- or X-ray machine that we use for  
20 the regular injections are utilized in this particular  
21 procedure.

22 The injection is done in the -- sort of the mid-back part  
23 of the spine. Even though this problem is in his knee, the  
24 nerves that control the knee come out of the spine in that  
25 particular area where they're bundled closely together in that

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1 particular area anyway.

2 And you basically place a large needle -- it's probably  
3 about as thick as one of these microphone wires -- into the  
4 patient's back. The reason why we use is a large needle is I  
5 have to put an electrode through that needle. So the needle  
6 sort of serves as a conduit for -- to allow me to put the  
7 electrode in the place.

8 We ended up using three needles on him because what we  
9 were trying to do is not only control the pain in his left leg  
10 and left knee from the RSD or the nerve related pain, we're  
11 also trying to see by utilizing the same device, could we  
12 control some of his back pain.

13 So there were three different needles placed, one in  
14 the center and then two flanking on the left and right side,  
15 that are placed into his spine. They go up to about the level  
16 of T-7 or T-8, which is right in the middle of your thoracic  
17 spin or your ribcage area. And that allows him to have  
18 independent control over the left versus the right. Or you  
19 can light them all up at the same time and try to get back  
20 pain coverage. Because if you have one electrode, you can  
21 stimulate up and down. If you have multiple electrodes, you  
22 can stimulate across, which is what's necessary to control the  
23 back pain.

24 Once those are put in, we then take the patient out  
25 to the recovery room, show them how to use the device so what

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1 when they're at home, they have a device that's hooked up to  
2 wires that are coming out of their back. They can turn it up,  
3 down, on, off. They can manipulate the left side to be higher  
4 than the right side or turn them all on at the same time. So  
5 it requires some extensive education from myself and the  
6 representative from the company who we utilized to put these  
7 in.

8 Q How did he do?

9 A He did great during the immediate post procedure  
10 period. And on the table, we were able to cut down 80 percent  
11 of his pain, including some of his back pain, but mainly the  
12 pain in his left leg and left knee. But more importantly,  
13 over the trial period, over the four-day trial period, when he  
14 returned to my office for the removal, because again these are  
15 temporary. This is a test drive. He hasn't bought the car  
16 yet. We're basically putting these things in temporarily.  
17 When he came back, all of his leg and knee pain was totally  
18 gone. The stimulator was able to cover up all the pain in  
19 that particular area. Unfortunately, he did not receive the  
20 relief that he was hoping for in his back.

21 MR. BAKER: Before we go on, Ms. Clerk, did I admit 37  
22 and 39?

23 THE COURT: I believe so.

24 MR. BAKER: Did I admit 37 and 39.

25 THE CLERK: 37.

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1 MR. BAKER: Not 39?

2 THE COURT: I think 39 was admitted as well.

3 THE CLERK: 39 was admitted today. Yes.

4 MR. BAKER: Thank you.

5 BY MR. BAKER:

6 Q Henry described from the stand that he was smiling  
7 and happy and his gait was improved for the first time in  
8 years. Does that comport with what you observed?

9 A Absolutely.

10 Q How did you feel about that?

11 A I felt pretty good about it. And I know he did.

12 Q Okay. If you'll turn to Exhibit 22. Excuse, not  
13 Exhibit 22. Page 22 in your Exhibit --

14 A In my -- okay.

15 Q -- 41. You reported those findings to Dr. Cocha.  
16 Is that right?

17 A That is correct.

18 Q And on Exhibit -- excuse Page 21, is this where you  
19 reported to Dr. Cocha that he had 100 percent immediate long  
20 term relief in his left leg pain but less in his back?

21 A Yes.

22 Q Now, Henry had been through a difficult treatment  
23 course. Is that right?

24 A Absolutely, yes.

25 Q Hadn't had any resolution of his pain.

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1 A No.

2 Q And is it fair to say by this time he had been  
3 through two knee surgeries, three lumbar sympathetic blocks,  
4 and an implantation of a stimulator into his system?

5 A Yes. I mean, at best, he had some temporary relief  
6 during the first two lumbar sympathetic blocks. But that was  
7 a few hours. This was for four days, which gave him quite a  
8 bit of home.

9 Q The hound is out, the hunt is on. Right?

10 A Yes.

11 Q And did you send Henry to any physicians to discuss  
12 a permanent spine stimulator?

13 A Yes. He was seen by Dr. Thomas Votter [phonetic],  
14 who's an orthopedic spine surgeon.

15 MR. BAKER: Rob, what's Votter's -- you around?

16 MR. CARDENAS: What's that?

17 MR. BAKER: What's Votter's exhibit number?

18 MR. CARDENAS: It's 48.

19 MR. BAKER: Thank you.

20 BY MR. BAKER:

21 Q Would you turn to Exhibit 48, quickly. It's just  
22 Dr. Votter, his records.

23 A Okay.

24 Q Does 48 contain the examination and treatment  
25 performed upon Enrique Rodriquez from Dr. Votter --

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1 A Yes.

2 Q -- upon your referral?

3 A Yes.

4 Q And was that examination reasonable, necessary and  
5 causally related to the subject accident to a reasonable  
6 degree of medical probability?

7 A Yes.

8 Q What's Dr. Votter's bill?

9 A \$330.

10 Q That sounds pretty reasonable. Is that reasonable,  
11 necessary, and causally related to the subject incident?

12 A Yes.

13 Q To a reasonable degree of probability?

14 A Yes -- medical probability, yes.

15 Q Medical probability. Thank you.

16 MR. BAKER: Your Honor, move to admit 48.

17 MR. WARD: Foundation, hearsay, Your Honor.

18 THE COURT: Noted for the record.

19 MR. BAKER: Admitted, Your Honor?

20 THE COURT: 48 will be admitted.

21 [Plaintiff's Exhibit 48 Received]

22 BY MR. BAKER:

23 Q How does this permanent spinal cord stimulator  
24 differ from the temporary spinal cord stimulator other than  
25 obviously being permanent?

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1           A     Well, the permanent spinal cord stimulator is  
2 different in that it's surgically implanted. There are a  
3 couple of components to the stimulator whether it's temporary  
4 or permanent. The device in a temporary setting has  
5 electrodes, so that's in common with the permanent one. But  
6 the battery pack and the battery power is a handheld device in  
7 the temporary one where the patient has a digital display and  
8 can turn it up or down, on, off, by pushing buttons. But  
9 there's a wire. The permanent one is wireless. There's  
10 something that looks very similar to a computer mouse that  
11 they can utilize that they would put over an implanted battery  
12 pack, over the site that it's implanted in the hip and buttock  
13 area. Then they can manipulate the computer chip and the  
14 battery pack back on some radio frequency waves, just like a  
15 remote control would do. So there's a remote control, no  
16 wires. But there's a battery pack which is implanted in a  
17 patient's body that typically lasts three to five years during  
18 that timeframe. So it averages about four years that the  
19 battery pack will last. The battery pack is then connected to  
20 electrodes. The electrodes --

21           Q     How much does that battery pack cost?

22           A     The battery pack costs about \$22,000.

23           Q     And how many times would you estimate that had to be  
24 replaced if Enrique received a permanent spinal cord  
25 stimulator?

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1           A     Well, based on his age, we're talking about a four-  
2 year life span of that, probably ten times.

3           Q     Approximately \$220,000?

4           A     Yes.

5           Q     Is that your opinion to a reasonable degree of  
6 medical probability?

7           A     Yes. That's just the battery pack portion.

8           Q     And you were discussing how the battery pack has  
9 leads to the stimulation --

10          A     Yes. The battery is then hooked to a -- kind of an  
11 interconnecting wire which is hooked up to the electrodes.  
12 The difference between a temporary stimulator versus a  
13 permanent stimulator involves -- when I put in lead in -- we  
14 use, again, the big needle, kind of similar to the size or  
15 caliber of the microphone wires, to place a lead or wire  
16 through the needle, then I remove the needle, leave the wire  
17 in place. Dr. Votter -- or a surgically placed permanent lead  
18 involves removing a piece of the bone in that particular area  
19 which is called a laminectomy which actually sticks the --  
20 what they call a paddle lead. So instead of having three  
21 wires individually wrapped, which is sort of inefficient  
22 because if you use a wire, I send a signal down a wire, the  
23 electricity, which in this case is sort of like a medication,  
24 is going to be sort of circumferentially distributed in a 360  
25 degree. So I can't send the signal down the wire saying I

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1 only want you to send that signal in a certain direction. It  
2 goes wherever it wants. The paddle leads, though, have the  
3 electrodes implanted on them. Then they have a layer of  
4 insulation on the other side. So when you put in those paddle  
5 leads, which is approximately the size of a popsicle stick,  
6 that paddle lead has all the electrodes placed one side of it.  
7 And it's a much more efficient delivery system which is why we  
8 can get the battery to last several years, four years. That  
9 allows for the patient to receive relief of their pain based  
10 on the stimulation patterns that are set up on the electrodes.  
11 But it also allows them to have it all implanted underneath  
12 their skin. Wires move. They tend to roll because they're  
13 sort of cylindrical objects. The paddle would be very  
14 difficult to move. But you can have little fractures of the  
15 leads along the wire that require replacement. They don't  
16 have to be replaced that frequently. Not every four years.  
17 But the typical replacement of the electrodes is about every  
18 ten to fifteen years because of sort of wear and tear on that  
19 area where is the patient is bending and twisting, as we  
20 expect, patients who have these to be more active. And so  
21 there's going to be some wear and tear on the actual products  
22 that we put in there.

23 Q What is the costs of those electrodes?

24 A The electrodes are about the same cost of the  
25 generator. They're approximately 20 -- \$22,000 as well.

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1 22 --

2 Q And so --

3 A -- is probably reasonable --

4 Q -- in his lifetime?

5 A For the electrodes, three times would be and  
6 adequate timeframe. Because again, ten to fifteen years is  
7 the typical timeframe in which you're replacing those. So,  
8 yes, three times --

9 Q Anywhere from 45- to \$65,000, approximately?

10 A 45 -- probably -- yes, 45 to 65, yes.

11 Q Okay. And that's at today's ex -- that's at today's  
12 cost. Is that what you're saying?

13 A Yes.

14 Q And is it your opinion to a reasonable degree of  
15 medical probability that those electrodes will also need to be  
16 replaced?

17 A Yes.

18 Q So now we're talking \$220,000 for the battery power?

19 A Yes.

20 Q An additional 45 to 65,000 for the electrodes. Is  
21 that fair to say?

22 A Yes.

23 Q Tell us about the stimulator unit, itself.

24 A Well, the stimulator unit is the battery pack. It  
25 has a computer chip in there. And those computer chips are,

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10 App. 1879

1 as you know, your computers go out of date. So they -- the  
2 battery lasts for four years, which is probably a good thing  
3 because then you're replacing it with the new and improved  
4 computer chip which may allow for different programming of the  
5 actual electrodes. There's usually sixteen different  
6 electrodes that we place, which is -- gives you multiple  
7 combinations. If you remember from math, if you have four  
8 different variables, four times three times two gives you  
9 multiple combinations. So if you have four of them, there's  
10 24 different combinations. I've never done the math. But if  
11 you take 16 times 15 times 14, you can imagine the number of  
12 combinations. So it takes a pretty powerful computer chip to  
13 manage those different combinations to customize the device.  
14 It's not one size fits all. It's, we put it in, in the exact  
15 spot that the trial was successful. The area in the spine  
16 where it's place is the same exact spot as the trial because  
17 we now have an X-ray picture of it. We can give that as a  
18 roadmap to the surgeon. But that device is placed under the  
19 skin and it's accessed with the remote control. So you don't  
20 have to do anything special to do that. But these are  
21 typically done instead of at a surgery center, they're done in  
22 a hospital setting and then there's additional costs  
23 associated with the surgeon's fees and the anesthesiologist  
24 fees and the hospital fees, which are also part of the whole  
25 permanent implantation.

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1 Q Are you familiar with the hospital costs?

2 A Yes.

3 Q And is there a hospital cost that would have to be  
4 incurred each time electrodes or the stimulator is replaced?

5 A Yes.

6 Q They'll be done in a hospital setting each time. Is  
7 that right?

8 A Yes.

9 Q What are the hospital costs associated with a spinal  
10 cord stimulator?

11 A Well, there's the physician cost to place them,  
12 which would be a spine surgeon. You're performing basically a  
13 laminectomy. And then you're creating a tunnel and pocket. So  
14 the cost associated with that type of procedure, approximately  
15 \$25,000 for the surgery costs. We talked about the device  
16 costs.

17 Q Now, I'm a little confused with the math. With  
18 respect to the electrodes and the stimulator, are they going  
19 to be replacing them at the same time or different times?

20 A Their paths may cross at some point.

21 Q Could Henry need as much as eight to ten additional  
22 surgical procedures to replace the spinal cord stimulator, the  
23 battery and the electrodes?

24 A Yes.

25 Q Okay. And the cost of each of those packages is

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1 what?

2 A When you say packages, I'm --

3 Q Well, you add \$220,000 would be the cost of putting  
4 in the original unit and the electrodes. Is that right?

5 A Yes.

6 Q And then you would need battery -- and that was  
7 about \$220,000?

8 A Yes.

9 Q And then the battery replacements would be about you  
10 said four times in his lifetime?

11 A The electrodes.

12 Q The electrodes?

13 A Yes. So I would say 10 to 15 years. So I would say  
14 three times for that. That's kind of where we got the 45 to  
15 65 -- or 45 -- yeah, 45 to 65, I guess, you know, I'll use  
16 your math -- with the electrode replacements. The original  
17 surgery costs, where they're putting the entire device is  
18 approximately \$25,000. That's the surgeon's fees. The  
19 anesthesia fees for the original placement is approximately  
20 \$2000 for the time that it's going to take to keep Mr.  
21 Rodriquez asleep. Then there's the hospital associated costs  
22 which some of the costs for the devices are built into the  
23 hospital costs, so separating those out -- the hospital costs  
24 for this type of procedure, not inclusive of the battery pack  
25 that we're already talking about replacing, and the

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1 electrodes, are approximately \$70,000.

2 Q So I'm going to ask you to do it for me, and I hate  
3 to do it, but could you explain to the judge what the lifetime  
4 cost of replacements of the permanent stimulator associated  
5 with the changes in electrodes and the changes in the unit  
6 would be for Henry's lifetime.

7 A Yes. The --

8 Q And then total it.

9 A Well, I'll do my best. The electrode costs -- and  
10 I'll give that 45 to \$65,000 range. I don't know exactly  
11 where it's going to be, but more likely than not, to a  
12 reasonable degree of medical probability, he will need three  
13 of those just based on the fact that he will be and is  
14 anticipated to be more active. And therefore, the little  
15 wires, they're very fine wires that make up the electrode, are  
16 known to fracture. So every 10 to 15 years it is likely that  
17 that will need to be replaced. The batteries will need to be  
18 replaced on average every four years. We calculated out that  
19 he probably would need 10 of those over a lifetime. The  
20 surgery costs associated --

21 Q About \$22,000 a time?

22 A \$22,000 a time. So \$220,000 just for that.

23 Q And you're aware that Henry is 46 right now?

24 THE PLAINTIFF: 47.

25 ///

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1 BY MR. BAKER:

2 Q 47?

3 A Yes. You're looking at now the hospital costs. The  
4 initial hospital costs -- and I've already kind of calculated  
5 out the costs associated with the actual devices that are --  
6 is about \$70,000 for the first initial placement. The batter  
7 -- and then there's the anesthesiologist costs of \$2000, the  
8 surgeon costs of \$25,000. Those are typically the costs  
9 associated with the initial placement and devices. The  
10 battery replacement does not require a major surgery. There's  
11 still going to be costs associated with it, but it will not be  
12 the hospital costs of the \$70,000. The battery replacement  
13 for a surgery center costs are approximately \$10,000 because  
14 that can be done at a surgery center or a hospital. But the  
15 charges are about the same. \$10,000 for the surgery center or  
16 the hospital charges. The anesthesia charges go down to about  
17 a thousand dollars. And then the surgeon charges go down to  
18 about \$10,000. So each time the battery is going to be  
19 replaced, there's going to be \$16,000 of additional costs  
20 associated with that, based on the surgeon fees, the  
21 anesthesia fees, the hospital charges or the surgery center  
22 charges. But then there's cost of the batteries. So that's  
23 the \$22,000. So we're already kind of calculated that out.

24 Q Are you keeping a running total?

25 A I'm trying to. I'm doing my best. The laminectomy

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1 or the revision of the leads is going to be the tricky part.  
2 That's going to be need to be done, let's say, three times  
3 over the course of his life to replace the electrodes or the  
4 leads. That electrode cost, we've already kind of calculated  
5 into that 45 to \$65,000 charges. The surgery fees will be  
6 similar to the original surgery fees. It might be reduced by  
7 about \$5000. So you're talking about a surgeon fee of \$20,000  
8 because they have to go in and revise the leads that are  
9 placed. So they have to go in and do a spinal surgery again.  
10 The hospital costs associated with that are still about the  
11 same. They're about \$70,000. And now you're adding in the  
12 leads. So realistically, you're three times a year -- or  
13 three times in a lifetime, you're going to have 70,000 -- or,  
14 excuse me, \$90,000 in costs. So that's 270,000. The \$16,000  
15 costs are going to be associated with ten times over a  
16 lifetime. So you have \$160,000 of surgery center costs.  
17 That's going to cover those costs over the lifetime. You're  
18 also know looking at the original \$220,000 of the sort of cost  
19 of the batteries times 10, so \$220,000, plus the costs  
20 associated with the electrodes, which is estimated to be 45 to  
21 \$65,000.

22 Q Can I average out at 50?

23 A Sure. That would be acceptable. And then those are  
24 the associated hard costs with this. These devices typically  
25 in their first year of life are going to require more frequent

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1 programming changes. And the nice thing about having a  
2 computer is you can program it. Some of the programming Mr.  
3 Rodriquez can do on his own with the little computer. Some of  
4 it requires visits in my office to be done. Those are  
5 typically about a \$300 charge. The first year -- every year  
6 of the first year, so the -- of the four years, the first  
7 year, there's going to be three of those visits -- or excuse  
8 me, four of those visits. So you're talking about \$1200 each  
9 of the first years. And then additional years, that  
10 programming needs to be done once a year. So you're talking  
11 about an additional \$2100 every time the battery is changed  
12 for programming issues. So that's the other associated costs  
13 with this.

14 Q That would total?

15 A That's going to be \$21,000 times -- or excuse me,  
16 \$2100 times 10, so an additional \$21,000. I think those are  
17 all the costs. So I'm going to --

18 Q And that totals --

19 MR. BAKER: And we'll get the transcript and add it up,  
20 Your Honor, and make sure it's all consistent.

21 BY MR. BAKER:

22 Q -- \$721,000?

23 A That sounds about right over the lifetime --

24 Q 270 plus 160 plus 220 plus 50 plus 21,000.

25 A Yes.

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1 Q Okay. And is it your opinion to a reasonable degree  
2 of medical probability that those charges are reasonable,  
3 necessary, and would be causally related to the injuries that  
4 Enrique sustained at the Palms Hotel?

5 A Yes.

6 Q Okay. Does he need the permanent spinal cord  
7 stimulator?

8 A If we want him to get better, yes.

9 Q Well, let's assume we want him to get better. Is it  
10 going to help him?

11 A Yes. It's already been shown to have helped him.

12 Q Were the results of the permanent spinal cord  
13 stimulator but your experience similar to the temporary spinal  
14 cord stimulator?

15 A They're similar, if not improved just because of the  
16 efficiency of the delivery system of the electricity because  
17 we're not shooting electricity in multiple different  
18 directions. We're pushing it towards the spinal cord or  
19 towards the nerve that we think are carrying these pain  
20 signals.

21 Q You've reviewed a life care plan in this case?

22 A Yes, I have.

23 Q And there were certain medicine costs that were  
24 involved in the life care plan?

25 A Yes.

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1 Q And have you reviewed them?

2 A I have.

3 Q What medications are you aware that Enrique is on  
4 right now?

5 A Currently he is on some medications to help control  
6 some of his nerve type pain. I'd have to look at the actual  
7 list. I hadn't memorized it.

8 Q Do you have an actual list?

9 A I do, in the life care plan.

10 Q Take your time and just a second and take a look.

11 A Okay. I'm on the page.

12 Q He's presently taking Valium?

13 A Yes.

14 Q And if he doesn't receive the -- well, let's go  
15 through it this way. He's presently taking Valium. Correct?

16 A Yes.

17 Q And Hydrocodone?

18 A Yes.

19 Q What does Hydrocodone do?

20 A Hydrocodone is a pain medication. It's Vicodin or  
21 Lortec.

22 Q Morphine?

23 A Morphine is another opiate pain medication.

24 Q Effexor.

25 A Effexor is an antidepressant medication that used

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1 for treatment of chronic pain anxiety and depression.

2 Q Psychobenzadrine.

3 A That is a muscle relaxer type medicine.

4 Q Doculax [sic]?

5 A That is a stool softener for constipation that's  
6 oftentimes associated with the use of opiate medications.

7 Q Anulose.

8 A That's another medication for constipation.

9 Q Okay.

10 A And there is one other one that he's taking for the  
11 discomfort, which is Topomax, which is a medication for some  
12 of the head and neck pain that he's also suffering. But it's  
13 also used for nerve related pain. So -- it's listed here for  
14 the purpose of headaches. But in my experience, this is a  
15 useful for a nerve related pain.

16 Q If the pain stimulator works and relieves the pain,  
17 as you said that it probably would and relieves the pain in  
18 his knee, is Henry going to be pain free?

19 A No.

20 Q Explain that to me.

21 A Well --

22 Q Better, yet, explain that to Your Honor.

23 A Yeah. When you look at the bigger picture here,  
24 clearly the major pain component in Mr. Rodriguez is his left  
25 leg, left knee, which you think is nerve related or CRPS

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1 related. The problem with decreasing or eliminating the pain  
2 in that particular area is it makes other things more obvious.  
3 He still has components of pain in his back, his neck, his  
4 bilateral wrists. So as we relieve one pain, we'll make other  
5 things more obvious. And they're not as severe as the leg pain  
6 or the knee pain obviously. But when you relieve one, you're  
7 now something else more and more obvious for the patient. So,  
8 like for example, what was disappointing with his lumbar -- or  
9 the trial spinal cord stimulator trial, is we were unable to  
10 relieve his back pain. Well, unfortunately, when I saw him  
11 back, his leg pain was gone, but his back pain became more  
12 obvious once that other component of his discomfort was gone.  
13 So it is likely that he may require additional care and  
14 continuation of some of these medications. I would say that  
15 there would be a reduction certainly in the need for these  
16 medications which, you know, based on the component of his  
17 pain and the sort of the totality of, you know, all of the  
18 components of it, with the knee and the leg being the majority  
19 of it, we may be able to get rid of, you know, 75 percent of  
20 the costs of these medications by replacing it with something  
21 much more efficient and directed towards the problem. But I  
22 don't think you're going to get rid of them totally.

23 Q And I'll go with through it with you.

24 MR. BAKER: Your Honor, can I ask to take a break?

25 THE COURT: Yeah.

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1 MR. BAKER: Thank you.

2 THE COURT: We only have about 20 minutes.

3 MR. BAKER: It's kind -- it's kind of one of those  
4 breaks.

5 MR. WARD: Am I going to get cross examination? Are we  
6 going to manage to take it up to the --

7 THE COURT: Are you going to be able to finish this  
8 witness if we take five minutes?

9 MR. BAKER: I don't think I'm going to be able to finish  
10 with this witness whether or not we take five minutes.

11 THE COURT: Okay. Let's just break for the afternoon  
12 then.

13 MR. BAKER: Thank you, Your Honor.

14 THE COURT: See you Monday at --

15 MR. BAKER: Your Honor, can I be excused for a second?

16 THE COURT: Yes.

17 MR. BAKER: Thank you.

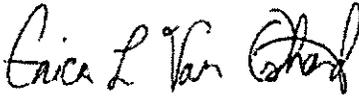
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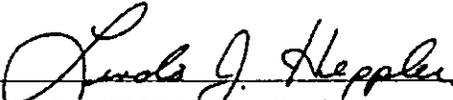
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TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

*Alvin D. Quinn*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MONDAY, NOVEMBER 1, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. JOSEPH SCHIFINI

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
Benson, Bertoldo & Baker

For the Defendant: KENNETH C. WARD, ESQ.  
Archer \* Norris

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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10 App. 1893

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Defendant's Witness(es):

None

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DEFENDANT'S:

None

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1 Q Volume 3?

2 A -- if it's 42.

3 Q Thank you. And what is contained in Exhibit 42,  
4 does it contain the records of your care and treatment of  
5 Enriquez Rodriguez.

6 A I want to say mine is actually 41, what it looks  
7 like.

8 Q Let's start that over again. All right.

9 It is 41. It is contained in Exhibit volume 2. Do  
10 you have that?

11 A I do have it, but I don't have the ones that we made  
12 copies of the other day, I have the original one.

13 Q Does that one contain it? No.

14 MR. BAKER: The Court's indulgence.

15 THE COURT: Sure.

16 THE WITNESS: Here they are. I have them up here.

17 MR. BAKER: Thank you.

18 THE WITNESS: I left them up here last.

19 MR. BAKER: Oh, incidentally, Your Honor, I found the  
20 copies that were Bate stamped that I had brought to Court and  
21 didn't realize I was holding the wrong one. So I owe the  
22 Court money for some Bate stamps and photocopies that were  
23 unnecessary, although very well done.

24 THE COURT: You had them along, Mr. Baker?

25 MR. BAKER: I believe I did.

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1 THE COURT: You put us through that exercise needlessly.

2 MR. BAKER: Your Honor, I --

3 UNIDENTIFIED SPEAKER: I had to join the printer's union  
4 over there.

5 MR. BAKER: I believe it's a sanction. I should have to  
6 buy everybody lunch.

7 THE COURT: Oh. How about drink, Mr. Baker.

8 MR. BAKER: I believe that.

9 [Laughter]

10 MR. BAKER: Your Honor, can I ask for a brief hour and a  
11 half recess. Okay.

12 THE COURT: Just joking. Just joking.

13 MR. BAKER: I get it, Your Honor.

14 BY MR. BAKER:

15 Q Exhibit 41 is your treatment records in this case?

16 A Yes, they are.

17 Q And they contain records of the care and treatment  
18 that you rendered to Enriquez Rodriguez as a result of his  
19 injuries at the Palms Hotel and Casino?

20 A Yes.

21 Q And was your treatment reasonable, necessary and  
22 causally related to the injury --

23 A Yes.

24 Q -- he sustained at the Palms Casino?

25 A It was.

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1 Q Is that your opinion to a reasonable degree of  
2 medical probability?

3 A Yes, it is.

4 Q And what was the bill that you generated with  
5 respect to care and treatment?

6 A I did not bring that bill with me, and it wouldn't  
7 be part of this copy, but I'm sure you have a total there  
8 somewhere. I just don't know what exhibit it is.

9 Q The bill is not contained in Exhibit 42 -- Exhibit  
10 41?

11 A No. That's just a copy of my -- of my chart.

12 THE COURT: Is it in this copy that Counsel gave me the  
13 other day?

14 MR. BAKER: I'm not sure, Your Honor.

15 THE COURT: You don't think so?

16 MR. BAKER: I don't know, Your Honor. If you give me  
17 just one-half a sec.

18 THE COURT: Sure.

19 [Pause]

20 BY MR. BAKER:

21 Q We've disclosed in the course of discovery bills in  
22 the amount of \$9,000 for your care and treatment so far in  
23 this case?

24 A That sound approximately the rate for the medical  
25 bills.

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1 Q For the services that you've rendered to this point  
2 in time?

3 A Yes.

4 Q And are bills of \$9,000 reasonable, necessary, and  
5 causally related to the subject accident?

6 A Yes.

7 MR. BAKER: Move to admit 41, Your Honor.

8 THE COURT: Any objection, Mr. Ward?

9 MR. WARD: None other than the standing objection, Your  
10 Honor.

11 THE COURT: Very well, noted for the record; 41 will be  
12 admitted.

13 [Plaintiff's Exhibit 41 Received]

14 BY MR. BAKER:

15 Q And if you'll go to 40, is this the surgery that you  
16 performed -- is it correct to call them surgeries, or would  
17 they be procedures?

18 A They're procedures performed in a surgery center.  
19 But because of the potential consequences they oftentimes are  
20 treated as if they are surgeries because of the potential side  
21 effects.

22 Q Would it be fair to say that the lumbar sympathetic  
23 blocks are more procedures and the inferentation of the spinal  
24 cord stimulator was more surgical in nature?

25 A Yes. You could argue either way for either one of

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1 them. But, yes, I would agree with that statement.

2 Q And it had to be performed at the surgical center;  
3 is that correct?

4 A Yes.

5 Q And Exhibit 40, is that the surgical center records  
6 and bills?

7 A Yes.

8 Q And was -- would you please tell the Court what the  
9 bill for the surgical procedure was?

10 A Well, there were two procedures performed there.  
11 One was a lumbar sympathetic block, I think the third of which  
12 that he had. One of the bills for that is \$1,972, and that's  
13 a reasonable standard bill for the southern Nevada community.

14 Q Is it also necessary and causally related to the  
15 subject accident?

16 A It is.

17 Q To a reasonable degree of medical probability?

18 A Yes.

19 Q And that's to be found on Bates Number 04 in Exhibit  
20 Number 40, which is contained in volume number 2?

21 A Yes.

22 Q And then there's another bill which is contained on  
23 '03, for \$32,550?

24 A Yes. That is the bill for the surgery center costs  
25 associated with the implantation of the triple lead spinal

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1 cord stimulator, which is also reasonable, necessary and  
2 causally related to the Palm's incident, based on my  
3 experience with these type of procedures and reviewing surgery  
4 center bills.

5 Q To a reasonable degree of medical probability?

6 A Yes.

7 MR. BAKER: Move to admit 40, Your Honor.

8 THE COURT: Any objection, other than that stated  
9 previously?

10 MR. WARD: No, Your Honor.

11 THE COURT: 40 will be admitted.

12 [Plaintiff's Exhibit 40 Received]

13 BY MR. BAKER:

14 Q You have Dr. Becker [phonetic], the Defendant's  
15 expert witness report, is that right?

16 A I have, Your Honor.

17 Q And he speaks about mountains out of mole hills and  
18 a constellation of injuries; is that correct?

19 A Yes.

20 Q And one of the things that you talked to me about  
21 was that RSD is associated with the shrinking of the nerve  
22 fibers in the tissue of the toe, which could result in things  
23 like ingrown toes; is that correct?

24 A Yes. You're changing basically the ratio of the  
25 nail to the nail bed. As you shrink the tip of the toe the

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1 toenail stays the same size and it doesn't fit very well.

2 Q And that's something in your experience and through  
3 the medical literature, which is related to either a complex  
4 sympathetic pain syndrome or and RSD?

5 A Yes.

6 Q So would it make you giggle or something, if it was  
7 suggested that Mr. Rodriguez' ingrown toenail is part of this  
8 constellation of symptoms as related to his RSD?

9 A Would it make me giggle?

10 Q Sure. Or do you anticipate that someone with RSD  
11 would get an ingrown toenail?

12 A No. That's kind of an anticipated progression of  
13 this.

14 Q And would it be fair to say that within the record  
15 now we've seen ingrown toenails which are associated with RSD?

16 A Yes.

17 Q Edema?

18 A Yes.

19 Q Allodynia?

20 A Yes.

21 Q Hyperesthesia?

22 A Yes.

23 Q Change in colors?

24 A Yes.

25 Q Temperature changes?

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10 App. 1903

1 A Yes.

2 Q All of these are objective signs of RSD; is that  
3 right?

4 A Yes. And just to point out, and I think we pointed  
5 this out last time, is those can be present in some  
6 circumstances and then absent, you know, a day later. So some  
7 of the color changes and things like that can be kind of  
8 transient, depending on when you're actually performing the  
9 objective examination.

10 Q And that's -- does that dovetail with the finding of  
11 a one hundred percent relief in pain in the prior sympathetic  
12 lumbar blocks?

13 A Yes.

14 Q And that's again evidence of the fact of an existing  
15 neurologically mediated pathology?

16 A Yes.

17 Q And is that the same too, with respect to the  
18 response to the temporary pain stimulator?

19 A Yes.

20 Q Doctor, I'm going to ask you a question that's, I  
21 don't know how you're going to feel about it, if it was  
22 suggested to you that I am orchestrating this treatment and  
23 building a case for him for gain, through my law office, how  
24 would you respond to that?

25 A It would be quite a feat, because there's multiple

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1 doctors involved in multiple States, in multiple specialties  
2 that you would have had to contact and orchestrate, and --  
3 that would be quite a feat.

4 Q It adds a little nefarious sound to it.

5 A A little more than that, yes.

6 Q Okay. I appreciate you saying that.

7 Could you turn to Exhibit Number 32.

8 MR. WARD: Object to the last question and move to strike  
9 the answer. There's been no suggestion that he's  
10 orchestrating everything in this case.

11 THE COURT: No suggestion at all?

12 MR. WARD: No.

13 MR. BAKER: And, Your Honor, let me state for the record,  
14 is that he and I spoke about what occurred during opening and  
15 everything's good as between us. You know, I'm not -- I'm  
16 fine with that.

17 But with respect to the fact that whether  
18 Dr. Foranti's [phonetic] bill came to my office, rather than  
19 another medical care provider, I understand doing that in  
20 front of a jury so people could look at me and say: Oh, bad  
21 lawyer, look what he's doing. But I believe that that's  
22 suggestive.

23 MR. WARD: May I respond to that?

24 THE COURT: Motions granted to the nefarious comment.

25 MR. WARD: I would just like to respond to that.

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1 THE COURT: Sure.

2 MR. WARD: In fairness to Mr. Baker. My -- the reason I  
3 asked that question is not because that I think Mr. Baker is  
4 being nefarious, but because I believe that the submitting the  
5 patient to Dr. Foranti, and the billing, and the report were  
6 litigation expenses and not treatment expenses.

7 I did not say, nor did I suggest that there was  
8 anything nefarious about it. I just thought it was -- it was  
9 not a referral from the doctor. He didn't write report to the  
10 doctor and it's potential litigation. People do that all the  
11 time, there's nothing wrong with it. I didn't suggest there  
12 was anything wrong with it.

13 MR. BAKER: I withdraw the question.

14 MR. WARD: That's the reason why I asked that question.

15 MR. BAKER: I withdraw my question.

16 THE COURT: Very well.

17 MR. BAKER: Thank you.

18 MR. WARD: I hope I'm not imputing your integrity, it's  
19 not --

20 THE COURT: You know, here's the thing, gentlemen, and  
21 I'm sure Mr. Baker is aware of that, I'm not sure Mr. Ward if  
22 you're aware of it or not, we're seeing more and more and more  
23 pretrial motions in limine on the subject of whether a case is  
24 attorney-driven or somehow, you know, some medical build-up on  
25 the issue of being attorney-driven.

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1           And so, you know, the Court is sensitive to the  
2 issue, because I see the issue come up a lot of times in  
3 motions in limine. I don't know whether it was a motion in  
4 limine in this particular case, frankly because I see the  
5 particular motion in limine so many times.

6           And what I'll often ask counsel is, do you have any  
7 evidence that the case is attorney-driven. Because if you do  
8 I'd like to see it right here, right now. Maybe it is  
9 relevant.

10          MR. WARD: I don't have any and I'm not contending it.

11          THE COURT: I understand you don't. But I think since  
12 the issue came up I thought you might want to know I think  
13 maybe what the source of it might have been.

14          MR. WARD: Certainly, certainly.

15          MR. BAKER: And my comment and my question was withdrawn,  
16 Your Honor.

17          THE COURT: Okay. Very well.

18 BY MR. BAKER:

19          Q       And can you please turn to Exhibit Number 32, in  
20 exhibit number -- in volume number 2, please. Are you there?

21          A       I'm already there.

22          Q       Now I'd like to -- is this medical records having to  
23 do with the excision of an ingrown toenail --

24          A       Yes.

25          Q       -- in Enrique Rodriguez?

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1 A Yes.

2 Q As you stated that's a medical condition and medical  
3 procedure that you see frequently associated with complaints  
4 of RSD?

5 A Yes.

6 Q I'd like to go through just a couple of sections of  
7 it with you real quick. If you'll go through muscular  
8 skeletal; what does it say?

9 A On the page 4 of this exhibit?

10 Q Exactly. Thank you.

11 A Okay. Muscular skeletal joint pain, muscle cramps,  
12 back pain, difficulty with walking.

13 Q Are all of those things typically associated with  
14 RSD?

15 A Yes.

16 Q And is this a podiatrist?

17 A This is a podiatrist, yes, Dr. Stacey [phonetic], I  
18 believe.

19 Q So is it fair to say we now have a pain management  
20 doctor, an orthopedic surgeon, a two pain -- well, two or  
21 three pain management doctors all noting symptoms consisting  
22 with an RSD, in this patient?

23 A Yes.

24 Q Let's go to something else. Let's go to skin.

25 A The integument/skin section notes change in color

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10 App. 1908

1 and change in nails, both of which are indicative of RSD, or  
2 CRPS.

3 Q Is change in color, that type of vascular mediated  
4 change in color, due to the sympathetic response that you  
5 described to the Judge earlier?

6 A Yes. That's what I believe this to represent.

7 Q Again, is that consistent with complaints of RSD?

8 A Yes.

9 Q And was the treatment reasonable and necessary and  
10 causally related to the subject incident?

11 A It was. And there was another finding in there  
12 consistent with RSD, which is under the hematologic and  
13 lymphatic system. Slow to heal after cuts which implies and  
14 impaired vascular supply to the extremity.

15 Q And the doctor performed an excision; is that right?

16 A Yes.

17 Q You'd be in a position to know?

18 A Yes.

19 Q Thank you. Do you know what the bill for this  
20 particular treatment was?

21 A It appears to \$782.50.

22 Q Is that reasonable and necessary, causally related  
23 to a reasonable degree of medical probability?

24 A Yes.

25 MR. BAKER: Move to admit -- what exhibit number was

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1 that, please?

2 THE WITNESS: 32.

3 MR. BAKER: Move to admit 32, Your Honor.

4 THE COURT: Any objection, Mr. Ward?

5 MR. WARD: No news one, Your Honor.

6 THE COURT: Very well. It's noted for the record. I  
7 will be admitted.

8 [Plaintiff's Exhibit 32 Received]

9 BY MR. BAKER:

10 Q I'm going to switch gears on you for a little bit,  
11 perhaps take you into an area that's a little bit more  
12 significant. You stated that Enriquez will require a  
13 permanent pain stimulator; is that right?

14 A Yes, that's my opinion.

15 Q And that was your opinion to a reasonable degree of  
16 medical probability; is that correct?

17 A Yes, that's correct.

18 Q And that's as a direct and approximate cause of the  
19 subject incident?

20 A Yes.

21 Q And that's to a reasonable degree of medical  
22 probability?

23 A It is.

24 Q What's the desire for the pain stimulator? Is it to  
25 permanently mask his pain, or something different?

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1           A     It's basically something when you've ran out of  
2 options and you're trying to cover up the pain based on that  
3 filter sort of theory that we talked about earlier.

4                     So essentially it's -- there's no other way to fix  
5 the nerve problem. It's probably within the spinal cord at  
6 that point and the stimulator is present to cover up the pain.  
7 So when it's on the pain's covered up. When it's off it's not  
8 covered up. So the pain would still be there.

9           Q     And Dr. Shaw testified that even though the pain  
10 won't be felt the condition is still there?

11           A     Yes.

12           Q     You concur with that?

13           A     I do.

14           Q     Is it then your opinion that Enriquez Rodriguez,  
15 with respect to his knee, suffered a permanent, it can be  
16 forever, injury to his left knee?

17           A     Yes, that's my medical opinion.

18           Q     And Dr. Shaw also spoke about the fact that although  
19 the pain might be masked he'll continue to limp?

20           A     He will continue to limp due to some anatomical  
21 abnormalities present within the knee which cause him to limp,  
22 which also caused changes in his posture and his gait.

23                     He may still require assistive devices if the  
24 majority of the reason he's using those is because of the pain  
25 in combination. So it really depends on the ratio of the pain

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1 versus the anatomic abnormalities which may continue to cause  
2 problems and need for assistive devices for ambulation.

3 Q And Dr. Shaw testified that he believes that carpal  
4 tunnel syndrome that's he reported is caused by the use of  
5 assistive devices, from probably some weight gain, compiled  
6 with just the need to use his hands while -- to move around.  
7 Do you concur with opinion?

8 A I do, yes. I think that's very reasonable to  
9 assume. We oftentimes see that in patients who are using  
10 assistive devices. Because if they injure one or both of  
11 their lower extremities, they're now using a cane or a crutch,  
12 which puts a lot of extra weight and pressure on the wrist,  
13 which oftentimes leads to a diagnosis of carpal tunnel  
14 syndrome.

15 Q And if he continues to need to use the assistive  
16 devices is he caught in a vicious circle, or is that carpal  
17 tunnel going to spontaneously heal?

18 A He's already formed it, so it's not going to  
19 spontaneously heal even if the assistive devices and the need  
20 for those go away.

21 Q And you're aware, and you've treated Mr. Rodriguez  
22 for pain in other areas than just his knee; is that right?

23 A That's correct.

24 Q And when you gave him the trial pain stimulator, the  
25 temporary pain stimulator, would you remind the Judge what

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1 occurred with respect to his lumbar pain?

2 A We were attempting to treat both the lumbar and the  
3 lower extremity symptoms with the same device. Although  
4 initially 80 percent of his pain was resolved in the  
5 procedure, or the operating room, as he got to do the test  
6 drive over the four days we lost the coverage of his low back  
7 and all of the stimulation provided him with complete relief  
8 of his left lower extremities. So we could get that under  
9 control, but his back was not able to be under control with  
10 the stimulator, so his back is still an issue for him.

11 Q Do you know Enriquez' major, or there wasn't one  
12 noted in the record with respect to his lumbar complaints?  
13 Did we discuss this already?

14 A No. But I think it's -- the best sort of  
15 explanation for that is found I believe in Dr. Fallgett's  
16 [phonetic] notes where he basically says that at this point,  
17 you know, he's now going to start focusing on the low back,  
18 because we've sort of addressed his knee.

19 So it's sort of you have to prioritize symptoms that  
20 patients have. His knee was the overwhelming problem at that  
21 time. And as his gait and posture continued to be an issue  
22 for him, his back became more of a problem as time went on,  
23 and it continues to be a problem for him.

24 Q In your experience treating over these last, how  
25 many years has it been now --

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1 A I think almost --

2 Q No, your experience in being a medical provider?

3 A Oh, in my experience, I've been a physician since  
4 1993.

5 Q In the area of pain?

6 A In pain management, well, that sort of encompasses  
7 all specialties. So specifically pain since 1997.

8 Q From your experience and does the medical literature  
9 suggest that individuals with overwhelming situs of pain tend  
10 to complain less, or focus less on the secondary pain areas?

11 A Yes. I mean, and that's why when I see a patient I  
12 will have them divide up their pain into different areas of  
13 percentages, so I know what to focus on first.

14 Q And do you find that physicians tend to concentrate  
15 most on the overwhelming pain area?

16 A Yes. I mean, that's why we call it the chief  
17 complaint. So, I mean, it's -- you know, a patient may say:  
18 I have left knee pain, back pain, neck pain, this and that and  
19 they may list out a list of pain complaints. And you may get  
20 them to focus on something and say: What is your main  
21 complaint? What would you like me to address specifically  
22 today? And for him initially that was left knee.

23 Q Okay. Is the pain stimulator going to work if  
24 Enriquez is able to afford it?

25 A Yes.

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1 Q What's going to happen now, to a reasonable degree  
2 of medical probability, with respect to his lumbar and  
3 cervical complaints?

4 A They will become more obvious. Unfortunately as you  
5 decrease one pain it becomes more obvious. It's sort of like  
6 when I explain to patients that if you have one pain that  
7 supersedes another one you'll focus less on that.

8 So the example I always give, if you're hammering  
9 something and hit a hammer onto your thumb, I don't care if  
10 blood is squirting out of your thumb, if somebody comes up and  
11 stomps on your big toe, your big toe is going to hurt more.  
12 At that particular moment you're going to focus on that.

13 So you could ask the patient the question at that  
14 moment, what's bothering you more, they may say the big toe,  
15 even though blood is squirting out of their thumb. But as the  
16 big toe pain resolves you're now going to be focusing back on  
17 the other complaint.

18 So it just becomes more obvious. Your mind kind of  
19 focuses on and prioritizes things in a different way than you  
20 may expect. I mean, a lot of times back pain is very  
21 disabling to patients. But although Mr. Rodriguez had back  
22 pain his knee seemed to be the main focus.

23 Q Dr. Shannon [phonetic], when she was speaking, and I  
24 believe it was on cross, it wasn't in response to something  
25 that I said, and analogy of a bunch of people talking in a

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1 room, and one person screaming in a room standing next to you,  
2 when that person shuts up finally you can hear the background  
3 noise. Do you concur with that type of analogy?

4 A I think that's similar to what I just described,  
5 that's probably a better analogy.

6 Q Do you want to use it from now on?

7 A I probably will.

8 Q I'll get you licensing rights through that, and  
9 she'll probably have to sign something.

10 So did we describe why you believe Enriquez has  
11 lumbar pain?

12 A I think I touched on it a little bit, but not --

13 Q And we've spoken to so many people recently that I'm  
14 getting a little bit unclear as to who said what. But can you  
15 please talk to the Judge about how -- what's the mechanism of  
16 Enriquez' lumbar pain?

17 A Well, the mechanism probably began during the  
18 initial event, but progressively worsened as time went on,  
19 based on his abnormal gait, which created sort of a  
20 compensatory reliance on other structures in your body.

21 So when your left knee hurts you may put more of  
22 your weight on your right, so you may end up with a right knee  
23 problem. When your leg hurts, your knee hurts, and you now  
24 have to use crutches, which was present and continues to be  
25 present in Mr. Rodriguez, that will change your gait, your

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1 ability to ambulate without assistance, but it also will  
2 change your posture.

3 And those postural changes were not only things that  
4 were suggested, they were actually noted I believe on a -- or  
5 excuse me, a CAT scan -- or no, I'm sorry, an x-ray study that  
6 I saw in the chart, by Dr. Strilo [phonetic], it was  
7 interpreted by him, showing some postural changes.

8 So it's not just subjectively, I look at him and I  
9 say, he's walking differently than I would expect him to walk.  
10 It's demonstrated, and findings are present even on x-ray  
11 studies.

12 So I believe it started with the initial event and  
13 has progressively worsened over the time that Mr. Rodriguez  
14 has been suffering from the pain in his knee.

15 Q Overwhelmingly have the medical records demonstrated  
16 an antalgic gait with respect to Mr. Rodriguez?

17 A Yes.

18 Q And do you believe that the precipitating event in  
19 this developing lumbar problem was the incident that occurred  
20 at the Palms Hotel in 2004?

21 A Yes. I don't see how you can separate the two.

22 Q Did that incident at the Palms in 2004 cause his  
23 lumbar back pain, according to the mechanism that you just  
24 described?

25 A I think ultimately, yes, it caused it. Was it

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1 directly -- was it the overwhelming complaint at the moment,  
2 no. But I think over time it developed.

3 Q Well, maybe I should ask this way: but for the  
4 event at the Palms Casino would Mr. Rodriguez be suffering  
5 from back pain today?

6 A No.

7 Q Is that your opinion to a reasonable degree of  
8 medical probability?

9 A Yes.

10 Q And over time, still ambulating with an antalgic  
11 gait, still using the assistive devices, if the pain  
12 stimulator is placed in him more, what do you to a reasonable  
13 degree of medical probability believe is going to happen with  
14 respect to his lumbar complaints?

15 A I believe he'll ultimate submit to injection therapy  
16 directed towards his lumbar spine, and ultimately surgery, or  
17 more likely than not of the fusion type. Based on his weight  
18 that a laminectomy or discectomy would create instability in  
19 his spine and lead to more surgeries that are sort or  
20 additive.

21 I think, in my experience with dealing with similar  
22 cases and dealing with surgeons, they would opt in a person of  
23 a body habit like Mr. Rodriguez has progressed into being,  
24 being overweight, they're going to opt more towards a fusion  
25 type surgery, which is going to create more stability in the

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10 App. 1918

1 spine.

2 Q With respect to the laminectomy, does the fact that  
3 he has --

4 MR. WARD: Object; move to strike the last answer. This  
5 witness is an anesthesiologist, he's not an orthopedic or a  
6 neurosurgeon, and I believe this is beyond the area of his  
7 expertise as to what kind of surgery will be done and who will  
8 do it.

9 THE COURT: Mr. Baker?

10 MR. BAKER: Would you like me to lay foundation, Your  
11 Honor?

12 THE COURT: I would.

13 BY MR. BAKER:

14 Q Since 1993 you've had many, many pain patients; is  
15 that true?

16 A Yes.

17 Q And many, many pain patients who have had antalgic  
18 gaits; is that correct?

19 A Yes.

20 Q And many, many pain patients who have had bio-  
21 mechanic and postural changes with respect to their lumbar  
22 spine?

23 A Yes.

24 Q And with respect to those patients you sent them out  
25 to see surgeons; is that correct?

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10 App. 1919

1 A Yes. And the other way, yes.

2 Q Okay. And so you've had referrals back and forth,  
3 to you to manage the pain, and to the surgeons for a potential  
4 surgical approach; is that fair to say?

5 A It's a team effort, yes.

6 Q And you're part of that team?

7 A I am.

8 Q And an important part of that team?

9 A I think so.

10 Q And as part of that team you keep in communication  
11 with the surgeon, about the surgeon's recommendations and  
12 treatment, cross-diagnoses, and prognoses; is that correct?

13 A Yes. Very seldom am I surprised, although I'm not a  
14 surgeon as the other attorney pointed out, I am able to  
15 anticipate basically, I'm very rarely surprised what the  
16 surgeon will recommend as I've sent the patient to a surgeon  
17 for a particular consultation. I typically can anticipate  
18 what is going to be recommended.

19 So although I'm not performing the surgery myself I  
20 am able to anticipate what the answer is going to be after  
21 they've seen the surgeon.

22 Q And that anticipation is based upon medical  
23 recognition of the physiologic factors which necessitate in  
24 the surgery; is that fair to say?

25 A Yes.

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1 Q And you send it to the surgeon to actually perform  
2 the procedure, but it's a surgical referral; is that fair to  
3 say?

4 A Yes.

5 Q And you continue to communicate with the surgeon  
6 about the treatment course?

7 A Yes.

8 Q And he continues to communicate with you about the  
9 treatment course?

10 A Yes.

11 Q And the option for surgery becomes part of that team  
12 effort that you've discussed?

13 A Yes, it's always an option.

14 Q And you've seen the bills for these surgeries many,  
15 many, many times since 1993?

16 A Yes.

17 Q And you're familiar with the reasonable and  
18 customary charges for surgery, including -- well, as distinct  
19 from the physiological and pathological needs leading to  
20 surgery?

21 A Yes.

22 Q Okay. And based upon that knowledge, your  
23 experience, your training, the many, many, many times that  
24 you've seen us in a clinical sense, and your team effort with  
25 a surgeon, is it your opinion to a reasonable degree of

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1 probability that Enriquez Rodriguez will require a lumbar  
2 surgery associated with the injuries he sustained at the Palms  
3 Hotel?

4 A Yes.

5 MR. WARD: Your Honor, I object and move to strike. It's  
6 one thing to report on what other practitioners have done,  
7 which I object to, but it's still one -- it's one thing to do  
8 that.

9 It's quite another to make a prognostication as to  
10 what a surgeon would do. The last time I checked this  
11 witness, even though he's a very well qualified  
12 anesthesiologist, he's still sending patients out for surgical  
13 consultations, he's not making them himself.

14 And I think that establishes that while he may be  
15 the smartest guy in the world he's not qualified to give that  
16 opinion for this Court. And in addition he's not been  
17 disclosed as an expert.

18 MR. BAKER: And, Your Honor, these are identical  
19 objections that were made at the time when Dr. Shaw testified.  
20 Based upon the Pravue versus Radine [phonetic] case that we've  
21 given you that speaks about the fact, that not only can a  
22 doctor speak to reasonable sustentative causation, but even  
23 standard of care.

24 Even when designated as a treating physician, and  
25 not retained witness, and a wide, wide latitude granted in a

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1 case I can never remember the name of, that I submitted to the  
2 Court during the course of Dr. Shannon's examination, I  
3 believe he has adequate foundation to testify to it. The case  
4 law readily supports you, in addition with the NRS, which  
5 speaks about what the scope of an expert's testimony can be.

6 MR. WARD: And I would simply add, that case is not about  
7 a non-disclosed expert offering opinions outside of their  
8 field as to what kind of future treatment somebody else might  
9 get that's not been previously disclosed.

10 BY MR. BAKER:

11 Q Do you believe that he's going to require a lumbar  
12 surgery?

13 A Yes.

14 Q Dr. Shaw spoke about the fact that he might require  
15 either a laminectomy or a fusion, but it seems to me that you  
16 believe a fusion would be more appropriate under these  
17 circumstances?

18 A Yes. I believe a laminectomy would be a stepping  
19 stone to a fusion. So progressing in that sense is just going  
20 to add medical costs and time delays for what ultimately seems  
21 to be reasonable to do for Mr. Rodriguez.

22 Q Mr. Rodriguez hasn't been shown to be overwhelmingly  
23 stenotic either, has he?

24 A He does have some stenosis present, which is multi-  
25 factorial. It's due to disk bulging and ligamentus

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1 hypertrophy, all narrowing the canal that is housing his  
2 nerves and his spinal cord.

3 Q Do you believe he's going to need a fusion and  
4 laminectomy?

5 A No.

6 Q Okay. So fusion is the road that you believe that  
7 this is going to take?

8 A Yes.

9 Q And that's your opinion to a reasonable degree of  
10 medical probability?

11 A Yes.

12 Q And is the requirement for that fusion related to  
13 the biomechanical and postural changes undergone by  
14 Mr. Rodriguez as a result of the incident at the Palms Hotel  
15 in 2004?

16 A Yes.

17 Q And is that your opinion to a reasonable degree of  
18 probability?

19 A Medical probability, yes.

20 Q Thank you. And yesterday I explained to you that  
21 sometimes I forget to say medical probability. Each time I  
22 ask to a probability of understanding I mean medical  
23 probability.

24 A Yes, I do.

25 Q And each of the questions you've answered have been

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1 to a reasonable degree of medical probability?

2 A Yes, they have.

3 Q Are they going to run off straight to do a fusion?

4 A No.

5 Q Can you explain the treatment course that would be  
6 necessary on a somewhat less invasive basis prior to fusion?

7 A There would need to be some diagnostic, further  
8 diagnostic workup that would be necessary. Dr. Kidwell,  
9 another pain management physician that was involved in the  
10 care of Mr. Rodriguez, had performed some epidural injections  
11 in the cervical and lumbar spine previously, but they were  
12 fairly -- no offense to Dr. Kidwell [phonetic] -- they were  
13 fairly generic sort of injections, where he was trying to  
14 infiltrate local anesthetic and some steroid medicine over  
15 multiple levels, which is indicative of the type of procedure  
16 that he had done. It was not really diagnostic, it was meant  
17 to be therapeutic. So that's -- that particular injection had  
18 a purpose to it.

19 The type of injections we're talking about are oftentimes  
20 referred to as selective nerve root blocks, or transforaminal  
21 epidural injections, where you're trying to isolate a disk  
22 segment. Once you get an idea of which disks -- or disk or  
23 disks are involved in the process, then you would move to  
24 performing lumbar provocation discography to determine the  
25 pain generator and the exact level. And then based on putting

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1 all the pieces of the puzzle together: the patient's symptoms,  
2 the MRI, the diagnostic injection studies including  
3 discography, you would then formulate a plan to have a fusion  
4 type surgery.

5 Q Start with the MRI. Do you know the cost for the  
6 MRI in this area?

7 A It's around 1,400, \$1,500.

8 Q And would that be reasonable, necessary, and  
9 causally related to the subject incident?

10 A Yes.

11 Q To a reasonable degree of medical probability?

12 A Yes.

13 Q With respect to the discography, that also has to  
14 take place at a surgical center?

15 A Yes.

16 Q So could you tell us -- break down the costs  
17 associated with the discography?

18 A Based on the levels that his MRI shows, issues which  
19 -- with -- which are multiple levels, he would need  
20 discography at L1 to L2-3, L3-4, and L4-5, above and below the  
21 levels of suspected pathology, which would help to validate  
22 that study.

23 Q Are those control discs?

24 A The L1-2 and L4-5 would be, yes. So it would need  
25 to be a four level discogram. And again, using the surgery

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1 center, costs of \$1,972 per level. You'd have about \$8,000 in  
2 costs associated with just surgery center fees. And then  
3 there would be a physician fee, which is about \$750 a level.  
4 So there'd be another \$3,000 in costs for the discogram, which  
5 would be performed one time.

6 Q \$11,000 altogether?

7 A Yes.

8 Q And would those discograms at those multiple levels  
9 be reasonable, necessary, and causally related to the subject  
10 incident at the Palms Hotel?

11 A Yes.

12 Q And that's a -- your opinion to a reasonable degree  
13 of medical and only medical probability?

14 A Yes.

15 Q Okay. With respect to the injections, what type of  
16 injections would Enrique require?

17 A Those would sort of precede the discography. And  
18 those would be the transforaminal epidurals, or selective  
19 nerve root block injections. Those would ultimately be  
20 performed in a series of three at multiple levels, just to get  
21 an idea of where you're dealing with the pain from. So there  
22 would be two needles with each one of those. The cost  
23 associated with that particular injection from a physician  
24 standpoint would be approximately \$1,500. The cost from a  
25 surgery center standpoint would have been approximately

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1 \$4,000. It is my anticipation to a reasonable degree of  
2 medical probability that that would have to be done twice. So  
3 you're talking about an extra \$11,000 for two injections.

4 Q 10,500?

5 A I think it's 55 --

6 Q 11,000, right.

7 A Yeah.

8 Q Okay. And is that \$11,000 for -- and the injections  
9 associated with that -- reasonable, necessary, and causally  
10 related to the subject incident?

11 A Actually I did the math wrong for you. I led you to  
12 believe something that wasn't true. It's 16,500, because it  
13 would have been done three times.

14 Q Okay. And I was going to ask you about that.  
15 Typically it's a series of three shots?

16 A Yes.

17 Q And the total cost for that would be \$16,500?

18 A Yes.

19 Q And is -- are those shots, injections, and the  
20 associated costs reasonable, necessary, and causally related  
21 to the incident occurring at the Palms Hotel?

22 A Yes.

23 Q And is that your opinion to a reasonable degree of  
24 medical probability?

25 A Yes.

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1 Q Tell us about the lumbar surgery that he will  
2 undergo.

3 A The lumbar fusion surgery involves removal of a disc  
4 and placement of a combination of metal and bone into an area  
5 where the disc used to be so it maintains that height. There  
6 is hardware that is placed in the form of screws and bars in  
7 that particular area. Basically what I describe to patients  
8 is kind of like super gluing a handle onto your favorite  
9 coffee mug. You -- your hands are very important while you're  
10 -- while the glue is bonding, but after the glue bonds your  
11 hands are no longer important. The hardware is there to hold  
12 all the bony structures in place so that the patient does not  
13 move too much to displace any of that bone fragments or the  
14 metal that's placed in there.

15 So that -- the big determining factor, would that need to  
16 be done at one or two levels. That's what I do not know. And  
17 I don't want to guess on that. Based on the MRI, I would say  
18 it's L2-3 and L3-4 which are the likely levels to be done.  
19 That would change the price range for the surgery from  
20 approximately \$100,000 for a single level fusion all the way  
21 up to about \$150,000 for a two level fusion, including the  
22 hospital costs and the physician costs.

23 Q That's exactly the numbers to which Dr. Shaw  
24 testified, I believe. So you concur with his opinion in that  
25 regard?

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1           A     I do, because I don't think anybody at this point  
2 knows if it's going to be a one level or two level type  
3 fusion.

4           Q     But is it your opinion to a reasonable degree of  
5 medical probability that at least a one level fusion will have  
6 to be performed upon Enrique Rodriguez caused by the injuries  
7 he sustained at the Palms Hotel and Casino?

8           A     Yes.

9           Q     And that's your opinion to a reasonable degree of  
10 probability?

11          A     Medical probability, yes.

12          Q     Thank you. And the 100 to \$150,000 was reasonable,  
13 necessary, and caused by the subject collision?

14          A     Yes.

15          Q     By the subject incident at the Palms Hotel and  
16 Casino?

17          A     Yes. It was sort of a collision, yes.

18          Q     Yeah. Well, I was kind of thinking that too. Thank  
19 you. And that's your opinion to a reasonable degree of  
20 medical probability?

21          A     Yes.

22          Q     Is -- and I asked Dr. Shaw this. I want you to do  
23 two prognoses for me, for the Court please. One is I'd like  
24 you to inform the Court what you see in Enrique Rodriguez's  
25 future with respect to his pain, the constellation of pain

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1 that he describes if he gets the spinal cord stimulator on a  
2 permanent basis and if he does not get the spinal cord  
3 stimulator on a permanent basis?

4 A Well, I think that if he gets the spinal cord  
5 stimulator on a permanent basis his life will be much  
6 different than it is now. The pain level will be down.  
7 Again, once you take away that pain, you're going -- other  
8 things are going to become more obvious and the focus may  
9 become on his back. The least of all of his problems I'm  
10 worried about is his neck at this point. But again, that --  
11 as you fix the back, the neck may become the focus. But I'm  
12 looking at --

13 Q Nobody's been real comfortable to comment on any  
14 future treatment with respect to his neck. Are you?

15 A Not at this point. I don't -- I mean obviously it's  
16 there on all the pain diagrams, but I don't know what that's  
17 going to require and I don't feel comfortable stating anything  
18 to a reasonable degree of medical probability. The best I can  
19 give you is possibilities, which I know is not necessarily  
20 preferred here in court. But as far as his neck -- or excuse  
21 me, his neck, I would sort of leave that to speculation as to  
22 what's going to happen there.

23 But in relation to his back and his knee, I don't  
24 foresee the gait abnormalities dramatically changing just the  
25 pain level is gone. I believe Dr. Becker even speculated that

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1 he feels that Mr. Rodriguez will require a knee replacement  
2 and put that --

3 Q Who said this?

4 A Dr. Becker, the other expert that was included in  
5 the life care plan provided.

6 Q Whose expert?

7 A The defense expert.

8 Q So the defense expert says that he believes he's  
9 going to need a knee replacement?

10 A Yes, according to the life care plan and the coding  
11 by Ms. Highland, who's, I guess, a vocational rehab  
12 specialist. They talked about in 5 to 10 years Mr. Rodriguez  
13 will need a total knee replacement if he doesn't lose weight.  
14 And I didn't see how they had planned on getting him to lose  
15 weight because it seems like as his gait abnormality and his  
16 life has changed, his weight has done nothing but increase.  
17 So I don't know how we're magically going to make him lose  
18 weight at this point. But they estimated a cost of  
19 \$103,751.94 --

20 Q Is that a single time cost?

21 A It's a one-time cost only, which --

22 Q With respect to a knee replacement?

23 A Which was odd for the circumstances because knee  
24 replacements, as Dr. Becker I'm sure should know, have  
25 lifetime plans sort of with them, or life spans. Usually

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1 that's in the range of 10 to 15 years. So it's likely that  
2 once you get a knee replacement, in 10 to 15 years you're  
3 going to have to have a second one. And in Mr. Rodriguez's  
4 situation, likely a third one depending on the age limits and  
5 things. Dr. Becker also pointed out that Mr. Rodriguez has  
6 good genes and apparently is planning on living a while. So I  
7 would anticipate that there's going to be a need for three  
8 knee replacements just because of the gait abnormalities and  
9 the weight.

10 He will also need a permanent spinal cord stimulator. We  
11 outlined those costs. And I believe that he will need a -- at  
12 least a one level lumbar fusion. That doesn't even account  
13 for the potential for what we call adjacent segment breakdown.  
14 Once you fused one level, you're potentially now exposing the  
15 other levels, you know, to additional risk of surgery, which  
16 is usually given at a 1 to 3 percent chance per year.

17 So even if you kind of take the average of that and look  
18 at the level at which you would have an operation, which in  
19 this case let's -- we'll just pick L3-4 just as a single  
20 level. You're looking at a risk above and below. So within  
21 25 years -- and he still has at least a 25-year life  
22 expectancy -- an adjacent segment problem is probable, 50  
23 percent or more, at one or both of those levels, just based on  
24 the simple math.

25 Q Did you see in Doctor --

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1 MR. WARD: Object. Move to strike on the same basis, the  
2 witness has not been disclosed to prognosticate as to future  
3 areas of surgery. I do not believe he's a surgeon and I think  
4 it's inappropriate for him to offer testimony in that area.

5 THE COURT: Mr. Baker?

6 MR. BAKER: I submit to my -- the Court the argument I've  
7 made several times now with respect to this issue.

8 THE COURT: Well, could we hear something more with  
9 respect to where that information comes from?

10 MR. BAKER: Which information specifically, Your Honor?

11 THE COURT: The 2 percent per year, the possibility that  
12 the adjoining discs may deteriorate further after that  
13 surgery.

14 BY MR. BAKER:

15 Q You've been a long-time physician for many pain  
16 sufferers. Is that fair to say?

17 A That's correct.

18 Q And you've read the medical literature with respect  
19 to adjacent segmental disc disease; is that correct?

20 A Not only have I read the literature regarding the  
21 subject, I've been a medical legal expert both on the  
22 plaintiff and the defense side. And I've read reports from  
23 physicians on each side and no one seems to argue with the 1  
24 to 3 percent sort of range. I kind of picked the number sort  
25 of in the middle, sort of as a middle of the road number, but

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1 there's a 2 percent range.

2 It's basically based on accelerated degeneration which  
3 occurs. If you take away a segment -- if you just think of it  
4 as three workers, one guy is now -- he calls out sick, the  
5 other two are going to have to do more work. And with a  
6 fusion you're looking at it as a permanent sort of an issue,  
7 and the additional adjacent segments are going to have to do  
8 more work. So it's a very accepted fact of that 1 to  
9 3 percent range. I'm sure we could get you some literature --

10 Q Is adjacent segmental disc disease something that's  
11 commonly recognized in the Las Vegas medical community?

12 A In the world community, not just Las Vegas.

13 Q And is it something that's even warned about when  
14 surgeons are speaking to their patients about the possible  
15 consequences and normal risks of surgery?

16 A Yes.

17 Q Is it contained in writing on those forms that  
18 you've seen?

19 A It's typically a big list of -- it's almost like a  
20 disclosure list. I discuss with the patient erectile  
21 dysfunction, adjacent segment breakdown, infection, death,  
22 paralysis. I mean those are kind of the list of things that  
23 surgeons typically will put in a consultation with a  
24 recommendation for surgery.

25 Q Have you ever been pro --

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1 MR. WARD: May I renew my objection, Your Honor. I  
2 believe -- it's not that I don't think this witness is a well  
3 qualified anesthesiologist. It's not that I don't think he  
4 discusses such things with his patient. But he's not  
5 disclosed as an expert witness and I think it's insufficient  
6 to come in and testify about orthopedic things on the basis of  
7 I've read some articles and I've talked to some doctors and  
8 I've seen some reports. I think that's insufficient.

9 THE COURT: Mr. Baker?

10 MR. BAKER: That's not what he testified, Your Honor. He  
11 testified that in his experience as a treating physician for  
12 long-term pain sufferers he's seen many, many instances of  
13 this. He speaks to his patients about this, he discusses  
14 these issues with others; that he's spoken about it on behalf  
15 of both plaintiffs and defendants.

16 BY MR. BAKER:

17 Q And has that been in courts, in the district court  
18 in Clark County, Nevada?

19 A It's been in court in Nevada. But it's also the  
20 same discussion I have when we talk about the reason for  
21 discography with patients. We're using the above and below  
22 sort of levels as control levels to determine are they bad at  
23 the time you're contemplating surgery, understanding that  
24 these will go bad on a more likely than not basis eventually  
25 based on that 1 to 3 percent sort of adjacent segment

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1 breakdown.

2 Q And is it also true that the discography that you  
3 perform, for example, if it's an L4-5 disc that's suspect of  
4 being bad and that they're going to fuse and an L3-L4  
5 discogram shows an internal disc obstruction in the superior  
6 disc, is that information that you provide used by surgeons  
7 to determine then to do a two level instead of one level  
8 fusion?

9 A Yes. I mean all that information becomes important.  
10 And in that scenario you would have had to test the L2-3 disc,  
11 which would be kind of considered a normal disc in that  
12 scenario, and then the L5-S1 disc, that they would not show  
13 any anatomic -- any major anatomic abnormalities or any pain  
14 responses.

15 Q Okay.

16 MR. BAKER: Based upon that, Your Honor, the cases that  
17 we provided you with respect to the discretion that the Court  
18 has in allowing a nonretained expert to testify, his  
19 experience, his treatment of patients, the communications he's  
20 had with doctors, plus the fact that he informs doctors  
21 whether or not an adjacent level is likely to have advanced  
22 disease on the basis of discography, I think it's appropriate  
23 for him to speak on this issue.

24 THE COURT: The objection is overruled. For the record  
25 -- the Court notes Mr. Ward's objection. For the record, I

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1 have similar testimony in other cases in this courtroom. I  
2 just was curious to know specifically from this witness. So  
3 thank you.

4 MR. BAKER: You're welcome --

5 THE COURT: Please proceed.

6 MR. BAKER: -- Your Honor.

7 BY MR. BAKER:

8 Q And is it your opinion to a reasonable degree of  
9 medical probability that he will undergo that sort of problems  
10 with the adjacent vertebral level?

11 A Eventually. Again, if we're just sticking with kind  
12 of the average and just picking the 2 percent, I'm expecting  
13 that his life expectancy is going to be greater than 25 years  
14 as I've testified to earlier, which makes it more likely than  
15 not and probable, medically probable, that he will suffer  
16 additional breakdown above and/or below based on just the  
17 passage of 25 years of time.

18 Q Have you spoken in your -- its entirety about your  
19 prognosis with respect to Enrique if he receives the permanent  
20 pain stimulator?

21 A That won't change. The receipt of the permanent  
22 stimulator won't change the need for spine surgery. His pain  
23 was still there even with the temporary.

24 Q And that's your opinion to a reasonable degree of  
25 medical probability?

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1 A Yes.

2 Q Before I asked you just as a kind of please describe  
3 to the Court what his life will be like, what his prognosis is  
4 if he gets the permanent pain stimulator. Have you discussed  
5 that in its entirety?

6 A No. I mean obviously his pain -- we suspect his  
7 pain will be reduced. Hopefully he will become more -- or  
8 it's anticipated that he will become more functional, be less  
9 depressed about his situation that he's got going on. The  
10 idea of being more functional means quality of life,  
11 participation in activities of daily living that he has not  
12 been able to participate in at this point. But I don't think  
13 that's going to change significantly his development of this  
14 antalgic gait. I don't think that's going to change his  
15 development of the postural and specifically the gait  
16 abnormalities, or the need for the knee replacement or the  
17 lumbar surgery.

18 Q Let me discuss something to you about his medicine,  
19 because you're describing a reduction in his pain associated  
20 with the implantation of the pain stimulator. Is that fair?

21 A That's -- that is fair.

22 Q Are you aware that he's currently on valium?

23 A Yes.

24 Q And have you reviewed the life care plan by  
25 Ms. Hartman?

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1 A Yes.

2 Q She had a total cost of the valium to his life plan  
3 of \$10,230, with a present value -- and if you want to look at  
4 it it's on page 13 of the life care plan.

5 A Do you have a -- I have a copy of --

6 MR. BAKER: May I approach the witness, Your Honor?

7 THE COURT: Yes.

8 MR. BAKER: Your Honor, may I stand next to the witness?

9 THE COURT: Sure.

10 BY MR. BAKER:

11 Q Do you see the charges for valium?

12 A Yes.

13 Q And do you agree and concur that the total lifetime  
14 cost would be the approximate amount of \$10,230?

15 A Yes.

16 Q Discounted to present value of \$7,619?

17 A Yes.

18 Q Would there be a reduction associated with his  
19 reduction in his pain complaints for the future costs of his  
20 valium?

21 A No.

22 Q The same question with respect to the hydrocodone.  
23 Is that a painkiller?

24 A Yes.

25 Q And you see that the total cost for life would be

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10 App. 1940

1 \$16,741?

2 A Yes.

3 Q Does that sound reasonable to you?

4 A It sounds reasonable, but that's one of the  
5 medications I would suspect that would be reduced by  
6 approximately 75 percent --

7 Q Okay.

8 A -- along with the next item, which is morphine.

9 Q Let's go -- before that, I gave the present value of  
10 16,000. Did you know -- excuse me, the total value of 16,000.  
11 Do you note a present value at 12,480?

12 A Yes.

13 Q So it would be your testimony to this Court that he  
14 may only need about a quarter of that cash?

15 A Yes, or approximately \$3,000 worth of hydrocodone  
16 over the lifetime.

17 Q And how about with respect to morphine. It had a  
18 totaled up cost of 46,883 and a present at 34,749. Am I  
19 reading that correctly?

20 A That is correct.

21 Q Do you again concur with those cost projections?

22 A I agree with the cost projections. But again, as  
23 the permanent spinal cord stimulator would be placed, my  
24 estimate of reduction would be approximately 75 percent as  
25 well.

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1 Q So 75 percent of approximately \$35,000?  
2 A Yes.  
3 Q Can you do the math?  
4 A I could. It's about --  
5 Q 8,300?  
6 A -- 8,500 or something like that.  
7 Q Okay. And is that your opinion to a reasonable  
8 degree of probability?  
9 A Yes.  
10 Q And that cost would be reasonable, necessary, and  
11 casually related to the accident?  
12 A Yes.  
13 Q And that's true with respect to the valium as well?  
14 A Yes.  
15 Q And the hydrocodone?  
16 A Yes.  
17 Q How about -- what's Effexor?  
18 A Effexor is a antidepressant type medicine that's  
19 used for anxiety and depression. I'm hopeful that that will  
20 be reduced, but I'm not confident enough to say it to a  
21 reasonable degree of medical probability.  
22 Q So the present value of the Effexor is?  
23 A 25 -- or present value is \$18,667 and the total cost  
24 is 25,186.  
25 Q More likely than not, is that total present value

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1 going to be required with respect to the injuries and damages  
2 sustained by Enrique at the Palms Hotel?

3 A Yes.

4 Q To a reasonable degree of probability?

5 A Yes.

6 Q Are there any other medications that he's currently  
7 on? By the way, some of those narcotic pain medications cause  
8 constipation?

9 A Yes.

10 Q Okay. And is it reasonable, necessary, causally  
11 related to give him something to try and assist with that  
12 problem?

13 A Yes. I mean that's a very common problem, not only  
14 with the pain medications but the lack of activity and the  
15 concurrent use of muscle relaxer type medicines like valium  
16 and cyclobenzaprine, which is a Flexeril type medicine.

17 Q Is the next medicine on that list cyclobenzaprine?

18 A Yes, it is.

19 Q And what's the total value as projected by Kathleen  
20 Hartman with respect to that medication?

21 A The present value is \$5,021 and the total cost is  
22 \$6,774.

23 Q With respect to the present value, would you  
24 anticipate a reduction in that specific medication?

25 A No.

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1 Q Okay. So more likely than not it will remain at  
2 5,021?

3 A Yes. I would say that would remain due to the fact  
4 that it's a muscle relaxant. I didn't -- do not anticipate  
5 that being useful to treat his knee, but I would say that's  
6 more useful to treat his low back and partly his neck issues.

7 Q That's your opinion to a reasonable degree of  
8 medical probability?

9 A Yes.

10 Q And that type of medication, reasonable, necessary,  
11 and causally related to the accident to a reasonable degree of  
12 medical probability?

13 A Yes.

14 Q And the two laxatives, are those two -- by the way,  
15 would you read the next two medications?

16 A Doculace and Enulose syrup. Both are used for  
17 constipation. They're laxatives and stool softeners. The  
18 Doculace has a present value of \$4,158 and a total cost of  
19 \$5,610. The Enulose syrup has a present value of \$10,157 and  
20 a total cost of -- I think this is probably incorrect. These  
21 numbers don't necessarily make sense. The total cost should  
22 be higher. So I'm --

23 Q Yeah, it seems like they're inverted.

24 A Yes, or the number -- there should be a one in front  
25 of there. But I --

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1 Q Could you project for the Court what the total value  
2 of the --

3 A Well, if we're using the present value and we're  
4 assuming the numbers are inverted, they're approximately  
5 \$11,000. Again, I would envision those would be decreased by  
6 75 percent as well, because much of the reason for the  
7 constipation is due to the use of the opiate type medicines,  
8 the hydrocodone and the morphine.

9 Q And that's your opinion to a reasonable degree of  
10 medical probability?

11 A Yes.

12 MR. BAKER: You have a objection?

13 MR. WARD: Yeah. I'd like to object for the record and  
14 move to strike. Your Honor, we've been given -- one of the  
15 experts that was disclosed in this case was a life care  
16 planner. And a life care plan was provided and the life care  
17 planner was deposed, and all of those questions were asked and  
18 answered.

19 Now we find out the life care planner's not going to be  
20 called and this treating physician is testifying as to  
21 expenses that are much higher than set forth in the life care  
22 plan. There's no point in disclosing experts at some point if  
23 you can just bring in everything that you want to any way you  
24 want to do it.

25 MR. BAKER: Your Honor, I --

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1 THE COURT: Mr. Baker?

2 MR. BAKER: I think that we have the right to put in  
3 futures through either a life care planner or through the  
4 physicians who are actually referring and prescribing the  
5 future treatment. And I think that it's typically preferred  
6 by the Court for the doctors to put in the evidence rather  
7 than to have the life care planner go through the medical  
8 records and pick the medical records and try to project  
9 expenses. And I believe that the life care planner would  
10 probably have drawn exactly the type of hearsay objection from  
11 Mr. Ward that we've been hearing through the whole trial.

12 This is a doctor testifying to medicines that have been  
13 prescribed to his patient, the future need for those medicines  
14 and the costs. And again, on the basis of the cases that  
15 we've given you, Gruber v. Levine [phonetic], the cases that  
16 we've cited to this Court for the wide discretion for him to  
17 speak, and the fact that he's actually a treating physician  
18 and not a retained expert. This is, respectfully, completely  
19 appropriate.

20 THE COURT: Any final thoughts, Mr. Ward?

21 MR. WARD: Yeah. I'll make it quick, Your Honor. I know  
22 Your Honor's tired of hearing this, but I feel the need to  
23 make the record because essentially here's the issue we have.  
24 When a life care planner comes in, the life care planner is  
25 given parameters about treatment. The life care planner

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1 doesn't say this person needs a back surgery, but they do go  
2 out and do things.

3           It's a -- to some extent it's a little bit like buying a  
4 car, say, you know, I went to this dealer and the car's this  
5 much and I went to this dealer and the car is this much, and I  
6 went to that dealer and the car is that much. And then when  
7 we take the life care planner's deposition, that's what we  
8 cross-examine him on. And essentially what we have instead is  
9 we have someone coming in and saying well, you know, off the  
10 top of my head, I just -- I'm not really sure what all those  
11 things cost, but I think it's a lot of money; and therefore, I  
12 think it's X dollars. And --

13           THE COURT: I think we're stuck with whatever the figures  
14 are in that exhibit. Is that an exhibit?

15           MR. BAKER: It's not an exhibit, Your Honor. And I'm  
16 actually asking him to testify not with respect to the  
17 exhibit, but whether what's put forward on it comports with  
18 his understanding as a treating physician and as a doctor of  
19 what these medicines would cost. And I believe I laid the  
20 foundation for that asking if he knew what these medicines  
21 cost in the community, if he was being prescribed these  
22 medicines currently, if those medicines were reasonable,  
23 necessary and causally related to the subject accident, and to  
24 what the future costs of it. If I don't want to call the life  
25 care planner and put it in through percipient witnesses, I

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1 believe that's completely appropriate.

2 THE COURT: Final thoughts?

3 MR. WARD: I would offer to voir dire their witness on  
4 this topic.

5 THE COURT: I think you're entitled to examine this  
6 witness as you have been doing, Mr. Baker, but I don't think  
7 he can speculate about some figures being inverted or anything  
8 like that. So --

9 MR. BAKER: Yeah. And actually, Your Honor --

10 THE COURT: -- to that extent --

11 MR. BAKER: -- I was going to -- I thought that his  
12 objection was going to be that. And I wasn't -- I was going  
13 to withdraw that testimony, because if he is speculating that  
14 they're inverted or there should be a one --

15 THE COURT: Right.

16 MR. BAKER: -- then that's not appropriate.

17 THE COURT: To that extent, Mr. Ward's objection is  
18 granted. Otherwise it's denied.

19 MR. BAKER: Okay.

20 BY MR. BAKER:

21 Q I asked you the question --

22 MR. BAKER: Thank you, Your Honor.

23 BY MR. BAKER:

24 Q I asked you the question about what his life would  
25 be like with the spinal cord stimulator. And let me ask you

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1 before, you read -- was it Dr. Becker's report?

2 A Yes.

3 Q And do you recall when he said he in no way would  
4 want to trivialize the damage that was caused to  
5 Mr. Rodriguez's knee as a direct result of the trauma he  
6 sustained at the Palms?

7 A Yes.

8 Q If he was suggesting that he doesn't need a spinal  
9 cord stimulator given all the evidence that you've seen: your  
10 clinical exams and everything that you've reviewed, would you  
11 -- your opinion be that he was trivializing the knee injury?

12 A I don't think he specifically addressed the spinal  
13 cord stimulator to the extent that I would have expected in a  
14 expert report, based on the fact that he's a orthopedic  
15 surgeon and a psychiatrist. I'm not sure how familiar he is  
16 with spinal cord stimulator and the technology, but this is a  
17 very standard procedure that we perform on these patients.  
18 Dr. Becker pointed out, as Mr. Enrique Rodriguez told him  
19 during the testimony, that I was the one -- and I remember  
20 Mr. Rodriguez being very excited about this -- that I was the  
21 one who put in Jerry Lewis's spinal cord stimulator, the  
22 Muscular Dystrophy Association chairman. He put that in  
23 Dr. Becker's notes. Dr. Becker felt the need to comment on  
24 that.

25 I believe I'm an expert in this. I don't know that I

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10 App. 1949

1 would consider Dr. Becker to be an expert in spinal cord  
2 stimulation just based on his lack of comment on these in any  
3 specific scientific way. There was no argument against the  
4 spinal cord stimulator; he just discounted the idea, which  
5 that was sort of ridiculous.

6 Q Could you tell the Court what you believe the  
7 prognosis will be if Enrique doesn't receive a spinal cord  
8 stimulator?

9 A I think it will be more of the same. I think you're  
10 going to see extensive weight gain, I think you're going to  
11 talk about knee replacements much earlier than we would have,  
12 you know, in Dr. Becker's estimation. He's an orthopedic  
13 surgeon, I'm just quoting his estimate. He felt that if  
14 there's no reduction in weight gain that a knee replacement is  
15 going to be necessary in the next 5 to 10 years. Without  
16 increasing his activity some way, I don't know how we're going  
17 to get that weight loss. So just looking at it from a purely  
18 knee standpoint, he's going to need a knee replacement in the  
19 next 5 to 10 years.

20 If the weight keeps escalating -- I think we've kind of  
21 estimated here that he's gained 60 to 70 pounds; some  
22 estimates are even up to 100 pounds more than his ideal body  
23 weight -- I get the feeling that, to a reasonable degree of  
24 medical probability, that the need for the knee replacement  
25 will be escalated and occur much quicker than it is now. And

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1 he will still need the three knee replacements over time.  
2 He'll eventually submit to the back surgery and -- that we  
3 talked about just because of the gait abnormalities, which are  
4 going to be present due to the knee operation.

5 We haven't even got to the fact that he's now describing  
6 some right knee pain, which is oftentimes a result of the gait  
7 abnormality. So I don't even want to get into that part of it  
8 because there's other things that happen as a result of this.  
9 So more of the same will occur if he doesn't get the spinal  
10 cord stimulator.

11 Q Did you read in Dr. Shaw's records where Dr. Shaw  
12 recommended potentially a gastric bypass?

13 A I believe, yes, he did call for a gastric bypass  
14 surgery.

15 Q So without a spinal cord stimulator, he might even  
16 have to undergo gastric bypass?

17 A In order to lose weight, yes.

18 Q Doctor, is Mr. Rodriguez disabled?

19 A Yes.

20 Q Is he permanently disabled at this point?

21 A Yes.

22 Q And is he 100 percent disabled?

23 A I don't --

24 Q Do you defer that to somebody who does vocational  
25 rehabilitation?

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10 App. 1951

1 A Yes.

2 Q And if he receives the spinal cord stimulator and  
3 makes great advances as we hope he will, would you defer what  
4 his future vocational capabilities would be to that same sort  
5 of vocational rehabilitation expert?

6 A Yes.

7 Q Doctor, has -- have all your opinions today been to  
8 a reasonable degree of medical probability?

9 A Yes.

10 Q I appreciate your time.

11 MR. BAKER: Pass the witness, Your Honor. This is going  
12 to call to the floor. No.

13 THE COURT: Do you want a short break, Mr. Ward, before  
14 we --

15 MR. WARD: I would, Your Honor.

16 THE COURT: I'm sorry?

17 MR. WARD: I would if it please the Court.

18 THE COURT: Okay. Let's do a five-minute break, 5,  
19 10-minute break.

20 MR. WARD: Thank you, Your Honor.

21 MR. BAKER: Thank you, Your Honor.

22 [Recess]

23 THE COURT: Now we're ready for cross-examination.  
24 Right, Mr. Ward.

25 MR. WARD: Thank you, Your Honor.

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## CROSS-EXAMINATION

1  
2 BY MR. WARD:

3 Q Doctor, you told us on Friday that -- actually you  
4 didn't tell us anything on Friday, Friday was Nevada day, so  
5 we weren't here.

6 You've been retained as an expert witness before?

7 A Yes.

8 Q Have you ever been retained by Mr. Baker or his  
9 firm?

10 A His firm, yes.

11 Q On how many occasions?

12 A Three.

13 Q Three. And what were you retained for?

14 A Two review records, kind of a forensic record review  
15 to come up with a treatment plan for a patient. And I think  
16 those are the three -- I think that that's the only purposes,  
17 other than being a treating physician.

18 Q Okay. And review of opposing reports?

19 A Yes.

20 Q Now as a treater, how do you -- do you see patients?

21 A Yes.

22 Q Patients come in and they're referred by other  
23 patients?

24 A Other doctors, usually.

25 Q Your referrals usually come from doctors?

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1           A     Usually. But it can come from attorneys, it can  
2 come from other patients, things like that, family members.

3           Q     Sure. Sure. And so when those situations arise you  
4 take a look at the patient themselves?

5           A     Yes.

6           Q     And you interview them?

7           A     Yes.

8           Q     Do you take notes?

9           A     Yes.

10          Q     Do you examine them?

11          A     Yes.

12          Q     Sometimes you look at prior medical records?

13          A     When available, yes.

14          Q     Do you routinely gather all their medical records?

15          A     It depends on the circumstances. That's preferable,  
16 but not always available.

17          Q     Okay. Do you routinely look at expert reports?

18          A     Yes.

19          Q     Opposition expert reports?

20          A     Yes.

21          Q     As a treating physicians?

22          A     Yes. That's part of the job, yes.

23          Q     It is? In what way, what do you -- how is looking  
24 at opposing expert reports part of being a treating physician?

25          A     Well, you want to see the totality of the records

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10 App. 1954

1 when -- again, when available, and all these records were made  
2 available to me, which would include Dr. Becker's [phonetic]  
3 records, I'm assuming you're referring to. But you want to  
4 look at all points-of-view and to come to an unbiased  
5 conclusion regarding the information presented.

6 So it's a piece of data that would be odd for me to  
7 dismiss or not look at.

8 Q So whenever you have a regular patient you get all  
9 expert reports, even opponent litigation reports?

10 A If they're available, yes. I typically am referred  
11 those. I mean, again, no one's really discussed with me in my  
12 practice, but the great majority of my practice, probably 80,  
13 85 percent of it revolves around the industrial system. So  
14 oftentimes I am court-appointed to see a patient and I have  
15 all these documents available to me. So it's not unusual for  
16 me.

17 Q Well, when you're court appointed you're actually  
18 actively involved in litigation, are you not?

19 A No. I'm usually the, sort of the guy who's middle  
20 of the road and sort of calls it like it is, which is why the  
21 court refers the patients to me for the review. So I'm just  
22 the guy chosen.

23 Q Okay. You're the guy that's the middle of the road.  
24 You're the guy who said in 2008, "I believe that this patient  
25 had undergone conservative treatment"?

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1 A Yes.

2 Q Okay. Now in 2008 we were four years post-accident?

3 A Yes.

4 Q And he had how many surgeries at that point?

5 A I think it was two surgeries on his left knees.

6 Q And how many doctors had he seen?

7 A I'd have to total them up, but approximately eight

8 to ten.

9 Q Okay. And how many MRIs and arthrograms had he had?

10 A Several.

11 Q And how many times had he been to physical therapy?

12 A I don't know.

13 Q And that's your -- that's what you call conservative

14 treatment?

15 A To the point where I was involved, yes, that -- I

16 would consider that conservative treatment.

17 Q What do you call "non-conservative treatment"?

18 A Where we're implanting things in patients, like the

19 spinal cord stimulator, things like that --

20 Q Oh.

21 A -- where we're talking about a major surgery on the

22 spine.

23 Q Okay. Now, you never talked to Dr. Foranti, did

24 you?

25 A I have talked to Dr. Foranti --

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10 App. 1956

1 Q About this case?

2 A -- but not in this particular circumstance.

3 Q Okay. So you haven't talked to Dr. Foranti about  
4 this case?

5 A No.

6 Q You haven't seen Dr. Foranti's notes about this  
7 case?

8 A Handwritten notes?

9 Q Notes?

10 A You're going to have to be a little more specific,  
11 because I've seen records from Dr. Foranti regarding the  
12 handwritten notes. I don't think those were made available to  
13 me.

14 Q You've seen a report, have you not?

15 A Yes.

16 Q You've seen more than that?

17 A I've seen what?

18 Q More than that --

19 A I think --

20 Q -- from Dr. Foranti?

21 A I think I've seen documentation, typed  
22 documentation. I'm not sure exactly what you're referring  
23 to.

24 MR. WARD: May I approach the witness, Your Honor?

25 THE COURT: Yes.

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10 App. 1957

1 BY MR. WARD:

2 Q This is Exhibit 25 and it's printed on yellow, it's  
3 not an original, but is that what you've seen?

4 A Yes.

5 Q You haven't seen anymore, right?

6 A No.

7 Q And you know what that is, right?

8 A It's a report.

9 Q Right. It's not notes, is it?

10 A You asked about notes, that's why I didn't know what  
11 you meant, but --

12 Q Right. You know what notes are?

13 A Well, this could also be considered an office visit  
14 note. So again, you know --

15 Q Okay.

16 A -- I'm just using your terminology, and I didn't  
17 understand it, and you didn't explain it very well.

18 Q Okay. I'll try to do better.

19 A Okay. I'm waiting.

20 Q You told us on Thursday that Dr. Foranti diagnosed  
21 this patient with having RSD, didn't you?

22 A I said he needed further work-up for the RSD.

23 Q And didn't you tell us that a number of people had  
24 diagnosed him as having RSD --

25 A Yes.

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10 App. 1958

1 Q -- including Foranti?

2 A Yes. Dr. Foranti, Dr. Miller, Talber, myself, Dr.  
3 Fallgett, so that's a number of people.

4 Q Right. So let me very specific, you testified that  
5 a number of people that had diagnosed Mr. Rodriguez as having  
6 RSD. Isn't that correct?

7 A Yes.

8 Q You did not testify that they testified that they  
9 needed further work-up; isn't that true?

10 MR. BAKER: That misstates his testimony, Your Honor.

11 THE COURT: I'm sorry.

12 MR. BAKER: I said that misstates his testimony. That's  
13 exactly what he testified to.

14 THE COURT: I'll ask you to rephrase the question, Mr.  
15 Ward.

16 MR. WARD: Sure.

17 BY MR. WARD:

18 Q Did you say that he testified that they needed  
19 further work-up, or did you say that he testified that his  
20 patient had RSD?

21 A Are you talking about testifying or writing it in  
22 the notes?

23 Q I'm talking about what you told this Court Thursday  
24 afternoon when you testified under oath right here, from that  
25 chair?

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10 App. 1959

1 A You're talking about me testifying --

2 Q Yes.

3 A -- and then you're talking about Dr. Foranti  
4 testifying. I just want to be clear to what question I'm  
5 answering.

6 Q Sure. I'm asking you, did you tell us, Thursday  
7 afternoon, that a number of people, including Dr. Foranti had  
8 diagnosed Mr. Rodriguez as having RSD?

9 A Yes.

10 Q That is true?

11 A That's true.

12 Q You did not say they were testifying that he needed  
13 a further workup. You said that they testified that he had  
14 RSD.

15 A When you say "they testified," again, I don't know  
16 that that document counts as testifying. So, again, I'm not  
17 sure what you're referring to. Do you have --

18 Q You're right.

19 A -- some other documentation --

20 Q I apologize.

21 A -- that I can review? Okay.

22 Q You're right, I'm not clear, so I'm going to be  
23 clear. Your testimony Thursday afternoon --

24 A Yes.

25 Q -- was that a number of doctors, including Dr.

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10 App. 1960

1 Foranti, had found that Mr. Rodriguez had RSD?

2 A Yes, that was my testimony.

3 Q You did not say that Dr. Foranti had found that the  
4 patient needed a further workup, you said Dr. Foranti found  
5 that the patient had RSD?

6 A Yes. I must have misspoke.

7 Q You must have misspoke?

8 A Yes.

9 Q Let me play your testimony from Thursday afternoon,  
10 and let's see.

11 [Pause]

12 Q We seem to have a technical difficulty, so I'm going  
13 to, rather than -- I'm going to see if we can't figure out a  
14 way to work on this and I'll move on.

15 THE COURT: Well, one second. On the bottom of the  
16 screen where it says "pause" if you were to click on that,  
17 will it then play? I don't know, I'm just asking.

18 UNIDENTIFIED SPEAKER: I can't click it, that's my  
19 problem.

20 THE COURT: Ms. Boyd, do you know what's going on.

21 MR. BOYD: It's off.

22 THE COURT: Okay. Very well then.

23 MR. WARD: If you get it figured out you'll let us know?

24 UNIDENTIFIED SPEAKER: Oh, yeah.

25 MR. WARD: Now -- oh, there we are.

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1 [Pause]

2 MR. WARD: We did this over lunch and it worked fine.

3 MR. BAKER: Your Honor --

4 THE COURT: That's always the way, isn't it.

5 Mr. Baker?

6 MR. BAKER: We had that conversation -- with respect, can  
7 I ask you not to play it for just one sec, please.

8 UNIDENTIFIED SPEAKER: Sure.

9 MR. BAKER: About the use of the deposition with respect  
10 to -- or testimony with respect to a witness and prior  
11 testimony. And he's just playing something not for  
12 impeachment purposes and not in any specific context. He's  
13 asked the witness if he said something. The witness answered  
14 what he said, and then he said, "Perhaps I misspoke" about  
15 something.

16 So this is not impeachment, and is not the proper  
17 way, or the proper reason to use prior testimony, consistent,  
18 inconsistent or otherwise.

19 THE COURT: Mr. Ward?

20 MR. WARD: It is impeachment. It makes it clear, he  
21 didn't misspeak at all.

22 THE COURT: Well, if he's playing it for purposes of  
23 impeachment, if we're able to play it, if that's his thought  
24 then I think he's entitled to explore that.

25 MR. BAKER: Sure, and my objection is, Your Honor, he's

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1 impeaching if he asks him, "Did you say this," and he says,  
2 "Yes," and then plays it to show that he in fact did say what  
3 he admitted to saying, that's not impeachment.

4 THE COURT: Well, understand your point. But if he can  
5 cue it up and make it play, I'm inclined to allow him --

6 MR. BAKER: And I really --

7 THE COURT: -- the opportunity.

8 MR. BAKER: -- want to see it, because it's cool, and  
9 I've never seen it never it happen before.

10 THE COURT: You know what, Mr. Baker, it is so cool.  
11 It's one of the most effective things that I've seen done  
12 during the course of trial. I've not seen it done in a bench  
13 trial, but I've seen it done in jury trials. It's really  
14 extremely effective, can be, especially with respect to these  
15 expert witnesses when the jury over a long period of time has  
16 heard an awful lot of them, it can be effective.

17 [Pause]

18 MR. WARD: Okay. While she's working on that I'm going  
19 to proceed ahead.

20 THE COURT: Very well.

21 BY MR. WARD:

22 Q With Dr. Foranti, Dr. Foranti said, did he not -- do  
23 you have Dr. Foranti's reports?

24 A I'm looking at, I'm sure, what you're going to refer  
25 to right now.

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1 Q I'm sorry?

2 A I said, I'm looking at what I'm assuming you're  
3 going to refer to right now, which is Dr. Foranti's report on  
4 page 5, which is Bate stamped.

5 MR. WARD: Give me one second.

6 [Pause]

7 [Audio Tape Played in Courtroom]

8 BY MR. WARD:

9 Q So is that what you said you misspoke about?

10 A That's exactly what I said, and I'm not sure I  
11 misspoke. I'm just looking at Dr. Foranti's report on page 4,  
12 which I'd like to draw your attention to, under "assessment".

13 Q Well, I object, this -- we're not asking. Your  
14 counsel --

15 MR. BAKER: It's responsive --

16 MR. WARD: -- can ask you questions --

17 MR. BAKER: -- to the question.

18 MR. WARD: -- you can't ask me questions.

19 THE COURT: He was trying to -- very well, I'll ask you  
20 to rephrase your question the, Mr. Ward, with the  
21 understanding that Mr. Baker can follow-up his examination.

22 MR. BAKER: Your Honor, can I ask, are you going to  
23 continue with the T.V.?

24 MR. WARD: No.

25 MR. BAKER: I can't hear anything that's being said over

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1 it.

2 MR. WARD: Can we -- there's just a buzzing.

3 [Pause]

4 MR. BAKER: Thank you.

5 BY MR. WARD:

6 Q Now, you saw Dr. Foranti's assessment, correct?

7 A Yes, that's correct.

8 Q And Dr. Foranti examined the patient, did he not?

9 A Yes, he did.

10 Q And you're aware that -- you've read this?

11 A Yes.

12 Q And you're aware that Mr. Rodriguez called it to his  
13 attention of what he thought were changes in the skin?

14 A Yes.

15 Q And you're aware that Mr. Rodriguez called to the  
16 doctor's attention what he thought were changes in the hair  
17 growth?

18 A Yes.

19 Q And you're aware that Mr. Rodriguez called to the  
20 attention of the doctor of what he thought the things were  
21 about sensitivity?

22 A Yes.

23 Q And you're aware that Mr. Rodriguez called to the  
24 doctor's attention, his toenails?

25 A I believe so, yes.

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10 App. 1965

1 Q Okay. And you're aware that Doctor -- that Mr.  
2 Rodriguez called to the doctor's attention, essentially  
3 everything that he had at that time, correct?

4 A Yes.

5 Q Okay. And in spite of hearing all that Dr. Foranti  
6 did not say: I think he's got RSD, did he?

7 A No, he didn't say, I think he's got RSD.

8 Q He said, "I think it's possible that he's got RSD,"  
9 correct?

10 A Yes.

11 Q But more likely he's got something else?

12 A Yes.

13 Q Okay. And that's after he saw all of those things?

14 A Yes.

15 Q And those were essentially the same things that you  
16 saw that led you to diagnose that he did have RSD?

17 A Yes.

18 Q Okay. So Dr. Foranti saw them and did not diagnose  
19 RSD. You saw them and did diagnose RSD?

20 A I don't know that Dr. Foranti didn't diagnose RSD.

21 Q You can't read his report?

22 A I read his report, and I'm point out something to  
23 you again, it's not my place, but I'm not sure that what  
24 you're asking me is correct.

25 Q You would agree that Dr. Foranti did say it is

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10 App. 1966

1 possible that he's got RSD, but it's more likely he's got  
2 something else?

3 A Yes. I agreed with you earlier when you asked the  
4 same question.

5 Q And then he said that further we do not have  
6 objective information, sufficient objective information from  
7 which to make a definitive diagnosis, correct?

8 A Yes. Which is what I was answering earlier.

9 Q And then the next line says: "If the pain continues  
10 or worsens I suggest that the patient undergo bone scans,"  
11 correct?

12 A Among other things, yes.

13 Q Well, he goes on. But what I just read you is  
14 accurate, correct?

15 A That is accurate, yes.

16 Q "Bone scans" is the first thing he put in it.

17 A It doesn't really need to be plural, but yes.

18 Q Bone scans are not subjective, are they?

19 A No.

20 Q Bone scans are objective?

21 A They can be.

22 Q And -- well, what are the circumstances when they're  
23 not?

24 A Well, if they don't show anything then they're not  
25 objective.

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10 App. 1967

1 Q Oh, okay. So as I understand it, you had a bone  
2 scan of the patient?

3 A Yes.

4 Q And it was negative?

5 A Yes.

6 Q And you said, in effect, I'm just going to throw  
7 that out, right?

8 A I don't know that that's exactly what I said, but,  
9 yes, I think that a bone scan is probably of the list of  
10 things I look at to diagnose with RSD or CRPS as one of the  
11 least useful pieces of information.

12 Q But that apparently is not what Dr. Foranti felt,  
13 correct?

14 A Well, I think you're misquoting his notes.

15 Q Well, let me try it again. Feel free to read along  
16 with me. "Furthermore, at this time we do not have sufficient  
17 objective information from which to make a definitive  
18 diagnosis. If the pain continues or worsens I suggest that  
19 the patient undergo bone scans, comma," is that correct?

20 A Well, there's a lot after the comma.

21 Q I understand.

22 A Yes. You've read it perfectly.

23 Q Okay. Okay. Now, you offered the opinion that  
24 everything, essentially all the treatment that Mr. Rodriguez  
25 has had in the last six years, five years, eleven months and a

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10 App. 1968

1 week is a result of this accident, correct?

2 A No, that wasn't my opinion. I don't think his  
3 asthma treatment is related to this accident. But, yes, I  
4 understand the spirit of your question.

5 Q Other than the asthma can you think of anything that  
6 you have found is not related to this accident?

7 A Nothing we've discussed.

8 Q Now if you wanted to know about whether a damage on  
9 a car had come from a particular accident, it would help to  
10 know what happened in the accident wouldn't it?

11 A Yes.

12 Q And injuries to people to some extent are the same  
13 way, isn't it?

14 A Yes. The mechanism of injury is what you're  
15 describing.

16 Q Yeah. Before you know, before you're able to offer  
17 an opinion as to whether something's related it helps to know  
18 something about the accident?

19 A Yes, sir.

20 Q And it helps to know something about the condition  
21 of the patient after the accident; isn't that correct?

22 A That's correct.

23 Q Isn't it correct that you've never looked at the  
24 records from the doctor who examined the patient immediately  
25 after the accident?

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10 App. 1969

1 A No, that's incorrect.

2 Q That's incorrect?

3 A Yes, that's incorrect.

4 Q Okay. So you saw the records from Dr. Heaps  
5 [phonetic]?

6 A Yes.

7 Q And you saw that Dr. Heaps conducted a complete  
8 physical examination?

9 A I don't know if it was complete, but it was focused  
10 on complaints at the time.

11 Q Well, did you read his deposition?

12 A No.

13 Q Are you telling me you don't know whether Dr. Heaps  
14 did an examination of the patient's neck?

15 A I'm sure he did an examination of the patient's  
16 neck, focused mainly though on the main complaint or the chief  
17 complaint, which is a focused exam, which is typically done in  
18 the emergency room, which would have been the left knee.

19 Q And you base that on what? How long have you known  
20 Dr. Heaps?

21 A I don't -- I don't know Dr. Heaps.

22 Q How many of Dr. Heaps' examinations have you seen?

23 A I think this is the first one.

24 Q The first one. And you actually haven't seen this  
25 one, correct?

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10 App. 1970

1 A This one, yes, I have.

2 Q You have seen the examination?

3 A I'm sure that it was contained in the bundle of  
4 records that I reviewed.

5 Q And you haven't read his deposition?

6 A I don't believe so.

7 Q So it would be your opinion, I take it, if Dr. Heaps  
8 testified that he examined the patient's neck and back and  
9 there wasn't anything wrong with it, that that just doesn't  
10 mean anything?

11 A I'm not sure that there was anything wrong with it  
12 at that particular moment. So I wouldn't have any reason to  
13 disagree with that testimony.

14 Q You saw the patient's description of the accident;  
15 did you not?

16 A Yes.

17 Q And did you see anything other than the neck as  
18 being involved?

19 A Are you talking about the knee or the neck?

20 Q I'm sorry, the knee?

21 A No.

22 Q Now, you reviewed the -- you reviewed the records of  
23 Dr. Miller, did you not?

24 A Yes.

25 Q Dr. Miller saw this patient for the first time, two

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10 App. 1971

1 and a half years after the accident, isn't that correct?

2 A I believe that's about the timeframe.

3 Q And Dr. Miller noted that the patient told him that  
4 his neck was snapped backwards, he was dizzy and confused.

5 "The patient sustained acute pain to the knee, neck, back and  
6 upper extremities," isn't that true?

7 A I believe that's Dr. Miller's notes --

8 Q Okay.

9 A -- that you're quoting.

10 Q You didn't see any of that in the examination by Dr.  
11 Heaps, did you, other than the knee?

12 A No.

13 Q And it's your belief I take it that if I have  
14 something and snap my neck backwards sufficient to cause me to  
15 be dizzy, and sustain acute pain to my knee, neck, back and  
16 upper extremities, that when I go to the doctor because my  
17 knee hurts I can't feel anything else.

18 A Occasionally that does occur.

19 Q And a doctor examining me can't find anything else?

20 A Some people feel physical exams are not all they're  
21 cracked up to be.

22 Q Well, right. But you're testifying about this  
23 particular patient, are you not?

24 A I am.

25 Q And based upon this patient, and based upon the

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10 App. 1972

1 things that you've read, would you suggest that this is a  
2 patient who seems to have a little more pain than the average  
3 person?

4 A No.

5 Q No?

6 A I mean, I -- for the injuries he suffered, no. I  
7 mean, in the context of what we're discussing, then no.

8 Q This patient consistently lists the pain as being  
9 constant, does he not?

10 A Well, it's funny that you mention the word  
11 "consistently" because that's sort of the theme of this  
12 particular case from my review of the records. But, yes, he  
13 does mention that it's constant.

14 Q He mentions it over, and over, and over as constant,  
15 doesn't he?

16 A Yes.

17 Q And he tells everybody that he goes to that it's  
18 constant, correct?

19 A Yes.

20 Q And he usually puts it as somewhere between eight or  
21 generally nine or ten on a scale of one to ten, right?

22 A Yes.

23 Q And what are the words that describe nine, was it  
24 "agonizing"?

25 A I don't know. I used the word severe, but --

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10 App. 1973

1 Q Okay. Have you ever looked at any of the pain  
2 charts that he has, in terms of what they say about describing  
3 the pain?

4 A That everybody has their own different pain charts,  
5 but the typical one is just a line with a zero and a ten on  
6 it, and you put a mark. It's just hard to interpret the  
7 number at that point. So most people put numbers, or words to  
8 account for language or intelligence barriers.

9 Q Okay. Well, the patient did a pain drawing on  
10 January 25, '05, from the Wellness Group.

11 [Counsel confer]

12 MR. WARD: May I approach the witness, Your Honor?

13 THE COURT: Yes.

14 BY MR. WARD:

15 Q Do you see that, Doctor?

16 A I do.

17 Q Now, you've seen other pain drawings that this  
18 patient has done, have you not?

19 A Yes.

20 Q In looking at all of his records so you could come  
21 in and testify about all this, you've looked at quite a number  
22 of pain drawings, haven't you?

23 A I have.

24 Q And you've seen on a number of occasions that this  
25 patient has been quite capable of putting down pain in

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1 different areas of his body; isn't that right?

2 A That's correct.

3 Q Okay. But on this particular drawing two months  
4 afterwards he doesn't put down different areas of his body,  
5 does he?

6 A No. He's just got an X on his left knee.

7 Q Right. And the number 9 in that situation, what is  
8 that called?

9 A It doesn't have a word associated with it.

10 Q Okay. Does it have a word associated below it?

11 A No.

12 Q How about eight?

13 A Eight has very severe, and ten has worse possible.  
14 So it's somewhere between very severe and worse possible, or  
15 horrible and agonizing.

16 Q Yeah. So is pain is somewhere between horrible and  
17 agonizing. And so -- and this is constant, right?

18 A Yes. I don't know that they asked it on this  
19 particular drawing, but, yes --

20 Q Okay.

21 A -- it has been.

22 Q May I approach the witness?

23 A Yes.

24 Q Thank you, Your Honor.

25 And you've seen over, and over, and over again that

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10 App. 1975

1 the pain is constant. The pain in his knee is constant. The  
2 pain in his back is constant. The pain, all these places,  
3 right?

4 A Yes.

5 Q And, now, have you ever seen anyone other than Mr.  
6 Rodriguez, who was in horrible, agonizing pain?

7 A Yes.

8 Q What makes it look like?

9 A They don't have a typical, sort of like a drug  
10 addict. You can really -- you can show of somebody that  
11 looked like you or Mr. Baker, or Mr. Rodriguez, and say who's  
12 the drug addict and you wouldn't be able to pick it out. Pain  
13 is not something that you can look at somebody and determine  
14 whether they have it or not.

15 That's why we have to ask people to fill out these  
16 pain diagrams and the visual analog pain scales. It's a --  
17 sort of an accumulation of sort of experiences in a patient's  
18 life. Your three might be his nine. So it's -- you trust  
19 what the patient tells you.

20 Q Well, when you said pain is something that you can't  
21 see, it's like if I tell you I've got a headache, you can't  
22 tell whether I have a headache or not?

23 A That's correct.

24 Q But you've seen someone with a kidney stone?

25 A Yes.

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10 App. 1976

1 Q A kidney stone I'm told is, and fortunately I  
2 haven't had one yet, but -- and I haven't had a baby, but I've  
3 heard that both of those can be relatively painful.

4 A Yes.

5 Q And oftentimes people react to them?

6 A Yes.

7 Q Okay. So, while you might not be able to tell  
8 whether I've got a headache or not, if I'm having agonizing  
9 pain, you suspect that I might be showing something.

10 A It depends. I mean it's not a guaranteed thing. If  
11 you see somebody who's a ten, again they may be rating that as  
12 a ten based on their life experience. And this exact same  
13 thing could happen to somebody like you and it might be a  
14 three. So, again, that's their own personal sort of scale.  
15 It's not your scale compared to them. We're not comparing  
16 apples and apples. We're comparing apples and oranges.

17 To someone who has a kidney stone and is writhing in  
18 pain and somebody who has a kidney stone who says, "Well, this  
19 is no big deal. I have these all the time." So, it just sort  
20 of depends. This is a new experience for Mr. Rodriguez.

21 Q And Mr. Rodriguez is taking pain medication?

22 A He is, yes.

23 Q He's taken morphine?

24 A Yes.

25 Q He's taken OxyContin?

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10 App. 1977

1 A No.

2 Q OxyContin.

3 A He's taking Hydrocodone.

4 Q Okay, Hydrocodone. Is that like Vicodin?

5 A Yes.

6 Q What else is he taking for pain?

7 A He's taking Valium for spasms and anxiety. He's  
8 also taking Flexeril, which is a muscle relaxer for spasms.  
9 He's taking medications to treat his depression which also are  
10 useful in treating pain, Effexor, are the medicines he's  
11 taking specifically for this problem.

12 Q And in spite of taking all of these, some of these  
13 are narcotics, right?

14 A Well, narcotics is kind of an unusual term and  
15 implies illegal substances, so he's taking --

16 Q Let me withdraw that. I don't want to --

17 A Yeah.

18 Q I don't mean to imply that.

19 A I didn't think you did. I just --

20 Q Some of them are opiates?

21 A Opiate medications and then he's taking  
22 benzodiazepine, which is a Valium. So, multiple different  
23 types of medications.

24 Q Yeah, I did not mean to imply that he was doing  
25 anything.

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10 App. 1978

1 A I understand. I don't take it personally.

2 Q Okay. But he's taking some fairly powerful pain  
3 medication, correct?

4 A Yes, he is.

5 Q Among the most powerful?

6 A Yes.

7 Q And he's still complaining of pain constantly?

8 A Yes.

9 Q Never relieves anything?

10 A That's correct.

11 Q And your explanation for that is that what? That it  
12 doesn't -- that it's not as bad as it might be with someone  
13 else, but he just can't tolerate it and that's why he -- he's  
14 got a low pain threshold. Is that what you're saying?

15 A He might have a low pain threshold, but the type of  
16 pain that he has, oftentimes morphine and Lortab or Vicodin  
17 type medicines are ineffective in treating nerve pain, which  
18 seems the great majority of his symptoms.

19 Q Okay. Now, you were asked a question about whether  
20 you had seen any evidence of Mr. Rodriguez being a malingerer?

21 A Yes.

22 Q Okay. Have you ever had a patient who was a  
23 malingerer?

24 A I've suspected patients of malingering. I've never  
25 been able to prove it.

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10 App. 1979

1 Q What is a malingerer?

2 A A malingerer is a DSM-IV, which is the sort of  
3 standard diagnosis both that a lot of psychologists and  
4 psychiatrists use to determine kind of classifications of  
5 different disease states or afflictions. Malingering is  
6 contained within that book, but it's specifically not a  
7 psychological or psychiatric disorder. It's a -- it's kind of  
8 put in another type of category.

9 In order to diagnose somebody with malingering, you  
10 have to prove intent, which is the key ingredient in the sort  
11 of diagnosis. It's basically the intent to defraud something  
12 or prove that something is there. But you have to prove that  
13 somebody is lying.

14 And although I have suspected patients of being  
15 malingerers in the past, the intent part was never disclosed,  
16 so therefore you can't make the diagnosis unless you prove  
17 intent.

18 Q And that's the DSM-IV?

19 A Yes.

20 Q Okay.

21 A Or the DSM-IVTR, I believe is what we're on now.

22 Q Okay. But aside from the DSM, malingering is a  
23 word. Malingering was a word in the English language before  
24 the DSM was around, wasn't it?

25 A Sure, but we're talking about a medical condition

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10 App. 1980

1 here, so that would be the gold standard.

2 Q Yeah. Well, I'm just asking you about malingering.  
3 What is it?

4 A Well, that's my definition.

5 Q Okay.

6 A I gave you my definition. I'm using the one from  
7 the DSM-IV.

8 Q Okay. So you're using the one from the DSM-IV and  
9 you're utilizing the part that says that you can't diagnose  
10 them as a malingerer unless you know what their intent is?

11 A Well, intent seems to be the key to the definition.

12 Q Okay. Is it -- in general, isn't malingering on a  
13 non-substantive basis, isn't malingering someone who  
14 exaggerates their symptoms for gain?

15 MR. BAKER: Objection, relevance, Your Honor. It's a  
16 medical diagnosis. He's being asked to testify as a doctor.

17 THE COURT: Well, I am wondering what the relevance is  
18 because I under -- I mean, to some extent, I think your follow  
19 up questions were fine, but I understood the doctor to say the  
20 other day that he didn't have any indication that Plaintiff  
21 was a malingerer.

22 MR. WARD: Right, I understand.

23 THE COURT: And so I thought you were following up. But  
24 if we're going to get too far afield here, then I'm going to  
25 sustain the objection.

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1 MR. WARD: May I broach it just a little bit further and  
2 see if I can work it out?

3 THE COURT: All right.

4 MR. WARD: Okay.

5 BY MR. WARD:

6 Q You said that you felt the patient was not a  
7 malingerer?

8 A Mr. Rodriguez, no, I never had any suspicion that he  
9 was a malingerer.

10 Q Yeah. What did you do? What kind of testing did  
11 you do? What kind of anything did you do to come to that  
12 conclusion?

13 A I didn't do anything other than speak with him,  
14 examine him, and deal with him over the course of my  
15 treatment.

16 Q Okay. Did you ever see in all of these records that  
17 you looked at anything that was inconsistent about Mr.  
18 Rodriguez' claims?

19 MR. BAKER: Your Honor, that's so broad.

20 THE COURT: It's pretty broad. Can you narrow that  
21 focus?

22 MR. WARD: Sure.

23 BY MR. WARD:

24 Q Did you ever see anything that didn't fit with what  
25 he was claiming to you? That he claimed one thing to one

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1 person and one thing to another?

2 MR. BAKER: Same objection, Your Honor.

3 THE COURT: Can you be a little more specific, Mr. Ward?

4 MR. WARD: Yes, Your Honor, I can.

5 BY MR. WARD:

6 Q Let's go to your first examination, which is  
7 November 26, '07, is that correct?

8 A That's correct.

9 Q And you say in here he divides his pain into 10  
10 percent neck pain, 2 percent right arm pain, 2 percent left  
11 arm pain, 8 percent mid back pain, 8 percent lower back pain,  
12 and 70 percent left leg and knee pain. Do you know how he did  
13 that?

14 MR. BAKER: Is there a Bate number on the bottom of that?

15 MR. WARD: Sure, I've got -- mine says Schifini 003.

16 MR. BAKER: Thank you. Sorry to interrupt.

17 MR. WARD: Is that the same?

18 THE COURT: Yeah, it's --

19 MR. BAKER: Is that this? Yeah, that's it.

20 THE COURT: Yes.

21 THE WITNESS: On the paperwork I have the patient fill  
22 out, it basically says divide your pain into 100 percent, so I  
23 don't know if he used a calculator or if he did the math in  
24 his head, but he understood it when I asked him, "The records  
25 you showed me before from 2005." He clearly didn't understand

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1 it because he put 9 percent pain attributed to his left knee.

2 So, he understood it in my office. I'm not sure  
3 exactly how he figured it out, but it's basically simple math.

4 BY MR. WARD:

5 Q Well --

6 A You know, dividing something into 100.

7 Q Let me offer this and you tell me whether you agree  
8 with me. You're talking about the document that we -- this  
9 one?

10 A I can't see it. It's --

11 Q May I approach, Your Honor?

12 THE COURT: Yes.

13 BY MR. WARD:

14 Q All right.

15 A Yes, that's the same document you showed me earlier.

16 Q Okay. My interpretation of that, because that's all  
17 he put, was that because he marked the box down below which  
18 said nine, that he was simply putting in that his pain was  
19 nine and not 9 percent.

20 A Yeah, and that's my assumption too. I just was  
21 pointing out that he did the math on mine, but didn't do the  
22 math correctly here.

23 Q Okay.

24 A It was basically asking him the same sort of  
25 questions and I think he was just putting a pain score there.

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1 Q Right. So, it would appear to you and to me both  
2 that he wasn't doing percentages on that pain drawing at all?

3 A No, I would assume that pain drawing that you showed  
4 me from the Wellness Group, Bate stamped 00015, refers to, I  
5 would assume 100 percent pain in his left knee at that --

6 Q Right.

7 A -- particular moment.

8 Q Thank you. And how was it when you asked him, how  
9 was it -- did he explain to you how it was he was able to  
10 allocate his pain?

11 A No, I'm just happy when patients can actually add up  
12 to 100. He -- 70 percent of his pain he attributed to his  
13 left leg and left knee, so the other 30 percent had developed  
14 in between the time he filled out your diagram that you  
15 referred from The Wellness Group to the time he saw me.

16 Q Okay. And you put in here that the patient states  
17 that this pain originally began on November 22, 2004.

18 A Yes.

19 Q Correct?

20 A Yes.

21 Q And that's your note, right?

22 A That's my note, yes.

23 Q What pain?

24 A The pain that he's -- that he's coming to see me  
25 for.

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10 App. 1985

1 Q Okay. So interpretation is the pain is telling that  
2 -- the patient is telling that his --

3 A Next time, yeah.

4 Q -- with the examination after he --

5 A No, but I mean yeah, yeah.

6 Q You do know that his only complaint was knee pain?

7 A Yes.

8 Q Okay. And so the way you achieve consistency here  
9 is to say he must have had all this other pain but Dr. Heaps  
10 just wasn't able to find it and the patient wasn't even aware  
11 of it. Is that essentially your assessment of it?

12 A Well, perhaps Dr. Heaps didn't do the right testing  
13 to find the pain. I mean I'm not sure exactly what you're  
14 referring to other than a negative examination in the areas  
15 that you're talking about.

16 So you're talking about physical examination skills  
17 and I don't know Dr. Heaps or his physical examination skills.  
18 I'm assuming they're up to snuff, but again, sometimes in  
19 order to find things you have to actually look for them. And  
20 were the right tests ordered at that point or did Mr.  
21 Rodriguez, was he most concerned about his left knee which was  
22 documented to swell up shortly after this accident? I mean,  
23 again, the main concern was his left knee, so I don't find  
24 what you're describing inconsistent at all.

25 Q Okay. Well, now tell me this. When you look at

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1 this based on what the patient told you, it seems to me there  
2 are several possibilities here.

3 A Okay.

4 Q I can think of at least two and there may be more.  
5 One possibility is that the patient was having pain in all  
6 these different areas and didn't tell the doctor and so the  
7 doctor didn't write it down. That's a possibility.

8 A Sure, that's one possibility.

9 Q Another possibility is that the patient told the  
10 doctor about all the pain, but the doctor didn't do his job  
11 and didn't write it down.

12 A That's another possibility.

13 Q Because it would be the doctor's -- it would be  
14 appropriate for the doctor to write it down if the patient  
15 told him, right?

16 A It would be, yes.

17 Q So, if he didn't write it down, the doctor is not  
18 doing his job, right?

19 A Not necessarily. Again, he might have thought it  
20 was trivial at that point because the focus was on something  
21 else, but we're talking about an emergency room doctor who's  
22 there to determine are you going to die before you leave. I  
23 mean they're not there to spend quality time with patients and  
24 get to know them. There's no physician patient relationship  
25 that's typically going beyond that one visit. So, it's not as

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10 App. 1987

1 complete as you'd like to portray it.

2 Q Well, I was simply portraying it as Dr. Heaps said  
3 it happened. He said he conducted an examination.

4 A Sure, yeah, he conducted an examination.

5 Q Of not just his knee, but of his head and of his  
6 shoulders and of his whatever. So, the three possibilities  
7 are either the patient had it and didn't tell the doctor about  
8 all these problems because his knee hurt so bad.

9 A Okay.

10 Q The other possibility is that the patient told the  
11 doctor and the doctor didn't write it down. Another  
12 possibility is the doctor did such an incomplete examination  
13 that he never even checked for it, right?

14 A Yes.

15 Q Another possibility is he didn't have any pain in  
16 those areas and he changed his story later on. Isn't that  
17 true?

18 A I guess that's certainly a possibility as you list  
19 all of those, but there's another possibility that you're  
20 forgetting.

21 Q And what is that?

22 A That these symptoms that developed over time could  
23 have blended together at some point where Mr. Rodriguez three  
24 years after his original accident couldn't remember what  
25 started exactly when. So, I think that's the most likely.

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10 App. 1988

1 Out of all the scenarios that you presented, I think that's  
2 the most likely scenario.

3 Q Oh, so the most likely scenario, if I understand it  
4 correctly then, what you're saying is he didn't have pain in  
5 all those different areas. He only had pain in his knee. But  
6 later on as a result of this accident, he had pain in all  
7 those different areas?

8 A I think that's the most likely scenario and I think  
9 that's --

10 Q Okay.

11 A -- consistent with my previous testimony.

12 Q Okay. So, if your neck is snapped back, how soon  
13 does it start hurting, like three months from now?

14 A It could start as soon as immediately or it --

15 Q Right.

16 A -- could be a couple of weeks. I mean it just sort  
17 of depends. Inflammation has to sort of set in.

18 Q Okay. So you had -- you're familiar with  
19 orthopedics enough to say that I can suffer a neck injury and  
20 it would be perfectly reasonable that I don't feel anything  
21 for two weeks?

22 A Yes.

23 Q Okay. And now how about the part down below that  
24 says the patient was unaware that this activity was taking  
25 place as he was paying attention to the game?

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10 App. 1989

1 A Yes, that was his testimony.

2 Q That's what he told you, correct?

3 A Yes.

4 Q Anything inconsistent about that?

5 A Not in my opinion.

6 Q No? What all did you look at? Did you look at Dr.  
7 Mortilauro's reports?

8 A Yes, I have.

9 Q Okay. Did you see in Dr. Mortilauro's reports where  
10 he told you that he was standing there watching this and all  
11 this thing was going around him and it was so dangerous he was  
12 concerned about his safety?

13 A I don't remember seeing that specifically, but I  
14 have no reason to doubt that that's present.

15 Q Okay. But if he did, that would be a little  
16 different from saying, "The patient was unaware of this  
17 activity was taking place as he was paying attention to the  
18 game," isn't that right or would those in your opinion both be  
19 the same?

20 A I think both of them can exist, but it depends on  
21 how the question was phrased to the patient. But, yes, I  
22 would agree that that is somewhat inconsistent.

23 Q Somewhat inconsistent?

24 A Yes, not troublesome, but --

25 Q Okay.

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10 App. 1990

1 A -- inconsistent.

2 Q Tell me this hypothetically. How could it be more  
3 inconsistent? He says on the one had he didn't even know what  
4 was happening and on the other hand he said it was so  
5 dangerous he was concerned about his safety. How could it be  
6 more disparate than that?

7 MR. BAKER: That's not even a hypothetical, Your Honor.  
8 If he's asking that question hypothetically, that's not  
9 hypothetical. If he's asking it otherwise, it's  
10 argumentative. He's answered the question.

11 THE COURT: Sustain the objection as to argumentative.  
12 BY MR. WARD:

13 Q Now, you saw him on physical examination correct?

14 A Yes, that's correct.

15 Q And he was 5'6"?

16 A Yes.

17 Q And he weighed 244 pounds?

18 A Yes.

19 Q Did you weigh him?

20 A No.

21 Q Did somebody at your shop weigh him?

22 A No.

23 Q You accepted what he told you?

24 A Yes.

25 Q What did he tell you about how much he weighed at

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1 the time of the accident?

2 A I don't believe I asked that question.

3 Q Okay. But you've offered the opinion that he gained  
4 70 or 80 pounds between the time of the accident and the time  
5 you saw him, isn't that true?

6 A Yes, based on the records I reviewed.

7 Q Okay. Well, the records that I have, and I'll be  
8 happy to divvy them out and show you, showed that he weighed  
9 225 pounds on the night of the accident.

10 A Okay.

11 Q Okay. The way I calculate it 225 pounds three years  
12 before is 19 pounds below 244. So, how do you get the 70 or  
13 80?

14 A That's what's reported in the records. I think the  
15 time that we were looking at these, he was talking about  
16 weighing 260, 270 pounds, which would be significantly more  
17 than what you're quoting. But if he's 225 at the time of the  
18 accident, I would agree 19 pounds of weight gain have occurred  
19 over the past three years.

20 Q Okay. And he's been pretty inactive, hasn't he?

21 A Yes.

22 Q So you wouldn't be terribly surprised that someone  
23 who's in their forties gains weight as they get older?

24 A No, I think it's kind of a normal process to gain a  
25 pound or two a year, but 19 pounds in three years, I think you

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10 App. 1992

1 need some help with that.

2 Q Okay. And 70 or 80, you'd need a lot more?

3 A Yes.

4 Q And all you knew is what the patient tells you,  
5 right?

6 A That's correct.

7 Q And you said that he exhibits no obvious pain  
8 behavior?

9 A Yes.

10 Q That was significant to you?

11 A Yes.

12 Q Why did you write that down?

13 A He wasn't trying to exaggerate the symptoms that he  
14 was having. He wasn't groaning and grimacing and the things  
15 that we typically see patients with. And again, that's  
16 typically due to my industrial medicine sort of background  
17 that those are common comments that I will make in these type  
18 of scenarios.

19 Q Right. And so he -- you said that he wasn't trying  
20 to exaggerate his pain by doing anything to show that he was  
21 experiencing pain?

22 A No, he wasn't groaning or grimacing --

23 Q Right.

24 A -- or huffing and puffing when I asked him to do  
25 things, so there was nothing that led me to believe that he

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1 was trying to defraud or show me that his exam was  
2 inconsistent.

3 Q Well, he was telling you though that his pain was  
4 horrible, right?

5 A Yes.

6 Q And in spite of the fact that he told you his pain  
7 was horrible and constant and horrible, he didn't exhibit any  
8 signs of pain?

9 A Well, I think you're misinterpreting my designation  
10 of pain behavior. I'm talking about exaggerating pain  
11 behavior, not pain -- he didn't exhibit any evidence of pain.  
12 It's does he exhibit exaggerated pain behavior like Waddell  
13 signs and things that we're looking for like that. That's a -  
14 - just to explain that statement in there.

15 Q Well, this doesn't say exaggerated pain behavior,  
16 does it?

17 A No, but I'm the person who documented it, so I think  
18 I would be the best person to explain it to you.

19 Q Okay. And so you can explain this by telling us  
20 that when you put obvious pain, when you said, "He exhibits no  
21 obvious pain behavior," what you really meant was he didn't  
22 exhibit any exaggerated pain behavior?

23 A Yes, that's what the spirit of that sentence is.

24 Q Okay. Is that typically the way you do things, use  
25 one word when you mean another?

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1           A     No, I just don't usually use the word exaggerated in  
2 patient records unless it's sort of necessary. Obvious pain  
3 behavior is a typical word that I see commonly used in  
4 physicians who do a lot of industrial medicine.

5                     Pain behavior, if I saw that he had obvious pain  
6 behavior on examination, we would have looked at more of  
7 performance of what's down at the bottom of my Bate stamped 2,  
8 which would have been I would have checked him for Waddell  
9 signs and things like that.

10                    So, there was no indication that there was any  
11 exaggeration, so that wasn't -- that portion of the test  
12 wasn't performed.

13           Q     Now, you wrote down here that he was able to toe  
14 walk and heel walk without difficult, is that correct?

15           A     That's correct.

16           Q     And toe walk and heel walk is sort of like that, on  
17 the turn of the heel?

18           A     No, it would be actually walking on your tippy toes  
19 or going back on your heels?

20           Q     Like this?

21           A     Yes.

22           Q     Okay. Now, when he was seen by Dr. Foranti, Dr.  
23 Foranti recorded that his gait and station were normal, didn't  
24 he?

25           A     I would have to look that up, but --

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1 Q Page 3, muscular skeletal?

2 A Yes.

3 Q And, oh, by the way, did you look at the ambulance  
4 response from the night of the accident?

5 A Yes.

6 Q And you saw that they indicated that he was alert?

7 A Yes.

8 Q And wasn't dizzy?

9 A I don't believe that they documented any dizziness.

10 Q Okay. And they documented non-dizziness, right?  
11 They said he wasn't lightheaded or any of that stuff?

12 A Yeah, I don't think there was anything in reference  
13 to that that was documented.

14 Q Right. But in -- he told Dr. Miller that he was  
15 dizzy and confused, correct?

16 A I believe he's mentioned that a couple of times  
17 throughout the records.

18 Q Okay. Do you find that to be inconsistent?

19 A That might be his recollection looking back on the  
20 sort of the experience. I don't know.

21 Q Okay. Well, let's say it is his recollection  
22 looking back on the experience. Would you say his  
23 recollection is wrong?

24 A Well, then you'd have to ask yourself which  
25 recollection is wrong. Is it that he was dizzy or is it that

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10 App. 1996

1 he was not dizzy? I mean which recollection would you like to  
2 believe if we're saying they're wrong.

3 Q Well, the EMT's don't do it based on recollection,  
4 do they? They sit down and examine the patient and they have  
5 a chart and book and they write it out, don't they? You've  
6 seen what EMT's do.

7 A Yes.

8 Q They don't talk to the patient and sit down three  
9 years later and say, "Oh, yeah. What was that patient? I  
10 remember it's not."

11 A About a previous event, so it is --

12 Q Well, they're asking about an event when they're  
13 right there.

14 A Well, the paramedics weren't standing there when he  
15 got hurt. They came. They were called to the scene, so they  
16 came minutes later. And if you're asking somebody who's dizzy  
17 and confused if they're dizzy and confused, perhaps they can't  
18 remember being dizzy and confused as a possibility. I  
19 understand the point of your question and I do find it  
20 somewhat, like if you ask me and things blend together. And  
21 so I don't think it's inconsistent years later to discuss that  
22 with a doctor.

23 Q Well, let me ask you this. You're familiar with  
24 what the EMT's do?

25 A EMT's, yes.

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1 Q Yeah. I mean you're a doctor. You went to school  
2 for many, many years.

3 A Yes.

4 Q Spent lots of money to do all this and you worked  
5 very hard.

6 A Yes.

7 Q And so it's your belief, isn't it, that when if they  
8 want to find out -- if EMT's want to find out if somebody's  
9 got a head injury one of the things they do is ask them do a  
10 global assessment?

11 A Yes.

12 Q And they don't say, "Are you dizzy?" They say,  
13 "What day is it?"

14 A They'll ask them common questions.

15 Q "What's your name?"

16 A "Who's the president? What's your name?" Things  
17 like that.

18 Q Where you were for Halloween yesterday?

19 A Yes.

20 Q Okay. And whatever they asked him, they were  
21 satisfied that he wasn't dizzy, right?

22 A Yes.

23 Q And you didn't find anywhere in the first year of  
24 his treatment that he complained about being dizzy at the  
25 scene of the accident? Isn't that true?

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10 App. 1998

1           A     I believe that's consistent with my recollection of  
2 review of the records.

3           Q     You didn't find anywhere in the first year that he  
4 contended that his neck snapped back backwards at the time of  
5 the accident, isn't that true?

6           A     That's correct.

7           Q     Okay. So, are you suggesting that if the patient  
8 remembers something other than what happened, that that's what  
9 you base your diagnosis on?

10          A     No.

11          Q     The patient remembers?

12          A     No, that's not necessarily what I based my diagnosis  
13 on, but again, it's a recollection and again, some people can  
14 be misquoted or misrecollect things.

15          Q     Okay. Now -- so Dr. Foranti said that gait and  
16 station were normal?

17          A     Yes. You're correct.

18          Q     And then he said toe to toe gait and heel to heel  
19 gait were deferred as the patient stated he would fall.  
20 Correct?

21          A     Yes.

22          Q     The doctor said on review of symptoms that the  
23 patient said had loss of balance, is that correct?

24          A     Yes and I think that kind of fits in with the fear  
25 of falling with the toe to toe and heel to heel gait.

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10 App. 1999

1 Q You didn't have any loss of balance when you -- he  
2 saw you, did he?

3 A No

4 Q He was able to walk without difficulty?

5 A He had an antalgic gait by the time I saw him.

6 Q But didn't have a antalgic gait when he was seen by  
7 this Dr. Foranti, did he?

8 A That is correct.

9 Q And that was two years post accident, correct?

10 A Yes.

11 Q Now, Dr. Foranti did a neurological examination did  
12 he not?

13 A I believe he did.

14 Q And he said that the exam revealed a notable absence  
15 of crepitus?

16 A Yes.

17 Q Absence of effusion?

18 A Yes.

19 Q Absence of tenderness in the bilateral wrists?

20 A Are we going with the neurologic exam or the  
21 extremity exam?

22 Q Extremity.

23 A Okay, yes.

24 Q I apologize.

25 A No, no, don't worry. I was just looking at the

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1 wrong thing. Yes, he mentioned all those things.

2 Q And so he didn't find any effusion or tenderness in  
3 the bilateral wrists, in the elbows, in the ankles or the  
4 right knee, correct?

5 A That is correct.

6 Q But it appears swollen, right?

7 A There do not appear to be any typos.

8 Q Okay. And he said it was without crepidice  
9 [phonetic], right?

10 A Yes.

11 Q And he said onychomycosis, correct?

12 A Yes.

13 Q Was noted in the nails of the great toes  
14 bilaterally, correct?

15 A Yes.

16 Q He didn't say, "Therefore, he must have RSD?"

17 A No.

18 Q He didn't even reference RSD with respect to that,  
19 did he?

20 A You wouldn't do that typically during the  
21 examination portion. You'd wait until the impression or the  
22 assessment.

23 Q Right. And in the assessment he didn't say anything  
24 about that?

25 A The toenail --

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1 Q Right.

2 A -- overgrowth? No, he didn't mention that  
3 specifically.

4 Q Right. And this term O-N-Y et cetera means fungus  
5 growth in the toes, right?

6 A It does, yes.

7 Q And you're aware that he had fungus growth in his  
8 toes when he was being treated by Dr. Shannon?

9 A Yes.

10 Q And you recall that Dr. Shannon referred him to a  
11 dermatologist?

12 A Either a dermatologist or a podiatrist. I think she  
13 referred him to somebody. I can't recall who.

14 Q Okay. I'll represent to you that she referred him  
15 to a dermatologist.

16 A Okay.

17 Q I'll represent to you that she testified from the  
18 same chair you're testifying that she didn't think the fungus  
19 in his toenails was related to anything that had anything to  
20 do with this accident.

21 A Not fungus specifically, but the abnormalities, I  
22 would disagree with her.

23 MR. BAKER: Your Honor, she only spoke about the fungus.  
24 She never talked about the ingrown toe, so I --

25 THE COURT: Actually, what she testified about was

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1 ingrown toenails. That's what she talked about.

2 MR. BAKER: Okay, Your Honor.

3 BY MR. WARD:

4 Q Now, the neurological exam said that muscle strength  
5 was five over five in the upper and lower extremities,  
6 correct?

7 A Yes.

8 Q What's that mean?

9 A It means he had full strength to resistance so as a  
10 Doctor's pulling and pushing, he was strong in those  
11 particular muscle groups that were being tested in the upper  
12 and lower extremities.

13 Q Okay. Finger opposition was normal?

14 A Yes.

15 Q What's that mean?

16 A It means he's able to do kind of the drunk test  
17 where you touching fingers and -- yeah, he's coordinated.

18 Q It didn't say anything in here about him dropping  
19 anything, did it?

20 A I don't believe so, no.

21 Q No. So there was no indication that he was having  
22 any trouble picking things up.

23 A Not in that portion of the examination.

24 Q Not at that time, right?

25 A Yes.

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1 Q And reflexes were bilaterally symmetric?

2 A In the upper extremities, in the lower extremities,  
3 the reflex on the left was decreased compared to the right.

4 Q And the sensation in the lower extremities, now you  
5 said, I believe, that you believe the patient had  
6 hypersensitivity --

7 A Yes.

8 Q -- correct?

9 A Yes.

10 Q So, hypersensitivity is you touch my arm and I pull  
11 it away, or I say "Ouch" or I do something, right?

12 A Yes.

13 Q You can't see hypersensitivity, can you?

14 A No.

15 Q Yet hypersensitivity was one of the significant  
16 items as to why you diagnosed RSD, isn't that true?

17 A Yes.

18 Q Okay. And Dr. Foranti said sensation was grossly  
19 normal in the lower extremities. Didn't he?

20 A Yes, he did.

21 Q Okay. So he didn't say anything about  
22 hypersensitivity.

23 A He did not mention it, no.

24 Q And you believe that he would have.

25 A Yes, I do.

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1 Q Because that would be completely inconsistent with  
2 sensation was grossly normal in the lower extremities?

3 A Yes.

4 Q Correct? Okay. And now did you testify that the  
5 records of Dr. Simpson, that the treatment given by Dr.  
6 Simpson was reasonable and necessary and caused by the  
7 accident?

8 A Remind me who Dr. Simpson is because --

9 Q Okay. Dr. Simpson is the doctor who saw the  
10 patient, the orthopedist who saw the patient before Dr.  
11 Shannon saw him.

12 A Yes.

13 Q So you can't remember who he is, but you think that  
14 all of his treatment was reasonable and necessary?

15 A Well, he had a left knee problem. It's very  
16 reasonable to see an orthopedic surgeon and seek treatment for  
17 the problem that you have.

18 Q So are you suggesting that when these patient --  
19 most of these doctors have bills in excess of \$10,000, right?

20 A When you say --

21 MR. BAKER: Objection. That misstates facts and --

22 THE WITNESS: Most of the doctors I met --

23 THE COURT: I don't know. I'll ask you to rephrase the  
24 question.

25 MR. WARD: Sure.

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1 BY MR. WARD:

2 Q How many different treaters have you looked at in  
3 this case?

4 A I've looked through all of the treaters essentially.

5 Q A bunch, right?

6 A Yes.

7 Q Many doctors. Many of these doctors have bills in  
8 excess of \$10,000, don't they?

9 A Yes.

10 Q Okay.

11 A It's basically the --

12 Q You've testified that their treatment's all  
13 reasonable and necessary?

14 A Yes.

15 Q So you know what their treatment is?

16 A Yes.

17 Q And they all have liens, don't they?

18 A I believe so, yes.

19 Q Essentially nobody got paid.

20 A No.

21 Q So they all will get paid perhaps if Mr. Rodriguez  
22 is successful in his claim, right?

23 A Yes. Yeah, that's my understanding.

24 Q And if Mr. Rodriguez is not successful in his claim,  
25 they won't get paid?

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10 App. 2006

1           A     Well, I don't know that that's true but they would  
2 have to pursue Mr. Rodriguez personally for that which happens  
3 so.

4           Q     Right. Yeah. But there's no indication that  
5 they've done that yet?

6           A     No, it's a little too early.

7           Q     Okay. So they have an economic incentive to assist  
8 Mr. Rodriguez with his recovery, do they not?

9           A     When you say they, I'm included in they so I can't  
10 speak for they but I can speak for me and I guess there is  
11 some economic incentive but really the idea here is to help  
12 the patient.

13          Q     Okay. That's not my question. My question is  
14 simply there is an economic incentive for these doctors to  
15 testify that everything that happened to him was caused by the  
16 accident?

17          MR. BAKER: Your Honor, he said he could only speak to  
18 himself. So it would be speculative to anybody outside of  
19 himself.

20          THE COURT: Sustain the objection.

21          BY MR. WARD:

22          Q     Isn't it true with you?

23          A     It's true with me in the sense that I provide a  
24 service, I expect to get paid and you know if there's no  
25 economic recovery from this particular case that I will not

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1 hesitate to pursue Mr. Rodriguez personally. That's because  
2 he's responsible for the services I provided to him.

3 Q Okay. And now what did Mr. Foranti, Dr. Foranti  
4 testify or what did he say in his report with respect to how  
5 the accident occurred? Do you remember that?

6 A I don't remember specifically but since I'm in  
7 Exhibit 25, I can tell you for certain. He described it as  
8 Mr. Rodriguez being tackled in a casino. His knee bent inward  
9 and he was unable to walk. He was taken by ambulance to  
10 Spring Valley Hospital and was released with a knee stabilizer  
11 and crutches.

12 Q Okay. And now you have looked at the -- you said in  
13 your report of November 26, 2007, that the sensation is normal  
14 on the right but abnormal to light touch and temperature  
15 sensation differences on the left. You're talking about lower  
16 extremities at that point?

17 A Yes, that's correct.

18 Q And so in essence what you're saying is that you're  
19 saying that when you touch the patient, the patient tells you  
20 that the right leg's different from the left leg?

21 A Yes.

22 Q You can't see that, correct?

23 A I can't see that.

24 Q Okay. And you have been practicing what? 20 years?  
25 15 years?

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1           A     Well, since medical school, almost 20 years. 18  
2 years.

3           Q     Okay. Quite a while.

4           A     Yes.

5           Q     I know when I finished 20 years as a lawyer, I  
6 thought I had been doing it quite a while.

7           A     It seems that way sometimes.

8           Q     Okay. And you get pretty sensitive with respect to  
9 your fingers, do you not?

10          A     Yes, you acquire some skill, yes.

11          Q     Right. Okay. You can do things after you have done  
12 it for awhile that you -- that probably the average person  
13 couldn't do?

14          A     Yes, that's a fair statement.

15          Q     So when you feel -- when a person -- when you feel  
16 the person's two legs, you can usually tell if one -- if  
17 there's a temperature difference in the two, can't you?

18          A     There's going to be a variability on how much  
19 temperature difference one can appreciate with your hands but  
20 not necessarily the standard way to measure temperature.

21          Q     That isn't my question. And I'm not asking whether  
22 you can tell me whether it's 37.2 degrees Celsius or anything  
23 else. I'm just asking isn't part of your examination  
24 sometimes you feel two limbs and you can tell the difference  
25 by touch whether one's warmer or colder than the other?

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1           A     Right, but there's a certain threshold that you  
2 would have to be -- in order for you to do that, you would  
3 have to be a certain number of degrees difference to be able  
4 to -- your hands aren't that sensitive. If you recall wanted  
5 to get personal, you could probably put your lips on something  
6 and tell the difference between the two more than your hands  
7 but, you know, I don't want to get that personal with my  
8 patients. So that's why I use a thermometer.

9           Q     But you're aware that doctors can tell gross  
10 differences in temperature by a touch?

11          A     It is possible, yes.

12          Q     Well, it's more than possible, isn't it? Haven't  
13 you experienced physicians who do that?

14          A     When I'm checking for a fever and I understand what  
15 the normal temperature in a patient is versus a fever, then  
16 yes, but again the standard of care when you're checking  
17 temperatures is to actually measure it with some device that's  
18 reproducible. My hands might be different and more calloused  
19 than another doctor and I may not be able to appreciate the  
20 differences. And I'm assuming you're referring to Dr.  
21 Becker's notes without really referring to them. I don't see  
22 that he used temperature strips or an infrared thermometer to  
23 check temperature differences. So therefore I think it's  
24 possible to measure them but not probable.

25          Q     The lumbar sympathetic blocks, one of the things you

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1 do when you do these sympathetic blocks is when you do all of  
2 the things you do with respect to a stimulator is to ask the  
3 patient is there pain relief?

4 A Yes, that's correct.

5 Q And that's subjective, right?

6 A Yes, it is.

7 Q So we're back to the vast majority of these tests  
8 all revolve around what the patient tells you?

9 A Yes.

10 Q We can find some exceptions, right?

11 A Yes.

12 Q One of those exceptions is bone density scan?

13 A A bone density scan is different than the bone scan.  
14 So I'm assuming you're referring to the bone scan?

15 Q The bone scan that's referred to in the records.

16 A Yeah, not bone density though. I just want to make  
17 it clear.

18 Q I apologize. I'm not a doctor. I'm using --

19 A So yes, that -- I understand. That's an objective  
20 test. We discussed that earlier.

21 Q That's one of the objective tests and that was  
22 negative, correct?

23 A Yes.

24 Q Okay. And when you did the block with the patient,  
25 he had no immediate reduction in his usual pain, correct?

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1 A Yes.

2 Q Now when you were here testifying on Thursday, I  
3 think I got the day right, you were talking about a  
4 stimulator.

5 A Yes.

6 Q Now were you asked before you came in here to come  
7 in and testify about the cost of a stimulator?

8 A No.

9 Q No. So that was just kind of off the top of your  
10 head?

11 A No.

12 Q It was based on your experience?

13 A Yes.

14 Q Okay. And the numbers that you had totaled up to  
15 about \$721,000?

16 A Yes.

17 Q Okay. And that included \$22,000 for a battery?

18 A Yes.

19 Q And the battery had to be replaced every four years?

20 A That's correct.

21 Q Correct. Okay. And you looked at the life care  
22 plan, didn't you?

23 A Yes, I've looked at both your life care plan and the  
24 previous one. I thought they were inadequate, both of them.

25 Q Well, talks about -- I'm not asking about our life

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1 care plan. Let me ask you about your life care plan. You saw  
2 the life care plan from Ms. Hartman (phonetic), correct?

3 A Yes.

4 Q And Ms. Hartman is a well qualified life care  
5 planner?

6 A I don't know that for certain but I am assuming that  
7 she went through some sort of qualifications. I don't know  
8 Ms. Hartman.

9 Q Okay. She was disclosed as an expert in this case,  
10 correct?

11 A I have no reason to dispute that then.

12 Q And she was disclosed as an expert for Mr.  
13 Rodriguez, correct?

14 A I'm assuming that to be true.

15 Q And her report was provided, correct?

16 A To who?

17 Q To me?

18 A Yes, I'm assuming it was provided to you, yes.

19 Q Okay. I mean you understand how litigation works,  
20 don't you?

21 A I do.

22 Q You've seen these reports, doctors' different  
23 reports, you looked at the life care plans. You offered  
24 comments about the life care plans.

25 A Not in this case.

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1 Q Well, you did offer comments when you were on the  
2 stand just a few minutes ago.

3 A Not prior to this testimony today.

4 Q Okay. But you did offer comments about the life  
5 care plan from the witness stand today, correct?

6 A Specifically related to medications only.

7 Q And Thursday, you offered comments about the cost of  
8 a stimulator?

9 A Yes.

10 Q And you said \$22,000 a battery every four years..

11 A And that's wholesale costs to the surgery center.  
12 I'm not even including the markup that the surgery center or  
13 the hospital would charge to that. I didn't think that was  
14 necessary or helpful.

15 Q Okay. And the life care planner said \$4,000 a  
16 battery, correct?

17 A I am not sure exactly what she said. Again, I  
18 thought her life care plan was probably one of the worst life  
19 care plans I've ever seen. So, you know, it's one of those  
20 things where looking at the numbers that she quoted, I'm not  
21 sure who she actually spoke to, but I'm sure you had the  
22 opportunity to depose her and ask her these questions and I'm  
23 not sure exactly who she talked to or what her answer to that  
24 question was. But my answers sort of supersede hers. She's a  
25 nurse, I'm a doctor.

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1 Q Well, she's a life care planner. She's a qualified  
2 life care planner, correct?

3 A I assume, yes. But I don't know what the --

4 Q And she was hired by Mr. Baker, correct?

5 A That is correct.

6 Q And she testified, right?

7 A Yes.

8 Q And she testified that the whole thing would cost --  
9 that the batteries for the next 31 years would cost 32,000 and  
10 you have the batteries for the next 31 years at \$220,000.

11 A And I'm buying Duracell batteries here, sir. I mean  
12 it's -- I mean if you look at the -- just the cost of the  
13 temporary trial, the costs are somewhere in the neighborhood  
14 of \$42,000. So when we're talking about permanent  
15 implantation, \$4,000 for a battery won't even get you in room.

16 Q Oh, so the life care planner just doesn't have any  
17 idea what she's talking about. She's using flashlight  
18 batteries, right, is that what you're suggesting?

19 A At that price, yes.

20 Q Oh, okay. \$4,000 a battery for flashlight  
21 batteries. And so when she says that the permanent -- that  
22 the permanent stimulator will be put in by Dr. Vader  
23 (phonetic) and that the spinal stimulator cost for the next 31  
24 years in her opinion is around something under 300,000 as  
25 opposed to 721,000, your feeling is she just doesn't know what

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1 she's talking about?

2 A That's correct.

3 Q Okay. Now in your consultation from November 26,  
4 2007, which is -- I have 03, I think.

5 [Counsel Confer]

6 BY MR. WARD:

7 Q You looked at it and said or you asked the patient  
8 and he described for you that he has constant daily aching,  
9 burning, numbing, pins and needles, shooting, stabbing and  
10 tingling type pain.

11 A Yes.

12 Q All of those pains at the same time?

13 A Yes.

14 Q That doesn't seem unusual to you?

15 A Absolutely not.

16 Q Okay. Is it true that when you did the implant of  
17 the spinal cord stimulator and when you said unfortunately he  
18 had minimal relief of the low back pain, you said which would  
19 have been predicted, correct?

20 A Which would have been predicted based on the fact  
21 that stimulators as a bonus will help low back pain  
22 occasionally which is the reason why we use three leads but if  
23 you had to predict whether or not it was going to help the  
24 back pain, you would predict no.

25 Q Okay. So you actually thought before you did all

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1 this that it wasn't going to do any good?

2 A For his back pain?

3 Q Right.

4 A Okay, I just wanted to complete your thought.

5 Q Right?

6 A Yes, I was hoping that it was going to help his back  
7 pain so that he could have relief of both areas of concern but  
8 it seemed like that in the long term fashion, which is the  
9 letter you're referring to, it helped his leg pain and not his  
10 back pain. But there was hope during the initial phase of the  
11 trial that 80 percent of all of the pain in those two areas  
12 were taken care of. So there was a thought that it actually  
13 may improve his back pain. That didn't sort of pan out over  
14 the trial period.

15 Q He told you that 80 percent of the pain had gone  
16 away, correct?

17 A Yes.

18 Q So you don't know whether it was or not. What you  
19 know is that's what he told you?

20 A I have no reason to disbelieve him but yes, that's  
21 what he told me.

22 Q Right, okay. And very few things -- there have been  
23 a lot of treatment by Mr. Rodriguez in the last six years,  
24 right?

25 A That's correct.

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1 Q And most of the doctors were hopeful that they would  
2 -- he would get some relief?

3 A I assume that's the truth, yes.

4 Q And he almost never did, right?

5 A He still has a lot of pain so I don't know that any  
6 of the treatments to him were successful in relieving his  
7 pain. They may have relieved some anatomical problems but not  
8 necessarily pain.

9 Q And a number of physicians told you or reported that  
10 they couldn't find any reason why he still had pain.

11 A There were a couple of physicians who reported that,  
12 yes.

13 Q Okay. And none of that put you on notice or  
14 questioning that maybe there was a problem here with the  
15 complaint?

16 A Not in the context of this particular case. It  
17 would have bothered me perhaps in other cases when there  
18 wasn't as much documentation leading to a conclusion for a  
19 syndrome that is mysterious and not well understood by most  
20 physicians. So in this particular scenario with the context  
21 of RSD or CRPS, it doesn't bother me in the least it.

22 Q And he never went back to Dr. Foranti, did he?

23 A No, I think it was a one-time consultation.

24 Q And now if you have hypersensitivity, is that felt  
25 on just touch?

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1           A     It can be felt on touch. It can be felt with the  
2 air conditioner blowing on you. It can be felt with clothes  
3 on you. It can be felt in many different circumstances.

4           Q     Okay. How about with pins?

5           A     Pins, yes.

6           Q     Pins would be really painful to someone who has  
7 hypersensitivity, isn't that correct?

8           A     Not as much as cold but pins can be sensitive. Most  
9 people don't use pinwheels anymore because of the potential  
10 for infectious disease transmission. But yes, it would be  
11 painful if it was present at that particular time.

12          Q     Okay. And inserting a pin would be even more pain?

13          A     Yes.

14          Q     Okay. Like when an EMG was done?

15          A     Yes, that's usually considered painful with or  
16 without symptoms of RSD.

17          Q     Okay. And so for someone who had RSD, that would be  
18 contraindicated, wouldn't it?

19          A     No.

20          Q     You've give them an EMG anyway?

21          A     Oh, absolutely. I mean you need to rule out is  
22 there any other nerve sources of pain at that particular time.  
23 So it's not necessarily a contraindication. It's sort of a  
24 relative contraindication but I will oftentimes discuss with  
25 neurologists and physiatrists who perform these tests to go

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1 ahead and perform the test because we need to know if we're  
2 dealing with another problem. Because unless you find the  
3 original offending diagnosis, you're going to end up with a  
4 treatment for the wrong thing.

5 Q And surgery would be contraindicated, correct?

6 A Not if you're attempting to correct something.

7 Q If you've got RSD, you can operate on the area and  
8 it's not contraindicated?

9 A It depends on what the circumstances are but if  
10 there is an ongoing problem that unless you solve it, the RSD  
11 is not going to go away, then you have to weigh the risks and  
12 benefits. So it's a relative contraindication. It's not an  
13 absolute contraindication to surgery.

14 MR. WARD: Thank you, doctor.

15 MR. BAKER: Judge, I have a few follow ups.

16 THE COURT: Mr. Baker, do you anticipate you'll be pretty  
17 succinct in your redirect examination?

18 MR. BAKER: Like a laser, Your Honor.

19 THE COURT: Good to hear.

20 [Unrelated Matters Not Transcribed]

21 REDIRECT EXAMINATION

22 BY MR. BAKER:

23 Q Doctor, it seems like consistency has become a  
24 little bit of a theme here with respect to Enrique's  
25 reporting, is that right?

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1 A Yes.

2 Q You looked through thousands of pages of documents?

3 A Yes.

4 Q Many, many providers?

5 A Yes.

6 Q And there were I think two or three consistencies  
7 that were pointed out to you about what you thought were  
8 trivial issues, is that correct?

9 A I thought they were all trivial issues. I mean the  
10 biggest inconsistency which I was waiting for him to point out  
11 was the fact that was it a water bottle being thrown or was it  
12 a t-shirt or some other sort of souvenir. That was the  
13 biggest inconsistency. That's in my mind a question that's  
14 still unanswered of what was being thrown out.

15 Q Great import, I'm sure. But with respect to  
16 reporting of an incident, pain complaints and duration, was  
17 Enrique extremely consistent for your experience?

18 A Yes.

19 Q Over six years of treatment?

20 A Yes.

21 Q That counsel was able to point out two or three what  
22 you called trivial inconsistencies?

23 A Yeah, the inconsistencies that were pointed out were  
24 very minor and don't necessarily add up to things. I mean  
25 again the most inconsistency that would be concerning in the

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1 big picture would be the inconsistencies on the examination  
2 but again put into the context of this is a dynamic condition  
3 that changes frequently where you might have swelling and  
4 discoloration at one point and the next doctor examines you  
5 three days later and the swelling is down and there  
6 discoloration is no longer present, is something that needs to  
7 be pointed out. So the examination, you're looking at the  
8 totality of the examination.

9 And I've done these for defense experts before when  
10 a patient was diagnosed with RSD and I've looked at the  
11 totality of the records which I think is necessary when it  
12 comes to these cases, not a one-time examination. But if you  
13 look at all of the records and you try to fit the diagnosis  
14 for RSD or CRPS, there's overwhelming evidence that Mr.  
15 Rodriguez has this condition. When you look at one particular  
16 exam, he may not fit the criteria, but I think that's the  
17 wrong thing to do. And when I do these for defense firms that  
18 are, you know, representing insurance companies, what I'm  
19 looking at is the entire records to look at this. Not one  
20 particular examination.

21 Q And that's why --

22 MR. WARD: I object and move to strike the gratuitous  
23 commentary about defense firms and insurance companies and he  
24 wasn't asked a question about that. It's entirely  
25 inappropriate to put that into this record.

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1 MR. BAKER: That all came in in cross when he spoke about  
2 the fact that he did IMEs, he was middle of the road, that he  
3 worked as an impartial observer. That was all that he stated  
4 on cross.

5 MR. WARD: Those were not questions that I asked and he  
6 sort of volunteered and I surely didn't ask him anything about  
7 working for defendants and insurance companies.

8 THE COURT: I think this witness testified that he has  
9 worked for both. I think that was his testimony. But in any  
10 event, the objection is overruled. Noted for the record.

11 BY MR. BAKER:

12 Q Okay. And in order to discuss the dynamics of RSD,  
13 you have to understand the guidelines, is that right?

14 A Yes.

15 Q And you've discussed subjective versus objective and  
16 subjective versus objective, color changes, part of RSD?

17 A Yes.

18 Q Subjective or objective?

19 A Objective.

20 Q Temperature changes, part of RSD?

21 A Well, they can be subjective when measured by the  
22 hand. But when you're actually measuring them with a device,  
23 which is the standard is the temperature strip or some sort of  
24 an infrared device, they're objective. Otherwise, they are  
25 subjective and so they don't mean anything in a physical exam

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1 which is meant to be objective.

2 Q Temperature change is taken of different extremities  
3 using a laser thermometer like you use, objective or  
4 subjective?

5 A Those are definitely objective.

6 Q And let's talk about Dr. Becker. You know it's  
7 going to be said that Dr. Becker said that he could tell the  
8 temperature changes between the legs with his human hands, his  
9 bare hands, correct?

10 A Yeah.

11 Q The temperature changes you found were one and a  
12 half degrees different between the left and the right leg, is  
13 that right?

14 A Be almost impossible to tell with just hands to tell  
15 that difference. Sometimes that's even difficult to tell with  
16 the standard temperature strips which is the reason why I've  
17 gone to using an infrared thermometer like the mechanics use  
18 before they touch something hot on a car.

19 Q Skin color changes, objective or subjective?

20 A Those are objective.

21 Q And those are all part of RSD determination, is that  
22 right?

23 A Yeah, RSD or CRPS, yes.

24 Q And a bone scan was negative in this case?

25 A Yes, and again I wasn't asked why the bone scan was

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1 ordered but I usually put that at the bottom of my list as far  
2 as things that I find helpful in making this diagnosis. It  
3 was ordered because Dr. Foranti suggested it and it was  
4 basically to fulfill his wishes that these things had been  
5 done. I mean we're talking about the chairman at UCLA, if he  
6 felt it was reasonable to order it, even if I disagreed, I was  
7 going to order the test just for completeness sake.

8 Q Now when you were going over Dr. Foranti's records  
9 with Mr. Ward, you wanted to tell him something. What did you  
10 want to tell him?

11 A Well, the way that he asked the question that made  
12 it sound like that I had misspoke and after looking back at  
13 the specific record that I was referring to, the only thing  
14 that I misspoke and I said I -- or many doctors believed that  
15 Mr. Rodriguez had RSD and they talk about complex regional  
16 pain syndrome is possible. He also felt that there was a  
17 mechanical component which is the reason why I evaluated the  
18 patient. I agreed with Dr. Foranti and I sent Mr. Rodriguez  
19 for another orthopedic evaluation to somebody who had never  
20 met him before, Dr. Kraveti (phonetic) in order to determine  
21 if there was this mechanical component to this. But Dr.  
22 Foranti's notes reflected it is possible that the patient, Mr.  
23 Rodriguez, has complex regional pain syndrome or reflex  
24 sympathetic dystrophy based on the complaints that he had and  
25 he even felt that it was necessary to order bone scans comma

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1 and then that's where we stopped.

2 Q Why don't you finish that sentence.

3 A Lumbar sympathetic blocks, trial of Clonidine  
4 patches, Neurontin, as well as x-rays of his bilateral feet  
5 and legs, to see if there was osteoporosis. So again, you're  
6 being presented with very limited sort of information. The  
7 physical examination may not have been absolutely consistent  
8 with reflect sympathetic dystrophy on that particular occasion  
9 but the history, the mechanism of injury, the chronicity of  
10 the complaints, led Dr. Foranti to suggest other studies.

11 He also talked about carpal tunnel syndrome and if  
12 you look at his examination, there's a negative Tunnel sign  
13 and a negative Phalen's test which is a compression test over  
14 the nerves that are affected, the median nerve specifically  
15 with the carpal tunnel. Even though the examination was  
16 normal for these tests, Dr. Foranti said secondarily I believe  
17 the gentleman may have carpal tunnel syndrome and should be  
18 evaluated for this. So even though the examination didn't fit  
19 with it, again that's one piece of the puzzle. If you add  
20 them altogether, you're now coming up with a much completer  
21 picture or a more complete picture and that's what we're doing  
22 here as physicians. We're looking at the records, the  
23 patient's history, the examination, the mechanism of injury,  
24 the context of everything and trying to formulate a diagnosis  
25 that's the best fit.

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1           In looking at the totality of the records, this is  
2 the diagnosis that's the best fit.

3           Q     What diagnosis is that?

4           A     CRPS.

5           Q     And that's your opinion to a reasonable degree of  
6 medical probability?

7           A     Yes.

8           Q     And a negative bone scan doesn't rule out RSD, does  
9 it?

10          A     No, because if that was the only thing that you  
11 could order, we would have ordered that in the beginning and  
12 said you don't have it. It's normal, so therefore you don't  
13 have CRPS, it's again one of the pieces of the puzzle and to  
14 me it's very minor slice of pie.

15          Q     And a lumbar sympathetic block did work to reduce  
16 his pain because we've heard comments about how nothing worked  
17 on his pain. A lumbar sympathetic block worked on his pain?

18          A     Temporarily.

19          Q     Okay. And is that exactly what you would expect to  
20 see alleviate his pain if he was suffering from a  
21 neurologically mediated disease?

22          A     Yes.

23          Q     And then the spinal cord stimulator, thank God for  
24 it. It really alleviated his pain, is that right?

25          A     Completely alleviated his pain and then, you know,

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1 just to clarify one other point that was made earlier about  
2 the constant daily aching, numbing, tingling type discussion  
3 of pain. Those are all words that I see described in nerve  
4 type pain. And they can all be consistent. You can have  
5 numbing and tingling and stabbing pain and all the words that  
6 were chosen there other than the word aching fit with nerve  
7 type pain.

8 Q And when they gave him the temporary pain  
9 stimulator, that's exactly what you would expect to see  
10 alleviate the pain if it was RSD mediated pain, is that fair  
11 to say?

12 A Yes.

13 Q So if it's been suggested that nothing works on the  
14 man, is it true that exactly those modalities that treat RSD  
15 or CRPS worked on him?

16 A Yes.

17 Q And could be anticipated to work into the future, is  
18 that right?

19 A That's correct.

20 Q Now Mr. Ward suggested when he was talking about Dr.  
21 Heaps' exam -- do you remember that conversation?

22 A Yes, I do.

23 Q He told you about certain explanations why no neck  
24 and no back pain were noted at that examination. Do you  
25 remember that?

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1           A     I do.

2           Q     Do you feel that the explanation that you gave that  
3 it was a cascade caused by postural changes and the use of  
4 assistant devices was ignored in those range of possibilities  
5 that you were given?

6           A     Well, I do -- I mean I think this is a progression  
7 of things over time. That was that particular day. When you  
8 look at things in the totality of the records, there is a  
9 progression which I think is very well documented in the  
10 notes.

11          Q     Overwhelmingly as his treating physician, do you  
12 believe his neck and back pain was caused by that cascade that  
13 you described because of postural changes and the use of  
14 assistant devices over time?

15          A     Yes.

16          Q     And is there a component also of that lumbar and  
17 cervical pain being masked by his primary, his chief main  
18 complaint which is his knee?

19          A     Yes, as we explained earlier, that's -- it's a very  
20 likely scenario.

21          Q     And when you read the medical records, don't that  
22 scenario, one the masking, and second the development of the  
23 ideology over time, make perfect absolute sense to someone  
24 who's looking at it from an unbiased perspective of a treating  
25 physician?

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1           A     Absolutely.

2           Q     With respect to the RSD, do you think that any  
3 responsible physician given the mountain of information that  
4 you've reviewed, could come to the diagnosis that this  
5 individual did not suffer from RSD?

6           A     I would have difficulty and question the intentions  
7 of anybody who does not come up with that diagnosis whose  
8 allegedly read the entirety of all these records and the  
9 supporting information contained within these records.

10          Q     Now when you spoke about malingering, you saw  
11 absolutely no evidence that Enrique was malingering, is that  
12 true?

13          A     That's correct.

14          Q     And malingering is not just some dictionary  
15 definition with five or six different possibilities, you know,  
16 reported in Webster. It's a DSMTR diagnosis, is that right?

17          A     Yeah, I mean we're -- in the medical context here,  
18 we're not talking about other things where, you know, I tell  
19 my wife my back hurts because I don't want to take out the  
20 garbage. I mean there's that context. Then there's the  
21 actual medical context which in order to state that a patient  
22 has that, it requires intent. That was hinted at in Dr.  
23 Becker's report but as Dr. Becker is I'm assuming a board  
24 certified psychiatrist as well as an orthopedic surgeon, he  
25 more than me would know that the DSM4 definition for

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1 malingering requires intent to deceive which --

2 Q He never mentioned in his report?

3 A He's never mentioned, no.

4 Q And that doesn't meet a definition of malingering if  
5 the intent aspect isn't included pursuant to the DSMTR?

6 A You have to have that to include it.

7 Q Now, it's been suggested that you have an economic  
8 reason for wanting Enrique Rodriguez to be compensated in this  
9 matter. Do you remember that?

10 A Yes.

11 Q Do you want him to get his pain stimulator?

12 A Oh, absolutely.

13 Q Do you want him to get the therapies that he needs  
14 to feel better?

15 A I want the best for Mr. Rodriguez and I want him to  
16 get the medical treatment that he's been so desperately  
17 waiting for.

18 Q You've only got \$9,000 invested in this on a lien  
19 basis, if you have a lien, is that right?

20 A That's correct.

21 Q Tell the Court why you want Enrique Rodriguez to get  
22 his pain stimulator and to get better?

23 A Well, I think this would change his -- I mean this  
24 is a life changing event just much like the collision that he  
25 had in the Palms Hotel was a life changing event. Perhaps we

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1 can correct some of the problems that occurred during the  
2 particular event with a new and improved event like a  
3 permanent spinal cord stimulator to get rid of the pain in his  
4 left leg and his knee. And then we can sort out some of the  
5 other remaining complaints that he has.

6 He's having side effects from the medications with  
7 constipation, the lethargy. He's frustrated he's having  
8 emotional problems from this. I think the idea of the spinal  
9 cord stimulator is an easy fix for him to get rid of many of  
10 the problems that he's currently experiencing due to the event  
11 that happened at the Palms Hotel.

12 MR. BAKER: Thank you, doctor. No further questions.

13 THE COURT: Any follow up, Mr. Ward?

14 MR. WARD: Yes, Your Honor.

15 RE-CROSS-EXAMINATION

16 BY MR. WARD:

17 Q Dr. Schifini, you are aware that Dr. Foranti did not  
18 conclude that the patient had complex regional pain syndrome  
19 or reflex sympathetic dystrophy, isn't that true?

20 MR. BAKER: Asked and answered, Your Honor.

21 THE COURT: Sustained.

22 THE WITNESS: That's incorrect actually.

23 THE COURT: I sustained the objection. There's no need  
24 to respond, sir.

25 ///

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1 BY MR. WARD:

2 Q What information do you have now to make a diagnosis  
3 that Dr. Foranti did not have at the time he wrote his report?

4 A I have the knowledge of the totality of the medical  
5 records. Dr. Foranti was dealing with his one piece of  
6 information and had not completed his thought yet. He wanted  
7 and requested additional diagnostic testing to be done which  
8 was ultimately performed by Dr. Miller. So he had not yet  
9 formulated all of his thoughts and if given an opportunity to  
10 review this, I am confident that Dr. Foranti would come to the  
11 same conclusions that I have.

12 MR. WARD: Move to strike as non-responsive.

13 THE COURT: Overruled.

14 BY MR. WARD:

15 Q How is it you know what Dr. Foranti would do? Have  
16 you talked to him?

17 A I have talked to him. Not in --

18 Q About this case?

19 A -- this case, no.

20 Q Then how is it you would know what he would do in  
21 this case?

22 A Because I'm a board certified anesthesiologist  
23 specializing in pain management just like Dr. Foranti and the  
24 information that he felt was valuable in the reference to the  
25 further diagnostic testing that he requested was ultimately

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1 done which helps me come to the diagnosis of complex regional  
2 pain syndrome in Mr. Rodriguez's case. So again Dr. Foranti  
3 did not have the opportunity to finish his thoughts because he  
4 -- there was an incomplete diagnostic workup.

5 Q Well, he suggested that there was insufficient  
6 objective information, correct?

7 A Yes.

8 Q And so he asked for a number of things.

9 A Yes.

10 Q One of those things that he asked for was a bone  
11 scan?

12 A Yes.

13 Q So you did a bone scan or you had a bone scan done?

14 A That's correct.

15 Q It was negative?

16 MR. BAKER: Your Honor, this is all asked and answered.

17 THE WITNESS: Yes.

18 THE COURT: It has been. Sustained.

19 MR. WARD: I wanted to go to the other areas, Your Honor.

20 It is -- these are areas that he raised on redirect.

21 THE COURT: We covered the bone scan in your previous  
22 examination of this witness.

23 MR. WARD: I'm going to -- I was doing that as prefatory  
24 to go to the rest of the things in that sentence.

25 THE COURT: Well, then let's get to it.

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1 MR. WARD: Right.

2 BY MR. WARD:

3 Q So of the things that Dr. Foranti said, after bone  
4 scans, he said lumbar sympathetic blocks, correct?

5 A That's correct.

6 MR. BAKER: This is all asked and answered still, Your  
7 Honor.

8 THE COURT: It has been. Is there a specific question  
9 with respect to that? I don't --

10 MR. WARD: But I didn't go into those on my cross-  
11 examination. I stopped at bone scan. They made a big deal  
12 about the fact that I stopped at bone scan so I wanted to go  
13 to the things after bone scan. Yes, Mr. Baker went over it. I  
14 didn't go over it, Your Honor.

15 THE COURT: You have a specific question with respect to  
16 that particular item?

17 MR. WARD: Right. I wanted to ask him what his --  
18 whether any of those -- I'll ask it this way.

19 BY MR. WARD:

20 Q The items in that sentence, which of those are truly  
21 objective?

22 A The x-rays and the bone scans are truly objective.  
23 The trial of the Clonidine patches, the Neurontin and the  
24 lumbar sympathetic blocks are partially objective, partially  
25 subjective. Mostly subjective.

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1 Q Okay. So the only one there that's truly objective  
2 are not the ones after bone scans, correct?

3 A Well, the x-rays of the feet and legs which I'm  
4 assuming were done at the orthopedic's office are objective as  
5 well.

6 Q Okay.

7 A So just the x-rays and the bone scan.

8 Q And what did they show?

9 A They did not show any evidence of osteoporosis.

10 Q So they were negative, too?

11 A Yes.

12 Q So all the things that were truly objective were  
13 negative?

14 A Both things, yes.

15 MR. WARD: Thank you. I have no further questions.

16 THE COURT: Any follow up, Mr. Baker?

17 MR. BAKER: No, Your Honor.

18 THE COURT: Thanks to the witness. You may be excused,  
19 Dr. Schifini.

20 THE WITNESS: Thank you.

21 THE COURT: See the rest of you tomorrow at 1:00.

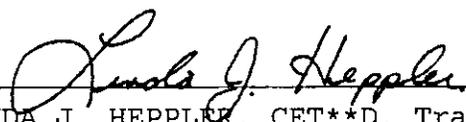
22 MR. BAKER: Thank you, Your Honor.

23 [Proceedings Concluded at 4:34 p.m.]  
24  
25

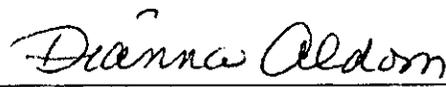
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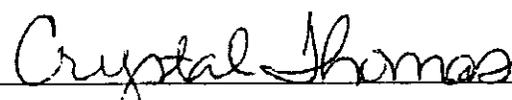
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10 App. 2037

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

\_\_\_\_\_ /

**APPELLANT'S APPENDIX**  
**VOLUME 9**

**ROBERT L. EISENBERG (Bar # 0950)**  
**Lemons, Grundy & Eisenberg**  
**6005 Plumas Street, Third Floor**  
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**775-786-6868**  
**Email: [rle@lge.net](mailto:rle@lge.net)**

**ATTORNEYS FOR APPELLANT**

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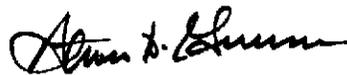
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DISTRICT COURT  
CLARK COUNTY, NEVADA

  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )  
\_\_\_\_\_ )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

WEDNESDAY, OCTOBER 27, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. MARYANNE SHANNON

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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CLERK OF THE COURT

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Defendant's Witness:

None

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DEFENDANT'S:

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WEDNESDAY, OCTOBER 27, 2010, 1:01 P.M.

[Designation of record begins at 1:01 p.m.]

THE COURT: Are you ready for Dr. Shannon?

MR. BAKER: Yes, Your Honor. Call Dr. Shannon.

THE COURT: Very well.

[Pause]

MARYANN SHANNON, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Please be seated, stating your full name, spelling your last name for the record.

THE WITNESS: Okay. My name is MaryAnn Shannon, last name is spelled S-H-A-N-N-O-N.

DIRECT EXAMINATION

BY MR. BAKER:

Q Good morning. Funny you should walk in, we were just talking about you.

A Okay.

Q Good morning.

A Good morning. Well, it's afternoon, actually.

Q Yeah. I guess it's getting to that time.

MR. BAKER: Are you all -- do you need a second?

MR. WARD: No, we're okay. No, we're just working.

UNIDENTIFIED SPEAKER: Wrestling with paper.

MR. BAKER: Okay.

BY MR. BAKER:

Q Would you please introduce yourself to the Court?

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1           A     I'm Mary Ann Shannon, I'm a local orthopedic  
2 surgeon, been practicing here since 1992.

3           Q     And are you board certified in orthopedic surgery?

4           A     Yes.

5           Q     Could you just please briefly -- just as -- as it's  
6 a bench trial and not a jury trial, explain your education to  
7 the Judge?

8           A     Sure. I went to the University of Illinois. I  
9 graduated with a bachelor's degree in chemistry and  
10 mathematics and went on to Northwestern University and  
11 finished medical school, got my MD degree.

12                     And then went on to do a rotating internship at the  
13 University of Minnesota in Minneapolis, general surgery  
14 followed by a four-year orthopedic residency. I then moved to  
15 Colorado and with the University of Colorado, did a hand  
16 fellowship at Hand Surgery Associates.

17                     That's my education, do you want me to go into my  
18 clinical practice too?

19           Q     Sure. Just a little bit. You're doing it at light  
20 speed. I don't think it's --

21           A     Okay. Following that I moved -- I got married, so I  
22 moved to Washington D.C. where my ex-husband worked for  
23 Lockheed Martin, that's not really relevant but he made me  
24 move to the Washington D.C. area. I was regional hand surgeon  
25 for Kaiser Permanente and for the private practice group

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1 called Greater Washington Orthopedics.

2 Following my divorce I moved to Texas, where I  
3 established a private practice and started to raise my  
4 daughter and then finally moved here to Las Vegas in 1992  
5 following my mother's development of cancer. And I needed to  
6 stop practicing clinically, because I had to take care of my  
7 daughter and my mother. So I took an administrative job here  
8 in Las Vegas working for what was State Industrial Insurance.  
9 I took care of my mother until she died and then I went into  
10 private practice through Sierra Health Services and then  
11 ultimately into private practice with a couple of different  
12 groups.

13 Q Is that it?

14 A That's it.

15 Q And Doctor, as part of your practice, do you  
16 prescribe and refer people for MRIs?

17 A Yes, I do.

18 Q As part of your practice, do you prescribe and refer  
19 people for physical therapy?

20 A Yes, I do.

21 Q As part of your practice, do you review the medical  
22 records of other physicians who have seen the patient both  
23 before and after you?

24 A Yes.

25 Q And is that common and customary in orthopedic

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1 practice?

2 A Yes. Depending on the source of the patient, yes.

3 Q And you've testified for your patients in court  
4 before?

5 A Yes, I have.

6 Q On approximately how many occasions?

7 A Well since I've been -- we've been legislated to  
8 keep records in 2005 this would be the 22nd time I've appeared  
9 in court here.

10 Q I remember the legislation, Doctor. And have you  
11 been qualified both as a treating physician and as an expert  
12 in courts in the State of Nevada?

13 A I've never been denied, so --

14 MR. BAKER: Your Honor, I move to have her admitted as a  
15 treating physician and qualified as an expert in the field of  
16 orthopedic surgery and the related matters to which she'll  
17 testify.

18 THE COURT: Any objection?

19 MR. WARD: I have no objection to her qualifications.

20 The only objection I have is that she has not be  
21 disclosed as anything other than a treating physician, so I  
22 would object to any claims of questions in terms of what would  
23 normally be submitted to an expert --

24 MR. BAKER: Can I have --

25 MR. WARD: -- aside from her treating.

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1 MR. BAKER: Your Honor --

2 THE COURT: Mr. Baker?

3 MR. BAKER: Yes, Your Honor.

4 I'd like to show you both the Fernandez v. Admirand  
5 [phonetic] case that speaks to the fact that once a physician  
6 is qualified to be expert, they can speak in any area of their  
7 expertise.

8 But more importantly, Your Honor, Prabhu v. Levine,  
9 which is 112 Nev. 1538 and speaks about the fact specifically  
10 that in the Prabhu case, a treating physician was allowed to  
11 testify to standard of care. It basically says that the  
12 treating physician or a doctor is an expert for any purpose.

13 THE COURT: Mr. Ward?

14 MR. WARD: I am not familiar with that specific case.  
15 The -- but I am familiar with Nevada Revised Statute 15.285  
16 and 51.065, that I believe that it would limit her from  
17 anything that she's been -- other than what she's been  
18 disclosed as, and she has only been disclosed as a treater.

19 If there are -- certainly she would be qualified.  
20 I'm not saying she wouldn't be qualified if she had been  
21 properly disclosed. She's not given a report. She's not been  
22 disclosed as anything other than a treater. So to ask her --  
23 I understand she can offer opinions about her own treatment.  
24 But to try to use her to -- as an expert to testify as to  
25 other doctors, I think would be inappropriate.

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1 MR. BAKER: And Your Honor, particularly I intend to use  
2 her to speak about other doctors. She's testified that she  
3 uses other doctors' treatment in the course of her diagnoses,  
4 prognoses and treatment of patients.

5 As an expert this Court certainly recognizes there's  
6 a difference between a retained expert and a not retained  
7 expert. She has not been retained as an expert in this case.  
8 She is a treating physician who has reviewed the course of the  
9 medical treatment, has commented on the course of the medical  
10 treatment and should rightly be allowed to testify to that.

11 And I'd like to add as well that N.R.S. 50.275  
12 allows her, in her capacity as expert as set out in the Prabhu  
13 v. Levine case, to speak to matters that would be otherwise  
14 inadmissible including hearsay.

15 And so Your Honor, by Nevada case law and Nevada  
16 statute she's an expert. She's not been disclosed as a  
17 retained expert but she is a physician and an expert.

18 THE COURT: I understand the distinction, and I am  
19 familiar both of these cases. Frankly I'm familiar with  
20 Dr. Shannon. She's testified in this Court before.

21 So I think the motion should be granted in it's  
22 entirety.

23 MR. BAKER: Which motion is that?

24 THE COURT: Motion to qualify her as an expert.

25 MR. BAKER: Thank you, Your Honor. And --

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1 THE COURT: It prompted this discussion.

2 MR. BAKER: Right. I forgot that that was actually a  
3 motion.

4 THE COURT: I think -- sort of.

5 MR. BAKER: Yeah.

6 MR. WARD: Yeah.

7 MR. BAKER: Sort of.

8 BY MR. BAKER:

9 Q Okay. Doctor, do you have your file with you today  
10 or just, would you like to use my exhibits?

11 A I'll probably have to use your exhibits. I figured  
12 there was no point in my bringing what would be duplicates all  
13 the way across town.

14 Q Save the trees.

15 MR. BAKER: May I approach the witness, Your Honor?

16 THE COURT: Yes.

17 MR. BAKER: And may I direct the witness to Number 1 to  
18 begin with?

19 THE COURT: Sure.

20 THE WITNESS: Okay. This is volume labor, okay.

21 [Counsel confer]

22 BY MR. BAKER:

23 Q If you go to 16, please, Doctor?

24 A 16, okay.

25 MR. BAKER: I really at some point I might ask for a

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1 break, Your Honor, to go get some bifocals.

2 THE COURT: To go get what?

3 MR. BAKER: Some bifocals.

4 THE WITNESS: I understand and can relate. Okay. We're  
5 ready.

6 BY MR. BAKER:

7 Q Are you there?

8 A Uh-huh.

9 Q Oh, you beat me.

10 A Yeah.

11 Q When is it that you first saw Enrique Rodriguez?

12 A He first presented himself on March 28th, 2005.

13 Q And what were his presenting conditions?

14 A He was being sent for evaluation of his left knee.

15 Q Okay. Did you evaluate his left knee?

16 A Yes, I did.

17 Q And did you perform a physical examination of his  
18 left knee?

19 A Yes, I did.

20 Q Could you describe to the Judge, please, what the  
21 physical examination entailed?

22 A Well physical examination require -- entails first,  
23 observation, of course. So you look for any bruising,  
24 swelling, any obvious deformity of the limb or the part, the  
25 body part you're looking at. So say if it was a fracture and

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1 I saw something that didn't look normal or out of alignment, I  
2 would observe that it's -- that there's deformity, that kind  
3 of thing.

4 Then after observation, you'll do palpation, which  
5 is to touch the body part. So, if specifically a knee you  
6 palpate the different areas of the knee, on the front of the  
7 knee, the kneecap, the quadriceps mechanisms, the patellar  
8 tendon mechanism. Then you move on to the collateral  
9 ligaments, the joint lines, palpate the bones of the joint.

10 You can feel the interior of the joint as best you  
11 can, whether there's swelling associated with it and whether  
12 that swelling may be fluid or just tissue inflammation.

13 And then the test -- and then you would go on to do  
14 provocative testing, to test the stability and to look for  
15 such problems as malalignment, active movement problems,  
16 atrophy which is observational, but also by testing of  
17 strength. And then provocative things such as testing  
18 ligaments and the meniscus.

19 Q And before we get into your further treatment is  
20 what's been marked as Exhibit 16 your file in this matter?

21 A Yes.

22 Q And is that kept in the ordinary course of your  
23 office?

24 A Yes.

25 Q Okay.

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1 MR. BAKER: Your Honor, we'd move to admit 16.

2 THE COURT: Any objection?

3 MR. WARD: I'd like to look at it before it's admitted,  
4 just to see what's in there.

5 MR. BAKER: We can have a --

6 MR. WARD: I can do that at a break. I don't want to --

7 THE COURT: You don't mind if Mr. Baker examines this  
8 witness with virtue of this --

9 MR. WARD: No. Absolutely not, Your Honor.

10 THE COURT: Very well. Please proceed.

11 MR. WARD: And I won't make any foundational objections.

12 THE COURT: Okay. We'll address this later. Don't  
13 forget to remind me, Mr. Ward.

14 MR. WARD: Okay.

15 MR. BAKER: He's good at reminding us though, Your Honor,  
16 because I had completely forgot.

17 BY MR. BAKER:

18 Q Now, you're aware that Mr. Rodriguez had seen other  
19 providers prior to seeing you; is that fair?

20 A Yes.

21 Q And you're aware that he was transported from the  
22 Palms Hotel in an ambulance; is that correct?

23 A Yes.

24 Q And are you familiar with the ambulance services in  
25 Clark County, Nevada?

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1 A Yes, I am.

2 Q And I'd ask you to please -- and I'm doing it kind  
3 of backwards. I normally do the housekeeping afterwards but I  
4 don't want to forget, if that's all right?

5 A Okay.

6 Q If I can ask you to turn Exhibit Number 2, to which  
7 authenticity and genuineness has been stipulated, is this the  
8 American Ambulance Response bill?

9 A Yeah, American Medical Response.

10 Q Okay. And when you're looking at that, the records,  
11 what was Mr. Rodriguez's complaint at the time he was  
12 transferred by ambulance?

13 A At that point he was complaining of left knee pain.

14 Q And --

15 A And it occurred at that -- on that date.

16 Q And do you notice that they put ice on  
17 Mr. Rodriguez's knee on AMR three?

18 A Let's see. Yes, they applied ice.

19 Q And what's the effect of ice when you apply it to a  
20 traumatically injured knee?

21 A It is done in order to minimize and decrease  
22 swelling.

23 Q Swelling and effusion, which would be water on the  
24 knee?

25 A Yes. Fluid accumulation within the joint.

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1 Q Do you notice that they also immobilized his knee?

2 A Yes, they did.

3 Q And what is the effect of immobilization on the  
4 knee?

5 A Also the same type of thing. It will decrease  
6 swelling and fluid production within joint.

7 Q And what is the effect of a long-term resting period  
8 with respect to the knee? Does that also minimize effusion  
9 and swelling?

10 A Yes. It will decrease that, but it will also cause  
11 weakness and atrophy of the muscles which causes another set  
12 of problems.

13 Q Okay. If Mr. Rodriguez had ice applied to his knee,  
14 had his knee immobilized and then spent several hours in a  
15 room lying in a gurney in a restful point, would it be  
16 surprising to you that emergency room doctor would not note  
17 that he had no effusion or swelling at the time of an initial  
18 investigations?

19 A Well, those treatments are geared to stopping  
20 effusion, stopping swelling and diminishing bruising or  
21 minimizing bruising that may occur.

22 Q And that bruising, after the ice and the  
23 immobilization is taken off, could later appear?

24 A Correct.

25 Q And so my question, Doctor, just so I make a clean

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1 record, would it be surprising to you that an emergency room  
2 physician conducting an examination to that knee after ice was  
3 placed on the knee, the knee was immobilized and there was a  
4 long period of resting did not note swelling or effusion?

5 MR. WARD: Object to the form, as to whether it's  
6 surprising to her. I mean --

7 THE COURT: What's improper about that?

8 MR. WARD: Well, I don't think that's the issue at hand.  
9 And I don't think it's relevant as to whether it's surprising  
10 to her.

11 THE COURT: I think it's relevant. Overruled.

12 MR. BAKER: Thank you.

13 THE WITNESS: Normally in the pattern of injuries that I  
14 see, be it coming from football or coming, you know, from  
15 somebody tripping down their stairs at their own home, they  
16 don't -- the -- it takes actually several days for a bruising  
17 that comes from -- the deeper it comes from the body, the  
18 longer it takes to show itself.

19 So if it's an abrasion or a scrape or a scar, or  
20 something where somebody cut them and is superficial to the  
21 skin, it's almost immediately visible. But if it's an  
22 indirect injury to a joint, say a ligament or a meniscus, it  
23 has -- the bleeding that occurs is so deep in the joint, it  
24 takes a while for it to diffuse out to hit the skin.

25 The first thing you would see would be swelling.

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1 You can minimize that and stop it by immobilizing and icing  
2 it. But it will eventually come, given time. And the deeper  
3 it is within the limb, the longer it takes to show itself.

4 I've seen bruising from deep tissue injuries can  
5 take, you know, up to a week to show themselves. Sometimes  
6 they'll not even show themselves at the knee because if  
7 they've been walking on it, it will dissect and they'll have  
8 bruising at their ankle because gravity pulls it all down, and  
9 the only superficial area it comes out, at the first place,  
10 would be at the ankle itself --

11 Q And --

12 A -- if it's very, very deep.

13 Q And I appreciate you sharing that with me. It makes  
14 me lead to one question, and then I'm going to step back for a  
15 sec, okay?

16 A Uh-huh.

17 Q So it would be consistent with your testimony if  
18 Enrique Rodriguez was noted to have ecchymosis by a orthopedic  
19 surgeon in California approximately one week -- ecchymosis is  
20 bruising -- approximately one week after this accident?

21 A Correct. It also takes up to a week to ten days for  
22 bruising, once it shows itself, to resolve and to -- you know,  
23 that bluish discoloration turning into that purplish, turning  
24 into that green, turning into that yellow, that eventually the  
25 bruise goes away.

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1 Q And that's consistently orthopedically with how you  
2 would expect an injury to unfold?

3 A Correct.

4 Q Now the question that I asked before we got into  
5 bruising was: Would it be surprising to you if an individual  
6 that had his knee iced, had his knee immobilized and then was  
7 put at rest for several hours before being seen by an  
8 emergency room doctor did not evidence swelling or effusion at  
9 the time of his examination?

10 A Well that -- it's not surprising in the sense that,  
11 you know -- of course if he had a sledge hammer hit him it  
12 would be that way. But of an indirect trauma, if it's  
13 immediately immobilized and immediately treated it would take  
14 quite a while for the bruising and all of the secondary signs  
15 to show themselves.

16 Q And what's your understanding of the trauma in this  
17 case?

18 A It was indirect trauma, someone fell into him and  
19 caused hyperextension, twisting of the leg. He didn't quite  
20 fall, that's my remembrance of his history. You know, he was  
21 made unbalanced but did not actually fall to the ground.

22 Q Okay. And you've reviewed views -- bills from  
23 American Medical Response before?

24 A Yes.

25 Q And the bill in this case if you look at 2 is \$534?

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1 A Yes.

2 Q Was that reasonable, necessary and causally related  
3 to the subject accident?

4 A Yes.

5 MR. BAKER: Move to admit Exhibit Number 2, Your Honor.

6 THE COURT: Any objection?

7 MR. WARD: No, Your Honor.

8 THE COURT: 2 is admitted.

9 [Plaintiff's Exhibit 2 Received]

10 BY MR. BAKER:

11 Q Now you're aware --

12 MR. BAKER: Robert, I admitted 3, 4 and 5? Is that what  
13 was submitted?

14 MR. CARDENAS: If you checked up there on your --

15 MR. BAKER: Oh, okay. You had already given it to me?

16 MR. CARDENAS: Yes.

17 MR. BAKER: Thank you.

18 BY MR. BAKER:

19 Q Okay. Are you aware that Mr. Rodriguez went back  
20 L.A. and visited Dr. Nork?

21 A Am I aware of it?

22 Q Yes.

23 A Yes, I'm aware of it. I've seen the record.

24 Q And you've reviewed those records previously; is  
25 that correct?

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1 A Yes.

2 Q And well what is the name of Dr. Nork, his company?

3 A Gosh, I don't know.

4 Q I was asking Rob.

5 A Okay.

6 MR. BAKER: Is it Associated?

7 MR. CARDENAS: Associated Physician. Number 6.

8 MR. BAKER: Thank you.

9 BY MR. BAKER:

10 Q Would you please turn to Exhibit Number 6?

11 MR. BAKER: And I'm wondering if you could find me the

12 billing statement, please, for Number 6.

13 BY MR. BAKER:

14 Q Are you there?

15 A Yes.

16 Q Could you please turn to Exhibit Number 13?

17 A One -- page 13?

18 Q Yes, please.

19 A All right.

20 Q Would you please look to where it says diagnosis

21 from Dr. Nork?

22 A All right.

23 MR. BAKER: Your Honor, may I --

24 THE WITNESS: I see it.

25 THE COURT: I wish you would. I somehow got lost. I'm

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1 Q Right. A contusion can be an impact anywhere, can't  
2 it?

3 A Well, yeah. It depends on where it is, this says --

4 Q You can have a contusion --

5 A -- this states knee.

6 Q -- on your arm?

7 A Yes.

8 Q Okay. If somebody has a bruise on their arm do you  
9 say they have a bruise on their arm?

10 A No.

11 Q Do you say they have a contusion?

12 A I will usually call it -- well, that's my  
13 conclusion.

14 Q Yeah.

15 A I will say there is bruising, but that usually the  
16 contusion -- the conclusion is there is a contusion.

17 Q Right. That's the --

18 A In order to get to a bruise you have to have some --  
19 you have to have a contusion.

20 Q Right. That's the conclusion but if you see  
21 bruising, you say bruising or you say ecchymosis?

22 A Generally speaking you do, unless it's short -- I  
23 mean, sometimes doctors will take shortcuts. But generally  
24 speaking you try to supplement your opinion with facts.

25 Q Yeah.

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1           A     And you -- when you -- we're taught to that -- when  
2 we make our -- when we do our dictations.

3           Q     All right. Have long have you known Dr. Nork?

4           A     I don't know Dr. Nork.

5           Q     How long did you talk to Dr. Nork about what he said  
6 about this patient?

7           A     I never talked to Dr. Nork.

8           Q     How do you know about what Dr. Nork means when he  
9 writes down contusions?

10          A     I can only infer it, as to what he meant.

11          Q     So you have no information at all?

12          A     Other than his reports, no.

13          Q     Okay. Is ecchymosis a term that doctors commonly  
14 use?

15          A     Yes. We can use that term.

16          Q     And bruising is a term that doctors commonly use?

17          A     Yes.

18          Q     Did you see --

19          A     Those are the two -- those two are synonymous types  
20 of documentation.

21          Q     Did you see any indication in Dr. Nork's records  
22 where he noted bruising or ecchymosis?

23          A     No. He doesn't note anything in his physical  
24 examination --

25          Q     No --

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1 A -- from December 6th, 2004.

2 Q Nowhere, right?

3 A He doesn't use that terminology, no.

4 Q Right. And if a patient came to you --

5 MR. BAKER: Your Honor, this is past voir dire on the  
6 issue. It isn't a cross-examination.

7 THE COURT: I wonder where you're headed here, Mr. Ward?

8 MR. WARD: My objection will stand, that for her to  
9 determine what Dr. Nork meant when he meant when he wrote the  
10 word "contusion" specifically to suggest that he really meant  
11 bruising is speculation. And there's no foundation for this  
12 expert to testify as to what he meant when he said it.

13 THE COURT: I don't think that was the question that  
14 Mr. Baker posed of this witness.

15 MR. BAKER: I asked her if contusion was part of the  
16 process where deep blood comes up towards the surface--

17 THE COURT: Right.

18 MR. BAKER: -- that she had described.

19 THE COURT: Right.

20 MR. BAKER: And she testified, yes.

21 Is that correct?

22 THE WITNESS: Right.

23 MR. BAKER: And --

24 MR. WARD: And that's basis for my objection, is what  
25 she's testifying as to what he meant that the patient had when

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1 he examined him.

2 THE COURT: Well my understanding is that she has  
3 reviewed these notes and she is being questioned by Mr. Baker  
4 as a result of some of the things that she's reviewed.

5 So the way that you've characterized the question is  
6 really not precisely how Mr. Baker posed the question. I'll  
7 note your objection for the record. Overruled. Let's move  
8 on.

9 DIRECT EXAMINATION CONTINUED

10 BY MR. BAKER:

11 Q So contusion was noted by Dr. Nork in Los Angeles;  
12 is that right?

13 A That's correct.

14 Q And as you said that's exactly what you would expect  
15 to see in a week to ten days or two weeks after a indirect  
16 traumatic impact?

17 A Correct.

18 Q And could you check the date that that contusion was  
19 noted?

20 A December 6th, 2004.

21 Q Does that fall exactly into the time period that you  
22 were describing?

23 A Yes. It falls well within the timeframes for still  
24 noting bruising and contusions.

25 Q And then again that doesn't surprise you that from a

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1 medical point of view that he would show contusion within two  
2 weeks?

3 A Correct.

4 Q And in fact that's exactly what you would expect  
5 from a traumatic impact to the knee?

6 A Correct.

7 Q Now Dr. Nork referred Mr. Rodriguez to physical  
8 therapy at Rancho Physical Therapy?

9 A Let me see it. I know he was referred --

10 Q He went for physical therapy at --

11 A -- for physical therapy --

12 Q Right.

13 A -- at this time.

14 Q I believe that's Exhibit 16.

15 MR. CARDENAS: 15.

16 MR. BAKER: 15, it looks like 16, Your Honor, 15.

17 THE COURT: Okay. Got it.

18 MR. BAKER: Were you able to find the bill for Nork?  
19 We'll talk about that.

20 BY MR. BAKER:

21 Q What was the purpose of Doctor -- are you there?

22 A Uh-huh.

23 Q What was the purpose of Dr. Nork referring Enrique  
24 for physical therapy to Rancho?

25 A It was to treat the sprain/strain of the knee and

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1 the contusion.

2 Q And what sort of modalities were utilized at Rancho?

3 A Let me look here. Electrical stimulation, hot  
4 packs, cold packs. So you use ice. He did a physical therapy  
5 evaluation, electrical stim, which is to stimulate the muscles  
6 that have been disused. Pool therapy was done. Let's see,  
7 manual therapy was done, that would be range of motion, and  
8 I'd imagine strand -- therapeutic exercise strengthening to  
9 get the joint moving again.

10 Q Now, I kind of broke this down anticipating  
11 Counsel's objection a little bit.

12 If you look from Bates Numbers 7 -- let me think  
13 about how to do this.

14 Okay. Mr. Rodriguez on referral by Dr. Nork,  
15 treated at Rancho from the period of 12/8/04 to 4/14/05, do  
16 you see that?

17 A Let me see here? That's 12/8/2004 --

18 Q And I'll represent to you that in March of '05, is  
19 when you began seeing Enrique and referred him to Rancho.

20 A All right.

21 Q So it's fair to say that on --

22 A Yes, to Jim. But the last time he was seen at this  
23 point was January 31st of '05.

24 Q Oh, that's correct. The 4/14 is a billing  
25 statement.

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1 A Uh-huh.

2 Q And was the treatment of Enrique at Rancho between  
3 12/8/04 and 1/13/05 reasonable?

4 A 1/31.

5 Q 1/31 -- reasonable, necessary and causally related?

6 A That's well within the normal confines of treating  
7 sprain/strains.

8 MR. BAKER: And Your Honor, move to admit then --

9 BY MR. BAKER:

10 Q Can you tell me the Bates numbers for the treatment  
11 between those two dates?

12 A Sure. Rancho PT, Number 2 through to Number 5.

13 Q Were the treatment dates?

14 A Were the treatment dates.

15 Q And those --

16 A Well they're the billings for treatment dates  
17 between December 8th, 2004 and January 31st of 2005.

18 Q And I hate to ask you to do it, but are you able to  
19 see what the Bates numbers are for the actual treatment  
20 records?

21 A Really?

22 Q I think I can find it for you.

23 A All right.

24 Q Is it 00070?

25 A Yeah. They're placed backwards, so -- it actually

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1 starts on 70.

2 Q Right.

3 A . Okay. Rancho PT 70.

4 Q And goes through to 76?

5 A Yes. Those are the -- that was the initial intake  
6 evaluation.

7 Q And were -- was that intake records and the  
8 treatments rendered thereby were reasonable, necessary and  
9 causally related to the subject accident?

10 A Yes.

11 Q And then if you go from --

12 MR. BAKER: My apologies to the Court.

13 THE COURT: Sure.

14 MR. BAKER: I got kind of mixed up.

15 BY MR. BAKER:

16 Q To 00020?

17 A All right.

18 Q To 00051? Is that also treatment that was referred  
19 and -- by Dr. Nork?

20 A Yes.

21 Q And was the treatment between 20 and 51 reasonable  
22 and necessary and causally related?

23 A This was. Because he had two session of therapy. A  
24 group of treatment was done at the end of 2005, I guess, when  
25 he returned back to California.

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1 Q Uh-huh.

2 A And that's what you're talking about here, correct?

3 Q Correct.

4 A Because that's what I'm looking at as far as dates.

5 It's like they're not exactly well organized here. They go  
6 from back from the beginning, when they start talking about  
7 it, Dec 12th, 2006 and then it works backwards in the notes.

8 Q And Doctor, I'll refer to you --

9 A As to what they did.

10 Q I might not be that interested in admitting the  
11 actual documents into evidence.

12 A Uh-huh.

13 Q But you've reviewed the file of the treatment as  
14 prescribed by Dr. Nork; is that right?

15 A Yes, I have.

16 Q And the billing statements associated with those  
17 treatments are set forth in Bate stamps Numbers 77 to 80?

18 A Yes.

19 Q And that's treatment in the amount of \$6,783?

20 A Yes. Yes.

21 Q And was -- those bills associated with services you  
22 reviewed reasonable, necessary, and causally related to the  
23 subject accident?

24 A Yes.

25 Q And is that your opinion to a reasonable degree of

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1 medical probability?

2 A Yes.

3 Q Now you also refer --

4 MR. WARD: May I object? Note my objection for the  
5 record.

6 THE COURT: Sure.

7 MR. WARD: As to causation.

8 MR. BAKER: Okay.

9 MR. WARD: And --

10 MR. BAKER: Continuing your objection the basis that you  
11 discussed?

12 MR. WARD: And is this Dr. Nork's billing?

13 MR. BAKER: No. This is the Rancho Physical Therapy  
14 billing --

15 MR. WARD: Okay.

16 MR. BAKER: -- that was referred by Dr. Nork, contained  
17 at Bates stamp numbers 77 through 80.

18 MR. WARD: Okay.

19 BY MR. BAKER:

20 Q And you also referred Mr. Rodriguez for physical  
21 therapy after your initial evaluation of him; is not --

22 A Yes, I did.

23 Q And if you will refer to Bates numbers 80 through  
24 85?

25 A On the Rancho PT?

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1 Q Yes.

2 A All right. Yes, I'm here.

3 Q Those are the bills for the services on your  
4 referral to physical therapy; is that correct?

5 A Yes.

6 Q And that's in the amount of \$4,150?

7 A Yes.

8 Q And was the treatment that he received reasonable,  
9 necessary and causally related?

10 A Yes.

11 Q And were the bills generated reasonable, necessary  
12 and causally related?

13 A Yes.

14 Q And just so I make sure that I put it into the  
15 record with respect to Nork, were the bills reasonable,  
16 necessary and causally related?

17 A Yes.

18 Q Thank you. If you'll go back to your exhibit where  
19 you were treating Mr. Rodriguez?

20 A 16.

21 Q When was the next time you saw him?

22 A I initially saw him on March 28th, 2005 and the next  
23 time I saw him was September 30, 2005.

24 Q Are you aware that --

25 A Yes, let me see here. Okay.

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1 Q Okay. What was his condition on that time you saw  
2 him at your next visit?

3 A He continued to have the same symptomology. It had  
4 not resolved or diminished between his first visit and when I  
5 saw him pre-operatively.

6 Q Did you perform a physical exam at that time?

7 A Yes.

8 Q And what did your physical examination reveal?

9 A At that point in time he had an increased Q angle  
10 which is the alignment of the kneecap to the -- kneecap to the  
11 patellar tendon. He had traced mild crepitation, which is  
12 something you see underneath the patella, which can be due to  
13 trauma, but it can also be due to degeneration and disuse.

14 He had both medial and lateral joint line discomfort  
15 at that time, one plus synovitis which was inflammation and  
16 swelling that was tissue-related, not fluid. He had a very  
17 tight lateral retinaculum on clinical --

18 Q Sorry. Can you say --

19 A -- examination.

20 Q -- that again, please?

21 A Huh?

22 Q The last thing you said, please?

23 A On the one plus synovitis? Is that we're talking  
24 about?

25 Q Yes.

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1           A     Yeah. One plus synovitis. Synovitis is a -- to  
2 distinguish a swollen knee between fluid, you can palpate and  
3 tissue swelling. There is -- tissue swelling means the joint  
4 lining is inflamed. The joint lining is what produces the  
5 fluid in the joint. We have a physiologic fluid we have in  
6 our joint like lubricant so that the motor -- the gears don't  
7 get -- aren't dry moving.

8                     That's what happens with people with arthritis.  
9 They get pain because it's a dry joint. When you've had  
10 trauma or inflammation, it winds up being fluid in the joint.  
11 And if it's inflamed, the inflammation or the tissue created  
12 by injuries or other conditions that cause swelling, is  
13 basically the joints' protective mechanism. That's the  
14 synovitis, the joint lining is what protects the joint and  
15 actually heals it. It creates chemicals that will heal  
16 injuries, but it will also takes care of damage and trauma to  
17 joint. It's there to heal it and take care of it.

18                     So if it's inflamed that means there's a process  
19 that the joint -- the joint lining says, I need to help this  
20 joint out, I need to do something. And then it gets -- it  
21 will basically hypertrophy. As part of that you also get  
22 fluid with it too, so usually synovitis and diffusion.  
23 Diffusion is the term for being able to feel fluid in it, not  
24 just puffiness but it feels like there's fluid within the  
25 joint.

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1                   There's techniques of blotting the joint and, or you  
2 can touch it and you can feel the fluid wave. That can't  
3 happen with a synovitis, so you try to make a distinction when  
4 we do exam. We don't always in a shortcut way like this  
5 examination, put down I did ballottement, to determine that  
6 there was -- whether or not there was an effusion versus  
7 synovitis. I just went right to the chase. I saw synovitis  
8 of his tissue.

9                   Q     Correct.

10                  A     Inflammation of the joint.

11                  Q     Had his knee gotten better over time?

12                  A     No. It had actually had gotten worse because he had  
13 pain both medially and laterally.

14                  Q     And the first time that you saw him, you actually  
15 diagnosed him with a lateral meniscus tear; is that correct?

16                  A     I believe that's just actually a typo. It's a voice  
17 recognition thing. I don't recall that I have thought he had  
18 lateral meniscus tear.

19                  Q     Did you always think he had a medial meniscus tear?

20                  A     Yes.

21                  Q     And what was your basis for thinking he had a medial  
22 meniscus tear in your March visit with him?

23                  A     It was that he had significant -- he still had  
24 significant tenderness throughout, but when I tested his  
25 McMurray's it was painful primarily medially.

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1 Q Could you --

2 A I also looked at his MRI and I know when I looked at  
3 the MRI there was degeneration of the medial meniscus, and he  
4 had an antecruciate ligament strain.

5 Q Which MRI did you look at?

6 A The one that he came with. He came with an MRI.

7 Q So he actually brought you an MRI; is that right?

8 A Yes. Because the way I wrote this here, I did see  
9 an MRI. I didn't just read a report.

10 Q Now if you'll turn to Exhibit 7? I know, I'm sorry.

11 A It's all right.

12 Q It's not nice to mess with a surgeon's hands.

13 A No, not problem. All right.

14 Q Now you're an orthopedic surgeon, do you read MRIs  
15 all the time?

16 A Yes. It's one of our tools for treatment.

17 Q And you practice primarily in extremities; is that  
18 right?

19 A Yes.

20 Q And you received advanced diagnostic and  
21 radiographic training with respect to diagnosing injuries and  
22 extremities; is that right?

23 A Well yes, that's -- we're trained in it because we  
24 have to utilize the test. We're not taught -- as an  
25 orthopedic surgeon, primary care is maybe taught to read a

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1 report and make a determination to refer on to somebody else;  
2 they are looking for things they can treat. They may have  
3 some knowledge about say, general surgical or who knows what,  
4 but generally on an extremity we never -- we're taught never  
5 to rely on what a radiologist says. We're always to taught to  
6 read the reports -- read the films ourselves.

7 So I always try to make a distinction in my  
8 recording whether or not I actually physically saw the actual  
9 films. If I don't have access to the films and all I have is  
10 the report, I'll say "the MRI report indicates." That's the  
11 way I always put it, and when I write "the MRI reveals," it  
12 means I saw the films.

13 Q And I am not trying to disparage DCs or DOs but you  
14 would never defer to what DC or a primary DO read on an MRI  
15 film; is that right?

16 A No, I would not.

17 Q And certain things could make MRI readings  
18 difficult; is that right?

19 A That's correct.

20 Q And one of those things could be just the strength  
21 of the MRI machine itself? Is that fair to say?

22 A That is correct.

23 Q And when you look at 000004, that's the report for  
24 the MRI, correct?

25 A Correct.

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1 Q First of all, it was reasonable, necessary and  
2 causally related to send him for an MRI; is that right?

3 A That's correct.

4 Q And if you'll look at Number 2, the bill in this  
5 case was \$1800?

6 A Yes, it was.

7 Q Is that reasonable, necessary and causally related  
8 to the subject accident?

9 A Yes, it would be.

10 Q And the treatment the MRI itself was reasonable,  
11 necessary and causally related to the subject accident?

12 A Yes.

13 MR. BAKER: Move to admit 7, Your Honor.

14 THE COURT: Any objection to 7?

15 MR. BAKER: Same standing objection?

16 MR. WARD: I don't have any objections other than what I  
17 initially said.

18 MR. BAKER: And --

19 THE COURT: Very well. Noted for the record.

20 MR. BAKER: And Mr. Ward, if you're having trouble  
21 following stuff, and I'm at it, you're very welcome to walk up  
22 and look down at it.

23 MR. WARD: Thank you.

24 BY MR. BAKER:

25 Q Let's talk about the MRI itself. This MRI was an

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1 open MRI; is that correct?

2 A That's correct.

3 Q And if you could tell the Court about closed and  
4 open MRIs. Basically do they have a different geography?

5 A Yes, they certainly do. Open MRIs were designed --  
6 they're at much lower strength because what you do -- MRI is a  
7 magnet. You put a person into a magnet. It's not an X-ray,  
8 it's not putting photons of radiation into somebody to get a  
9 picture of their body. We're putting them into a magnet to  
10 magnetize their tissues and then scan it to get a picture of  
11 the magnetic characteristics of whatever tissue we're looking  
12 at -- be it a knee, an abdomen, a heart, whatever it may be.

13 The strength of the coil is important in that it  
14 tells us basically how much definition we can get. It's like  
15 having a .1 megapixel camera versus a ten megapixel camera.  
16 You're going to get further definition.

17 You can -- and there's another aspect to MRIs that  
18 you have to deal with. It's the length of the tube, it's the  
19 magnetic strength which is what Tesla talks about, that .35  
20 Tesla -- 1.5 is considered standard for high definition at a  
21 minimum 3 Teslas is the newest technology, but it's limited --  
22 the 3 Teslas don't have the same software capability. They  
23 don't have the same support structures that 1.5 Tesla has; 1.5  
24 Tesla is considered standard for high definition if you really  
25 want to know exactly how good an MRI is, use a 1.5 Tesla. And

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1 you want a company that has very, very advanced software to  
2 get you to the information you need. And a 1.5 Tesla strength  
3 magnet magnetizes you to a certain level.

4 It takes a little bit longer time than say a 3  
5 Tesla. Three Tesla, the reason that they even developed it is  
6 to get the scan faster, because one of the big complaints is  
7 people laying in a tube and they just can't sit still if  
8 they're in pain. So, but what you have to do is then you have  
9 to magnetize the people, and they have residual magnetic  
10 signals within them and you then have to -- you can also get  
11 into where the additional magnetic -- it causes artifacting.

12 It accentuates any artifacts that may be present  
13 because the magnet is so strong, and that's one of the  
14 downsides of the 3T units is that you have to have software to  
15 take out the artifact, because it magnifies artifact and  
16 that's why they're sort of, more or less still standard within  
17 the radiology community is 1.5 Tesla, because the support  
18 structures for the software are so good that they can make it  
19 look -- they can define it better. And it doesn't magnify  
20 artifacts which a 3 Tesla unit will do if they don't have good  
21 software support for the unit.

22 So 3Ts are not as widely used as a 1.5 Tesla unit  
23 would be.

24 Q Now, let's -- before we go into this particular --  
25 because this was a .35 Tesla machine; is that right?

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1           A     Right.  It's an open-sided MRI for people who feel  
2     too claustrophobic.  It has a shorter tube, so you've got less  
3     magnetism and it's -- but it's a quicker sample.  So what  
4     you're getting is a less defined picture.

5                     The best analogy is having like a one megapixel  
6     camera versus a ten megapixel camera picture.

7           Q     And that -- and in your analogy, this would be about  
8     a third of the megapixels that you were talking about  
9     together?

10          A     Well 1.5 is standard in the -- you know, 3.0 is the  
11     highest that you can get so --

12          Q     And this was point --

13          A     -- it's one-tenth of it and it's one -- 20 -- it's  
14     20 percent of what a 1.5 is.

15          Q     Just not a very good machine; is that fair to say?

16          A     That's correct.  It'll show shadows and it'll be  
17     grainy and you're going to have to -- you're going to have  
18     difficulty interpreting it well.

19          Q     And before we even get into that, there's a  
20     percentage of false negatives and false positives in any MRI  
21     read of the knee; is that fair to say?

22          A     That's correct.

23          Q     And when you compound that with the fact that this  
24     is a .35 Tesla machine, you're starting to get into a  
25     situation where some oversight would be really expected; is

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1 that fair to say?

2 A Some inaccuracies within the read of the film would  
3 be expected, meaning you could miss something. You could miss  
4 something. You could have -- it could tell you something's  
5 there that isn't there, and it could also tell you that  
6 something isn't there that is there. Because it's too grainy  
7 a picture to really be able to determine, especially in a  
8 person who's say over the age of 30.

9 You get degeneration within a meniscus, meniscal  
10 tears can hide within that degenerative meniscus. You know,  
11 and degenerative meniscal tears, as we get over -- when we  
12 start approaching 30s, 40s and 50s, age-related changes which  
13 is degeneration. It's when the meniscus dries out.

14 A meniscus is like a shock absorber and it's very  
15 akin to a rubber band. In that sense it's basically a gasket  
16 or a seal. It's got a rubbery-like constitution to it, and  
17 just like a rubber band what happens to a rubber band as it  
18 gets older, it starts drying out. And degeneration of the  
19 meniscus is the drying out, like a drying out of a rubber  
20 band. It gets easier for it to be injured with any kind of  
21 trauma.

22 So those are all the factors that, you know, kind of  
23 play in as to why it really needs a clinician. I mean,  
24 there's tons of studies out that we didn't even talk about,  
25 what's more specific, what's more accurate? And certainly

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1 open-sided versus the 1.5 Tesla closed unit, there is ten --  
2 five times the accuracy in the 1.5 Tesla.

3 Q By the way did you notice who read this particular  
4 film? It was a DO?

5 A Correct, yes.

6 Q And that's the primary care physician that you said  
7 you would never defer to with respect to a read?

8 A No.

9 MR. WARD: Object; leading, argumentative.

10 THE COURT: Sustained. Ask you to rephrase.

11 BY MR. BAKER:

12 Q Is that the type of person that you would not defer  
13 to?

14 A I normally, as I said previously, will read my own  
15 MRIs.

16 Q In the case where a film is read by a DO and it's on  
17 a .35 Tesla machine and the individual is in the age period  
18 that we talked about, being 35 or older, is there anything  
19 nefarious or curious or suspicious about sending out that film  
20 for a second read?

21 A No, not at all.

22 Q And that's something -- is that something you see  
23 that occurs all the time?

24 A Well it certainly will occur if another doctor  
25 certainly say -- as an example, I would look at it and I said

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1 this is read wrong. Then we would -- you know, normally what  
2 would happen, if it wasn't, you know, a question of a  
3 liability case where there would be arguments, I would just  
4 act on it and say, you know, this MRI says there's nothing  
5 there and I think there is. And talk to the patient and make  
6 a determination, because they're the person who's being  
7 responsible for what's going to transpire.

8 But if there's a question of oversight over it and  
9 you totally disagree with it, then I would protect myself with  
10 getting a second read because I wouldn't want argument that it  
11 was my opinion against this person's opinion.

12 Q And --

13 A You know, to try to get a second opinion, now I  
14 don't think I -- you know, the example, I think there's  
15 something here. I think it needs to be looked at again. I  
16 don't think this doctor read it properly.

17 Q Okay. And in instance -- like, in Enrique  
18 Rodriquez, are you familiar that he continued to have pain  
19 after the MRI read?

20 A Yes.

21 Q So in an instance where an individual continues to  
22 have pain, there's a .35 Tesla machine, that the film is read  
23 by a DO, and the person falls into the age category that we're  
24 talking about, is there anything suspicious, nefarious or  
25 wrong in sending the MRI out for an additional read?

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1 A No, not at all.

2 Q And in fact does good orthopedic practice require  
3 that you in fact do send it out?

4 A Yes. You want to have as much backup for what  
5 you're going to -- what you're going to recommend to a patient  
6 as possible.

7 Q Now you're aware that this MRI was sent out for a  
8 second read and that's in Exhibit Number 9?

9 A Yes, I'm aware of that.

10 Q And could you turn to Exhibit Number 9? First of  
11 all, with respect to Exhibit Number 9, was that referral  
12 reasonable, necessary and causally related to the trauma?

13 A Yes.

14 Q And that's your opinion to a reasonable degree of  
15 probability?

16 A Yes.

17 Q And as to all your opinions to reasonable, necessity  
18 and causation up to this point, been to a reasonable degree of  
19 probability?

20 A Yes.

21 Q And this MRI was read by a DC; is that correct?

22 A Yes.

23 Q And could discuss the impressions with the Court?

24 A The impressions sections reads:

25 "Thickening, some degree of thickening,

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1 intermediate single change and equivocal  
2 redundancy/laxity of the anterior cruciate ligament,  
3 consistent with a partial tear and/or early mucoid  
4 degeneration."

5 That means he felt, when he reviewed it, the  
6 anterior cruciate ligament was not completely normal, that  
7 there -- the conclusion of these types of changes in signal,  
8 is that, it either is degeneration of that cruciate ligament,  
9 or an injury had occurred and there's an attempt at healing of  
10 it.

11 Q I'm more interested in the healing.

12 MR. WARD: I want to object and I wanted to wait until  
13 the witness finished the answer.

14 But I would object on the basis that she's offering  
15 an opinion as to what he thought and that's speculative.  
16 There's no foundation that she's ever talked to him. There's  
17 no foundation that she knows him and she's offering her  
18 interpretation of what he thought when he wrote this and I  
19 object to that.

20 MR. BAKER: Impressions are what somebody thinks, and she  
21 is speaking about the fact and relating to what he wrote down  
22 on the piece of paper with respect to his thoughts concerning  
23 the condition of the anterior cruciate ligament.

24 MR. WARD: And my objection, Your Honor, is not her  
25 testifying as to what he wrote down. My objection is to her

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1       testifying as to what he meant when he wrote that down.

2               THE COURT: Well --

3               MR. WARD: That's the speculative part.

4               THE COURT: -- your objection's noted for the record.

5                       The thing of it is this is a bench trial and so I  
6 think this expert witness probably is helpful to the Court in  
7 figuring out what the facts are in this case.

8               MR. BAKER: Thank you, Your Honor.

9 BY MR. BAKER:

10              Q       I'm more interested if you could please speak to the  
11 Court about what mucoid degeneration is?

12              A       The anterior cruciate ligament is an internal  
13 ligament within the joint. We have four ligaments within our  
14 knee and we have two that are outside the joint and two that  
15 are with -- inside the joint, and it's easy to determine the  
16 two. The two that are inside in the joint are called the  
17 cruciate, they cross; that was what cruciate means.

18                       They are in the middle of the joint and they keep,  
19 they basically keep the lower half of the leg from moving  
20 forward and backward. That's why one's called anterior  
21 cruciate and one's called posterior cruciate. Anterior  
22 cruciate will not allow forward movement of the calf on the  
23 femur, so it doesn't -- so the foot can't come out from  
24 underneath the leg.

25                       And the posterior cruciate protects against that

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1 posterior movement. They are crossing ligaments inside the  
2 middle of the joint, so it describes what they are.

3           And then thirdly, the other thing is, it's  
4 intrasynovial, meaning that ligament's blood supply comes from  
5 the ends of the ligament. There is no blood supply coming  
6 from tissues around the ligament. The collateral ligaments on  
7 the outside of the joint get blood supply from all of the soft  
8 tissues, so if they're traumatized, they heal very easily.  
9 When the cruciate ligaments are injured by any kind of forward  
10 -- any kind of hyperextension injuries, if we're going to talk  
11 about the mechanism of injury that was described that occurred  
12 to this individual.

13           It is putting at risk the anterior cruciate  
14 ligament. That's the ligament that is the most likely to get  
15 damaged with a knee that gets hit and extends, hyper-extended,  
16 meaning back-kneed where your knees straight and they try to  
17 push your knee even further straight. That's the ligament  
18 that kind of holds all that together so you don't dislocate  
19 your knee.

20           So when it's traumatized, it's got to heal  
21 internally and it can only get its blood supply to heal from  
22 the top and the bottom, from the tibia and the femur where it  
23 attaches. There is no blood supply anywhere else. So where  
24 is the area of the meniscus -- or not the meniscus, but the  
25 cruciate ligament that's going to be most likely to get to not

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1 heal? It's the middle part, because the blood supply can only  
2 go so far. If you strain it, you've stretched the ligament,  
3 the little capillaries that cover the joint that come from the  
4 bone can get traumatized. If they get damaged then the blood  
5 supply to that anterior cruciate ligament is compromised and  
6 then the ligament can go on to completely rupture  
7 intrasynovially.

8           One of the factors of, you know, say it's a partial  
9 injury. The mucoid degeneration is basically like partial  
10 rupture. Mucoid means it's deteriorated, the ligament isn't  
11 normal any more. The mucoid degeneration is basically parts  
12 of that ligament did die and they turned to liquid, spots of  
13 the ligament that did -- their blood supply was compromised.

14           So mucoid degeneration means the blood supply was  
15 compromised and that ligament in little areas, it's like horse  
16 hairs, some of the little fibers just didn't survive. And  
17 when they don't survive, they liquefy and that's what mucoid  
18 degeneration is, mucus. It can't turn into water because it  
19 was a tendon at one -- it was a ligament at one time. It  
20 turns into a mucousy tissue as it deteriorates.

21           Q     And Doctor, are you

22           A     So --

23           Q     Oh, I'm sorry.

24           A     Go ahead.

25           Q     Are you aware that Dr. Heaps' deposition was read

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1 and diagnosed Mr. Rodriguez with some partial ligamentus  
2 tearing upon his examination?

3 A Correct. I'm aware of that.

4 Q And that's consistent with what you just spoke  
5 about?

6 A It's consistent with this MRI report.

7 MR. WARD: Object; that misstates what Dr. Heaps said.

8 MR. BAKER: Well, we'll let the Court remember that.

9 THE COURT: Well, I mean can you point to a portion in  
10 the deposition testimony that was read into record that --

11 MR. BAKER: Can I see?

12 THE COURT: -- supports your statement?

13 MR. WARD: I can track it down in a moment.

14 THE COURT: Okay.

15 MR. WARD: The -- I can explain exactly where I differ,  
16 and that is the question asked if that's what Dr. Heaps found  
17 on examination. Dr. Heaps testified he didn't find anything  
18 on examination. He offered a conclusion that he had a sprain  
19 of the knee, but he didn't say that was based on something  
20 that he found on his examination. He said that was based on  
21 what the patient told him. What he found on his examination  
22 was not --

23 MR. BAKER: On page 40, lines 20 through 21 of Dr. Heaps'  
24 examination, Dr. Heaps' impression, there was fibrous damage  
25 to the medial collateral ligaments, Your Honor.

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1 MR. WARD: That's -- I agree. That's his impression but  
2 that isn't -- but that doesn't say that's what he found on his  
3 examination and that was the question, "What did he find on  
4 his examination?"

5 BY MR. BAKER:

6 Q If Dr. Heaps had an impression there was damage to  
7 ligaments, would that be consistent with what you said?

8 A Yes.

9 Q Thank you. And more importantly for purposes of  
10 this conversation, mucoid degeneration, does -- can that hide  
11 a frank meniscus tear from being observed through MRI  
12 observation?

13 A Mucoid degeneration within the interior of a  
14 meniscus can hide meniscal tears, yes.

15 Q Okay. Is it fair to say then in this case we have a  
16 bad machine?

17 A Yes.

18 Q Read by a DO?

19 A Correct.

20 Q With a follow-up read which was reasonable,  
21 necessary and causally related?

22 A Correct.

23 Q And then you read the film yourself?

24 A Yes.

25 Q With a higher level of training?

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1 A Correct.

2 Q And what was your impression? What was your  
3 diagnosis on the basis of the --

4 A Let me go back to my --

5 Q -- MRI that was conducted in --

6 A January of '05.

7 Q -- January of '05, a month-and-a-half after the  
8 accident?

9 A Clinically, I felt -- well when I reviewed the MRI I  
10 though there was meniscal tear and this said lateral, but I  
11 meant medial. That the anterior cruciate ligament was  
12 strained and that there was some injury to the patella femoral  
13 joint with lateral patellar compression syndrome.

14 That -- so the kneecap was a little bit off to the  
15 side, it was out of alignment a little bit, which can happen  
16 once you've immobilized the leg and the muscles start to  
17 weaken, then the patella -- the kneecap will start getting out  
18 of alignment.

19 Q Now if was suggested that you ran off and performed  
20 a surgery on Mr. Rodriguez's left knee without sufficient MRI  
21 or diagnostic evidence, how would you respond to that?

22 A He'd had failure of conservative management. He had  
23 an MRI which was to say the least, lowest accuracy type of  
24 test, and a clinical examination that said there was still  
25 something ongoing that had not responded to what the original

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1 -- the original diagnosis was contusion, sprain/strain.

2 Contusion, sprain/strain should get better within  
3 six weeks. He continued to have the same -- similar  
4 symptomatology going over many, many months. In fact, I  
5 didn't operate on him until October of 2005, which is not  
6 quite a year before the -- the year after the accident and he  
7 had the same persisting symptoms. At that point in time, he  
8 meets all criteria and even if he came off the street and  
9 didn't have an injury, and you know, with -- and we didn't  
10 have sprain/strain, persisting symptoms with a clinical  
11 examination indicating potential meniscus problems, on a  
12 clinical basis he meets all the criteria for surgery.

13 Q Okay.

14 A So --

15 Q Eventually did you perform surgery?

16 A Yes.

17 Q And although MRIs and everything are nice is the  
18 gold standard for finding a meniscal tear, an arthroscopic  
19 intervention?

20 A That's correct. It is considered the gold standard.

21 Q What -- when did you conduct your surgery?

22 A It was completed on October 4th of 2005.

23 Q Could you tell the Judge what you did?

24 A We did -- well, the arthroscopic treatment is  
25 basically you put cameras into the joint through little stab

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1 holes -- stab wounds, and we take a look at the interior of  
2 the joint. We can then, through other little stab wounds, put  
3 probes, push on -- and a lot of people will talk about  
4 degeneration within the meniscus and meniscal tears caused by  
5 degeneration. You have to actually palpate the meniscus in  
6 order to determine that. That can't be done with an MRI. It  
7 can only be done with actually palpating it through an  
8 arthroscope -- I mean other than opening it physically up with  
9 a big, huge incision which is not done anymore.

10 I mean it was done in the '70s -- '60s and '70s but  
11 it's currently -- no one opens up a joint unless you've got  
12 some tumor to deal with or something huge or doing cartilage  
13 transplant surgery. We do open -- I do arthrotomies for  
14 cartilage transplants but that's in order to place cartilage  
15 on the bone's surface.

16 Generally speaking we treat all meniscal problems,  
17 ligament tears and everything within the knee and a large  
18 amount of articular cartilage sorters, all through the  
19 arthroscope because it allows us to not only look at what  
20 we're doing, it allows us to put instrumentation in and  
21 introduce tissues. We can suture through a scope, we can put  
22 screws and we can even augment by putting in artificial  
23 ligaments to replace, like the anterior cruciate, and all  
24 through a scope. We drill tunnels and we put them in, but we  
25 palpate the joint.

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1           So that's the gold standard. We can see everything.  
2 We can push, pull, maneuver, manipulate and we can prove  
3 whether or not there's stability, instability, tears or other  
4 problems within the joint.

5           Q     Now you have some pictures?

6           A     Yes.

7           Q     Would you please demonstrate for the Judge what you  
8 found intraoperatively?

9           A     Okay. Yes. What I found --

10          MR. BAKER: Your Honor, can you -- do you mind if she  
11 stands up?

12          THE COURT: No, no. It's quite all right.

13          THE WITNESS: I mean I'm sure in all the pictures you've  
14 seen, you -- these are the actual pictures. I have a copy of  
15 my own. The patient was --

16          MR. WARD: May we can we have this marked and admitted  
17 into evidence, Your Honor?

18          THE WITNESS: Well, yeah. As long as I eventually get  
19 them back, you guys can have them.

20          THE COURT: So --

21          MR. WARD: You're talking these pictures?

22          THE COURT: -- well, if they're admitted --

23          MR. BAKER: Yes.

24          THE COURT: -- they won't come back.

25          THE WITNESS: Oh, well that's fine. I mean, you're not

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1 coming back to see me, Mr. Rodriguez, right? You're -- you  
2 know, so --

3 MR. BAKER: Well, let me do it this way first, to --  
4 BY MR. BAKER:

5 Q Doctor, was the entirety of your treatment  
6 reasonable, necessary and causally related to the subject  
7 accident?

8 A Yes.

9 Q And you have a bill in this case; is that correct?

10 A Yes.

11 Q And could you please tell the Court what the amount  
12 of your bill was?

13 A Oh, I didn't bring it with me, but I -- it was  
14 somewhere in the \$16,000 range.

15 Q I have the bill which was included in Exhibit 16 as  
16 \$16,701.50?

17 A Correct.

18 Q Was that reasonable, necessary and causally related  
19 to the subject accident?

20 A Yes.

21 Q And with respect to both of those opinions are those  
22 opinions held to a reasonable degree of medical probability?

23 A Yes.

24 MR. BAKER: Move to admit 16, and then I think you could  
25 put the pictures as part of 16, Your Honor.

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1 THE WITNESS: Yeah. Well, I don't have any problem with  
2 her having them. You know, with the Court having them, that's  
3 not an issue.

4 THE COURT: Did you want to see these pictures, Mr. Ward?

5 MR. WARD: I just would like them marked and admitted  
6 into evidence if they're going to be talked about.

7 THE COURT: Okay.

8 MR. BAKER: And I just wanted to get -- so Your Honor, I  
9 move to admit 16.

10 THE COURT: And I didn't hear any objections?

11 MR. WARD: No, there isn't any objection.

12 THE COURT: 16 is admitted.

13 [Plaintiff's Exhibit 16 Received]

14 THE COURT: I guess we'll ask the clerk to mark these.  
15 Do they need to be marked individually or can they be marked  
16 all as a packet?

17 MR. WARD: I think it would be worthwhile marking them  
18 individually, if that's possible?

19 MR. BAKER: Maybe just A and B, Your Honor.

20 THE COURT: I'm sorry?

21 MR. BAKER: A and B.

22 THE WITNESS: There's four of them.

23 THE COURT: There's --

24 MR. BAKER: A, B, C and D? If I got that right?

25 THE COURT: No, five of them.

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1 THE WITNESS: Five, okay. There's five.

2 THE COURT: Okay. Okay.

3 [Clerk to Court]

4 THE WITNESS: A through E, if it's five.

5 THE COURT: You're right, yes. Okay.

6 MR. BAKER: If we go above J, I can't get that.

7 THE WITNESS: Yeah. Me either.

8 MR. BAKER: Right.

9 THE WITNESS: I have trouble with that myself.

10 THE CLERK: Well the first one is 78 and then 78A, B, C  
11 and D --

12 THE COURT: And E.

13 THE WITNESS: That will work.

14 THE COURT: Oh, the first one's 78?

15 THE CLERK: Correct.

16 THE COURT: Okay. Great, so ordered.

17 [Plaintiff's Exhibit 78A through E Received]

18 BY MR. BAKER:

19 Q And incidentally just so I get it into the record,  
20 Dr. Heaps on his description of the location of pain in this  
21 patient said it was on the medial aspect of -- beneath the  
22 patella. Is that consistent with a medial meniscus tear?

23 A Correct. It is.

24 Q Okay. You were describing to the Judge what you saw  
25 in your pictures?

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1 A Oh, what I did find --

2 Q Well, let's let them get them back for you first.

3 A Okay. Not a problem.

4 [Court confers with Clerk]

5 THE COURT: Okay. All right.

6 THE WITNESS: One -- this is -- I don't know if you want  
7 to mark all these separately, but I guess we could -- if you  
8 want put stickies on it? I could tell you what each picture  
9 shows, if you'd like to do that?

10 THE COURT: Okay, great. Stickies, you mean like this?

11 [Clerk to Court]

12 THE COURT: Well I think what she's saying is that each  
13 picture contains some different --

14 THE WITNESS: There are different things on the pictures.

15 THE COURT: -- anatomy -- I guess you could just write on  
16 there, Doctor.

17 THE WITNESS: Okay. Not a problem.

18 THE COURT: If that's all right with Counsel, you could  
19 just write on the --

20 THE WITNESS: Okay.

21 THE COURT: -- pictures.

22 THE WITNESS: All right. This is the patella femoral  
23 joint. So this is patella and this is femur. And the first  
24 picture, which is the top left picture, shows the irregularity  
25 which is condromalacia. That's the term that it is when you

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1 see this physical appearance of the articular surface.

2           The articular surface should be glossy smooth and  
3 you should be able to see a well defined line. When you  
4 don't, when it looks irregular and looks like there's peach  
5 fuzz on it, it means it's -- the articular cartilage is  
6 deteriorating. And we see this patella femoral problem, as  
7 you can see with age, but you can see it from trauma, there --  
8 we have to kind of put it together as to why you see it but we  
9 definitely see a articular cartilage abnormality.

10           The femoral trochlea, this is the groove between the  
11 patella. He had some fluid in the joints, so sometimes what  
12 happens is you get a -- it gets -- the picture gets fuzzy  
13 because of bleeding. And I always do my MRI -- I do my  
14 arthroscopies without a tourniquet because it lessens the  
15 probably of getting DVT and this gentleman had a history of  
16 clots. And I felt it was important not to put a tourniquet on  
17 his leg so he could get another --

18 BY MR. BAKER:

19           Q     Blood clot?

20           A     -- potentially an embolis. We even treated him with  
21 Lovenox for a while just to minimize the risk of clots  
22 forming. Because that's one of the complications of these  
23 surgeries, is that you could wind up with clots. So you  
24 suffer with sometimes not getting a great look at it. So, I  
25 probably took this picture -- one of the technical problems is

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1 it's clear when you decide to push the button and when you  
2 push the button, all of a sudden it gets fuzzy, and so you're  
3 sort of trying to catch it when it's clear.

4 Q Like the three-year-old not smiling anymore?

5 A And they stop smiling, exactly. It's like taking a  
6 picture.

7 So this was unfortunately taken. I was -- really  
8 did it to take a look at the alignment, but the kneecap has  
9 got a little bit of irregularity; when you look at it's not  
10 even. The joint ought to be even. If it isn't even, it's  
11 tilted. That means there is some malalignment in the kneecap  
12 area, so there's a little malalignment.

13 THE COURT: Okay. Let interrupt with you here for a  
14 moment.

15 Mr. Ward, do you want to come up here and look at these  
16 pictures as she's testifying?

17 MR. WARD: Sure.

18 THE COURT: It's kind of hard for you to know what's  
19 being said.

20 MR. WARD: I just figured it was going to be hard to see  
21 them from --

22 THE WITNESS: Yeah. It's going to be hard.

23 MR. WARD: -- small pictures and I didn't want to  
24 interfere with Your Honor looking at them.

25 THE WITNESS: This is the kneecap joint with the

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1 irregularity which would be the condromalacia, which shows  
2 it's not a hundred percent pristine. It's -- this has got  
3 degeneration within it. This shows the alignment of the  
4 kneecap joint with the groove that the kneecap sits in, and  
5 this is the kneecap itself. And you can see there's a little  
6 bit of malalignment because the spaces are not equal. There's  
7 a little wider on one side than the other which means that the  
8 kneecap is just a tiny bit tilted, not a tremendous amount by  
9 any means.

10           And during a full range of motion the kneecap could  
11 start out being straight and then as it gets further and  
12 further, it could tilt more and more and more, until it's all  
13 -- until when you get it fully bent it's way off the side.  
14 So, we try to check for all these things and this was just  
15 trying to get a picture of that.

16           This is looking at the medial meniscus with buckling  
17 which is, you know, potentially got some degeneration. The  
18 good news is other than this area, which is to the inside  
19 part, that is showing potential damage to the articular  
20 cartilage. But generally speaking much smoother than this  
21 kneecap cartilage was and the tibia, which is below. So,  
22 you're looking at the tibia as the floor and the meniscus,  
23 which is the shock absorber, which is this little area which  
24 is a crescent. Meniscus means moon and that's Latin and it's  
25 crescent moon, basically.

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1           So it's what we call semi-lunar cartilage, that's  
2 what the term meniscus means. So it looks like a crescent  
3 moon. But what does it is, it makes that -- the tibia which  
4 is flat meet the femur. When you look at the femur, the  
5 femur's rounded, the round and the flat, it's like putting a  
6 square peg in a round hole; they don't work. And this makes  
7 them work together.

8           So what the meniscus does -- they used to think it  
9 was avascular, it was a remnant, it didn't do anything, but it  
10 actually is a shock absorber. It allows full weight  
11 transmission across the whole tibia from the femur. So the  
12 areas of the femur that are -- that directly hit bone to bone  
13 aren't taking all the pressure and that the whole of this  
14 curved surface is transmitting pressure across the whole of  
15 the tibia.

16           And when the meniscus is removed completely, as it  
17 was done say in the '50s and '60s, they used to take -- just  
18 make a big incision and cut the whole thing out because they  
19 knew it was not vascular. In adults, only ten percent of the  
20 meniscus edge has actually got a blood supply where it can  
21 heal. And that's the problem when you have trauma to the  
22 meniscus, the meniscus doesn't have the capability of healing,  
23 especially when it's damaged on its interior.

24 BY MR. BAKER:

25           Q     Because its lack of vascularity?. That's why

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1 children, you can do surgery on, because up to a half of their  
2 meniscus will have a blood supply. It's as they grow and the  
3 meniscus gets bigger and then they age, that the meniscus  
4 becomes more avascular and only at the edges where it will  
5 heal.

6 So, when you have a detachment along the edge we try  
7 to fix all of those, because we've found over time that if you  
8 don't fix the meniscus and you take the whole thing out,  
9 you're going to wind up with progressive arthritis of the  
10 joint because of the action of removing that shock absorber.  
11 So all the weight's got to go through one small area.

12 They found in studies -- and I can get them for you  
13 if you want to actually read the studies -- that 50 percent of  
14 your weight is -- comes through the meniscus and 50 percent  
15 comes through the direct bone to the -- tibia to femur. So if  
16 you remove that half of the weight-bearing area, that means  
17 that the only -- the weight-bearing area that normally takes  
18 it because of shape, has got to twice the amount of work over  
19 the rest of that person's lifetime which means it will  
20 degenerate twice as quickly as another individual.

21 So we basically are -- potentially, if we take out a  
22 whole meniscus, a subtotal meniscectomies, we don't like to do  
23 them are -- you're basically sentencing that person to  
24 arthritis in their knee by removing the shock absorber.

25 Q May I ask you a quick question? You described the

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1 non-arthritic quality of the articular surfaces?

2 A Uh-huh.

3 Q And however there's a frank medial meniscus tear; is  
4 that true?

5 A Yes. But he also doesn't have exactly a hundred  
6 percent no-problem on the medial condyle. He's got an area  
7 that's irregular, that's only shadowed because it's on the  
8 edge of the picture here.

9 Q But that's indicative of a traumatically-related  
10 tear of the meniscus?

11 A Yes. It sits -- yes. When you have degenerative  
12 arthritis, it's a uniform loss of the articular cartilage  
13 throughout the whole joint. You don't have spots that are  
14 deteriorating.

15 Q And you don't see that in this case?

16 A Correct.

17 Q Which indicates to you that meniscal tear is a frank  
18 traumatically-related meniscal tear?

19 A It's causing traumatic degeneration of the articular  
20 surface and it has to come from some place.

21 Q So the degeneration of the articulated surface is  
22 caused by the frank meniscal tear; is that right?

23 A Yes.

24 Q And that meniscal tear is entirely consistent with  
25 your reading of the MRI from January; is that true?

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1           A     Correct.

2           Q     And is that your opinion to a reasonable degree of  
3 probability?

4           A     Yes.

5           Q     So in fact the findings that you're seeing on these  
6 films is all consistent with what you saw in the January MRI,  
7 which you read yourself?

8           A     Correct.

9           Q     And that's your opinion to a reasonable degree of  
10 probability?

11          A     Correct. Now this next picture the last one on the  
12 front page shows the anterior cruciate ligament. The anterior  
13 cruciate ligament normally -- this is -- you can see it's  
14 intrasynovial. You see this redness on it. It's got all  
15 these -- you see the little vessels on the top of it, and then  
16 you see all this bunch of like gunk on it, like tissue. Like  
17 why is that thickened? The ligament should look white like  
18 the articular surface.

19                 That's because that's a traumatized area of the ACL  
20 that's been trying to heal. The lining, the stuff that covers  
21 the top of the ACL does have the capability to do some limited  
22 healing and that's been -- there's an area here with this  
23 redness -- this is the femur up here, the notch where it  
24 attaches.

25                 And this is the middle part of the ligament which is

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1 consistent with the MRI finding that when it was -- when you  
2 look at that mucoid degeneration that there was some trauma  
3 and there was some attempt at healing, so he had a partial  
4 ACL. That's what you clinically see here.

5 Now the lateral joint, this is the lateral. The  
6 outside part looks absolutely pristine, normal lateral  
7 meniscus, normal articular surface, normal femur. Okay.

8 Q It's pretty.

9 A Yeah. It was very pretty. When you go back to the  
10 medial side, you see this again. There is the articular  
11 cartilage again. When you look at the notch towards the edge  
12 and that's articular cartilage degeneration.

13 Q And that --

14 A And --

15 Q -- in your opinion, is directly related to the  
16 trauma in the subject accident?

17 A Well, it's more flat-like, which is what you what  
18 consider. If it was degenerative, like I said, it's just a  
19 buffing. It's just --

20 Q So --

21 A The patella femoral joint is more degenerative  
22 because it's like fuzzy, peachy fuzz, because it's thinning  
23 out uniformly because of wearing. You know, you're just  
24 buffing it up and you're scraping off the surface uniformly  
25 over an area.

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1           When you are looking at traumatic arthritis, you're  
2 looking for these types of things, where like, it's a carpet  
3 being pulled up. The articular surface -- the articular  
4 cartilage sits on a foundation of the bone. The articular  
5 surface has no blood supply. It's just like tile and carpet;  
6 it's glued to the bone.

7           And when it's been ripped up, and then you're  
8 ripping it up, you're getting a flap. A flap means it's being  
9 pulled off by something traumatic. It's not just being worn  
10 down by wear or people walking over the carpet and it's just  
11 getting smaller and smaller, it got ripped up.

12           And that's what this other picture here shows, is  
13 articular cartilage, you can see, it looks like it's all  
14 loose, like you can put a probe in it and you can pull that  
15 stuff away. That means it's flap-like degeneration, so it's  
16 like the carpet being pulled up off of its -- of the  
17 attachment to the bone and it's loose like a loose piece of  
18 carpet.

19           So you can clean this up. We can't -- if it's full  
20 thickness, we do a cartilage transplant. The articular  
21 cartilage has no blood supply, so it can't heal at all.

22           Q     All right.

23           A     Once it's been damaged like this, we can shave it  
24 down, we smooth it down and make it like a degenerative  
25 arthritic change to smooth it so it won't -- because when you

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1 move this, it's like catching carpet on a door opening and  
2 closing it'll jam the door -- it'll jam the joint.

3 We want to make it smooth. Even though it's not full  
4 thickness, we want to make -- you know, if that carpet under  
5 the door is lower pile, it's not going to abrade the door  
6 opening and closing. We don't -- we have to accept what we  
7 can do.

8 We can't make the pile as high as it used to be if  
9 it's already damaged. We thin it down, so it doesn't catch  
10 when the door opens and closes, which what the meniscus does.  
11 It sits, glued to the tibia, just like carpet or tile. So,  
12 and you know, we don't want the loose tile kicking up so you  
13 trip while you go through the door, or it catches on the door.

14 Q Doctor, may I interrupt for a sec? That traumatic  
15 meniscus tear, it is your opinion to a reasonable degree of  
16 probability it's traumatic?

17 A Yes.

18 Q And it's your opinion to a reasonable degree of  
19 medical probability that it's directly related to the incident  
20 that happened at the Palms Hotel?

21 A Based on history, there was no other traumatic  
22 incident for me to attribute it to. The reason I say it's  
23 traumatic is the articular cartilage has degeneration in it  
24 that say trauma occurred. It didn't come out of nowhere. The  
25 meniscus is causing that.

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1 Q Okay. And is it your opinion that the tear is  
2 directly and proximately related to this incident at the Palms  
3 Hotel?

4 A Yes. I have no other traumatic incident to  
5 attribute it to.

6 Q And is that in your opinion to a reasonable degree  
7 of probability?

8 A Yes.

9 Q And is that opinion bolstered by the fact that your  
10 findings through arthroscopy are what would be actually  
11 anticipated by your reading of the MRI in January?

12 A Well it would be anticipated based on the history  
13 and the MRI.

14 Q That --

15 A Now, the other thing here is this is the synovitis.  
16 Remember we -- this is the patella femoral joint again. You  
17 see the alignment, a little bit open so the kneecap, that's --  
18 that can be corrected with physical therapy. This was not so  
19 severe that I felt had -- I had to go release and realign it  
20 and make any ligamentous changes. I felt it could be corrected  
21 with physical therapy post-operatively.

22 This is looking at the joint lining, the synovium,  
23 and you see it's inflamed. There's redness, there's -- and  
24 it's very thick. Normally, the joint lining is very thin, you  
25 can see ligaments through it. You can see again up on this

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1 first picture, a lot of tissue. It looks like it's a whole  
2 bunch of stuff there, and sometimes this tissue will get  
3 pinched by the two bones and that causes pain because the  
4 nerve endings for the interior of the joint are in the  
5 synovium. So --

6 Q Can I get you some water?

7 A No, I'm good. Did -- then when I went back here,  
8 it's way in the back, so it's hard to get underneath the  
9 corner, but I did pull the meniscus up and was able to put my  
10 probe underneath the meniscus, high -- and that's a meniscus  
11 tear, because I was able to pull the meniscus forward. Again  
12 I had a lot of bleeding going on because I was actually  
13 getting to trauma area and I wasn't able to catch a good  
14 picture of it.

15 But the meniscus did pull forward because that's  
16 what probe was under when I was pulling on it. That's a  
17 meniscus tear and you have to deal with that.

18 So the last set of pictures, let's see here. Well,  
19 actually the last two sets of pictures. Well last -- next to  
20 last. I guess this would come up as being C, shows after  
21 we've cleaned out the meniscus that it's all -- I've taken off  
22 the part of the meniscus that's the thinnest, the part that  
23 was torn and can't heal. The peripheral rim is what can heal  
24 and the meniscus is triangle-shaped, it's very thick at the  
25 edges and it's very thin in the middle, because of the round

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1 curvature of the femur you want to slip in and fit into that  
2 triangle.

3 So when you take out part of the meniscus, and I  
4 clean -- we clean out the cartilage, you wind up taking out  
5 some of the meniscus and so then you have a truncated flat --  
6 a truncated meniscus that's not as -- it's not perfectly  
7 triangle shaped.

8 Q And once it's truncated does that create the  
9 permanent biomechanical change in the structure of the knee?

10 A Yes. Based on the percentage of the meniscus that  
11 you removed, so you remove as little as possible, okay?

12 And there again is the inflammation of the joint  
13 lining. That's what creates the joint fluid and lubricates the  
14 joint. And you can see it's very, very thickened, which is  
15 inflammation and that means there's a trauma in the joint, the  
16 joint's trying to compensate for. Having cleaned up your --  
17 in full flexion -- this is a picture of the kneecap joint  
18 again, when it's in full flexion. The kneecap is in a nice  
19 position, so that's why I didn't do a release of the  
20 ligaments.

21 But again, lot's of inflammatory tissue in the  
22 front. He had synovitis everywhere.

23 So, that's what these pictures show.

24 Q I just learned more about the knee than I ever  
25 thought I would. Thank you.

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1 THE COURT: Me too.

2 MR. BAKER: Thank you, Your Honor.

3 THE COURT: We'll give my pictures to one -- the clerk.

4 BY MR. BAKER:

5 Q Doctor, you showed us your surgery and --

6 A Uh-huh.

7 Q -- it's a pretty amazing thing. But even under the  
8 most pristine environment, even under the best circumstances,  
9 is there a percentage of people who have post-operative  
10 failure and require a secondary surgery?

11 A Yes. Ten to 15 percent, if you're doing your job  
12 properly. We build in a recurrence rate and that's due to --  
13 it's a philosophical thing. If I wanted to make sure I've got  
14 no recurrent tears, I'd just take out the whole meniscus. But  
15 what have I done? I've taken away 50 percent of his  
16 weight-bearing capability.

17 Remember only 10 percent, the -- right at the edge  
18 is all that's got a good blood supply and can be guaranteed to  
19 heal. What we want to do is make sure that it -- it has  
20 limited healing capability inside where we stopped the  
21 meniscectomy. And what we do especially with age is we make a  
22 determination, based on skill and experience, as to where to  
23 stop. What's the part of the meniscus that I can stop on,  
24 keeping as much as possible to try to maintain as much shock  
25 absorber as humanly possible?

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1           So we make an educated guess. It's through  
2 experience, and the American Academy, you know, feels that if  
3 it's 10 to 15 percent recurrence you've done about your -- the  
4 right amount, because otherwise if your recurrence rate is  
5 less, you're taking too much meniscus. You're putting that  
6 person at risk for more arthritis.

7           If you have too high a reoccurrence rate, you go to  
8 25 or 30 or 40 percent, then you're not taking enough and  
9 they're -- you never did clear up the whole problem and they  
10 just get it right back right away. And one of the aspects  
11 that we have to judge -- it's a judgment, so we're like  
12 trimming material.

13           Okay? The good analogy for the meniscus is, I'm in  
14 there and I'm a tailor and now I'm trimming material, but I  
15 can't hem it. I can't serge it. I can't smooth it. The body  
16 seals it and smoothes it over a six to eight week period after  
17 the surgery. And when you go back in on a meniscectomy, say  
18 for whatever reason you have to look again? And there's been  
19 studies and they've done this, where they go and look -- you  
20 know, how many people are actually going to sign up to have  
21 another surgery, so we can check their meniscus if they're  
22 doing well?

23           They're not going to. So the only thing we have is  
24 antidotal evidence. And I think there might be one study out  
25 there where they went -- where somebody signed up and said

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1     okay, I'll let you do my meniscectomy and I'm going to let you  
2     do it -- in ten to 12 weeks I'm going to let you look again,  
3     even though I don't need surgery. Number one, insurance  
4     companies won't pay for it and neither would a patient. And  
5     so we have only antidotal evidence really.

6             And I've had -- I've looked in on several of my  
7     patients and what you find -- you know, say they had a trauma  
8     and I did a meniscectomy. I can remember specifically one  
9     individual -- of course I can't name him, because it's not  
10    appropriate -- but had a meniscectomy and they did fine for a  
11    year-and-a-half and then they tripped and they fell again and  
12    now they have a new tear. The MRI showed a tear elsewhere, so  
13    I had to go in and trim out this new tear on the other side.  
14    But I got an opportunity to look at my meniscectomy from the  
15    other year, and what happens is it's truncated, but it does  
16    smooth out.

17            So we leave the roughened edge always when we're  
18    going in there, like the tailor who just cuts the material,  
19    and the body seams it and it will do it over a period of time.  
20    And what you get ultimately is a smoothed edge. It is  
21    truncated and blunted. It can't be that full, nice triangle  
22    shape that goes out to a thin edge.

23            Q     You love this stuff don't you?

24            A     I like it. Yeah.

25            Q     Okay.

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1 A So --

2 Q And Doctor, therefore, is it foreseeable that  
3 Enrique Rodriguez would require a follow up surgery to his  
4 left knee regardless of how well you performed the procedure?

5 A There's a 10 to 15 percent probability of that.

6 Q And that's your opinion to a reasonable degree of  
7 probability?

8 A Yes.

9 Q And Doctor, you're aware that there's a six or seven  
10 month gap in the time that Enrique first saw you and he had  
11 his surgery; is that right?

12 A Correct.

13 Q However, even intraoperatively, the findings that  
14 you found were the same as you saw all the way back on the MRI  
15 in January of '05; is that right?

16 A Yes.

17 Q And are you aware of why he had that gap in  
18 treatment?

19 A Well, I'm aware that he had difficulty with funding  
20 the procedure.

21 Q Have you seen this before?

22 A Oh, absolutely, yes.

23 Q Now you would take a lien; is it right?

24 A Yes.

25 Q But hospitals and anesthesia and preoperative --

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1 could you explain to the Judge how that works?

2 A Yes. I can't pay the hospital's bill and  
3 arrangements have to be made and the hospitals are very  
4 unforgiving. And they already do a lot of free surgery  
5 through people who come through the emergency room, who have  
6 no way to pay. So, bringing in what would be considered a  
7 semi-elective -- it would be considered semi-elective. It's  
8 not a truly elective, and that it's not something he could,  
9 you know, go on living with because he was having difficulty  
10 functioning.

11 So it's not truly emergent because his life's not  
12 threatened by it, so it's -- we consider those semi-elective.  
13 They need to be done but there's no timeframe that, you know,  
14 that I could then go to a hospital administration and say if  
15 you don't do something by this date, you're causing X, Y, Z to  
16 occur, which is the only leverage I would have to make a  
17 hospital pay for -- do a surgery that wasn't going to get  
18 paid.

19 So, what we have to do then is make -- help make the  
20 patient make arrangements to get somebody to fund it, and  
21 that's what liens are about.

22 Q And you find nothing nefarious in that gap in  
23 treatment?

24 A No, no. I mean, it just is difficult to get --  
25 because what they have to do with liens -- the lien company,

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1 because they won't basically buy -- the lien companies, they  
2 buy the risk.

3 Q It's a shame that there's not more access, isn't it?

4 A Correct. But the hospital isn't going to take that  
5 risk and neither will, you know, other facilities, potentially  
6 anesthesiologists and the like. They want to get paid.

7 Q And just so I don't forget to ask, was your  
8 treatment of Enrique, including the surgery that you performed  
9 on his left knee directly related to the impact he received at  
10 the Palms Hotel in November of '04?

11 A Yes.

12 Q And that's your opinion to a reasonable degree of  
13 probability?

14 A Yes.

15 Q And the bill of 16,000 and so, that's already in  
16 evidence that was reasonable, necessary and causally related?

17 A Yes.

18 Q And that's your opinion to a reasonable degree of  
19 probability?

20 A Yes.

21 Q Can I just take 15, ten more minutes of your time  
22 and do a little housekeeping?

23 A All right.

24 Q All right. You testified that the medical statement  
25 from the ambulance company, American Medical Response in

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1 Exhibit Number 2 --

2 MR. BAKER: That's in evidence; is that right?

3 THE CLERK: Correct.

4 BY MR. BAKER:

5 Q And it was reasonable, necessary and causally  
6 related to a reasonable degree of medical probability?

7 A Yes.

8 Q And you testified that your portion of the Rancho  
9 Physical Therapy bill, which was Exhibit Number 15, was  
10 causally related and reasonable, necessary -- and reasonable  
11 and necessary in terms of its billing?

12 A Yes.

13 Q To a reasonable degree of probability?

14 A Yes.

15 Q I'd like you to turn to Exhibit Number 6, which is  
16 Associated Physicians. You've reviewed this treatment?

17 A Yes.

18 Q And we've talked about Dr. Nork's finding?

19 A Correct.

20 Q Was that treatment reasonable, necessary and  
21 causally related to the accident to a reasonable degree of  
22 probability?

23 A Yes.

24 MR. BAKER: Move to admit 6, Your Honor.

25 THE COURT: Any objection?

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1 MR. WARD: No objection, Your Honor.

2 THE COURT: 6 will be admitted.

3 [Plaintiff's Exhibit 6 Received]

4 MR. BAKER: And we weren't able to find that bill, is  
5 that right?

6 MR. CARDENAS: We did too.

7 MR. BAKER: And Your Honor, we have a bill which I'd like  
8 to show the Doctor, please?

9 THE COURT: Sure.

10 BY MR. BAKER:

11 Q It's in the amount of -- this is getting ridiculous  
12 -- \$667.59.

13 A An optometrist could take care of that.

14 Q I know. I'm scared.

15 A Okay.

16 Q Is that reasonable, necessary and causally related?

17 A Physician Management Solutions is -- I don't have --  
18 see any other doctors.

19 Q The billing service.

20 A Oh, okay. Sure. That would be reasonable.

21 Q To a reasonable degree of probability?

22 A Yes. Yes.

23 MR. BAKER: Your Honor, may I include with Exhibit 6?

24 THE COURT: Any objection?

25 MR. WARD: No, Your Honor.

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1 THE COURT: So ordered.

2 THE CLERK: Exhibit 6?

3 MR. BAKER: Speaking of 6 --

4 THE CLERK: We just admitted 6.

5 MR. BAKER: Right. That wasn't part of our exhibit  
6 potentially, so we'd like to make it part of our exhibit --

7 THE CLERK: Okay.

8 MR. BAKER: -- for the record.

9 BY MR. BAKER:

10 Q And the MRI from Inland Valley MRI which was Exhibit  
11 Number 7?

12 A Okay.

13 Q The treatment was reasonable, necessary and causally  
14 related?

15 A Yes.

16 Q And if you'll look to 2, in fact I think we've  
17 already discussed this, that's in the amount of 1800?

18 A Yes, we've already talked about that.

19 Q Reasonable, necessary and causally related to a  
20 reasonable degree of probability?

21 A Yes.

22 MR. BAKER: Move to admit 7.

23 THE COURT: Any objection?

24 MR. WARD: None, other than the ongoing objection about  
25 expertise.

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1 MR. BAKER: Is 7 already admitted?

2 THE CLERK: I have it as admitted.

3 MR. BAKER: Okay. Just making sure.

4 BY MR. BAKER:

5 Q If you'll turn to Exhibit Number 8. You've reviewed  
6 the treatment of Dr. Simpson and Campbell?

7 A Yes, I have.

8 Q And their treatment was reasonable, necessary and  
9 causally related to a reasonable degree of probability?

10 A Yes.

11 Q And the billing amount is on the front page, which  
12 is 01 and that's in the amount of \$272?

13 A Correct.

14 Q And that's reasonable, necessary and causally  
15 related to a reasonable degree of probability?

16 A Yes.

17 MR. BAKER: Move to admit 8, Your Honor.

18 THE COURT: Any objection?

19 MR. WARD: No, Your Honor.

20 THE COURT: So ordered.

21 [Plaintiff's Exhibit 8 Received]

22 BY MR. BAKER:

23 Q I'd like you to do -- no, that's okay.

24 If you'll go to Number 9?

25 A Okay.

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1 Q This is for the read that was the secondary read; do  
2 you recall?

3 A Yes, I do.

4 Q And that read was reasonable, necessary and causally  
5 related?

6 A Correct, it was.

7 Q And the bill is \$500?

8 A Yes.

9 Q And that's reasonable, necessary and causally  
10 related?

11 A Yes.

12 Q Both of those opinions to a reasonable degree of  
13 probability?

14 A Yes.

15 MR. BAKER: Move to admit 9, Your Honor.

16 THE COURT: Any objection?

17 MR. WARD: No, Your Honor.

18 THE COURT: 9 is admitted.

19 [Plaintiff's Exhibit 9 Received]

20 BY MR. BAKER:

21 Q VQ Arthocare is Exhibit Number 10. This is for a  
22 brace?

23 A Yes.

24 Q You've reviewed that record?

25 A Yes, I have.

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1 Q And the brace and treatment was reasonable,  
2 necessary and causally related to a reasonable degree of  
3 probability?

4 A Yes.

5 Q And what's the bill amount? Is 1500 --

6 A \$1588.75.

7 Q And that's reasonable, necessary and causally  
8 related?

9 A Yes.

10 Q To a reasonable degree of probability?

11 A Yes.

12 MR. BAKER: Move to admit 10, Your Honor.

13 THE COURT: Any objection to 10?

14 MR. WARD: No, Your Honor.

15 THE COURT: 10's admitted.

16 [Plaintiff's Exhibit 10 Received]

17 BY MR. BAKER:

18 Q 11 is what, Doctor?

19 A Is the Lovenox and the treatment for -- to prevent  
20 pulmonary embolus.

21 Q I suspect that that's reasonable, necessary and  
22 causally related?

23 A Yes.

24 Q To a reasonable degree of probability?

25 A Yes.

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1 Q And the billing amount contained in Exhibit 11 is?

2 A \$886.

3 Q Reasonable, necessary and causally related?

4 A Yes.

5 Q To a reasonable degree of probability?

6 A Yes.

7 MR. BAKER: Move to admit Number 11, Your Honor.

8 THE COURT: Any objection to 11?

9 MR. WARD: No, Your Honor.

10 THE COURT: 11 is admitted.

11 [Plaintiff's Exhibit 11 Received]

12 BY MR. BAKER:

13 Q Your -- where was your surgery conducted?

14 A It was conducted at Valley Hospital.

15 Q And do you conduct surgeries there frequently?

16 A Yes.

17 Q And I assume you wouldn't want to conduct this type  
18 of surgery on the street somewhere?

19 A No, that's correct.

20 Q So was the treatment services rendered at Valley  
21 Hospital reasonable, necessary and causally related?

22 A Yes.

23 Q To a reasonable degree of probability?

24 A Correct, yes.

25 Q And the bill amount was how much?

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1 A It looks like 15,999.

2 Q Reasonable, necessary and causally related?

3 A Yes.

4 Q To a reasonable degree of probability?

5 A Yes.

6 Q That -- did I say to a reasonable degree of medical  
7 probability?

8 A Yes, you did.

9 Q Okay. I got on a roll.

10 MR. BAKER: Move to exhibit -- admit 12, Your Honor.

11 THE COURT: Any objection to 12?

12 MR. WARD: No, Your Honor.

13 THE COURT: 12's admitted.

14 [Plaintiff's Exhibit 12 Received]

15 BY MR. BAKER:

16 Q Exhibit 13 is?

17 A Let's see what this is? X-rays of the cervical and  
18 lumbar spine, it looks like.

19 Q That's cervical and lumbar?

20 A Is that what it says? Submitted -- oh, submitted X-  
21 rays, AP, lower cervical, lateral cervical, AP, lumbar,  
22 lateral lumbar.

23 Q We'll skip that. And Exhibit Number 14?

24 A Okay.

25 Q Is that also cervical and lumbar?

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1           A     Let me see. This was for -- one was at least for an  
2 arthrogram MRI which I ordered on the patient.

3           Q     Why did you do that?

4           A     Because of ongoing symptoms after surgery. The only  
5 way -- once you've done surgery on a knee -- here's one of the  
6 things about magnetic resonance imaging, and I think this is a  
7 pretty good analogy and it makes it sense for most people.

8                     When you've done an MRI, it's not a picture. It is  
9 looking at electrical -- it looks at electrical charges. It's  
10 looking at your magnetism. So think of it like looking for  
11 uranium and I'm -- I've got my little Geiger counter out and  
12 I'm scanning it and I find something bad because it goes  
13 click, click, click, click, click, and I find that piece of  
14 uranium on the ground and I take it away. All right. That's  
15 my surgery. I've removed the uranium I've got rid of the  
16 problem.

17                     The ground itself still has the uranium in it. It  
18 still shows a shadow and that's what you see on MRIs because  
19 it takes a while for that electrical charge to dissipate.  
20 Even though I've removed part of that meniscus, it still shows  
21 the shadow of what was there.

22                     What I've found over time is that if I did an MRI  
23 within six months to a year of having done a surgery, that it  
24 would show me -- it would show that I did absolutely nothing.  
25 I've gotten several of them where it said I had the exact same

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1 meniscus tear and I've got pictures that show I took it out.  
2 And where you put the two MRIs against each other and they'd  
3 say "Oh, my gosh, they're identical."

4 Q That's weird.

5 A And well, it's because the magnetic shadow. It's  
6 the shadow. It's the ghost of it. Its like walking on a  
7 beach and you've seen -- you're looking for people on --  
8 you're looking for life. You see all the footprints in the  
9 sand. You put your helicopter up and you go looking and you  
10 say, gosh there must be people on this island. There's  
11 footprints everywhere. And you -- but you go there and you  
12 land your little helicopter and you take all those people away  
13 who were on the Lost island and you -- they'll go away, the  
14 campfires are still there and footprints are still in the  
15 sand.

16 Q That's good.

17 A It take time to wear those away. So if you do an  
18 MRI within, up to a year of the actual first MRI or a surgical  
19 intervention, the MRI can look identical. How do you stop  
20 that? How do you make a determination --

21 Q By doing the MRA?

22 A We do the MR -- arthrogram, correct.

23 Q And was this MRA reasonable, necessary and causally  
24 related to a reasonable degree of probability?

25 A Yes.

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1 Q And what is the bill for that, please?

2 A Well, let me see it. I'm looking at -- oh here it  
3 is. The one page I didn't look at, okay, \$2635.

4 Q They're little more expensive than the MRI?

5 A Yes. They were -- well, also it was an  
6 inteventional procedure. You have to put a needle into a  
7 patient and you take additional risks.

8 Q And that's painful.

9 A It has to be -- it's painful and it has to be done  
10 by a radiologist, not just a scanner, so --

11 Q And how much was it, 26?

12 A Twenty-six-thirty-five.

13 Q Is that reasonable, necessary and causally related  
14 to a reasonable degree of probability?

15 A Yes.

16 Q And the procedure itself as well?

17 A Yes.

18 MR. BAKER: Move to admit -- what exhibit is that please?

19 MR. CARDENAS: 14.

20 MR. BAKER: Move to admit 14, Your Honor.

21 THE COURT: Any objection?

22 MR. WARD: No, Your Honor.

23 THE COURT: 14 will be admitted.

24 [Plaintiff's Exhibit 14 Received]

25 MR. BAKER: Was 13 admitted? No, that was something

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1 different.

2 THE WITNESS: That was the X-rays of the lumbar --

3 MR. BAKER: Right.

4 THE WITNESS: -- and cervical.

5 BY MR. BAKER:

6 Q And we've already discussed your Rancho Physical  
7 Therapy bills?

8 A Correct.

9 Q That's been admitted into evidence already; is that  
10 correct?

11 A Correct.

12 Q And those were reasonable, necessary and causally  
13 related?

14 A Correct, yes.

15 Q And the bills as well?

16 A Yes.

17 Q Doctor, thank you for the lesson. I'll pass through  
18 to cross.

19 THE COURT: Okay. Can we have a little break before you  
20 proceed with cross-examination, Mr. Ward?

21 MR. WARD: Absolutely, Your Honor. Since I know who the  
22 Judge is, of course.

23 THE COURT: Let's take about a ten minute break please?

24 MR. WARD: Thank you.

25 (Recess at 2:36 p.m., recommencing at 2:59 p.m.)

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1 THE MARSHAL: Please come to order.

2 THE COURT: Please be seated. Okay.

3 MR. BAKER: Your Honor --

4 THE COURT: Mr. Baker?

5 MR. BAKER: -- Ken has graciously given me permission to  
6 ask one final housekeeping question of the witness.

7 THE COURT: Very well.

8 MR. BAKER: Thank you, Your Honor.

9 DIRECT EXAMINATION CONTINUED

10 BY MR. BAKER:

11 Q Doctor --

12 MR. WARD: Even two or three, if he needs too.

13 MR. BAKER: Thank you.

14 BY MR. BAKER:

15 Q Doctor, throughout -- Monique had a heart attack and  
16 throughout your testimony I've asked you questions to a  
17 reasonable degree of probability. Did you understand in each  
18 of those instances I mean to a reasonable degree of medical  
19 probability?

20 A Yes, I understood that.

21 Q And have all your answers been to a reasonable  
22 degree of medical probability?

23 A Yes.

24 Q Thank you.

25 THE COURT: Okay. Mr. Ward?

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1 MR. WARD: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. WARD:

4 Q Now, Doctor, the photographs that you had were,  
5 what, originally taken in digital format?

6 A 2005, I'm not sure if Valley Hospital was -- well,  
7 it was digital. I don't know to what level the digital was --

8 Q Right.

9 A -- so I don't know.

10 Q There were digital photographs?

11 A Yeah, I believe it -- I don't know what level of  
12 digital it was, because they just recently, of course, made a  
13 change.

14 Q And do you have copies of those digital photographs?

15 A I scanned those digital photographs into my computer  
16 system because I'm paperless.

17 Q Okay.

18 A So I do -- actually, I should have a copy in my  
19 actual computer system. Now, it's a scanned photo. It's not  
20 digital coming from Valley that took it on -- do you know what  
21 I'm saying? There's a difference.

22 Q Yeah, my question --

23 A I mean, the printer printed up something from a  
24 digital format that was taken on their printer. I don't know  
25 what Valley did with the actual digital photographs. My

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1 digital copies are those that were scanned off of those  
2 photographs, but I do have digital copies.

3 Q Okay. So you -- if I understand it correctly, these  
4 were originally taken as digitals?

5 A I'm pretty certain that it was a digital camera.  
6 I'm pretty sure --

7 Q Then they were printed out?

8 A Correct. They were printed out and --

9 Q And then you took --

10 A -- I was given the prints.

11 Q -- the printed out copies --

12 A Correct.

13 Q -- and scanned those?

14 A Into my computer system.

15 Q And then printed them out again from your computer  
16 system?

17 A Those pictures came from the hospital.

18 Q Oh, those are the photographs from the hospital,  
19 okay.

20 A Yes, correct.

21 Q So those are the hospital prints from the original  
22 digitals?

23 A Correct.

24 Q But you don't have the original digitals?

25 A Correct.

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1 Q Do you know whether the hospital does?

2 A I do not know how they record keep.

3 Q Okay.

4 A I do know that when I do my surgeries I make three  
5 copies of the actual digital photographs. I place one into  
6 the paper chart for the hospital, I take one copy for myself  
7 and I give a copy to the patient.

8 Q Okay.

9 A I always print up three because Las Vegas tends to  
10 be very migratory and the hospital never gives up anything and  
11 when a patient leaves and go out of town and they want -- and  
12 a doctor calls for photographs, they're going to be asking for  
13 mine and I don't let go of them. I mean, this is like  
14 probably the first time I've ever let go of them, so -- but  
15 the patient knows that he can't come to get them from me  
16 anymore because I've given them up. So barring, you know,  
17 from that standpoint.

18 MR. BAKER: And, Your Honor, sorry to interrupt. Can the  
19 record reflect that we have consented, and Mr. Rodriguez has  
20 consented, for the release of those original photographs and  
21 waives any rights or remedies with respect to that?

22 THE COURT: That's a good thing because you won't be  
23 getting them back from the Clerk's Office.

24 MR. BAKER: Okay.

25 THE COURT: Thank you, Mr. Baker.

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1 BY MR. WARD:

2 Q Now you were talking about the power of the MRI  
3 machine that did the original MRI, correct?

4 A Yes.

5 Q And what did you say it was?

6 A It was .35 Tesla, I believe.

7 Q Okay. And what is the one that they did the MRI  
8 arthrogram on?

9 A I don't know. I actually -- I'd have to actually  
10 look at the films because the report does not indicate what it  
11 is and I don't have the arthrogram MRI pictures. They're  
12 normally printed on the actual films, so I don't have them at  
13 my -- you know, I only have paperwork to look at to review for  
14 this case and I scanned it looking because I assumed that  
15 would be a question and I cannot find any indication of what  
16 Tesla unit was used, although in 2005 I really don't send  
17 anybody generally unless it's requested for open-sided to  
18 anything under 1.5.

19 Q But you don't know what their machine was?

20 A I have no actual -- I cannot, you know, swear to  
21 anything because it's not on the report. You know, if I was  
22 to obtain the actual films, I could read it off the film  
23 itself.

24 Q And you haven't made any attempts to go over to that  
25 imaging center and take a look at their machine to see what it

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1 is?

2 A No, I wasn't -- I wasn't aware I was actually going  
3 to testify at all in any circumstance until the end of last  
4 week. So I worked all last weekend, Saturday, Sunday, clinic  
5 and then surgery yesterday so I didn't have any opportunity to  
6 do so.

7 Q And you got the -- you got the MRI that was done on  
8 Mr. Rodriguez in January of 2005; isn't that correct?

9 A Yes.

10 Q And you thought it was sufficient for your purposes;  
11 is that correct?

12 A At that point in time I was relying mostly on my  
13 clinical examination, recognizing it was a lower Tesla unit, I  
14 mean I can piece together what I would have done. I knew it  
15 would be grainy and I went on my clinical evaluation of the  
16 patient.

17 Q And your clinical evaluation of the patient was what  
18 you did in -- on March 28 of '05?

19 A Correct.

20 Q Okay. Now you said earlier that if you totally  
21 disagreed with the person who read the MRI, that you get a  
22 second opinion, correct?

23 A Yes.

24 Q Okay. Now the person who read that MRI said there  
25 is no evidence of acute internal derangement, magnetic

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1 resonance arthrography can be performed if clinical symptoms  
2 persist. Be fair to say you had a pretty sharp disagreement  
3 with the conclusions offered?

4 A I based my exam -- I based my conclusions on  
5 clinical examination.

6 Q I understand that, but you testified that if you  
7 totally disagree with someone else who read the MRI, that  
8 you'd get a second opinion?

9 A I don't know that I said exactly that. I mean, you  
10 might have inferred that from it. I said if there is a big  
11 enough -- big enough disagreement I can -- I would do it, but  
12 I don't always do it, no. It's not given that I'll go ahead  
13 and do it.

14 Q Wouldn't you say there's a pretty big disagreement  
15 between saying there was an internal derangement and saying  
16 there's no internal derangement?

17 A Yes, but normally I'll rely on clinical examination,  
18 especially when enough time has gone by.

19 Q Okay. Now you are unable to determine from looking  
20 at the actual photographs of the knee when those conditions  
21 developed; isn't that true?

22 A That's correct. There's no timeframe on those.

23 Q Okay. So when you say these were all caused by the  
24 incident at the Palms, what you're essentially saying is, I  
25 haven't been told about anything else and therefore it must be

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1 what happened at the Palms, correct?

2 A That's correct.

3 Q It's not because of anything else, it's simply  
4 process of elimination?

5 A Yes, that's correct.

6 Q And if you knew that there had been some other  
7 something or other you might offer a different opinion?

8 A That's correct.

9 Q You'd certainly take it into consideration?

10 A Absolutely.

11 Q Okay. Now, I will represent to you that  
12 Mr. Rodriguez at the time of the accident was five feet, six  
13 inches tall and weighed approximately 225 pounds. Now, you're  
14 a doctor and you've been treating people for a number of  
15 years, is that overweight?

16 A Correct, it is, yes.

17 Q Is that overweight by a fairly significant margin?

18 A Yes, it is.

19 Q What effect does that have on your knees?

20 A It wears them out earlier.

21 Q And so would you expect someone who is 45 years old  
22 and who has been -- 44 years old and has been walking around  
23 for a number of years at 225 pounds, that that would have some  
24 significant effect on his knees?

25 A Oh yes, it would be a cumulative micro-trauma that

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1 would degenerate the joint.

2 Q Okay. And you would call that trauma as well,  
3 correct?

4 A It's called micro-trauma because it's wear and tear  
5 -- additional wear and tear that's, you know, over and above  
6 the norm.

7 Q Okay.

8 A It'd be similar to the type of determination you  
9 could make by somebody who did heavy labor who was hopping up  
10 and down all the time even who was normal weight, he's  
11 traumatizing the joint on his own with the type of activities  
12 he, you know, is involved in.

13 Q Right.

14 A It's a different kind of micro-trauma, but it's a  
15 micro-trauma too.

16 Q And that has an effect on the knee joints of  
17 Mr. Rodriguez; is that correct?

18 A Yes, it will.

19 Q And you could see that on the photographs, could you  
20 not?

21 A There was degeneration within the meniscus.

22 Q Yeah.

23 A And I cannot determine -- I mean, which I know the  
24 next question. I cannot make a determination as to what the  
25 source of that degeneration -- what contribution of that

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1 degeneration would come from wear and tear and age and factors  
2 such as weight.

3 Q Right. And when you actually looked in his knee it  
4 was almost a year after the accident, correct?

5 A That is correct.

6 Q And would you expect that he would be -- that his  
7 knee would have gotten a lot better over that year, even if he  
8 hadn't had an accident?

9 A Well, yes and no. I mean, whatever can heal would  
10 heal.

11 Q That was a bad question. Let me try again.

12 A Okay.

13 Q Let's assume he had no accident at all. Given what  
14 you know about Mr. Rodriguez, that he's 225 pounds and weighs  
15 -- weighs 225 pounds and is five feet, six inches tall, would  
16 you expect that he would suffer some degeneration -- ongoing  
17 degeneration in his knee joints?

18 A Well, age alone will do that, and then you have that  
19 additional factor.

20 Q Okay. So age alone causes degeneration and extra  
21 weight causes it even more?

22 A Correct. It's all impacted, of course, by genetics.

23 Q Right.

24 A And there are people who have tremendous genetics,  
25 who are massively overweight, and I look at their knees and I

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1 say to myself, my god, they -- it should be worse than it is  
2 and they look, but it's their genetics, doesn't allow them to  
3 respond to micro-trauma. They're able to keep it in check and  
4 they look great. And then I have people who are skinny, who  
5 don't do much of anything, have a minor trauma and I look in  
6 that knee and I say oh my, lord, it looks horrible; how it can  
7 be this way? This person was -- never did anything wrong.

8           They just -- you know, it's just the genetics caused  
9 -- you add all these other factors and so everybody is so  
10 individual, you know, you can't say oh, just because he weighs  
11 this much and he's this age, he has to have degeneration. It  
12 may be a very low amount because of his genetics. It could be  
13 a high amount because of genetics too and other additional  
14 factors like work activities, you know, how many other traumas  
15 a person has had, at what age those traumas may have occurred.

16           So if they played football, so a young man who's  
17 skinny who plays football and has one major trauma when he's  
18 17 years old, even if it's a meniscus, or he strains his  
19 anterior cruciate ligament, then goes on to become a  
20 carpenter. Still not very fat and just does his work, by the  
21 time he's 40 he's got an arthritic knee and he never had  
22 anything, except maybe that football injury when he was 15  
23 years old that was examined, had an MRI and they said there  
24 was only a sprain/strain of his leg, but we know that there  
25 was almost certainly something more or it wouldn't have had --

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1 it wouldn't have fallen that direction. So it's kind of a  
2 incomplete hypothetical to give me all -- you know, a couple  
3 of -- one factor and to hang everything on it, but you're  
4 right, that factor does -- the time factor and weight -- the  
5 weight does bear on it and that it will shift, you know,  
6 whatever his genetics will allow in an adverse way. It's like  
7 sliding him on a scale in a direction. I think I did -- I  
8 think I answered the question, but you can always answer it  
9 again -- ask it again and I'll answer it more succinctly for  
10 you.

11 MR. BAKER: Does that mean I waived my incomplete  
12 hypothetical objection, Your Honor?

13 THE COURT: I think so.

14 MR. WARD: Would you submit your objections in writing?

15 MR. BAKER: Thank you, I will.

16 [Laughter]

17 BY MR. WARD:

18 Q So you don't know how much of what you saw when you  
19 operated on his knee was caused by an event -- a one-time  
20 event from a year before and how much of it was caused by  
21 ongoing degeneration?

22 A There are aspects of what was in his knee that I can  
23 attribute to trauma, though I cannot say specifically without  
24 knowing -- be living in his life and being at his side 24/7  
25 from the time of the incident that occurred at the Palms to

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1 the time I did a surgery on him that that was the absolute  
2 only trauma that occurred. There were findings on the  
3 cruciate ligament, both the tibial plateau and femoral condyle  
4 that were traumatic in origin.

5 The only history of trauma that was given to me by  
6 the patient was the Palm's trauma. There was degeneration  
7 within the patella femoral joint, which I can absolutely 100  
8 percent attribute to age and weight probably, because it was  
9 an irregular wear, your -- it looked like peach fuzz on the  
10 patella femoral joint. That's not traumatic; that's  
11 degenerative.

12 And I don't -- I can't -- you know, the, we -- some  
13 people will argue that an aggravation of degenerative  
14 conditions can be caused by trauma, I can't say for certain  
15 looking at that that there was any trauma that degeneration on  
16 the patella without looking at his other patella and have to,  
17 you know, to compare the two patellas because they're bookends  
18 and I wasn't going to scope his other leg to go look at what  
19 percentage of the degeneration that's currently present in  
20 that knee could be attribute -- might be a variable that  
21 trauma might have affected.

22 So I'd say --barring anything like that, I'd say the  
23 patella femoral joint itself definitely was degenerative. The  
24 femoral condyle, the meniscus tear, thought it may have a  
25 contribution of a degenerative tear that was accelerated or

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1 aggravated by the hyperextension injury, because that's the  
2 other next question that obviously comes up. If I have a  
3 degenerative meniscus tear then that -- part of that's  
4 degeneration and that's made it tear easily. And then the  
5 tear that was present was a cut I could put my probe into, so  
6 there was a traumatic component to that.

7 But even over and above that, the femoral condyle  
8 lesions were isolated, distinct and spotted -- spot areas, not  
9 diffuse. Those were traumatic. And without -- but I only --  
10 and I only have the one trauma to attribute it to, based on  
11 history.

12 Q Okay. And so now to the -- if you have a  
13 significant event, a tear that occurs on a particular  
14 occasion, would you expect someone who perform -- a physician  
15 who performed a physical exam to notice that tear on the  
16 examination?

17 A Depends on when they see them. One of the aspects  
18 of tears is that they increase over time with normal activity.  
19 You have to factor in, if he was having pain he stopped his  
20 activities. So there's going to be a mitigating factor, in  
21 that it's not going to progress quickly -- as quickly as say a  
22 guy who has minimal discomfort and has to go out and feed his  
23 family and he gets into his truck and gets up and down and up  
24 down.

25 It's like a seam that tears; it can tear

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1 progressively over time. So that early on when you see  
2 somebody with trauma, you have to separate out what is  
3 contusion, sprain/strain and is there an underlying internal  
4 derangement that persists and just keeps on not getting  
5 better.

6 Time -- and so you can -- and when you have a  
7 contusion, if you look at the -- at examination findings,  
8 bruising and contusions are extremely painful. That's going  
9 to overshadow anything else that's behind it. A small tear of  
10 a meniscus isn't going to be painful until it causes  
11 mechanical symptoms and that's going to be stress related  
12 movement, like pivoting, twisting, going up and down stairs  
13 and running. That's when a meniscus tear becomes symptomatic  
14 to a patient.

15 If you have a trauma that's a contusion or a bruise,  
16 the soft tissues are all -- have got bleeding in them,  
17 ecchymosis, strain of a ligament where you're -- every step --  
18 every normal step puts stress on the ligament and you get pain  
19 because of that stretching on it. That kind of pain is very  
20 sharp, our nerve endings are more superficial than they are  
21 deep, our sensory input from our brain doesn't have to be very  
22 dense in the interior of a joint because you've got the  
23 exterior to protect it. So the density of our ability to  
24 sense things is more superficial. So when you have an initial  
25 injury like a contusion, a bruise or a strain you see the

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1 bruising, that's the first thing anyone feels. You have to  
2 examine a knee to find the instabilities. You have to examine  
3 the knee to find the meniscus tears, but their contusions,  
4 their bruises cause them so much pain you can't get a proper  
5 examination.

6           So you find these other findings over time and  
7 that's sometimes why you'll see a person have the diagnosis of  
8 a contusion or a sprain/strain and then over the next month  
9 the contusions and the abrasions all heal up and now it seems  
10 like the pain has changed. And then they say well, I had all  
11 this pain.

12           The patient doesn't basically discriminate; it's  
13 pain in the joint. But the character of the pain can change  
14 from one examiner to another over time because of changes in  
15 the circumstances because remember, if you have a -- if an  
16 injury comes from superficial to deep, superficial areas, the  
17 bruising, the contusion areas have all got most of the nerve  
18 endings. They go on like fire. They're just going crazy and  
19 the brain is listening to them.

20           Pain is like a party, I mean when you have an  
21 injury. This is the best analogy for how pain is perceived by  
22 a person's human brain. Pain has a gate theory and so you can  
23 have -- if you have multiple traumas, you get your head  
24 smashed and you break your arm and you break your pelvis and  
25 you go into that emergency room and they drag you in on the

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1 gurney and you've got bruises everywhere and that person will  
2 tell the doctor -- if the doctor sits -- because I did this  
3 through residency all the time. You'll talk to them, my most  
4 famous example was a racecar driver, and she got burned,  
5 everything, and she got crushed, open fractures of her ankles,  
6 everything, and -- NASCAR driver, and they brought her in and  
7 she said, you know, my wrist hurts.

8           She's got open fractures of her ankles staring me in  
9 the fact, I'm looking at a smashed pelvis, burn perineum from  
10 the fire and she says, you know, my wrist is killing me; if  
11 you could just do something about my wrist. And that, for me,  
12 as a resident was like the most confusing thing I think I'd  
13 ever seen. I mean, I'm looking at this tremendous trauma on  
14 this woman and I had -- I research and I find -- you finally  
15 figure out, it's the brain takes -- it's like walking into a  
16 party and you got 50 people -- you got 50 injuries, all 50  
17 different things, it's like people talking at the party. The  
18 loudest one or the one closest to you is the voice you hear.  
19 You can't hear all those voices in that room, you just drown  
20 them out, it's white noise. So you get -- you take care of  
21 the things as you see them.

22           Now for her it was very unusual that it's a minor  
23 problem that was giving her so much trouble. Usually it's the  
24 most severe thing that will give you the biggest problem  
25 that's the biggest pain you get. When that thing quiets down,

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1 that's the voice that stops in the party, the next voices show  
2 up and you can hear them, because when that person shuts up,  
3 you've got 100 people in the room, you know they're all  
4 talking. When John stops talking, you're going to hear  
5 Louise, you know, because he stopped. Your brain now focuses  
6 on something else. Pain is that way and the lesser levels of  
7 pain, as contusions and bruises are, like a very high level  
8 discomfort because of the nerve endings, very dense nerve  
9 endings, you get a bruise and swelling, the skin goes crazy.  
10 Once the bruising starts to subside, then the character of the  
11 pain changes; it's like that person shut up, now we got  
12 another problem.

13           During that period of time you can continue to walk  
14 on the leg, so you've got a little tear of a meniscus. You  
15 think on clinical when you examine them, you don't really see  
16 this, you know, the -- because the bruise -- you touch the  
17 bruise, it hurts too bad. You can't touch the meniscus  
18 because the bruise is interfering with your examination and  
19 when you examine them, you bend their knee up, you can't do a  
20 McMurray's Test because the contusion gets in the way.

21           So you can have a clinical examination that says  
22 contusion, sprain/strain, but that doesn't mean there isn't a  
23 meniscus tear within it. And with a meniscus tear is a tear  
24 that, with activity, will increase over size -- with size over  
25 time when you do activity. It mitigates because he wasn't

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1 walking on the leg, he stopped doing activity, so then he has  
2 that factor that's probably part of why you can only surmise  
3 his articular surfaces actually look pretty good after a year,  
4 because he decreased his activity level to such a point that  
5 he wasn't damaging the articular cartilage with activity. ;  
6 But if he'd have forced himself to walk on it, he probably  
7 would have caused more damage over time on the bone surfaces,  
8 which don't have a lot of nerve endings, but he had enough of  
9 a tear near the nerve ending on the capsule that he knew it  
10 hurt and he wasn't going to move on it.

11 So that's why a clinical examination early on  
12 evolves and it changes. And one examiner early on is going to  
13 see potentially something totally different than another  
14 examiner later on because of the character of the resolution  
15 of the other associated injuries that come with the trauma.  
16 The bruises and contusions start to subside and then you start  
17 seeing other things. So you have the benefit of time.

18 That's another -- you know, the MRI was done, that's  
19 all well and good, but the clinical over time is something you  
20 have to look at. When -- there are studies out there, I can  
21 -- I think I even brought one if you want to put it into  
22 evidence, that talks about the -- and it was done in Britain  
23 -- that shows that clinical examination is far more sensitive  
24 than MRIs. Well, that's -- you know, I didn't examine the  
25 study, what Tesla units were used and how they went about

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1 getting the study and how they determined the sensitivity, but  
2 there's a ton of argument in the orthopedic community as to  
3 whether or not an MRI is superior to a clinical examination  
4 versus, you know, which one should be used as a gold standard  
5 to determine if you need surgery. We do agree overall when  
6 you compare arthroscopy and MRI, arthroscopy is the gold  
7 standard. It doesn't matter what the MRI says; there's false  
8 negatives and false positives, but it's 100 percent accurate  
9 when you look inside.

10 So from that perspective, you know, if there's any  
11 confusion with regard to physical examination, you have to  
12 look at the timeframes and the development of the process and  
13 the change with what healing can occur in a person. So the  
14 exams don't have to be -- I don't have to have the exact same  
15 exam as somebody two months prior had examined him. So you  
16 have to take all that stuff into consideration when you take  
17 your histories.

18 So I don't know if that answered the question. I  
19 kind of got off in a ramble, but I thought I stayed on point.

20 Q He was seen by Dr. Heaps on the night of the  
21 accident?

22 A Yes.

23 Q If he had suffered a significant injury, you would  
24 expect no swelling?

25 MR. BAKER: Vague. Excuse me, vague to definition of

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1 significant, Your Honor.

2 THE COURT: Ask you to rephrase, given her testimony  
3 earlier.

4 MR. WARD: Sure.

5 BY MR. WARD:

6 Q Given the injury that you think that he sustained  
7 that night, you would expect that he would have that injury  
8 and have no swelling whatsoever?

9 A Not necessarily. It depends on if he completely  
10 immobilized and iced it down. You can keep the bruising down,  
11 it can keep the tenderness down, because ice is an anesthetic.

12 Q So --

13 A So it depends on how he examined the patient. I  
14 don't know exactly what was done. If he examined the patient  
15 immediately after ice is removed, the patient may be numb and  
16 may not show -- it may not show any swelling or bruising  
17 either because you're minimizing it by immobilization and ice,  
18 you know. So -- and when swelling will occur is usually  
19 because you're moving it and you're causing more bleeding  
20 within the joint. He wasn't moving it at all.

21 So usually the best time to examine for contusions,  
22 bruising, sprains and strains is within two to three days.  
23 Like people who sprain their ankle, the swelling in the ankle  
24 gets worse over the next couple of days. If you want to see  
25 what it looks like at its worst, bring the patient in at three

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1 days and take a good look.

2 Q And how soon does the swelling start?

3 A It can start immediately. It can start within 12 to  
4 24 hours. It depends on the person's activity. If they do  
5 absolutely nothing, it may take a lot longer for the swelling  
6 to show itself.

7 Q What's your understanding as to what Mr. Rodriguez  
8 did after the event?

9 A I know I read in some of the reports that he didn't  
10 do much of anything with it. I know he went home within a few  
11 days, that a spent a couple of days not doing anything and  
12 then he went home. I don't know how he went -- was  
13 transported; I don't know if he was laying in the back of a  
14 seat of a car or how he got back home. I don't know anything  
15 about the particulars.

16 Q What's your information about what he did  
17 immediately after the accident?

18 A That he tried to walk it off, I understand, but then  
19 he felt he had a lot of discomfort so he stopped and then sat  
20 down and didn't move it and then iced it and then decided not  
21 to do anything about it.

22 Q So --

23 A I think he brought -- they brought an ambulance, he  
24 talked to them, I guess he thought it -- they -- I believe  
25 that what I read was he tried -- he decided -- he basically

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1 said well, no I think I'm not going to go in an ambulance and  
2 then thought better of it after trying to walk it off and said  
3 yes, I need one and they brought them back a second time. I  
4 think that's what happened.

5 Q Did you look at the ambulance records?

6 A I looked at the one that we discussed already.

7 Q And so you --

8 A I haven't seen more than one.

9 Q -- saw the one that said that the ambulance went  
10 back out on a non-emergency basis?

11 A I did see -- like I said, I gave you that history --

12 Q Right.

13 A -- so I know I looked at the records that reflect  
14 something like that, but I didn't see the original emergency  
15 -- the original ambulance records when they didn't take him.

16 Q Well, you test --

17 A And what paperwork might have been produced from  
18 that?

19 Q You testified that this was all reasonable and  
20 necessary, correct?

21 A Well, I wasn't given that. The ones I did see were  
22 reasonable and necessary.

23 Q Okay. And the ones you did see said that they went  
24 out on a non-emergency basis?

25 A Yes.

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1 Q And it says that he got up -- that he was sitting in  
2 a chair in no apparent distress; is that correct?

3 A I believe so, yes.

4 Q Yeah. And when they got there, he got up and walked  
5 over to where the gurney was.

6 A Yes, they asked him to, I think, was what I thought  
7 I read. He didn't do it voluntarily -- he walked over  
8 voluntarily, but I don't know who told who to do what.

9 Q Well, would you show me where you see that in the  
10 record?

11 A It says here, "41-year-old male" -- and I don't know  
12 what that c-slash whatever is, complains of or -- I don't know  
13 what it means, I'm assuming complains of, "left knee PX" -- I  
14 don't know what that abbreviation means -- "five of ten" -- so  
15 I'm assuming that's his pain level, is five out of ten,  
16 "moderate amount of pain radiating. Patient states he began"  
17 -- pain -- patient --

18 Q Radiating or not radiating?

19 A It says radiating -- or let me see. Five of ten,  
20 okay, it's got such a separation, non-radiating, so it stays  
21 in the knee. Patient states that "something began  
22 approximately two hours ago after a woman dove and hit his  
23 knee with her shoulder. Patient states the woman hit his knee  
24 from the front." I don't know if that's front, it's hard to  
25 tell -- "of his knee and his knee buckled. He states he tried

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1 to walk it off, but it began hurting and he called 9-1-1."

2 First something -- oh, first crew canceled, okay.

3 "Patient said he would drive himself. Patient states he began  
4 hurting when he started walking and called back for the  
5 ambulance." So I knew there was -- I thought I had read that.

6 Q Okay. And you read the part at the end of that  
7 paragraph where it says, "Patient has no other complaints at  
8 this time"?

9 A Let me see. Yes, I see that.

10 Q And you see the next sentence where it says,  
11 "Patient found sitting in chair in care of security"?

12 A Uh-huh.

13 Q "Patient in no obvious distress."

14 A Correct.

15 Q Okay.

16 MR. BAKER: Your Honor, I'd ask if she's reading part of  
17 this document into evidence, because apparently she's going to  
18 read it, if she reads the entirety of it.

19 THE COURT: I'm sorry, I couldn't hear.

20 MR. BAKER: I'd ask that she reads the entirety of the  
21 document into evidence, since she's the only one who can read  
22 it if he's going to be questioning her on the document.

23 THE COURT: That's right, there is that medical  
24 handwriting thingamajig, isn't there? Very well. Sustained.

25 MR. BAKER: Thank you, Your Honor.

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1 BY MR. WARD:

2 Q So next it says, "Age 41, male." What's it say  
3 after that?

4 A No, "Patient, 41-year-old" and I don't know what  
5 those abbreviations mean. It says c-slash -- and I'm not sure  
6 if it's an L or an S or an 8. It looks like it was --  
7 somebody tried to write something, maybe it was an 8 and then  
8 they changed their mind or made it an L; I can't really tell  
9 honestly. But then there's a left --

10 Q But you don't know what that means?

11 A I don't know.

12 Q And then there's what?

13 A And then there's a left -- the L circle is left --  
14 knee PX. I have no idea what PX means. I'm going to -- I  
15 can't for certain know what it means, except maybe they mean  
16 pain, because next is five of ten, which is normally a pain  
17 scale. So the PX may mean pain.

18 Q Well, isn't it true you don't know what that means?

19 A Huh?

20 Q Isn't that true you don't know what that means?

21 A I'm almost certain I don't know what PX means.

22 Q Okay. Then --

23 A So --

24 MR. BAKER: Didn't she already read this portion into  
25 evidence?

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1 THE COURT: I'm sorry, Mr. Baker?

2 MR. BAKER: Didn't she already read this portion into  
3 evidence. She read down to O; is that right?

4 THE WITNESS: I did.

5 MR. BAKER: All I was asking the Court, Your Honor, is  
6 after O, if she could just read from skin down.

7 THE WITNESS: Okay. You want me to do the O part?

8 MR. BAKER: Well, I don't --

9 THE WITNESS: Patient found sitting.

10 MR. BAKER: -- want to take over the questioning of the  
11 witness. I was --

12 MR. WARD: I would like to ask questions.

13 THE COURT: And you're entitled to.

14 MR. WARD: Thank you, Your Honor.

15 THE COURT: But let's just make sure we get all of it  
16 read into the record.

17 MR. BAKER: And I did -- that's exactly correct. I'm  
18 sorry, Your Honor.

19 THE WITNESS: Okay.

20 BY MR. WARD:

21 Q And next it says weight, 130 kilograms?

22 A Yeah, it says age 41, they x'ed off male, AVPU, they  
23 circled A and on the next -- and they have something else  
24 circled on the bottom, A and O, it looks like. Oh, I think  
25 this is a consciousness status thing. He's --

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1 Q Wait, I'm --

2 A -- alert and that's what they were circling.

3 Q Is it true you don't know what this is for sure?

4 A I don't know for certain.

5 Q Then I would ask that you not offer --

6 A Okay.

7 Q -- opinions --

8 A Okay.

9 Q Wait. Can you stop for one second?

10 A Yes.

11 Q We've already gone over this, so can I go the next  
12 area?

13 A Sure.

14 Q Thank you. The next part of the chart says,  
15 "Documented findings."

16 A Correct.

17 Q And then under that it says "Skin," printed, and it  
18 says "LPD." What's LPD mean?

19 A Might be a WPD.

20 Q Okay. What does WPD mean?

21 A I have no idea.

22 Q Okay. Next it has "Head," correct?

23 A Correct.

24 Q "Negative, dizzy"?

25 A Correct.

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1 Q "Negative, light-headed"?

2 A Correct.

3 Q "Negative, loss of consciousness"?

4 A Correct.

5 Q Next it has "Neck."

6 A Uh-huh.

7 Q "Negative," what?

8 A "JVD," which is jugular venous distention.

9 Q Okay. Negative?

10 A "Negative tracheal deviation."

11 Q Okay. Next it has "Chest"?

12 A Chest, yes.

13 Q And what's that say?

14 A I think it's a three, but it says "rise and fall."

15 Q Okay.

16 A So I'm assuming that means normal rise and fall;

17 he's breathing adequately.

18 Q Okay. "Lung sounds"?

19 A They're "clear" and then I can't read -- B1L -- I

20 guess bilateral, must be bilateral, but it looks like a one

21 not an I.

22 Q "Abdomen"?

23 A "Soft and non-tender."

24 Q "Pelvis"?

25 A "Is stable"?

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1 Q "Lower extremities"?

2 A "Left knee PX, post-impact with woman's shoulder."

3 They put "negative, contusion," but "positive, swelling."

4 Q Okay. What does negative contusion mean?

5 A They didn't see any definite ecchymosis is what I  
6 would assume it means, no abrasions, no ecchymosis was evident  
7 to them.

8 Q Do people often refer to contusions as marks on the  
9 surface?

10 A Yes, it's bruising, like ecchymosis. It would be --

11 Q But you can also have contusions that aren't  
12 bruising, can't you?

13 A You can have abrasions.

14 Q Right.

15 A Which is like scratches.

16 Q Right.

17 A Right.

18 Q Or you can have like contusions, I can hit my hand  
19 on this and leave a mark there. It's not a bruise, but it's a  
20 mark, it's a contusion, right?

21 A Right, normally associated with some bruising under  
22 the skin with it normally, but you can have just marks with no  
23 bruising.

24 Q Okay. But they said negative contusion?

25 A Yes.

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1 Q Correct? Okay.

2 Now, next is "clinical condition."

3 A Yes.

4 Q And it says "R/O," which is rule out?

5 A Rule out.

6 Q Rule out what?

7 A "Musculoskeletal PX due to impact."

8 Q Okay. After that is?

9 A "ABL." I don't know if that means ambulance or not.

10 Q Okay. And "assessment"?

11 A "Assessment, walk to gurney."

12 Q Now, let me stop you there. Where does it say that  
13 they asked him to walk to the gurney?

14 A The assessment would be walk to a gurney. I mean,  
15 that's the plan. The plan -- from what I can tell was there  
16 plan to have him to walk to the gurney.

17 Q So that's where -- you get all that from the  
18 statement, walk to the gurney?

19 A Yeah, that's kind of what I'm getting out of it.

20 Q You don't just get he walked to the gurney?

21 A I don't -- I don't know. You'll have to talk to  
22 them specifically to know if they forced him to walk to the  
23 gurney or he volunteered to the walk to the gurney, but the  
24 plan was to get him to go the gurney.

25 Q I understand. The reason I'm asking you this is

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1 that you offered that they asked him to walk to the gurney and  
2 I'm trying to find out --

3 A Yeah.

4 Q -- where you got that?

5 A I got it from the plan, because the plan is to have  
6 him walk to the gurney. That's what I get out of it. Now, if  
7 it's a mistake, you'll have to get them to say so, but the way  
8 I read it, he was asked to walk to the gurney. That's what I  
9 got out of it.

10 Q Okay. Was he also asked for an assessment?

11 A No, but it's the plan. We're under plan, which is  
12 what they're going to do, which would be indicating this is  
13 what they plan to do.

14 Q Okay. What else did they plan to do?

15 A It says "gurney to" -- and I can't read that word --  
16 it looks like tinkle, but I know that that can't be right.

17 Q Okay.

18 A Gurney to --

19 Q How about truck?

20 A Okay. Yeah, that could be truck, but it looks like  
21 it's an I, you know what I mean?

22 Q Okay.

23 A But it could be truck. You're right, it could be.

24 Q Apply icepack?

25 A "Apply icepacks. Vital signs" --

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1 Q Let me interrupt you there.  
2 You've seen EMT's work before?  
3 A Yes.  
4 Q You're familiar with how they do it?  
5 A Yes.  
6 Q Do they carry a bucket of ice with them?  
7 A No, no, they have those little chemical packs that  
8 they break and put on the person.  
9 Q So when they say apply ice, they didn't really mean  
10 they applied ice?  
11 A No, they -- probably cold compression.  
12 Q Okay.  
13 A So a cold press of some type.  
14 Q And how long do those stay cold?  
15 A Twenty to thirty minutes maximum.  
16 Q Okay. And where do you see that they ever applied  
17 another?  
18 A Oh, the transport didn't take that long. I'm sure  
19 that they may or may not have.  
20 Q Okay.  
21 A It's hard to say. I mean, they don't have a follow  
22 up note as to what they did or how many they put on, but they  
23 did apply one at least.  
24 Q All right. And is there anything else in that  
25 record that we haven't read?

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1           A     "Vital signs, transport" and I don't know what those  
2 numbers are after it, but "gurney to" FD -- or "ED," must be  
3 emergency department, "report to nurse."

4           Q     Okay.

5           A     I'm assuming that's an ED, but it looks like an FD.

6           Q     Okay.

7           A     So.

8           Q     Is that it?

9           A     That's what I see. And then a signature and I think  
10 initials.

11          Q     Okay.

12          A     Oh, maybe that's a time underneath there. That  
13 could be time.

14          Q     Okay.

15          A     Hard to know. I can't really read it.

16          Q     So next he got to the doctor, correct?

17          A     Say that -- that's not in this record, but I'm  
18 yeah --

19          Q     It's in another record.

20          A     -- he was taken to the emergency room.

21          Q     And you've looked at the Spring Valley Medical  
22 Center records, correct?

23          A     I believe --

24          MR. BAKER: That's three.

25          THE WITNESS: Oh, is it three? Okay. All righty. And

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1 these are the doctor's notes.

2 BY MR. WARD:

3 Q Yeah. Now do you see anything in his records that  
4 indicate that they put another icepack on him?

5 A Well, let me see here. I don't know who these notes  
6 are. You know, honestly, I work out of Spring Valley and  
7 there's usually a more -- there's usually a nursing note here.  
8 The nurses are the ones who put icepacks on, but I don't see  
9 the nursing notes here.

10 Q Okay.

11 A So the doctor is not going to necessarily apply  
12 icepacks on his own.

13 Q So the answer is you don't see anything there that  
14 suggests anybody put an icepack on him again?

15 A Correct.

16 Q Okay.

17 A I don't see anything that said they didn't either,  
18 because I don't see the proper nursing notes in this emergency  
19 record.

20 Q Well, you've looked at medical records, haven't you?

21 A Yes, I have.

22 Q They don't -- you don't expect to find a medical  
23 record that says, "We didn't put an icepack on"?

24 A No, you won't have anything to say they didn't.

25 Q Okay. And you see various areas where there's

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1 references to swelling and ecchymosis?

2 [Witness reviews notes]

3 THE WITNESS: I see that they circled and put a T for  
4 tenderness. They --

5 BY MR. BAKER:

6 Q Could you read the Bates Number, please?

7 A It says six on Spring Valley.

8 Q Thank you.

9 A Range of motion was limited by pain, he did have  
10 tenderness --

11 Q Okay. Now let me inter- --

12 A -- overlying --

13 Q Let me interrupt you for a second, please.

14 A Okay.

15 Q Tenderness isn't something you can see, is it?

16 A No, it is not.

17 Q It's not something you can measure, is it?

18 A You can measure by a person's reaction, but no, you  
19 can -- there's nothing qualitative that you can physically  
20 touch with your fingertips to tell you how diffuse a  
21 tenderness is, other than what the patient reports to you.

22 Q Right. If you were giving me an examination and you  
23 touch my arm and I said that really hurts, you'd write down  
24 that that's tender?

25 A Correct.

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1 Q And -- but you don't have any way of knowing whether  
2 it is -- whether it hurts or it doesn't hurt, right?

3 A No, there's nothing that I can see, feel or touch  
4 that would verify that tenderness existed.

5 Q So when we do an examination -- when you do an  
6 examination, you write down things that you actually observe?

7 A Yes.

8 Q That you can see?

9 A Yes, we do.

10 Q Okay. He's got -- a big cut on their arm, blood  
11 coming out, you don't have to ask them, do you have a cut on  
12 your arm?

13 A That's correct.

14 Q But there are other things that are a result of the  
15 patient telling you that you write down that you just, for the  
16 most part, accept what the patient is telling you, correct?

17 A Correct.

18 Q And that relates to things like tenderness?

19 A That is correct.

20 Q So if I say to you, you can't examine my knee  
21 because it hurts too much, you don't know whether it hurts too  
22 much or not?

23 A Correct.

24 Q Okay. And essentially Dr. Heaps did an examination,  
25 did he not?

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1 A Yes, he attempted to do one.

2 Q And he wrote down that there were complaints of pain  
3 on the inner aspect of the left knee; is that correct?

4 A That's correct.

5 Q Now are you telling me, Doctor, that if you have  
6 pain in the inner aspect of your left knee that you're not  
7 going to be aware of any other pain?

8 A No, I'm not saying that.

9 Q Okay. So it's not like -- it's not like it  
10 completely covers up -- I'll withdraw that question. That's a  
11 bad question. Let me ask it a different sort of way.

12 A Yeah.

13 Q You're talking about the racecar driver who came in,  
14 who had all these issues and had a -- had -- and said to you  
15 my wrist hurts, correct?

16 A Correct.

17 Q So let me understand. So you wrote down she injured  
18 her wrist, let's put a cast on her wrist and send her home?

19 A Well, of course not.

20 Q No.

21 A No, of course not.

22 Q What did you do?

23 A I examined her and got proper x-rays on everything  
24 that we could examine.

25 Q Okay.

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1           A     She complained of pain, but once you touch other  
2 areas she complained of pain in all the proper areas.  
3 Everything that was broken did hurt her, but I had to elicit  
4 it by examination in order to get her to admit to it.

5           Q     Right.

6           A     That's correct.

7           Q     So you conducted an examination?

8           A     Absolutely.

9           Q     And you're aware that Dr. Heaps conducted an  
10 examination?

11          A     Yes, he did.

12          Q     So when your racecar driver came in and complained  
13 about her wrist, when you conducted an examination and asked  
14 her about other areas did she say oh, nothing else hurts?

15          A     No, she said that's what hurts her the most.

16          Q     Correct. But once you started doing the examination  
17 then you were able to find that she had other areas?

18          A     Correct.

19          Q     Okay. And you're aware that Dr. Heaps did a  
20 complete examination head-to-toe, correct?

21          A     As far as I can tell, he did.

22          Q     Yes. And he didn't find anything; isn't that true?

23          A     Let me take a look at this, though. Yes, he  
24 examined -- basically, as far as I can tell, the lower  
25 extremities. I don't -- let me see, here's the head/neck, is

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1 it -- oh, they got them reversed. Okay.

2 Q Have you never seen these records before?

3 A No, I've seen these records, but there's multiple  
4 sheets.

5 Q Okay.

6 A And Spring Valley also has an upper extremity sheet.  
7 Now, if you're going to talk about there being a complete  
8 examination of every joint, that page is missing. That's all  
9 I'm saying.

10 Q Have you --

11 A But he did do a complete lower extremity  
12 examination, focused to lower extremity.

13 Q And are you aware from Dr. Heaps' deposition that he  
14 said he did a complete examination of his whole body?

15 A I never saw the depos.

16 Q Okay. So you don't know whether he did that or not?

17 A Not from this record.

18 Q Okay. But you would expect him to do that in a  
19 matter of course?

20 A Of course, yes.

21 Q So you would think if he's a good doctor, that he's  
22 going to do that?

23 A Yes.

24 Q Why does he do that?

25 A Because he's required to do it by being in the

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1 emergency room. Someone says that there's a trauma, he's  
2 going to try to clear and make sure he doesn't have any  
3 additional injuries as best he can tell.

4 Q Right. So the requirement -- when you say  
5 "required", I take it what you mean -- correct me --

6 MR. WARD: I'm sorry, I didn't get permission from the  
7 Court.

8 THE COURT: That's all right. We don't stand on ceremony  
9 around here in this Department.

10 MR. BAKER: Now you tell us.

11 BY MR. WARD:

12 Q So you're not saying required that he's got some  
13 sort of a list that says you got to do this. What you're  
14 saying is, if I understand you correctly, that a good  
15 physician, such as yourself, such as Dr. Heaps, such as  
16 someone like that, knows that if you have a patient who tells  
17 you they've been involved in some sort of an accident that  
18 they may have injuries to other parts of their body that they  
19 haven't told you about?

20 A That's correct.

21 Q And therefore, you want to do a complete examination  
22 so that you can find out if they've got injuries to the rest  
23 of their body that they haven't told you about?

24 A Correct.

25 Q And I take it that you assume that being a competent

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1 physician, that as long as the patient is conscious and being  
2 honest and cooperative with you, that you will be able to  
3 conduct an examination and find out if they have other  
4 injuries --

5 A Yes.

6 Q -- that they haven't told you about when they came  
7 in?

8 A Yes, generally speaking you can get to most of the  
9 injuries --

10 Q Okay.

11 A -- with a clinical examination.

12 Q Okay. And isn't it true that you don't find any  
13 evidence that Dr. Heaps noted any swelling?

14 A No, he didn't write that there was an swelling.

15 Q Okay. He wrote negative, didn't he?

16 A He didn't write negative. He just only noted  
17 tenderness. So it's not a negative, it's just not -- he  
18 didn't see that there was any swelling. I mean, I guess he  
19 didn't put a little circle that says no swelling, but he --  
20 the lack of a circle or a diagram would indicate he did not  
21 think there was any swelling.

22 Q Okay.

23 MR. BAKER: May I approach the witness, Your Honor?

24 THE COURT: I'm sorry?

25 MR. BAKER: May I approach the witness?

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1 THE COURT: Sure.

2 BY MR. WARD:

3 Q And he has a chart, a chart of the lower part of the  
4 human body?

5 A Yes, he does.

6 Q And there's a place for marks on that chart?

7 A Yes, there is.

8 Q And he -- the legend is tenderness, that's one of  
9 the things?

10 A Yes.

11 Q And S for swelling?

12 A Correct.

13 Q That's another one of the things. And E for  
14 ecchymosis?

15 A That is correct.

16 Q Ecchymosis is bruising?

17 A Correct.

18 Q And the only marks on that chart are at the inner  
19 aspect of the left knee; is that correct?

20 A Yes, that's correct.

21 Q And that has the letter T for tenderness?

22 A Yes, it does.

23 Q Meaning when the doctor touched that area the  
24 patient told him that the area was tender?

25 A That is correct.

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1 Q And are you aware that Dr. Heaps did an examination  
2 and said he did not find any nerve injury anywhere?

3 A Let me see the nerve injury, where he put it. He  
4 did a neurovascular examination, yes.

5 Q And he didn't find any evidence of any problems;  
6 isn't that correct?

7 A That's correct.

8 Q Isn't it fair to say that other than the fact that  
9 he noted tenderness, which means he touched the knee the  
10 patient told him it was tender --

11 A Yes.

12 Q -- he didn't find anything else; isn't that true?

13 A Other than guarding of the joint, because of  
14 restricted range of motion, he couldn't do a good stability  
15 examination, that meant the patient was guarding it, yeah he  
16 wasn't able to find anything positive or abnormal because the  
17 patient wasn't allowing examination completely of the knee.

18 Q Okay.

19 A Everything else turned -- looks normal. Basically,  
20 he checked off normal on everything else.

21 Q Everything he tested was okay.

22 A Right.

23 Q So he didn't find anything other than the patient  
24 said the knee hurt and wouldn't let him examine part of it?

25 A Correct.

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1 Q Okay. Now the patient then went to see Dr. Nork;  
2 isn't that correct?

3 A Yes.

4 Q And Dr. Nork saw him when?

5 A Was it December 6th, I think.

6 Q Okay.

7 A Of 2004.

8 Q Okay. So we're talking about --

9 A Within 14 days.

10 Q Okay. And so -- did Dr. Nork find any swelling?

11 A Let me see. He saw no effusion, so he had no fluid  
12 within the joint.

13 Q Okay.

14 A You have significant guarding again, as he did with  
15 the emergency room visit. Diffuse tenderness around the  
16 kneecap and the patella tendon. As best as he could tell, the  
17 collateral ligaments were intact.

18 Q If you had a significant internal derangement, would  
19 you not expect some fluid in the knee by this time?

20 A It depends on if they're not moving the leg. I'm --  
21 a person completely immobilizes it, ices it, doesn't weight  
22 bear it, the original -- that trauma can -- swelling may not  
23 show itself until you're using it. I mean, he came in a  
24 long-leg extension brace, so he wasn't using the leg at all.

25 Q Well, the long-leg extension brace is a walkable

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1 brace, isn't it?

2 A He could weight bear on it, yes. I don't know that  
3 he was or wasn't weight bearing on it. He comes in -- was  
4 walking with crutches, so we don't know what element of weight  
5 bearing he was do. He had the knee in extension, though.

6 Q So you don't have any knowledge about how much  
7 weight bearing he was doing?

8 A No, it's not noted here.

9 Q And you don't have anything to suggest that he  
10 continually had ice on it, correct?

11 A I don't see anything in the history indicating that.

12 Q And it's your experience that under normal  
13 circumstances, most non-athlete patients don't ice things down  
14 for two consecutive weeks?

15 A Depends on the patient, depends on how they are, but  
16 generally speaking, that's correct.

17 Q Okay. Did you ever see any indication that  
18 Mr. Rodriguez was putting ice on his knee?

19 A I saw him several -- you know, a couple of months  
20 later, so it wasn't like I would have any indication by that  
21 time. Any icing that would be beneficial would of -- wouldn't  
22 be beneficial anymore.

23 Q Okay. So unless you knew the patient was icing the  
24 knee all the time, wouldn't you expect that there would be  
25 some effusion at the joint if there had been significant

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1 tearing two weeks earlier?

2 A If he was moving the knee, yes. I don't know that  
3 he was moving the knee. If he kept the knee in complete  
4 extension, he wasn't moving it in any direction, and ice --  
5 just keep -- even if he didn't ice it, effusions will go away  
6 as long as you're not disturbing the meniscus tear. So if you  
7 completely immobilize something and you don't move it,  
8 effusion will go away because there's no irritation with --  
9 from within the joint to make it swell.

10 Q Okay.

11 A So I don't know how much movement he was doing or  
12 not doing.

13 Q Okay. Well, if the patient had not been using the  
14 knee and not weight bearing would you expect there to be any  
15 swelling?

16 MR. BAKER: Assumes facts in evidence, Your Honor.

17 THE WITNESS: Say that again. If I --

18 THE COURT: I'd like to hear the question again before I  
19 rule on your objection.

20 MR. WARD: Sure.

21 BY MR. WARD:

22 Q If you were to assume that the patient was not  
23 moving the knee and not weight bearing on the knee, would you  
24 expect there would be swelling or not?

25 MR. BAKER: Same objection, Your Honor. That's assuming

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1 facts in evidence and an incomplete hypothetical.

2 THE COURT: Maybe not, but I'll allow it.

3 THE WITNESS: I would not expect any swelling at that  
4 point.

5 BY MR. WARD:

6 Q Well, didn't Mr. Rodriguez tell Dr. Nork that there  
7 had been swelling?

8 A Yes, he did.

9 Q Why would that be?

10 A He reported -- I'm just going based on what his  
11 history was, he reported that there was -- that the knee was  
12 swollen.

13 Q Okay. Dr. Nork wrote down that he had been told by  
14 Mr. Rodriguez that there had been substantial swelling; isn't  
15 that correct?

16 A That's correct.

17 Q Okay. So now we have a situation where a -- at  
18 least according to Mr. Rodriguez he got swelling, so why did  
19 that happen if he's not using the knee?

20 A You would indicate that he probably was using the  
21 knee at some point.

22 Q Okay. So then you would expect that when Dr. Nork  
23 examined him two weeks later that there would be some residual  
24 swelling?

25 A Potentially.

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1 Q Yeah. And --

2 A Depends on when he stopped walking on it, how much  
3 time occurs in between. So it's a -- you know --

4 Q Is this sort of like when Jupiter aligns with Mars?

5 A Something like that. It depends on -- I mean, I'd  
6 have to have an accounting of the whole two weeks, as to --

7 Q Right.

8 A -- what his activity levels were, as to say on this  
9 day I would expect swelling, on this day I wouldn't expect  
10 swelling.

11 Q Okay. So there's all these possibilities that you  
12 don't know, right?

13 A Correct. This is completely, you know,  
14 incomplete --

15 Q Right, but what --

16 A -- to make a determination about.

17 Q What you do know is that Dr. Heaps said he didn't  
18 see any swelling and Dr. Nork said he didn't see any swelling,  
19 right?

20 A Let me see here. He saw no joint effusion. Yes,  
21 that's correct. If you're going to equate effusion and  
22 swelling. In order to have swelling -- swelling -- there's  
23 one aspect of swelling, which is effusion; one aspect which is  
24 synovitis. He did not note any synovitis either, but he  
25 didn't say no there was none, but based on this I would assume

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1 it was not swollen.

2 Q Right. He says in the current complaints that the  
3 patient states that the swelling has subsided considerably,  
4 correct?

5 A Yes, he did say that.

6 Q Okay. And he says that the patient states that his  
7 knee was swollen when he was taken to the medical facility at  
8 Spring Valley; isn't that correct?

9 A That's what it says.

10 Q But that's not what the records show, correct?

11 A That's correct.

12 Q Okay. Now let me ask you this, Doctor, you  
13 performed surgery on Mr. Rodriguez; isn't that correct?

14 A I did.

15 Q And in what year was that?

16 A 2005, October, wasn't it?

17 Q Yeah.

18 A I believe.

19 Q Yeah. And is it true that, according to the  
20 complaints of Mr. Rodriguez, he wasn't really helped by the  
21 surgery?

22 MR. BAKER: I'm sorry, could you repeat that?

23 THE WITNESS: Yeah, that's what I've gotten subsequently.

24 MR. BAKER: I didn't hear the question, I'm sorry.

25 ///

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1 BY MR. WARD:

2 Q Let's see if I can remember. According to the  
3 complaints of Mr. Rodriguez, he would say that he wasn't  
4 helped to any significant extent by the surgery; isn't that  
5 correct?

6 A That's correct.

7 MR. BAKER: Thank you.

8 MR. WARD: Did I get it right that time?

9 MR. BAKER: You got it.

10 BY MR. WARD:

11 Q And, in fact, he came back and you recommended some  
12 more follow up. You recommended another MRI of his knee,  
13 correct?

14 A That's correct.

15 Q And what they essentially found when they look --  
16 did the MRI was that a surgeon had been at work?

17 A Yeah.

18 Q And that would be you?

19 A The arthrogram MRI reflected the pictures.

20 Q Okay.

21 A So, yes.

22 Q And that you had done your job well?

23 A Yes, there was no additional tears, there was no --  
24 it didn't even show any loose bodies or anything, which I know  
25 on the second surgery they did find, but that wasn't present

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1 on the arthrogram --

2 Q Right.

3 A -- that I did.

4 Q And so, he was still complaining of pain and you put  
5 in your -- you put in your chart that you did everything to  
6 find out why he was complaining of pain and you couldn't find  
7 anything --

8 A Right. I didn't recommend surgery as a -- to  
9 address his pain because I didn't find any surgical treatable  
10 lesion based on the MRI. To take a look -- post-operatively,  
11 when you look at knees, you deal with additional set of  
12 issues, including scar tissue forming in the joint when you do  
13 a synovectomy. And you don't want to operate on that, because  
14 it's like chasing your tail, you'll never catch it.

15 So you usually have to let the soft tissue subside.  
16 So the normal recommendation is, if you can't find any  
17 surgically treatable lesion, you give it time.

18 Q And so, you recommended that he have some sort of  
19 injections?

20 A Yes.

21 Q And they didn't help him?

22 A Correct.

23 Q And he told you that his physical therapist said  
24 that further physical therapy wasn't going to help?

25 A That's correct. He maximized -- he maxed out on

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1 therapy.

2 Q And being an orthopedic surgeon, you know a lot  
3 about these joints and what causes problems, correct?

4 A Yes.

5 Q And you looked at everything you could look at,  
6 right?

7 A Yes.

8 Q And your conclusion was that there was no effusion?

9 A Yes.

10 Q That's fluid?

11 A Correct.

12 Q Trace synovitis?

13 A Correct.

14 Q So trace means just a little tiny bit?

15 A Minimal. Minimal. It was present, but it wasn't  
16 excessive.

17 Q Yeah. But the patient complained vigorously about  
18 pain; isn't that correct?

19 A Yes, including popping. It was one of the things he  
20 complained about post-operatively.

21 Q Right. He complained to you about popping and so  
22 you did a McMurray's Test?

23 A Right.

24 Q And found no popping?

25 A Couldn't demonstrate it, no.

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1 Q Right. So he complained about it, but you couldn't  
2 find it?

3 A I couldn't find it.

4 Q Okay. And you're pretty good about finding it if  
5 it's there, I take it?

6 A I'm usually pretty good at it.

7 Q Right. And so that's why you said, patient with  
8 symptoms with no obvious explanation for them, correct?

9 A Yeah, I was trying to be as honest as I could.

10 Q I'm not questioning your honesty in any way.

11 When you first saw the patient, did you know that he  
12 had been to Dr. Nork?

13 A I know that he had treatment prior to the time I had  
14 seen him.

15 Q And did you note that Dr. Nork said, when he did an  
16 examination, that there -- that the patient complained to him  
17 of no instability or clicking or popping or grinding or  
18 grading?

19 A Yes, I know that was on his initial visit.

20 Q Dr. Nork is an orthopedic surgeon; is he not?

21 A Yes.

22 Q And you don't hold against him the fact that he has  
23 an office in California as opposed to --

24 A No, not at all.

25 Q The same standards for orthopedic surgeons in

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1 California as in Las Vegas as in Washington as in Illinois?

2 A Correct.

3 Q It's just colder in Illinois?

4 A Well, yeah, I guess.

5 Q And Dr. Nork did an examination on the patient?

6 A Are we specifically discussing December 6th?

7 Q I think that's his first -- yes.

8 A Right.

9 Q Yes.

10 A Okay.

11 Q His examination.

12 A Just wanted to make sure it wasn't some other  
13 examination.

14 Q And he said that the medial and lateral collateral  
15 ligaments are intact; is that correct?

16 A Correct.

17 Q As are the cruciate ligaments intact.

18 A That's correct.

19 Q Right?

20 A Yes.

21 Q And he did an examination?

22 A Yes, he did.

23 Q And in his examination what did he find as opposed  
24 to what the patient told him that was abnormal?

25 A Well, let's see. What do you mean? You mean -- are

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1 you talk -- I mean, I can read what I already read once  
2 before, which is --

3 Q No, I'm not asking you to read it again. I didn't  
4 mean to interrupt you. What I'm asking is --

5 A Okay.

6 Q -- in Dr. Nork's record, which is relatively limited  
7 because he didn't see him that many times -- I mean, it's  
8 limited in number of times --

9 A Correct.

10 Q -- we know that the patient came in and complained  
11 of pain.

12 A Yes, he did.

13 Q Just like he came in and complained of pain when you  
14 couldn't find anything wrong, correct?

15 A Well, initial evaluation I thought that he did  
16 demonstrate a meniscus tear.

17 Q I understand. I'm talking about the time  
18 post-surgery.

19 A Okay.

20 Q I apologize.

21 A All right.

22 Q Bad question. Let me do it again.

23 A Okay.

24 Q When he came in post-surgery he complained of pain  
25 and as a result of that complaint of pain, you sent him out to

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1 have another MRI?

2 A Correct.

3 Q You sent him out to have injections?

4 A Yes.

5 Q You sent him to physical therapy?

6 A Yes.

7 Q Spent a lot of money?

8 A Yeah, unfortunately.

9 Q Nothing helped?

10 A He had persisting symptoms.

11 Q Nobody found anything?

12 A Not -- from nothing we could document with testing,  
13 that's correct.

14 Q And -- nothing you could document in any other way,  
15 correct?

16 A Correct.

17 Q Okay. So what I'm asking is, Dr. Nork did an  
18 examination. Other than the fact that the patient complained  
19 to him of pain, what did Dr. Nork find that was abnormal?

20 A Just the tenderness that he exhibited.

21 Q Well, tenderness isn't --

22 A And complaints of pain.

23 Q -- a finding, is it?

24 A That's not something that's an objective --  
25 something you can objectively touch, but it was a -- it is a

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1 finding that's taken into consideration when you make  
2 diagnoses. Unfortunately, we do have to take into  
3 consideration what a patient says.

4 Q Sure. And --

5 A So he did find tenderness on his examination.

6 Q Okay. But I take it you don't do things based on  
7 what the patient reports to you alone?

8 A Oh, no, of course not.

9 Q And now it says that Mr. Rodriguez had minimal  
10 weight bearing?

11 A He reported that he was not weight bearing --  
12 minimal weight bearing.

13 Q Well, let me be clear here. He says minimal weight  
14 bearing, right?

15 A Right. He was using crutches primarily.

16 Q Okay. So minimal weight bearing means some weight  
17 bearing?

18 A Yes. It's hard when you're an older individual to  
19 put -- to completely non-weight bear. That means you have to  
20 bend your knee. Unless you're wearing high heels or large --  
21 you know, with a knee in extension, which is what this man  
22 had, he has to put some kind of weight, otherwise he's going  
23 to scuff the ground when he walks through. Normally we get  
24 around that by saying you don't put your shoe on under the leg  
25 that you're walking through so your body -- your foot can

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1 swing and your other shoe, which has maybe an inch heel on it,  
2 will allow you to clear the ground where you're not hiking up  
3 your hip and injuring your back trying to walk.

4 The other thing that you find is with people as they  
5 get older, they can't balance themselves properly and they  
6 will at least toe touch to maintain balance so they're not  
7 falling off to the side. The other reason that that's done is  
8 because when a person does not weight bear on their limbs  
9 appropriately. They're going to strain, get a chronic strain  
10 to their back; they're going to strain their shoulders;  
11 they're going to injure their neck because you're not really  
12 designed to be on crutches continuously.

13 So that's basically one of the issues for this is  
14 that, you know, one of the problems with it is that if he  
15 didn't do any weight bearing, he's putting a lot of pressure  
16 on everything else with the non-weight bearing, or the minimal  
17 weight bearing, such as toe touch, but you have to toe touch  
18 to balance or you're really going to screw your back up.

19 Q So he was doing minimal weight bearing?

20 A Yes, he was at least trying to balance himself  
21 properly.

22 Q Okay. So with minimal weight bearing you would  
23 expect, if there was going to be swelling, that there would be  
24 swelling?

25 A If there was going to be minimal weight bearing,

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1 you'd have minimal swelling, depends on -- because swelling  
2 normally comes from moving the knee and if he's got it in an  
3 immobilizer primarily he's not going to have much in the way  
4 of swelling because he's not irritating the joint by the  
5 movement.

6 Q Where did the patient go after Dr. Nork? You said,  
7 as I understood, that Dr. Nork didn't find anything, correct?

8 A Correct.

9 Q On his examination?

10 A I'm not exactly sure how he got to me.

11 Q And he -- and I think I asked this, but Dr. Nork did  
12 not register -- did not record anywhere bruising or  
13 ecchymosis?

14 A No, he didn't record any.

15 Q Okay.

16 A I guess he -- here, he went to Dr. Campbell --

17 Q Okay.

18 A -- in the interim, before I saw him in March.

19 Q Okay. And you testified that everything  
20 Dr. Campbell and the people at Wellness did for him was  
21 reasonable and necessary, correct?

22 A Yes.

23 Q What did they do that was reasonable and necessary?

24 A They did physical modalities, electrical stim, that  
25 kind of thing, to try to keep the muscles from atrophying

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1 tremendously.

2 February 1, 2005, there was a positive McMurray's  
3 Test on the left knee. And --

4 Q Dr. Nork did not register a positive McMurray's  
5 sign, did he?

6 A No. No, he did not.

7 Q And he's an orthopedist, correct?

8 A Correct.

9 Q And Dr. Campbell is what?

10 A I believe he's a chiropractor, isn't he?

11 Q He's a chiropractor.

12 A Yeah.

13 Q Okay.

14 A He's a QME doctor, but a chiropractor.

15 Q Okay. QME has something to do with workers' comp,  
16 right?

17 A It sure does.

18 Q Okay. And this isn't a workers' comp issue, right?

19 A No, not at all.

20 Q Okay. So now when did the -- when did he see  
21 Dr Campbell, do you know?

22 A Okay. He saw Dr. Campbell -- get the paperwork  
23 here. That's Dr. Simpson. He said Dr. Campbell, initial  
24 office visit January 24, 2005.

25 Q Okay. I want to see if we can bring something up.

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1 I don't know how long it will take, if you want to try it.

2 [Counsel Confer]

3 MR. WARD: I'm going to see if we can get this on the  
4 projector, but I'll -- so I don't waste your time, I'll  
5 continue on with my questions.

6 THE WITNESS: Okay.

7 MR. WARD: And we've learned that we're supposed to turn  
8 this on before we --

9 MR. BAKER: Haven't we been through this already?

10 BY MR. WARD:

11 Q Now, you've -- let me put this aside for the moment  
12 while we're trying to figure out what we're going to do here.

13 You've treated lots of people with knee injuries,  
14 correct?

15 A Yes, I have.

16 Q Like hundreds?

17 A Probably thousands over 20 years.

18 Q Thousands? Okay.

19 A You know, at least one or two thousand maybe.

20 Q In terms of the injury itself, how would you rank  
21 this in terms of severity?

22 A You mean as far as what I've seen over the whole  
23 scale?

24 Q Uh-huh.

25 A Mild to moderate.

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1 Q Okay.

2 A You know, it might eeks it way to just the moderate  
3 edge of something.

4 Q Okay.

5 A This is certainly not a severe injury.

6 Q Okay. It's on the lower end of moderate?

7 A Yes.

8 Q Okay. And you would expect that the patient would  
9 get better with treatment?

10 A You would expect, yes.

11 Q And you would expect the patient to get better with  
12 time?

13 A Correct.

14 Q You wouldn't expect that this would be a life --

15 A Altering --

16 Q -- altering event?

17 A No, you would not expect that. No.

18 Q Okay. You wouldn't expect that ingrown toenails  
19 would be a result of a knee injury?

20 A Oh, no.

21 Q No?

22 A No.

23 Q Now, when the patient was seen in -- by Dr. Campbell  
24 -- here we are.

25 A Okay. It's a blank screen.

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1 THE COURT: It's not working? Still not working?  
2 THE WITNESS: No, it's not working.  
3 THE COURT: Who pulled the plug on the witness?  
4 THE WITNESS: I can look at that.  
5 MR. WARD: It's not -- we're not hooked up to the  
6 internal system. That's why we have the projector.  
7 THE WITNESS: Okay.  
8 THE COURT: Well, I can see it on my screen.  
9 MR. WARD: Oh, really?  
10 THE WITNESS: Oh, you are?  
11 THE COURT: Yeah.  
12 THE WITNESS: There you go.  
13 MR. WARD: We thought we weren't hooked up.  
14 THE WITNESS: There's one up there, too.  
15 MR. WARD: Okay. Well I -- may I suggest that we proceed  
16 to try to get through this witness, unless Your Honor --  
17 THE COURT: Of course. Can you see the screen,  
18 Mr. Baker?  
19 MR. BAKER: It's on.  
20 THE COURT: If you can't see it, feel free to move  
21 around.  
22 MR. BAKER: It's on right here, Your Honor.  
23 THE COURT: Oh, it is?  
24 MR. BAKER: Yes.  
25 MR. CARDENAS: Just turn it on. Hit the on button.

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1 MR. WARD: Is ours not turned on?

2 THE COURT: Does the witness have one?

3 THE WITNESS: No, it's still black. It doesn't like me.  
4 I felt for a little button somewhere else, any buttons.

5 THE COURT: What about on this side? Is the power button  
6 on?

7 THE WITNESS: Is there such thing as a power button? Oh,  
8 it says welcome, so I guess not. There it is, okay.

9 MR. WARD: You got it?

10 THE WITNESS: Yeah, I've got it.

11 BY MR. WARD:

12 Q Okay. I'm going to ask you from the screen and then  
13 you can look on there if you need it.

14 A Yeah.

15 Q Now, you're familiar with this, are you not?  
16 Patient pain drawing?

17 A Yes.

18 Q What's the purpose of that?

19 A To get a least serial -- because it's normally done  
20 -- you do it certainly on your initial, but a lot of people  
21 will do them on a serial basis to determine what their current  
22 pain status is or current pain complaints.

23 Q Okay. And this was two to three months  
24 post-accident; is that correct?

25 A Does it have a date on the top of it? Where's the

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1 date on it?

2 Q You know, I can't tell what the date is. There's a  
3 date up there, but it looks like it's a fax date, so I don't  
4 know what the --

5 A Yeah, that's not going to count. I don't see a  
6 specific date on this diagram.

7 Q Okay. Well, we know that Mr. Rodriguez went to the  
8 Wellness Group sometime in January of 2005?

9 A Right.

10 Q So we know this is at least two months  
11 post-accident.

12 A Okay.

13 Q Your NASCAR driver, I take it, by the time two  
14 months had passed, realized that she had more injuries than  
15 just her wrist

16 A She was in rehab by that time, but you know, she  
17 went -- did go back to racecar driving.

18 Q She did?

19 A That was her goal, even though she'd destroyed her  
20 ankles, she found a way and she got back to racecar driving.  
21 I saw that by the end of my residency.

22 Q Did --

23 A It was amazing.

24 Q Did -- was there any lawsuit connected with her  
25 injury?

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1 A I think that she --

2 MR. BAKER: Your Honor --

3 THE WITNESS: -- those racecar drivers sign their life  
4 away, that if you die or whatever, it doesn't mean anything.

5 MR. BAKER: Your Honor, you know what I'm going to say,  
6 relevance.

7 THE COURT: Sustained.

8 MR. BAKER: Relevance objection to that.

9 THE COURT: Sustained, Mr. Baker.

10 MR. BAKER: Thanks. Could we strike that from the  
11 record?

12 THE COURT: I'll wipe it out of my memory.

13 MR. BAKER: Sure.

14 MR. WARD: Well, I would submit that I can offer why it's  
15 relevant.

16 THE COURT: Very well.

17 MR. WARD: If the Court wants to allow me to do that?

18 THE COURT: Go for it.

19 MR. WARD: Okay.

20 BY MR. WARD:

21 Q You've been treating patients over 20 years with  
22 orthopedic injuries?

23 A Yes.

24 Q You find --

25 MR. BAKER: Your Honor, I'll withdraw the objection.

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1 THE COURT: All right.

2 MR. BAKER: I really want to finish.

3 THE COURT: Yeah, I was hoping we could finish with  
4 Dr. Shannon today.

5 THE WITNESS: I'd like that too.

6 THE COURT: I bet you would.

7 MR. WARD: We can look at the record at how long the  
8 questions are and how long the answers are.

9 THE COURT: Please proceed, Mr. Ward.

10 BY MR. WARD:

11 Q With the patient pain drawing, the purpose is to  
12 have the patient write down what's troubling them; isn't that  
13 correct?

14 A That is correct.

15 Q And it says on here for aches and burning and  
16 numbness and pins and needles and stabbing and other, correct?

17 A Correct.

18 Q And it says on here "percentage of pain in the  
19 back"?

20 A Uh-huh.

21 Q And "percentage of pain in the legs." And it  
22 invites the patient to mark on the pain drawing?

23 A Yes, it does.

24 Q And where does the patient mark? Where did this  
25 patient mark?

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1 A On the left knee. I believe -- isn't that the left.

2 Q And what does that tell you?

3 A That his pain complaint was his left knee.

4 Q And nowhere else?

5 A That's what this diagram says, yes.

6 Q And below that, can we go down a line or two? And  
7 what does he contend his level of pain is?

8 A Nine out of ten.

9 Q Okay. So it's beyond horrible and very severe and  
10 it's just under agonizing?

11 A That's correct.

12 Q Correct?

13 A Yes.

14 Q Okay. Now, when -- were any of these records  
15 provided to you at any time?

16 A This particular record, I don't recall seeing. This  
17 specific diagram, no.

18 Q Any of the records from the Wellness Group?

19 A Yes, I've seen Dr. Simpson's note, but -- I've seen  
20 what's in this packet. One thing that's not in this is  
21 Dr. Campbell's QME report, initial office visit moderate. I  
22 don't see it here unless he did it just on paper, which there  
23 is a paper documentation I thought.

24 Q Okay. Now it includes the second opinion of Vision  
25 Radiology Consultants, correct?

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1           A     It may. I'd have to look at every piece of paper  
2 here. Honestly, in this section, which is Section 8, I don't  
3 see it. The radiology associates re-read, I don't see it  
4 here.

5           Q     Okay. You're aware that the first MRI was read by  
6 an osteopath?

7           A     Yes, I am.

8           Q     Okay. And you're familiar with osteopaths?

9           A     Yes, I am.

10          Q     And they're physician, doctors, are they not?

11          A     Yes, they're recognized and licensed the same as an  
12 MD.

13          Q     Okay. So an osteopath is not a -- is not in a  
14 different category in terms of what they're allowed to do than  
15 an MD?

16          A     I'm not aware of it. I haven't read the osteopathic  
17 law to know exactly what they are and are not capable of doing  
18 in comparison. I know that they are licensed in a separate  
19 board in each state. So, you know, unless I read the law --  
20 the two laws, I don't know -- I don't believe they're  
21 different.

22          Q     Right. In general --

23          A     As far as what you can do.

24          Q     In general, an osteopath can perform surgery?

25          A     I believe so, yes.

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1 Q Okay. In general, an osteopath can prescribe  
2 medications?

3 A Yes, I believe so. Yes.

4 Q Okay. And it was an osteopath who read this -- the  
5 MRI the first time; is that correct?

6 A I believe so.

7 Q And you looked at the charge and saw that the charge  
8 was reasonable and necessary; is that correct?

9 A I agree, yes.

10 Q And the charge was for -- there were two charges;  
11 isn't that right?

12 A There might be. You'd have to pull it off. I've  
13 looked at -- you had me look at a lot of bills today.

14 Q There is a charge for the MRI of \$1800?

15 A Right. And then the other must be the  
16 interpretation charge.

17 Q Well, the interpretation --

18 A Or is it an x-ray charge?

19 Q The charge for \$550 says it's for a holographic  
20 reconstruction. You're familiar with what the MRI report  
21 says, are you not?

22 A Yes, I am.

23 Q And you're familiar that he says that he read it  
24 under a special reader; is that correct?

25 A Yes, I think that's what the report says.

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1 Q That he used a 3D imaging?

2 A Correct.

3 Q Something or other?

4 A Yes.

5 Q Is that right?

6 And what is that technology?

7 A Well, I don't technically use this. I mean, I would  
8 use it if it was for fractures, because you want to see  
9 displacement of bones and the structure. Three dimensional  
10 reconstruction is to try to basically make a model out of the  
11 joint; that's what it does. It takes the images and puts them  
12 into a 3D construction.

13 Primarily, when I use those, those -- I do 3D  
14 reconstructions from time to time, but it's usually for  
15 fractures when I'm planning a surgical approach to repair a  
16 broken bone that's got zillion little pieces to know if it's  
17 even doable.

18 Q So you're telling me you don't know what the doctor  
19 that did the MRI was doing when he said images were viewed on  
20 a digital work station with multiplanner reformatted and three  
21 dimensional reconstructed sequences performed by the  
22 radiologist at the time of interpretation as needed? Are you  
23 saying you don't know what that is?

24 A I know what he did, I don't know what the purpose of  
25 it would be. I understand -- I read that it was done. I

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1 didn't -- you know, I'm not familiar enough with the software  
2 and the -- because it is a software reconstruction. I mean,  
3 that's the limits of -- that's what they talk about when you  
4 talk about limits on 1.5 Tesla versus 3 Tesla, is you're  
5 constructing it off the scans and the quality of the scans  
6 gives you the quality of the reconstruction, which is software  
7 based.

8 Q Okay.

9 A So this is a computer reconstruction based on the  
10 films themselves. So you're like cutting each film out and  
11 making a little piece of paper out of it and you're stacking  
12 it and making it into a picture that's three dimensional.  
13 That's what this means. And they -- and what happens is the  
14 software in between fills in the gaps because when you have  
15 these smaller Tesla units what they do is they take bigger --  
16 it's a scan that's done quickly, so it's use -- it's making  
17 cuts, it's like cutting you up like a salami.

18 And if they're doing the cuts every .1 millimeter is  
19 one -- every millimeter or is it every five milliliters or is  
20 it every centimeter that the cut is made? The software fills  
21 in the absent photos, because when you get an MRI scan it's  
22 like chopping you up like a salami. And when they reconstruct  
23 them, they turn them into AP and lateral, things that most  
24 doctors are used to looking at in x-ray form.

25 When they do a 3D reconstruction, they're cutting them

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1 out and putting them and stacking them so you can make  
2 actually a model of the bone, but it's only as good as the  
3 definition of the unit, the clarity of cleaning up the fuzz on  
4 it and then filling in the differences between it.

5 If the scan was done, and they don't really talk  
6 about what the density and the distance between each cut was,  
7 then you have a lot of fudge factor that's based on software  
8 filling in the blanks.

9 It's like taking -- when they do a raid, they do  
10 raid division of a computer program, that's one of the big  
11 things that you see now, is your computer discs are raid --  
12 made raid capable. That means they split every piece of  
13 information in a computer file and put half of it in one place  
14 and half of it in another place so that if there's a hard  
15 drive crash, they can reconstruct it. What they're doing is,  
16 they're splitting the file. You don't get the density. And  
17 what they have is a program that will fill in the gaps, so  
18 that if one hard drive goes down, you don't lose every piece  
19 of information that was ever on the hard drive. It's a way  
20 for you to maintain if it's business related important  
21 information that you don't lose everything. And when you have  
22 a crash of a drive, what's the biggest problem? If you didn't  
23 back it up, you lose everything.

24 Well, these -- this does the same thing. It's a  
25 program then that fills in the gaps. So if your raid drive

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1 goes down, one of them, you still have the other one, you  
2 reconstruct all your information. These are software programs  
3 working to fill in the gaps just like the raid program saves  
4 your information and can reinterpret it. These programs fill  
5 in the gaps, but they're all based on how much definition  
6 occurs between the magnet, and the magnet is the strength of  
7 the picture taken, and then the rest is the software turning  
8 it in to something.

9 I don't know a lot about what the software was, to  
10 make a comment about it, nor to figure out exactly how it was  
11 being utilized and what the -- how good the computer program  
12 was that made -- filled in all these -- all the gaps from this  
13 scan. So it doesn't just -- just putting that sentence there  
14 doesn't mean a lot to me and how it would make this scan so  
15 much better or make it much more reliable than the scanned  
16 pictures, which we know are moderate or low -- of low  
17 specificity. They're just -- they're grainy pictures  
18 basically, because it's a small -- because it was an open MRI  
19 unit.

20 Q And you know that he found that both menisci show  
21 gross normal morphological characteristics?

22 A I understand that.

23 Q Okay. And that he said the anterior and posterior  
24 cruciate ligaments, the medial and lateral collateral  
25 ligaments and the patella or quadricep tendons remain taught?

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1           A     I understand. I see that.

2           Q     Okay. And you're suggesting that the kinds of  
3 problems you saw wouldn't show up on this kind of an MRI; is  
4 that right?

5           A     Potentially not. You also have these other things.  
6 When we did it -- when I did my clinical examination I found  
7 that the anterior cruciate ligament seemed to be a little  
8 unstable and I --

9           Q     I --

10          A     -- and I felt that it clinically was a problem. The  
11 intrasynovial ligaments take time to degenerate and you can  
12 have good stability on clinical. You can -- and if you don't  
13 interpret it properly, I mean, you're getting into highly  
14 technical areas that you want to more or less talk to the  
15 radiologist about if you're not personally looking at the  
16 scans.

17                   I mean, you can tear apart the test. I can make  
18 points that tell you -- that can make you throw away this MRI.  
19 I can give you points, if I knew the software, that would make  
20 you think that that MRI was a great MRI, and all we do is  
21 confuse people who don't know how it was put together. I  
22 mean, so I'm not exactly sure what you're really asking me.

23          Q     I'm asking you if that were his findings?

24          A     Yes, I know what his find -- I see what his findings  
25 are.

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1 Q And I'm asking you, based on the resolution of this  
2 machine, are you telling me that the problems that you saw  
3 wouldn't have shown up on this MRI?

4 A I say they are less likely to have shown up than on  
5 a good standard, 1.5 unit.

6 Q That's not my question. My question is whether -- I  
7 mean, let me give my example. In the old days we had rabbit  
8 ear on the back of our televisions to get pictures and now we  
9 have HDTV.

10 A Correct.

11 Q And when we see the horse race, it looks a lot  
12 better on HDTV than it did on the old black and whites with  
13 rabbit ears.

14 A That's correct.

15 Q But on the old black and white with rabbit ear we  
16 could still tell it was a horse race. We couldn't see it  
17 quite as well, but we could tell that it was a horse race. So  
18 my question to you is, are you telling me that the resolution  
19 of this machine is such that the problems you saw when you did  
20 surgery would not have shown up on this film?

21 A Yes.

22 Q And you're sure of that?

23 A Yeah.

24 Q And how do you know that?

25 A Based on the fact, just the example you gave me.

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1 You're looking -- we're trying to make a determination of  
2 something that is -- when you look at meniscal pathology,  
3 you're not -- I would trust the MRI if you told me it was a  
4 broken bone because I could see one piece that's out of  
5 alignment with another piece. It's gross. It's like looking  
6 at a grainy picture. Anybody with half a brain could look at  
7 it and say it's out of alignment.

8 But you're getting into a meniscus, which is  
9 probably, when you look at its actual size, is not much bigger  
10 than a big silver dollar, that's being cut up into pieces that  
11 are five to six millimeters apart. You're maybe taking three  
12 to four slices, because of that unit and its strength, getting  
13 a grainy picture, with three slices of that whole meniscus and  
14 a computer filling in the gaps.

15 Q Well, how many slices were there of that meniscus?

16 A I'd have to look at the -- I'd have to take a look  
17 at the scan again. I'm just saying, when you look at a mild  
18 to moderate, which is this Tesla level, based on the amount of  
19 magnet, you have to -- it's not defined in the report exactly  
20 how many cuts were made, at what distance they were made. And  
21 in 2005 at that point time they were not making one millimeter  
22 cuts, which were high definition.

23 Q Okay. But you looked --

24 A So I have to assume they're four to five millimeters  
25 apart.

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1 Q But you looked at the film, did you not?

2 A I did.

3 Q And based on looking at the film, you diagnosed a  
4 tear?

5 A With my clinical examination. All of it was a  
6 correlation between the physical examination and then looking  
7 at a grainy photograph and saying yeah, it doesn't look quite  
8 normal and my clinical examination would indicate there's  
9 something wrong with this, so I'm going to assume there's  
10 something wrong with this.

11 Q Well, didn't you say, on September 30, '05,  
12 "MRI reveals a lateral meniscus tear, anterior  
13 cruciate ligament strain, and injury to the patella  
14 femoral joint with patellar compression syndrome."  
15 Isn't that what you said?

16 A Yes, that's what I said.

17 Q You said you could see that on the MRI?

18 A Yes, I saw it in a grainy form on the MRI, based on  
19 my clinical. Now if he had come in -

20 Q So you can see --

21 A You can see the graininess.

22 Q You can see the --

23 THE COURT: One at a time.

24 THE WITNESS: Yes, you can see graininess and it's you --  
25 you're filling in the picture in your own mind.

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1 BY MR. WARD:

2 Q So you --

3 A That's what it is.

4 Q So you can look at these films and diagnose a tear,  
5 correct?

6 A Yes.

7 Q But you think that Mr. Atoon -- Dr. Atoon can't look  
8 at these films and make a diagnosis of no tear; is that  
9 correct?

10 A I'm saying I don't know what his qualifications were  
11 to read the films.

12 Q And you saw the inside of the patient's knee: isn't  
13 that correct?

14 A Yes, I did.

15 Q But the knee that you were looking at was not the  
16 same knee that was in the MRI; isn't that true?

17 A You're talking about nine months later?

18 Q Yes.

19 A Yes, of course, it was -- it can't be identical  
20 unless I looked at it the same moment.

21 Q And something where you would expect with this  
22 particular patient that there would be continual changes?

23 A There could be continual changes, yes.

24 Q Okay.

25 A And over time, there would be. The more time, the

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1 more changes.

2 Q Correct. Now, the patient -- you have here he was  
3 placed in physical therapy and ultimately went to a second  
4 doctor, placed on medications and ultimately obtained an MRI.  
5 This is from March 24, '05, it's on --

6 A Right.

7 Q -- Bates Page 05 from your record.

8 A Right. That was history given by the patient, not  
9 come -- it did not come from records.

10 Q Okay. So you don't know what the MRI said at that  
11 point; is that correct?

12 A I was just in that section documenting what the  
13 patient said.

14 Q Let me strike that. Let me strike that and withdraw  
15 that question.

16 Surgery was recommended; is that right?

17 A Yes.

18 Q Who recommended surgery at that point?

19 A Wasn't it -- beside me?

20 Q It says surgery was recommended. I assume that  
21 means --

22 A Yeah, it was Dr. Whitfield or whatever, the other  
23 guy that was with Dr. Campbell recommended surgery because he  
24 found a positive McMurray's on clinical and he recommended  
25 surgery. That's my understanding.

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1 Q What doctor was that?

2 A Let's see, it should be here. Section 8, okay, on  
3 Page Number 6 on the Wellness Center, which correlates with a  
4 report -- should be -- I think that's Simpson, it's the same  
5 date of service.

6 [Counsel Confer]

7 THE WITNESS: Wellness Center and it says -- let's see.  
8 And on Page 13 of the Wellness Center, Dr. Simpson -- William  
9 Simpson, MD, orthopedic surgeon said,

10 "MRI of the left knee was reviewed with the  
11 patient and was recommended the patient undergo left  
12 knee arthroscopic surgery."

13 So I think my record was accurate in that somebody  
14 else had recommended surgery beside me.

15 BY MR. WARD:

16 Q Okay. And the other doctor that read the MRI, did  
17 he see a torn meniscus?

18 A He saw degeneration within the meniscus could not  
19 exclude tear, I think is what it said. Early degeneration,  
20 posterior horn of the medial -- of the medial meniscus, that  
21 was by Steven Whiner [phonetic], American Chiropractic Board  
22 of Radiology.

23 Q Yeah, he said degeneration, correct?

24 A Correct.

25 Q Okay. And do you know when the final treatment from

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1 the Wellness Clinic was?

2 A Let me look. February 15, it looks like. It's  
3 unclear who he actually saw.

4 Q Okay. So --

5 A Or if he saw anybody, actually, because there's  
6 nothing written under diagnosis or treatment plan or anything.  
7 And there's no dictated note with respect to that day's visit.

8 Q When you saw the patient March 28 '05, you  
9 recommended that he see Dr. Mortillaro; isn't that right?

10 A Yes.

11 Q Dr. Mortillaro is a psychologist; isn't that right?

12 A Yes.

13 Q Do you refer all your surgical patients to  
14 Dr. Mortillaro?

15 A Not all.

16 Q What percentage do you refer to Dr. Mortillaro?

17 A Five percent or less probably.

18 Q Okay. Why did you refer this particular patient to  
19 Dr. Mortillaro?

20 A He had symptoms of post-traumatic stress, crying and  
21 weeping, very emotional regarding -- and it sounded like  
22 post-traumatic stress, which I'm not going to try to treat.

23 Q You don't diagnose and you don't treat  
24 post-traumatic stress, I guess?

25 A I can -- I won't write it down as a final diagnosis,

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1 because they would say, am I qualified? Am I psychologist or  
2 psychiatrist? I can recognize it when I see it, like I can  
3 see depression, but I'm not going to go about treating it and  
4 I was making a referral for appropriate care.

5 Q So is it fair to say that in your training as an  
6 orthopedic surgeon, you don't have training to diagnose and  
7 you don't have training to treat depression or post-traumatic  
8 stress disorder?

9 A That's correct.

10 Q Okay. You would refer to someone else for that?

11 A Correct.

12 Q If you suspected something, you would refer to  
13 someone else, but you wouldn't actually make a diagnosis?

14 A Correct.

15 Q Okay. And so that's why you referred the patient to  
16 Dr. Mortillaro?

17 A That's my under -- that's my recollection.

18 Q Okay. Is that it? Is that the only reason you  
19 referred him?

20 A Well, I mean, as part of that, if you have  
21 post-traumatic stress, I wanted to get a read as to, you know,  
22 as to his ability to tolerate a surgery too. I mean, that all  
23 comes a part of it.

24 Q Okay.

25 A A person might tolerate it.

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1 Q Well, what was the patient's attitude in terms of  
2 wanting surgery when he came to see you?

3 A Honestly, I don't recall and I didn't write it down,  
4 so I don't have a specific recollection of the individual on  
5 that date.

6 Q Okay. Would it surprise you to hear that the reason  
7 he came to you was because he was looking for another doctor  
8 because he couldn't get the last doctors to do surgery?

9 A I didn't have that information, so.

10 Q So would that surprise you?

11 A Well --

12 Q We've been asking you about surprise today.

13 A I mean, yes and no. I mean, one doctor recommended  
14 it, you know, in evolution, other people didn't. It's -- you  
15 see that sometimes.

16 Q Okay. But my specific point was that he came to you  
17 because he was hoping you would operate on him.

18 A Okay.

19 Q Does that surprise you?

20 A Well, no -- I mean, yes and no. I mean, if he's in  
21 a lot of pain and he wanted to have surgery. I don't know the  
22 situation with respect to -- oftentimes when people live  
23 somewhere else, they have to come to the state that they're --  
24 that the injury occurred in because nobody -- if they don't  
25 have insurance, they can't get anyone to treat them from a

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1 financial standpoint. They're not going to take on the risk  
2 and if it has to be done under a lien, you're going to wind up  
3 having to have a relationship with whatever attorney -- the  
4 doctors have to be able to trust the attorney that they're not  
5 going to not get paid basically, because no matter what, we  
6 take a risk regarding that, even with the greatest of  
7 relationships on liens.

8 Q You take a risk because if the patient doesn't win  
9 the lawsuit, you don't get paid?

10 A Yeah and create all kinds of hassle for everybody.

11 Q Right. Okay. So from your standpoint, it's a  
12 little better if the patient wins?

13 A Yeah.

14 Q You get paid?

15 A Well, hopefully, but you know, I've seen it go both  
16 ways.

17 Q Right, but if you lose you don't -- if the patient  
18 loses, you don't get paid?

19 A That's not necessarily true. We're less likely --

20 Q That's generally true, though?

21 A -- to be paid. It generally can be true, yes.

22 Q Okay. Now, are you aware that some patients, for  
23 psychological reasons, just don't get better?

24 A Yes, that can happen.

25 Q No matter what you do for them, they just don't seem

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1 to get better?

2 A There's multi-factorial reasons for each specific  
3 case, but yes, I've seen that.

4 Q Okay. And was that any part of why you sent this  
5 patient to Dr. Mortillaro, that you were concerned that this  
6 may be one of those patients that just didn't get better?

7 A I don't recall specifically because I didn't write  
8 it down exactly why I sent him over.

9 Q Okay.

10 A So I don't recall it specifically.

11 Q Okay. But that's essentially been your experience  
12 with this patient, isn't it -- hadn't it? He just doesn't get  
13 better?

14 A Well, after reviewing the records, I recognize he's  
15 still having problems, but there's other issues that are  
16 separate from the knee that have evolved over time. So based  
17 on the record I reviewed, that could explain ongoing pain and  
18 why he's not any better.

19 Q In terms of his knee, it seems that he just hasn't  
20 gotten better?

21 A Yes.

22 Q To the point where you've sent him out for various  
23 things after surgery, none of it helped?

24 A Right. And why I recommended waiting, even though  
25 he had persisting pain, because I couldn't document something

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1 that I could uniformly say that I could reasonably feel that I  
2 was going -- he was going to get better with my intervening in  
3 any way.

4 Q And when the -- when you first scheduled the patient  
5 for surgery, did he tell you that he had had a pulmonary  
6 embolism?

7 A I was told that's why we ordered Lovenox.

8 Q And did you do any testing or did he tell you that?

9 A He told me that.

10 Q And what is a pulmonary embolism?

11 A That's a clot coming generally from the lower  
12 extremities, although they can occur from upper extremities in  
13 one percent of cases, that come from the legs, go up through  
14 the heart, lodge in the lungs and cause difficulty with  
15 breathing and sometimes, if they're large enough, can kill  
16 you.

17 Q Okay. It's not the kind of thing you're likely to  
18 forget?

19 A No.

20 Q Okay. If you've got -- if you've had it before, you  
21 know it?

22 MR. BAKER: Objection, Your Honor, relevance.

23 THE COURT: Sustained.

24 BY MR. WARD:

25 Q And the -- after the surgery, you discussed a fungal

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1 infection in the patient's toes?

2 A If I put it in the notes, then yes. He might have  
3 discussed it with me.

4 Q And you recommended a dermatology referral?

5 A Yes.

6 Q Was that caused by the injury?

7 A No, not that I'm aware of.

8 Q And there was some concern at some point that the  
9 patient had a possible recurrent meniscus tear?

10 A That was why the arthogram MRI was done to verify --  
11 to rule it in or rule it out.

12 Q Okay. So is it true that there was some concern  
13 that the patient had a possible recurrent meniscus tear?

14 A I had to look for every reason why he was still  
15 having pain.

16 Q Right, but he was coming to you and complaining of  
17 pain, correct?

18 A Correct.

19 Q And you tested everything and couldn't find  
20 anything?

21 A No, I didn't -- I wasn't able to verify why he had  
22 pain.

23 Q Okay. And so because you thought, based on his  
24 complaints, there might be a recurrent meniscus tear --

25 A Right. One of the differential diagnosis, because

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1 of the complaint of pain and popping --

2 Q I'm not quite done.

3 A Oh, I'm sorry. Okay.

4 Q And just -- if you'll just give me a second.

5 A No problem.

6 Q And so as a result of that, you sent him to an MRI  
7 again, a different kind of -- an arthrogram --

8 A Right.

9 Q -- to find out if he had a meniscal tear and that  
10 was negative, right?

11 A That was negative, yes.

12 Q Now, I interrupted you, you were about to say  
13 something, so please --

14 A That's all right -- it's not really relevant. I  
15 don't even remember either way.

16 Q Okay.

17 A So --

18 Q And so after the MRI showed no recurrent meniscal  
19 tears or other relevant injury; isn't that correct?

20 A Yes.

21 Q And this was where he was complaining of popping,  
22 but you couldn't find popping when you examined him?

23 A That's correct.

24 Q Okay. Now, let me ask you, I've tried taking a  
25 rubber hammer and hitting my knee and trying to make it jump

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1 and I can't ever find the place to do it.

2 A Right.

3 Q You, I'll bet, are pretty good at doing that?

4 A Yes.

5 Q Okay. And that's because you know exactly where the  
6 -- you're supposed to hit it to make that happen?

7 A Yes.

8 Q Okay. And I take it you know a whole bunch of other  
9 things about how to examine people to find out what's going on  
10 with their body, especially their joints?

11 A Yes.

12 Q Okay. And you looked everywhere and couldn't find  
13 any evidence that would support his claim that there was  
14 popping in the meniscus?

15 MR. BAKER: Your Honor, this has been asked and answered  
16 so many times.

17 THE COURT: Sustained.

18 MR. BAKER: Let me restate my objection, Your Honor.  
19 Asked and answered and I withdraw my previous objection. I  
20 didn't mean to say so many times.

21 THE COURT: Very well.

22 BY MR. WARD:

23 Q And so you recommended that there not be any  
24 surgical intervention; is that correct?

25 A Yes, I recommended that we let time take care of it,

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1 that there might be scar tissue in the joint causing his  
2 symptoms, which would never show up on the MR -- on the  
3 arthrogram MRI and just give it time.

4 Q Would that show up on examination?

5 A Would what show up on examination?

6 Q If there were scar tissue developing in the joint?

7 A No, not necessarily.

8 Q Okay.

9 A If you have a placi sometimes you can and that was  
10 the one thing I couldn't verify. The MRI arthrogram won't  
11 pick it up, but a placi could cause popping that will vary.  
12 Normally, if you stretch the joint out, you can get the placi  
13 to go away, but if it doesn't, then you have to go back in and  
14 cut out the scar tissue, or at least look for that. That's  
15 something an MRI arthrogram won't find, but could cause popping  
16 and pain and be a consequence of a surgery because of scar  
17 tissue.

18 Q Okay. So you're suggesting there could be a cause  
19 for popping?

20 A There could be.

21 Q Right. But whether there's a cause or not, with all  
22 of your examinations, you couldn't find it?

23 A Correct. I could not reproduce his complaint --

24 Q Okay.

25 A -- on examination.

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1 Q Okay. Chondromalacia is roughening of the inner  
2 aspect of the patella?

3 A Yes.

4 Q How long does that take to develop?

5 A Long time. It can be short period if you've  
6 completely disused the leg, but normally it's a degenerative  
7 condition.

8 Q Okay. And would you suspect that what you saw, the  
9 chondromalacia in this patient, was something that had  
10 developed over a number of years?

11 A Yeah, the initial part of it -- you can have  
12 chondromalacia that's asymptomatic and then once you stop  
13 using the leg it can become symptomatic because of disuse and  
14 atrophy. That's what you do to correct it. That's why the  
15 therapy after surgery, get the leg strong, maybe the  
16 chondromalacia symptoms might go away.

17 Q Okay. So if you sustained a knee injury and you  
18 cause injury to the tissue, you can heal the tissue, correct?

19 MR. BAKER: Objection as to what tissue.

20 THE WITNESS: Yeah, that's what I was going to --

21 THE COURT: Objection as to what, Mr. Baker?

22 MR. BAKER: As to what tissue. I'm sorry, vagueness,  
23 objection.

24 THE COURT: Okay.

25 THE WITNESS: You mean the soft tissues or about the knee

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1 or what --

2 BY MR. WARD:

3 Q Yeah, some tissues in the knee can be healed, right?

4 A Oh, yes, around the knee.

5 Q Some conditions -- I mean, people can have knee  
6 injuries and actually have a life after that?

7 A That's correct, they can.

8 Q They have to follow physical therapy and they have  
9 to do certain things?

10 A Right.

11 Q But just because someone sustains a knee injury such  
12 as this doesn't mean it's over?

13 MR. BAKER: Objection; asked and answered.

14 THE COURT: Sustained.

15 THE WITNESS: What's over? You mean their life?

16 BY MR. WARD:

17 Q Right.

18 A Yeah, people aren't going to die from a knee injury.

19 MR. BAKER: Your Honor, objection. Asked and answered.

20 THE COURT: Sustained. Dr. Shannon, you need to wait  
21 until the Court rules on the objection --

22 THE WITNESS: I'm sorry.

23 THE COURT: -- before you answer the question.

24 THE WITNESS: Sorry.

25 THE COURT: Please proceed.

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1 MR. WARD: Thank you, Doctor.

2 MR. BAKER: Your Honor, can I speed through it.

3 THE COURT: Okay. How speedy can you speed through,  
4 Mr. Baker?

5 MR. BAKER: I can't talk as fast as she can, or think as  
6 fast as he can, but I think I can do pretty well.

7 THE COURT: All right.

8 REDIRECT EXAMINATION

9 BY MR. BAKER:

10 Q I want to address just a couple of things that were  
11 talked about.

12 Originally it was suggested that the McMurray sign  
13 that is duly stated for Enrique Rodriguez prior to him seeing  
14 you is from a chiropractor. That's not true, that was from an  
15 orthopedic surgeon. Is that true as well?

16 A That's correct. Simpson was an orthopedic surgeon.

17 Q And it was also -- they spoke about the fact how  
18 Enrique told the ambulance -- would you turn to Exhibit Number  
19 2, please?

20 MR. WARD: What is that, Counsel?

21 MR. BAKER: It's the ambulance report.

22 BY MR. BAKER:

23 Q There's a conversation about Enrique telling his  
24 doctor that his knee was swollen in the ambulance and you  
25 didn't see any evidence that his knee was swollen in the

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1 ambulance; is that correct?

2 A He -- oh, you mean you're talking about the first  
3 doctor, North [sic] or Note [sic]?

4 Q Right, where you said the leg was swollen, but the  
5 swelling has gone down.

6 A Right.

7 Q And it was said that he reported that his leg was  
8 swollen in the ambulance; do you recall that?

9 A Yes.

10 Q But you couldn't find any evidence of that when  
11 Mr. Ward was talking to you. Would you turn to Exhibit 2,  
12 Page 3.

13 A Okay. All right.

14 Q Lower extremities.

15 A Okay. Right.

16 Q Could you tell the Court what that says?

17 A There was positive swelling.

18 Q Okay. So he had swelling in the ambulance; is that  
19 right?

20 A Yes.

21 Q Then he went to the hospital; is that right?

22 A Yes.

23 Q And if you could turn to Exhibit Number 3. You know  
24 that they gave him ice, right?

25 A Yes, I do.

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1 Q You know that they laid him out in a bed; is that  
2 right?

3 A Yes, they did.

4 Q You know that they immobilized his leg; is that  
5 right?

6 A Yes.

7 Q Look at Exhibit Number 1, they gave him ibuprofen  
8 too, didn't they?

9 A Yes, they did.

10 Q Anti-inflammatory?

11 A Yes.

12 Q Not so surprising that the doctor wouldn't see  
13 swelling after ice, immobilization, rest and an  
14 anti-inflammatory; is that right?

15 A That will help get rid of swelling.

16 Q Then he went to see Dr. Nork; is that correct?

17 A Yes.

18 Q And Dr. Nork saw that he had a contusion; is that  
19 right?

20 A That's what he wrote.

21 Q And that contusion is part of that bleeding process  
22 in the blood rising up that you spoke to us again, right?

23 A Yes.

24 Q That you talked about would develop between a week  
25 and two weeks; is that correct?

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1 A Yes.

2 Q So the contusion is there in exactly the time period  
3 that you would expect it to be; is that correct?

4 A Yes.

5 Q Then there was an MRI that was conducted; is that  
6 right?

7 A Yes.

8 Q And an MRI is not the gold standard that -- in  
9 determining knee injury; arthroscopy is, correct?

10 A That's correct.

11 Q And an MRI really to have much efficacy has to be  
12 correlated with clinical symptoms and clinical findings; is  
13 that right?

14 A That's correct.

15 Q So the MRI was conducted, correct?

16 A Yes.

17 Q Oh, incidentally, during that period of time,  
18 Dr. Simpson was able to elucidate a McMurray sign, correct?

19 A Yes, he did.

20 Q Which is indicative of a meniscal tear; is that  
21 right?

22 A That's correct.

23 Q You read the MRI with your own two little eyes; is  
24 that right?

25 A Yes, I did.

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1 Q Not under some garbage three dimensional  
2 representation of a garbage image in the first place. Is that  
3 fair to say?

4 MR. WARD: I'll object. Argumentative.

5 THE COURT: Sustained.

6 THE WITNESS: I did look at the .35 Tesla MRI. I looked  
7 at the original scanned pictures.

8 BY MR. BAKER:

9 Q Then you saw him?

10 A Uh-huh.

11 Q Is that right?

12 A Yes. Yes, I did.

13 Q You did a clinical observation?

14 A Right.

15 Q Or clinical examination.

16 A Uh-huh.

17 Q Is that right?

18 A Yes, I did.

19 Q That suggested meniscal tear; is that right?

20 A Yes, it did.

21 Q You correlated that with the MRI, which suggested to  
22 you, a trained orthopedic surgeon reading it, for a meniscal  
23 tear; is that correct?

24 A Yes.

25 Q And he underwent a surgery?

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1 A Correct.

2 Q And you found a meniscus tear in exactly the same  
3 place where he had originally indicated pain after a  
4 McMurray's test and after an indicative MRI; is that right?

5 A That's correct.

6 Q And during your orthopedic surgery, you found a  
7 meniscus tear in the exact same place that it was suggested in  
8 all of those studies and clinical examinations that we've  
9 already discussed; is that right?

10 A That's correct.

11 Q You did surgery, right?

12 A Yes.

13 Q Some people have recurrent injuries -- recurrent  
14 pathology after an orthopedic surgery to their knee; is that  
15 right?

16 A Yes, 10 to 15 percent.

17 Q Ten to 15 percent. And to 10 to 15 percent of them  
18 will develop scar tissue; is that right?

19 A That's correct.

20 Q And that scar tissue breaks off and forms loose  
21 bodies; is that right?

22 A It can, yes.

23 Q Okay. And if it forms loose bodies, that might not  
24 be evidenced on an MRI, correct?

25 A Yes, it can -- you can miss it.

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1 Q Because they hide; is that right?

2 A Yes, they hide and if it's early on, they're small.  
3 They start out like a pebble of sand that in an oyster gets  
4 bigger and bigger.

5 Q So he --

6 A The longer the timeframe, the bigger it gets.

7 Q So he continues to have pain complaints, correct?

8 A Yes, he did.

9 Q Goes and has another surgery?

10 A Yes.

11 Q The doctor opens him up?

12 A Right.

13 Q Finds loose bodies in his knee --

14 MR. WARD: I'll object. This exceeds the scope of the  
15 direct -- exceeds the scope of the cross.

16 THE COURT: I think this may, Mr. Baker. Sustain the  
17 objection.

18 MR. BAKER: Okay. I'm sorry, he spoke to her about scar  
19 tissue during his cross-examination.

20 MR. WARD: I did --

21 MR. BAKER: She spoke about scar tissue as well. She  
22 completely -- do you recall that?

23 THE WITNESS: I did -- I did speak about it.

24 MR. WARD: I did not ask this witness about any treatment  
25 that he got after he left. I was only asking her about

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1 treatment during the period of time she saw him.

2 MR. BAKER: Yeah, but the scar tissue and the treatment  
3 are related, Your Honor.

4 THE COURT: Very well. I'll allow it.

5 BY MR. BAKER:

6 Q So had loose bodies, which are formed when scar  
7 tissue breaks off; is that right?

8 A Yes, it can.

9 Q Those loose bodies hide, don't show up on an MRI?

10 A Until they get big enough, that's correct.

11 Q And Enrique continued to experience pain and suggest  
12 and report pain, right?

13 MR. WARD: Leading.

14 THE COURT: Overruled.

15 BY MR. BAKER:

16 Q Did Mr. Rodriguez continue to experience pain?

17 A Yes, he did.

18 Q And that type of pain is normally, and can be  
19 associated with scar tissue?

20 A Yes, it can.

21 Q And loose bodies?

22 A Yes.

23 Q And Dr. Tauber opened up and found those bodies; is  
24 that right?

25 A That's my understanding of the record.

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1 Q Now Mr. Ward talked to you about this not being a  
2 life-altering event. In your experience, a single orthopedic  
3 intervention on a knee is typically not a life-altering event;  
4 is that right?

5 A That's correct.

6 Q But how about hypothetically instances when people  
7 have to have multiple recurring orthopedic surgeries, can that  
8 be a life-altering event?

9 A Well, they'll -- multi-repeat interventions on a  
10 knee, along with multiple repeat injuries, eventually cause  
11 the knee to degenerate and deteriorate.

12 Q And hypothetically if an individual develops an  
13 infection during a surgery and has to have a long cost of  
14 hospital treatment, that's --

15 MR. WARD: Object. There's no evidence of this.

16 MR. BAKER: It's a hypothetically, Your Honor.

17 MR. WARD: And it definitely exceeds the scope of the  
18 cross.

19 THE COURT: Sustained.

20 MR. BAKER: Thank you.

21 BY MR. BAKER:

22 Q Wouldn't RSD be a life-altering event?

23 A Yes, it --

24 MR. WARD: Same thing, Your Honor.

25 THE COURT: Same ruling.

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1 MR. BAKER: Thank you, Your Honor. No further questions.

2 THE COURT: Do you have any follow up, Mr. Ward?

3 MR. WARD: Yes, Your Honor.

4 RE-CROSS-EXAMINATION

5 BY MR. WARD:

6 Q You said that sometimes patients develop scar  
7 tissue?

8 A Well, everybody develops scar tissue all the time.  
9 I mean symptomatic scar tissue.

10 Q Okay.

11 A I don't want to mislead anybody. We make a cut on a  
12 person to do a surgery, that's got to heal the scar tissue, so  
13 we make scar tissue all the time.

14 Q Correct.

15 A But usually not symptomatic scar tissue.

16 Q Okay. So every patient has scars and every patient  
17 has scar tissue, but not every patient has symptomatic scar  
18 tissue?

19 A That's correct.

20 Q And I believe you just said that you can have things  
21 -- you can have scars that get bigger.

22 A Yes, that's true.

23 Q Correct?

24 A Yes.

25 Q And as they get bigger there's the potential for

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1 causing problems?

2 A That's correct.

3 Q They're not usually bigger right after the surgery,  
4 are they?

5 A No, not usually.

6 Q And you examined for that, did you not?

7 A Right. Plicas and scar tissue will develop over  
8 six, eight, ten weeks, and then get worse over time.

9 Q Right. And -- but Mr. Rodriguez was complaining of  
10 pain right away, wasn't he?

11 A I believe -- my recollection is he was continuously  
12 complaining.

13 Q Right. Not some period of time later, right  
14 afterwards?

15 A Yes.

16 Q Before there was a long opportunity for something to  
17 develop; is that correct?

18 A Well, yes.

19 Q And you haven't looked at the records of anyone who  
20 treated Mr. Rodriguez after your treatment; is that true?

21 A Oh, I have.

22 Q Okay. And have you had this patient back for  
23 surgery?

24 A No, I haven't seen him since --

25 Q No.

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1 MR. WARD: Thank you. I have no further questions.

2 THE COURT: Any follow up, Mr. Baker?

3 MR. BAKER: Two questions, Your Honor.

4 FURTHER REDIRECT EXAMINATION

5 BY MR. BAKER:

6 Q You said he developed -- he continued to have pain  
7 immediately post-surgically?

8 A He had the usual amount of post-operative pain. For  
9 the first two to three weeks we expect people to have pain  
10 because I swelled up their knee.

11 Q And any --

12 A So they're going to hurt and then you expect it to  
13 subside -- start to subside and his never did.

14 Q So he had pain immediately, correct?

15 A Yes.

16 Q And you're familiar with just post-surgical pain?

17 A Yes.

18 Q And is there -- there's a varying rate of  
19 post-surgical pain, in terms of time duration?

20 A Time duration and severity.

21 Q Right. And then the scarring and the loose body  
22 buildup can happen within four weeks, you said?

23 A Well, the beginnings of it yes, but it may not  
24 obstruct or be enough that it's going to be so obvious that I  
25 have to do a surgery immediately. It takes awhile for it to

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1 be big enough to be a real problem.

2 Q Okay.

3 A Or that you can actually document that it's present.  
4 I mean, I guess that's the better way to say it. I mean, the  
5 loose body could have been there very close to immediately,  
6 could have been intermittently painful for him, could have --  
7 these are could haves and could have been small enough that  
8 only he would notice it and I couldn't elicit it on  
9 examination until it's big enough and enough time has passed  
10 that it's clinically symptomatic that I could demonstrate it.

11 Q But nonetheless, a pain generator?

12 A Yes.

13 MR. BAKER: Thank you. No further questions, Your Honor.

14 THE COURT: Any follow up, Mr. Ward?

15 MR. WARD: No, Your Honor.

16 THE COURT: With the thanks of the Court, Dr. Shannon,  
17 you may be excused.

18 THE WITNESS: Thank you.

19 [End of requested portion at 5:02 p.m.]  
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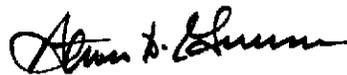
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DISTRICT COURT  
CLARK COUNTY, NEVADA

  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ,	)	
	)	
Plaintiff,	)	CASE NO. A-531538
	)	
v.	)	DEPT. X
	)	
FIESTA PALMS LLC,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

WEDNESDAY, OCTOBER 27, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF ENRIQUE RODRIGUEZ  
VOLUME II

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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Defendant's Witness(es):

None

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1                    WEDNESDAY - OCTOBER 27, 2010 - 12:15 P.M.

2            THE COURT: Mr. Rodriguez, ask that you come forward to  
3 the witness box. Since it's a new day, we'll re-swear you.  
4 Madame Clerk?

5            ENRIQUE RODRIGUEZ, PLAINTIFF'S WITNESS, SWORN

6            THE CLERK: Please be seated, stating your full name,  
7 spelling your last name for the record.

8            THE WITNESS: My name's Enrique Rodriguez, E-N-R-I-Q-U-E  
9 last name, R-O-D-R-I-G-U-E-Z.

10          THE COURT: Thank you. Mr. Ward, whenever you're ready.

11          MR. WARD: Yes, Your Honor. Thank you.

12                  I want to read from the deposition of Mr. Rodriguez,  
13 and there is a -- the original has been lodged with the Court  
14 and I presume you have a copy?

15          MR. CARDENAS: We do.

16          MR. WARD: I'm going to direct your attention to Page 87.

17          MR. BAKER: You're just going to read from the depo?

18          MR. WARD: Correct.

19          MR. BAKER: Your Honor, is that typical?

20          THE COURT: That's not typical in our jurisdiction.  
21 Usually there's a question that's posed first.

22          MR. BAKER: I don't want to start off objecting, but I  
23 guess I'll just start off objecting.

24          THE COURT: As long as you're not objectionable about it.

25          MR. BAKER: Thank you, Your Honor. I'm just -- I'm not

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1 used to this methodology. Normally a question would have to  
2 be pending and the deposition would be used for impeachment.  
3 The deposition itself is not evidence and should not be read  
4 into it just sua sponte.

5 THE COURT: That's my understanding of the law. Mr.  
6 Ward?

7 MR. WARD: It may come as a surprise, and this is what  
8 happens when you get old in this business, Your Honor. I've  
9 never done this, I don't think without it being objected to --

10 THE COURT: Really?

11 MR. WARD: -- and so I come with the documentation. Rule  
12 -- Rules of Civil Procedure for Nevada District Courts, Rule  
13 32(a), Use of Depositions, (2), "The deposition of a party" --  
14 and I'll skip the rest of it, but it's there -- "may be used  
15 by an adverse party for any purpose."

16 THE COURT: That's true. Mr. Baker, any response?

17 MR. BAKER: I have the rule, Your Honor. Can I take a  
18 look at it right now?

19 THE COURT: Sure.

20 [Pause]

21 MR. BAKER: I'm sorry, can you -- what section is that?  
22 Do you know, when you get into the bifocal years, you start to  
23 have problems.

24 THE COURT: I know them well, Mr. Baker.

25 MR. WARD: 32(a)(2).

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1 MR. BAKER: Your Honor, when they talk about 32(a), of  
2 which (2) is a subsection, it says,

3 "At the trial or upon a hearing of a motion or  
4 an interlocutory proceeding, any part of or all of a  
5 deposition, so far as admissible under the rules of  
6 evidence apply, as though the witness were taken,  
7 been present and testifying, may be used against any  
8 party who is present on" --

9 My objection stands, Your Honor. It's not evidence. The  
10 proper use of a deposition is for impeachment purposes.  
11 Depositions don't come into evidence and therefore the  
12 provision of the rule, which says if admissible into evidence  
13 controls.

14 THE COURT: Well, I'm curious, Mr. Ward, you said Rule  
15 32(a), did you say Subsection 2?

16 MR. WARD: Rule 32 -- Rule 32(a) is Use of Depositions,  
17 under (a) are Subsection 1 and Subsection 2. Under Subsection  
18 2 it says,

19 "The deposition of a party or anyone who at the  
20 time of taking the deposition was an officer,  
21 director or managing agent, or a person designed at  
22 under Rule 30(b)(6) or 31(a), to testify on behalf  
23 of a public or private corporation, partnership or  
24 association, or governmental agency which is a  
25 party, may be used by an adverse party for any

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1                   purpose."

2                   The significance of part A and 1 is that if there's  
3 something within the deposition that is inadmissible then that  
4 objection still stands and that's why it says as if the  
5 witness were testifying from the witness stand. So he can't  
6 sneak something in by way of deposition which would otherwise  
7 not be admissible if the witness were on the witness stand,  
8 but in terms of using the deposition that's what for any  
9 purpose means. It's only adverse parties. You can't do this  
10 for just witnesses, but for adverse parties you can use it for  
11 any purpose to bring it into evidence.

12                  THE COURT: Let me ask you this.

13                  MR. WARD: Yes.

14                  THE COURT: Do you read the rule to mean that even though  
15 the witness is on the stand, you can stand up and read the  
16 entire deposition transcript testimony, aside from anything  
17 that's not admissible? Is that how you read the rule?

18                  MR. WARD: I read the rule that way, yes. I don't think  
19 it would be a smart thing to do, but I think it's possible if  
20 somebody wanted to do that.

21                  THE COURT: Mr. Baker?

22                  MR. BAKER: I respectfully disagree with Mr. Ward, Your  
23 Honor. It says, "So far as admissible under the Rules of  
24 Evidence." And the use of a deposition itself under the Rules  
25 of Evidence falls under the remaining provisions. You can use

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1 a deposition when the party's not available, you can use it if  
2 they've been subpoenaed. There's no exception with respect  
3 particularly to a party. The deposition itself is not  
4 evidence and does not just get read into evidence. It can be  
5 used for the purposes of impeachment or the normal purposes  
6 for which you see a deposition being used.

7 So my objection would be that the deposition itself  
8 is not evidence. Rule 32(a)(2) falls on the general provision  
9 of (a); (a) restricts the use of depositions to so far as  
10 admissible under the rules and the purported and suggested use  
11 right now is not admissible under the rules.

12 THE COURT: I think you can use this deposition  
13 testimony, but I think your intent is to impeach his  
14 credibility, I think you have to ask him the question before  
15 you can just simply stand up and recite the testimony that  
16 he's given at the deposition.

17 MR. WARD: That's not what I'm using it for.

18 THE COURT: What are you using it for?

19 MR. WARD: I didn't say I was using it to impeach his  
20 credibility.

21 THE COURT: No, you didn't say that. You haven't said  
22 why you're attempting this approach.

23 MR. WARD: And my suggestion, Your Honor, is that if we  
24 followed Mr. Baker's objection, then the deposition of a party  
25 would not be used for anything different from any other

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1 witness and there wouldn't be any need to have this code  
2 section in here that says the deposition of a party may be  
3 used by an adverse party for any purpose. There -- that would  
4 be superfluous if we said well, you can use -- you can only  
5 use it the same way you can use a deposition of a witness.  
6 Number three is -- deals with depositions of witnesses,  
7 whether or not a party.

8 THE COURT: I don't read the rule the way that you do,  
9 that would allow you to stand up and read his entire  
10 deposition transcript testimony, considering he's here and you  
11 can examine him. I don't read the rule the same way you do.  
12 So, given that ruling, I'm really not sure what you are  
13 proposing to do, if you're not proposing to impeach him.

14 MR. WARD: What I wanted to do is -- was I wanted to  
15 remind him of his deposition testimony and ask him if that's  
16 changed.

17 THE COURT: Then I think you can ask the question and  
18 follow up with the deposition testimony.

19 MR. WARD: Okay.

20 CROSS-EXAMINATION

21 BY MR. WARD:

22 Q Mr. Rodriguez, do you remember having your  
23 deposition taken?

24 A Yes.

25 Q And do you remember when that was?

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1           A     I don't recall the date.

2           Q     Do you remember what conditions that you thought as  
3 of the time that was taken -- what parts of your body you  
4 thought were still being effected [sic] -- affected by the  
5 events of November 22, 2004?

6           A     Can you repeat that question, please?

7           Q     Sure. Do you remember what you said -- can -- do  
8 you remember what your condition was at the time your  
9 deposition was taken, in terms of the parts of your body that  
10 were still being affected by the events of November 22, 2004?

11          A     I believe so, yes.

12          Q     Okay. Can you tell me what those are?

13          A     What I recall during the time of my deposition, I  
14 recall my left wrist, my right hand, my left ankle, my knee,  
15 my shin --

16          Q     Which knee?

17          A     My left knee, my neck, my lower back, my right ankle  
18 and the sleep apnea issue.

19          Q     Anything else?

20          A     That's all I recall for right now.

21          Q     Do you remember saying that your --

22           MR. BAKER: I'm sorry, I'm just really not understanding  
23 how this is working. This isn't impeachment now. Now, he  
24 asked what do you remember talking about at your deposition.  
25 He's said what he remembered talking about at his deposition

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1 and how is it impeachment to then say do you remember also  
2 saying this?

3 THE COURT: I don't know, but let's see where he goes.

4 MR. BAKER: Yeah, well actually I'm interested.

5 THE COURT: Please proceed, Mr. Ward.

6 BY MR. WARD:

7 Q I would say, in the event I was not clear, and we  
8 don't do repeats on the record, but it will be in the record,  
9 what I was interested in is not what you said in your  
10 deposition, but what parts of your body at the time your  
11 deposition was taken you remembered as being affected by the  
12 accident. Did you understand that?

13 MR. BAKER: I withdraw my objection, Your Honor.

14 THE COURT: Very well.

15 THE WITNESS: Can you repeat the question?

16 BY MR. WARD:

17 Q Did you understand that my prior question that I was  
18 asking you at the time your deposition was taken, what parts  
19 of your body you thought were suffering effects from the  
20 incident on the night of November 22, 2004?

21 A Yes.

22 Q Okay. I was -- I'm not asking you to try to recall  
23 what you said in your deposition, I'm asking you what you  
24 remember of your injuries at that time.

25 A Yes.

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1 Q Okay. Now so my question is, do you remember that  
2 at that time that your right fingers were bothering you?

3 A Yes.

4 Q And you thought that was related to the accident?

5 A Yes.

6 Q And that your upper shoulder was bothering you and  
7 you thought that was related to the accident?

8 A Yes.

9 Q And your left shoulder was bothering you and you  
10 thought that was related to the accident?

11 A Correct.

12 Q And your right shoulder was bothering you and you  
13 thought that was related to the accident?

14 A Yes.

15 Q And your left foot was bothering you and you thought  
16 that was related to the accident?

17 A Correct.

18 Q And your left toe was bothering you and you thought  
19 that was related to the accident?

20 A Now that I recall, correct.

21 Q And your right leg was bothering you and you thought  
22 that was related to the accident?

23 A Now that I recall, correct.

24 Q And that you thought the headaches you were getting  
25 were related to the accident?

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1 A Now that I recall, correct.

2 Q Okay. Tell me, if you will, the -- to the extent  
3 you can recall, the first time you complained to a medical  
4 treater about your neck following this accident?

5 A I don't recall the first time.

6 Q Okay. Can you tell me how you thought it was  
7 injured in the accident?

8 A When the lady dove into my knee and I fell and I  
9 twisted and my body torqued, that's when I realized from the  
10 twist and then eventually the next morning when I woke up in  
11 the casino and my whole body was sore, my neck was sore, my  
12 lower back, everything woke up sore.

13 Q And how did you understand that your left wrist was  
14 injured in the accident?

15 A Well, with time just the fact of moving around,  
16 using canes, the cycle of the braces, the cycle of me, for all  
17 these years, having to get up from this chair, move around,  
18 get up from bed, not being able to move properly, moving just  
19 in my bed, using canes, having to use my -- my wrists just to  
20 move around, just to get by, that's my wrist.

21 Q Okay. So when did that first start bothering you?

22 A Well, it started bothering me right away because  
23 when I left the hospital, I left with crutches and I started  
24 using crutches. I couldn't use my knee.

25 Q So as soon as you left the hospital that on night

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1 with crutches, your left wrist started bothering you?

2 A I don't recall it like that, but I started using  
3 crutches.

4 Q Sure. Tell me then, if you will -- if you remember,  
5 when your left wrist started bothering you?

6 A I don't recall.

7 Q When did your right hand start bothering you?

8 A I believe in February of 2005.

9 Q And what is it you relate that too?

10 A To the same injury.

11 Q What happened in February of 2005? Anything in  
12 particular or you just noticed pain one day?

13 A I noticed pain, I noticed numbness that I still have  
14 right now, tingling in my fingers, numbness all the time.

15 Q And by whom -- by whom were you treated for the  
16 injuries to your neck, your left wrist and your right hand?

17 A Eventually, I did physical therapy for treatment  
18 there.

19 Q With whom was that?

20 A I believe it was in Las Vegas -- physical therapy  
21 here in Las Vegas. It was -- I don't recall, but it was  
22 definitely a hand therapy here in Las Vegas.

23 Q You just don't remember who it was?

24 A I don't remember.

25 Q How about your right fingers, when did that start

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1     bothering you?

2             A     I think that's what I was talking about, my right  
3     hand and my right fingers.

4             Q     Okay. You specifically said your right hand and  
5     your right fingers, so I thought you were talking about two  
6     different things.

7             A     It all began at the same time.

8             Q     Okay. And your lower back, when did that -- did  
9     that start bothering you on the night of the incident?

10            A     Well, like I said, the next morning when I woke up  
11    and I felt the pain, the numbness, you know, my whole body, I  
12    knew then that I was in trouble and that there was more than  
13    just the injury to my knee.

14            Q     And so what was the mechanism that you understood as  
15    to how your lower back was injured?

16            MR. BAKER: Your Honor, I'll object to this line of  
17    questioning as it calls for an expertise in biomechanics and  
18    it calls for expertise in medicine, neither of which he has.

19            THE COURT: Well, the Court allowed you some latitude;  
20    I'm inclined to allow Mr. Ward the same latitude.

21            MR. WARD: Thank you, Your Honor.

22    BY MR. WARD:

23            Q     Let me clarify my question. I respect that you are  
24    a property investor and not a doctor, so I'm not trying to ask  
25    you about doctor issues, I'm not trying to ask you about

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1 engineering issues. What I'm trying to ask you about are  
2 things like, if I bang my elbow on this thing and it hurts and  
3 somebody says well, how did you hurt your elbow? I said well,  
4 I banged it on this here. That's essentially what I'm asking.

5 So what I'm trying to find out is, did your lower  
6 back -- did you come in contact with someone? Did you twist  
7 it? Did you -- that's what I'm looking for.

8 A Pretty much the force of a body coming to my knee  
9 and hitting my knee and injuring my meniscus, and watching  
10 plenty of football and watching plenty of sports, and my body  
11 torquing and twisting and that force of the motion and waking  
12 up the next morning, there was really no other way for that to  
13 have happened.

14 Q Okay. And if I get to your upper shoulder, your  
15 left shoulder and your right shoulder, what would that be?  
16 How did that happen?

17 A Now, you're referring to what dates?

18 Q Well, let me ask you. When did you first become  
19 aware that you had injuries to your upper shoulder, your left  
20 shoulder and your right shoulder? And I'll break them down  
21 individually if you want them individual.

22 A During a period of time of this going on, now six  
23 years, with my body now breaking down because I'm not able to  
24 work out like I used to, unfortunately like I've unfortunately  
25 now realized, sleeping on my sides, for example, and putting

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1 weight on my side because of crutches, because of canes,  
2 because of the way that I move, has created so much stress and  
3 pressure on my shoulders that I've done physical therapy even  
4 for that, for pain on my shoulders. So then I've made it a  
5 point to even try to sleep on the other side and that's  
6 created the same problem. So unfortunately that's another  
7 thing that I've had to deal with and that's another thing that  
8 I've had to have -- to incorporate in my physical therapy,  
9 special physical therapy for my shoulders because of the  
10 excruciating pain of just having a -- of just sleeping and  
11 sleeping wrong.

12 That's not something that I wish on myself or  
13 anybody, but just for having to wake up like that and just for  
14 having to get through life. So there -- I don't recall a  
15 particular date in mind, but I do recall having to deal with  
16 that, having to go to physical therapy to try to improve  
17 what's hurt with me.

18 Q So essentially your shoulder problems, you believe,  
19 are caused by using crutches and sleeping on them?

20 A Absolutely, yes.

21 Q And we know about your left knee and your shin. How  
22 about your left ankle and your left foot and your left toe?

23 A My left ankle, I recall going to Beverly Hills to  
24 meet with Dr. Tauber, and unfortunately since I'm not a  
25 doctor, I don't really look at my left ankle at times and I go

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1 to him for a follow up and he looks at me and he said wow, is  
2 your ankle broke? And I'm like, I'm just there and next thing  
3 I know he takes me into the x-ray room because he thought my  
4 ankle was broke because it was swollen.

5 Fortunately it wasn't broke and being once again  
6 that my main pain is my knee, so it's like well, you know, it  
7 could be broke, but I don't really feel it because my pain is  
8 my knee, but fortunately it wasn't broke. So there reveals  
9 another problem with my left ankle.

10 Q And you went to see Dr. Tauber in 2006; isn't that  
11 correct?

12 A Correct.

13 Q So you -- is it -- are you telling me you weren't  
14 aware of any left ankle problems until -- and left foot  
15 problems and left toe problems until you went to Dr. Tauber  
16 two years after the accident?

17 A No, I wouldn't say it that way. I would say he  
18 revealed more.

19 Q Okay. Well, I'm not asking you about Dr. Tauber.  
20 What I'm asking you about is if you can tell me, if you  
21 remember, when you first became aware that you had left foot,  
22 left ankle and left toe problems?

23 A No, I became more aware of that much more earlier,  
24 because even simple tasks, like sitting down right here, or  
25 even sitting on the toilet for one or two months, my both feet

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1 [sic] would fall asleep, and they would fall asleep so -- how  
2 would I say it, so seriously, like a brick, that I would  
3 actually bend down and touch them and I wouldn't feel  
4 anything. It was -- it was that solid that I would amaze  
5 myself that I would touch my feet and I would say wow, what's  
6 happening with me. So no, no I realized that sadness --

7 Q Okay.

8 A -- much earlier.

9 Q And when -- when was that that you first realized?

10 A I don't recall a date.

11 Q Well, I'm not asking for a date. I'm asking in  
12 general if you remember. Was it a year after the accident?  
13 Was it two years after the accident? Was it --

14 A No, it --

15 Q -- a week after the accident?

16 A -- it was within a -- within a couple of months  
17 after the accident.

18 Q Okay. So within a couple of months after the  
19 accident, you were having problems in your left foot, your  
20 left toe and your left ankle that you thought were related to  
21 the accident?

22 A Correct.

23 Q And what was your understanding of the mechanism as  
24 to how that happened? Did you bang your left foot or left toe  
25 on something?

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1 A Absolutely not.

2 Q What's your understanding as to why you think it's  
3 related to the accident?

4 A What is my understanding?

5 Q Correct.

6 A That it's all coming from the same injury.

7 Q Is it just sort of your conclusion that every  
8 problem that you have must be related to the accident?

9 A I was always healthy. I never had any of these  
10 problems.

11 Q So you don't have any complaints at the present time  
12 that you think are not related to the accident?

13 A Repeat that question.

14 Q Sure. Are you telling me that you don't have any  
15 complaints that you think are not related to the accident?  
16 I'm asking that in a double negative, let me ask it more  
17 properly. I apologize; lawyers always speak in double  
18 negatives and it's very difficult. So let me --

19 Do you have any physical conditions now that you  
20 think are not related to the accident?

21 A Yes.

22 Q What would that be?

23 A I have asthma.

24 Q Okay. Anything else?

25 A That's all that I can recall, really.

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1 Q Okay. Everything else that you see a doctor for,  
2 and have seen a doctor for for the last six years other than  
3 asthma, you believe has been caused by the accident?

4 A Correct.

5 Q Okay. And headaches, how often do you have  
6 headaches?

7 A I don't have them too often anymore.

8 Q Did you, a year ago, get headaches often?

9 A I'm on medication.

10 Q Now is it your belief that you have a torn ligament  
11 in your left wrist?

12 A Correct.

13 Q And that's from moving in bed you believe?

14 A Correct.

15 Q And you believe that's caused by the accident?

16 A Correct.

17 Q Okay. And you believe that you have carpal tunnel  
18 syndrome?

19 A Correct.

20 Q And you believe that's caused by the accident?

21 A Correct.

22 Q And you believe that you have bulging discs in your  
23 neck and back?

24 A Correct.

25 Q And you believe that's caused by the accident?

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1 A Correct.

2 Q And you have an ingrown toenail?

3 A Correct.

4 Q And you believe that's caused by the accident?

5 A Correct.

6 Q Now do you recall going to Rancho Physical Therapy?

7 A Yes.

8 Q I'm going to show you -- I call to your attention,  
9 because I believe it's in the exhibit books under Exhibit 15.

10 MR. BAKER: Is he showing him something that's not in  
11 evidence, Your Honor?

12 THE COURT: I don't know.

13 MR. WARD: Yes, I am.

14 MR. BAKER: Your Honor, this document's not in evidence.

15 THE COURT: Has it -- are you proposing to mark it or is  
16 it to refresh his recollection or --

17 MR. WARD: No, I --

18 THE COURT: -- what's the purpose?

19 MR. WARD: -- want to get it into evidence.

20 THE COURT: Oh, so you want it marked as a proposed  
21 exhibit?

22 MR. WARD: It's already marked. It's part of Plaintiff's  
23 Exhibit 15.

24 MR. BAKER: I'm sorry, what page?

25 MR. WARD: Page 26 -- 25.

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1 [Counsel Confer]

2 MR. WARD: I think you have to show documents to  
3 witnesses before you get them into evidence, the last time I  
4 checked.

5 MR. BAKER: Yeah, I remember that from school.

6 THE COURT: What number is it? Page number?

7 MR. WARD: It's Exhibit -- it's Exhibit Number 15, which  
8 is multiple pages and so I'm looking for -- it says Rancho PT,  
9 Bates Number 25. It doesn't say Bates Number, but it's 25.

10 MR. BAKER: I've got it.

11 MR. WARD: May I approach, Your Honor, and show you the  
12 -- what I'm looking at?

13 THE COURT: Sure. Okay. I have it. Thank you.

14 MR. WARD: Okay. May I approach the witness, Your Honor?

15 THE COURT: Yes.

16 BY MR. WARD:

17 Q This is the document. Are you -- did you find that?

18 MR. WARD: Can I go behind here and get the book?

19 THE COURT: Sure, why not?

20 MR. BAKER: Can I just ask that it's indicated for the  
21 record what the date of that document is?

22 THE COURT: Sure.

23 MR. WARD: You know, the -- it doesn't have a date on it.  
24 I could --

25 MR. BAKER: I think the date might be on the page before.

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1 MR. WARD: We could track down the date, I'm sure,  
2 because it's one of many, but --

3 MR. BAKER: May I make a representation for the record,  
4 Your Honor?

5 THE COURT: Sure.

6 MR. BAKER: What's being shown to the witness right now  
7 is Rancho PT bill, Exhibit 15, Bate Stamp Number 25, and  
8 that's immediately proceeded -- let me show this to you, by  
9 Rancho PT bill from Exhibit Number 15, Bate Stamp 24, which  
10 indicates the date 2/8/04.

11 THE COURT: 2/8 or 12/8?

12 MR. BAKER: 12/8.

13 MR. WARD: Okay. So are you saying you believe that's  
14 the date of this?

15 MR. BAKER: Yes.

16 MR. WARD: Okay. I'm not questioning. I --

17 MR. BAKER: Yeah.

18 MR. WARD: -- haven't dug through these.

19 BY MR. WARD:

20 Q Do you see that, sir? Do you see that? Do you see  
21 the Rancho Physical Therapy Graphic Pain Assessment?

22 A Yes.

23 Q And were you given this at Rancho Physical Therapy?

24 A I don't recall.

25 Q Were you asked to fill this out at Rancho Physical

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1 Therapy?

2 A Now what date is this?

3 Q I believe it's been represented that it's December  
4 2004.

5 A Okay. Yeah and I'm saying it because I've been to  
6 several Rancho Physical Therapy facilities.

7 Q Uh-huh.

8 A That's why I'm asking. Okay.

9 Q And these are your marks, correct?

10 A I would assume that they are.

11 Q Okay. And they asked you to fill this out?

12 MR. BAKER: Your Honor, he's only testified that he  
13 assumes and that's not proper foundation for that document.

14 THE COURT: Ask you to rephrase, Mr. Ward.

15 MR. WARD: Sure.

16 BY MR. WARD:

17 Q When you -- let's go back. You had an injury  
18 November 22, 2004 at --

19 A Correct.

20 Q -- the Palms casino?

21 A Correct.

22 Q You went to see Dr. Heaps?

23 A Correct.

24 Q Sometime later you went to see Dr. Nork?

25 A Correct.

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1 Q Dr. Nork suggested, based on your complaints, that  
2 you go to physical therapy?

3 A Correct.

4 Q So you went to Rancho Physical Therapy?

5 A Correct.

6 Q And when you went there you interacted with the  
7 people who were performing physical therapy?

8 A Correct.

9 Q And you were -- you don't have any trouble  
10 understanding what they were saying? And what I'm asking is,  
11 from a medical standpoint, they weren't asking it in such  
12 complicated areas that you were having trouble understanding  
13 what they were saying?

14 A I understand now. My main concern when I went to  
15 physical therapy, I'm coming in on crutches, I have an  
16 immobilizer on my knee. My main concern at the time, my  
17 intense pain, I was not able to walk, was getting physical  
18 therapy for my knee. That was that.

19 Q And so you interacted with the people at Rancho  
20 Physical Therapy?

21 A Correct.

22 Q And they asked you questions?

23 A Correct.

24 Q And you answered them?

25 A Correct.

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1 Q And they asked you to fill things out, they gave you  
2 pieces of paper with writing on them?

3 A I could not walk, I had a brace on my knee. I  
4 needed physical therapy. I needed to get well for my knee.

5 Q My question, sir, is as part of the physical therapy  
6 regimen, didn't you interact with the people at the physical  
7 therapy place?

8 A I would assume, yes.

9 Q You talked to them?

10 A If I recall in December of 2004, yes.

11 Q And they asked you to fill out certain pieces of  
12 paper? They gave you papers and asked you to write on them?

13 A Yes, uh-huh.

14 Q And one of the things they asked you to write on was  
15 this document?

16 A Correct.

17 Q And you're the one who made the marks, correct?

18 A I would say -- I would say this is what I filled  
19 out.

20 Q So it's your marks on there?

21 A Of my primary reason for being at Rancho Physical  
22 Therapy, for the prescription that I needed care. Somebody  
23 dove into my left knee, I could not walk and I needed to get  
24 better.

25 Q And you read the instructions, correct?

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1 A Correct.

2 Q And instruction number one was, "Draw a line on the  
3 pain intensity scale at the point that best describes your  
4 pain at the present time;" is that true?

5 A Correct.

6 Q And you drew a line through six?

7 A Correct.

8 Q Okay. And number two it says, "Draw the location of  
9 your pain complaints." You see it's plural, right?

10 A Correct.

11 Q On the body diagrams above. There's two diagrams,  
12 right?

13 A Correct.

14 Q And you're being asked to put in your pain  
15 complaints, correct?

16 A Correct.

17 Q And the third says, "If you have any other symptoms,  
18 such as tingling or numbness, draw these as a dotted line;" is  
19 that correct?

20 A Correct.

21 Q And the only area that you marked was your left  
22 knee; isn't that true?

23 A At that time, with medication, with Lortab, that's  
24 how I felt at that time in my condition -- my knee.

25 Q And so the only thing you marked was your left knee,

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1 correct?

2 A At that time.

3 Q Now you went to Dr. Mortillaro, correct?

4 A Correct.

5 Q Now Dr. Mortillaro is a psychologist; is he not?

6 A Correct.

7 Q Now you went to see Dr. Shannon -- do you remember  
8 Dr. Shannon?

9 A I remember her, yes.

10 Q Okay. And you went to Dr. Shannon essentially  
11 because you couldn't get the other doctors to operate on you;  
12 isn't that right?

13 A Correct.

14 Q Okay. But you did get Dr. Shannon to operate on  
15 you?

16 A Correct.

17 Q And Dr. Shannon didn't take a new MRI?

18 A I don't recall.

19 Q Okay. You don't remember going through an MRI  
20 machine more than once at that point, do you?

21 A I don't recall.

22 MR. BAKER: I guess, Your Honor, it's a belated  
23 objection. I'd object to the characterization he got  
24 Dr. Shannon to operate on you as argumentative and a  
25 mischaracterization and move to strike. I didn't think he

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1 could get a board certified orthopedic surgeon to operate on  
2 him.

3 THE COURT: Sustain the objection and ask you to  
4 rephrase, Mr. Ward.

5 MR. WARD: Sure.

6 BY MR. WARD:

7 Q You went to Dr. Shannon because the other doctors  
8 before wouldn't perform surgery on you; isn't that correct?

9 A Because I decided to not go with the other doctors,  
10 correct?

11 Q Right. And you were hoping that Dr. Shannon would  
12 perform surgery on you?

13 A I needed surgery --

14 Q And you hoped --

15 A -- on my knee.

16 Q And you hoped Dr. Shannon would perform it?

17 A I was hoping, correct.

18 Q Okay. And you're not the one who decides whether  
19 you need surgery or not, are you? You defer to your doctors  
20 for that, don't you?

21 A Correct.

22 Q Now Dr. Shannon asked you to see Dr. Mortillaro; is  
23 that true?

24 A I don't recall if it was like -- in that order, but  
25 I did see Dr. Mortillaro.

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1 Q Well, you saw Dr. Mortillaro after you saw  
2 Dr. Shannon, didn't you?

3 A I believe so.

4 Q And you went to Dr. Mortillaro as a referral?

5 A Correct, as a referral.

6 Q From who?

7 A I don't recall.

8 Q If the referral was from Dr. Shannon, do you have  
9 any idea why you were being referred to Dr. Mortillaro?  
10 Anybody tell you why?

11 A By that time, I was feeling so much emotions. I was  
12 feeling bad. I -- there was so much stress, anxiety, there  
13 was too much going on in my head, it was too much pressure.  
14 My whole life changed. I needed help.

15 Q And so you thought Dr. Shannon referred -- you  
16 thought you were being referred to Dr. Mortillaro because you  
17 needed help?

18 A I needed someone to talk to.

19 Q Okay.

20 MR. WARD: I will offer the Bates 25, Rancho Physical  
21 Therapy into evidence, Your Honor.

22 MR. BAKER: No objection, Your Honor.

23 THE COURT: Very well. It will be admitted.

24 [Plaintiff's Exhibit 77 Received]

25 MR. BAKER: Dr. Shannon is here, Your Honor.

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1 THE COURT: Okay.

2 MR. BAKER: She's in the hallway.

3 MR. WARD: Do you want to interrupt here?

4 MR. BAKER: If you don't mind.

5 MR. WARD: I don't mind.

6 MR. BAKER: Yeah, I don't want to leave her waiting.

7 MR. WARD: No, no, I understand.

8 MR. BAKER: Thank you.

9 THE COURT: Okay. We'll resume your testimony a little  
10 bit later. We ask you to step down because we're going to  
11 bring Dr. Shannon in.

12 THE WITNESS: Okay.

13 MR. WARD: Your Honor, as a matter of housekeeping, since  
14 I have taken this one out, should I have it marked separately?

15 THE COURT: I guess so.

16 MR. WARD: Okay.

17 THE COURT: Sure.

18 THE CLERK: It will be Exhibit 77.

19 [End of designated portion at 1:00 p.m.]

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

STEPHANIE MCMEEL, CET\*D, Transcriber

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

\_\_\_\_\_ /

**APPELLANT'S APPENDIX**  
**VOLUME 8**

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CHRONO INDEX

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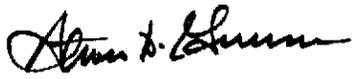
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DISTRICT COURT  
CLARK COUNTY, NEVADA

  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS, LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MONDAY, OCTOBER 25, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF SHERI LONG

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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MONDAY - OCTOBER 25, 2010 - 11:37

[Designation of record begins at 11:37 a.m.]

THE COURT: Okay. Mr. Baker?

MR. BAKER: Yes, Your Honor.

THE COURT: Next witness?

MR. BAKER: Yes, Your Honor. I'd like to call Sherri Long, please.

THE COURT: Ms. Long, come forward. Is she in the courtroom? Very good.

SHERRI LONG, PLAINTIFF'S WITNESS, SWORN

THE CLERK: State and spell your name for the record.

THE WITNESS: My name is Sheri Long, S-H-E-R-I L-O-N-G.

THE COURT: Whenever you're ready, Mr. Baker.

MR. BAKER: Thank you.

DIRECT EXAMINATION

BY MR. BAKER:

Q Hi, Sheri.

A Hi.

Q I remember you from your deposition. How are you?

A Good, thanks.

Q By the way, I wanted to apologize for serving a subpoena on you. It's just in the event that you weren't here to testify, I needed to be able to show the Judge that I was diligent. Okay?

A Okay.

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1 Q So, sorry about that.

2 Are you the promotional director at the Palms Hotel?

3 A No, I'm the vice president of marketing.

4 Q And what position did you occupy in November of  
5 2004?

6 A Director of marketing.

7 Q What were your job duties as director of marketing?

8 A I was over the special events and promotions,  
9 advertising, public relations; oversaw the Club Booth; and  
10 entertainment.

11 Q And part of entertainment was the Monday night  
12 football games in 2004? November?

13 A Well, it was part of promotions.

14 Q And you went to the Palms when the Palms opened up  
15 in October of 2001, is that right?

16 A The Palms opened in November of 2001, and I was  
17 hired in April of that year.

18 Q And were you the marketing director at that time?

19 A Right.

20 Q And as part of the promotional events that you put  
21 on, is it true that the Palms never gave you any specialized  
22 instruction in safety issues relating to those promotion  
23 events?

24 A That's correct.

25 Q And is it true that in the marketing -- or, the

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1 promotional department, they never generated a guideline or a  
2 policy for safe procedures during promotional events?

3 A That's correct.

4 Q And is it fair to say that neither you or anyone in  
5 your staff ever received from the Palms specific training  
6 having to do with safety occurring during promotional events?

7 A That's correct.

8 Q Now, the Monday Night Football, it started off in  
9 the Key West Room, is that right?

10 A Correct.

11 Q And that's about what, an 8,000 square foot room?

12 A Yes.

13 Q That's a big room, isn't it?

14 A Yes.

15 Q And that room is designed for banquets and affairs  
16 with a lot of people?

17 A Yes, it was originally designed to be a bingo room.  
18 And we didn't open that way, so.

19 Q And then the open nature of it allowed people to  
20 move around and do things pretty much free from the hazard of  
21 bumping up or otherwise entangling themselves in the Key West  
22 Room?

23 A Depending on how it was set.

24 Q Right. Now, there was a time where the Monday Night  
25 Football was moved into the sport betting area?

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1 A Yes.

2 Q And that's an area with a bar, is that correct?

3 A There is a bar outside of the Book.

4 Q And that's an area that's designed differently.

5 It's not designed so that people freely flow through it.

6 There are actually tables for people to sit at?

7 A There are.

8 Q And there was a time when Monday Night Football was  
9 being held in the Key West Room that you became aware that  
10 certain individuals were throwing promotional items into the  
11 audience, is that right?

12 A Yes.

13 Q And that occurred prior to it being moved to the  
14 Sportsbook, is that right?

15 A Yes.

16 Q And I believe that I recall that you spoke to me  
17 about the fact that you met with some of your staff, including  
18 a woman named Denise, is that right, after you became aware  
19 that promotional items were being thrown into the audience?

20 A Yes.

21 Q And you told them --

22 A Or Maureen. It might have been Maureen is the one  
23 that you're --

24 Q I have a problem pronouncing her last name, but it's  
25 De- --

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1 A Demuckis [phonetic throughout].

2 Q Demuckis? Is that Noreen?

3 A Maureen Holden. I had two marketing managers.

4 Maureen opened the property and Denise came after Maureen.

5 Q And Denise was made known that you didn't believe  
6 that promotional items should be thrown into the audience, is  
7 that right?

8 A Yes.

9 Q And the reason, as the marketing director of the  
10 Palms, that you didn't believe that promotional items should  
11 be thrown into the audience is because somebody could get  
12 hurt?

13 A Correct.

14 Q And it was unreasonable for people to be throwing  
15 items into the audience, is that right?

16 A I wouldn't say unreasonable. I just felt that it  
17 was inappropriate.

18 Q Okay. Because it's foreseeable that somebody could  
19 get injured?

20 A Possibly, yes. It also creates chaos. So.

21 Q So if somebody in your department or at your hotel  
22 informed these promotional girls -- and let me lay a  
23 foundation for that.

24 As part of Monday Night Football you, either  
25 directly or through your department, would bring in

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1 promotional girls, is that right?

2 A Yes.

3 Q And Brandy Beaver was one of the promotional girls?

4 A Yes.

5 Q And basically these promotional girls are supposed  
6 to try to just rah rah, get the audience stirred up and  
7 involved in the event?

8 A They also have other duties on occasion, like MC'ing  
9 and -- MC'ing a drawing or things along that line.

10 Q But generally they're there to create a festive  
11 atmosphere, is that fair to say?

12 A Yes.

13 Q And to interact with the crowd, is that correct?

14 A Uh-huh.

15 Q And -- is that right?

16 A Yes.

17 Q And at some time after you found that objects were  
18 being thrown in the Key West Room you specifically even spoke  
19 with Denise about the fact that that was inappropriate, is  
20 that correct?

21 A Yes.

22 Q For the reasons that we mentioned; that somebody  
23 could get hurt?

24 A Uh-huh.

25 Q Is that right?

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1 A Uh-huh. Yes.

2 Q And it was foreseeable to you at that time that if  
3 promotional items were thrown into the crowd, somebody might  
4 be hurt. That's fair to say?

5 A Fair to say.

6 Q And if Denise or someone else in your staff informed  
7 Brandy Beavers or any of these promotional girls that it was  
8 okay to throw objects in the Sportsbook area during  
9 promotional events, that would also be inappropriate, wouldn't  
10 it?

11 A I'm -- can you say that again?

12 Q Sure. If Denise or another one of your employees  
13 told the promotional girls, after the event that happened in  
14 the Key West Room and your talk, that it was okay to throw  
15 promotional items into the crowd, that that's part of what  
16 they were there to do, you would consider it inappropriate?  
17 Is that fair to say?

18 A Correct.

19 Q And again, that's because somebody could foreseeably  
20 be injured by these promotional items being thrown, is that  
21 right?

22 A Correct.

23 Q And really, that's exactly what happened in this  
24 case, isn't that fair to say?

25 MR. WARD: Object. Argumentative.

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1 MR. BAKER: I can ask nicer.

2 THE COURT: Argumentative? Ask you to rephrase it,  
3 Mr. Baker.

4 BY MR. BAKER:

5 Q And you're aware that Mr. Rodriguez is alleging that  
6 he was injured when promotional objects were thrown during a  
7 Monday Night Football and somebody collided and injured his  
8 leg, is that fair to say?

9 A I'm aware of --

10 Q You're aware of that allegation on the part of --

11 A Of the allegation. Yes.

12 Q Now, after you spoke with your people regarding  
13 throwing objects from the Key West Room did you generate any  
14 memo that said objects are not supposed to be thrown during  
15 promotional events?

16 A Not that I recall.

17 Q Did you create any guideline or policy that was  
18 generated and issued, saying objects are not supposed to be  
19 thrown in the promotional events?

20 A Not that I recall.

21 Q Did you make it part of any security manual or  
22 procedure guide of the Palms, that promotional items were not  
23 supposed to be thrown in the -- during promotions held at the  
24 Palms?

25 A I did not.

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1 Q I'm going to ask you -- and there are some books  
2 behind you. Exhibit books.

3 MR. BAKER: Can I get that for her, Your Honor?

4 THE COURT: Sure.

5 [Counsel and Clerk Confer]

6 BY MR. BAKER:

7 Q As an employee of the Palms Hotel, you're familiar  
8 with many of the documents and forms and reporting forms that  
9 are generated by the hotel? Is that fair to say?

10 A I'm aware of some of them. I wouldn't say many.

11 Q Could you turn to 58?

12 A Okay.

13 Q Do you recognize that document?

14 A It says it's a security incident report.

15 Q Have you seen a security incident report before?

16 A A couple of times. I've never seen this one.

17 Q Is this a security incident report which was  
18 produced to me by the Defendants in this case regarding  
19 Enrique Rodriguez incident at the Palms in November of 2004?

20 A That's what it says.

21 MR. BAKER: Move to admit 58, Your Honor.

22 THE COURT: Any objection?

23 MR. WARD: No. No objection, Your Honor.

24 THE COURT: 58 will be admitted.

25 [Plaintiff's Exhibit 58 Received]

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1 BY MR. BAKER:

2 Q And I'd like you to look about one, two, three,  
3 four, five, six lines down.

4 A In the narrative?

5 Q In the narrative section.

6 A Okay.

7 Q Mr. Rodriguez stated one bottle was thrown his way  
8 and a white female, approximately 45 years old sitting in the  
9 chair in front of him, got up and dove to retrieve the bottle,  
10 which caused her to injure his left knee with her shoulder.

11 Do you see that?

12 A Yes.

13 Q And is this the type of injury that you were afraid  
14 could occur in the event that promotional items were thrown  
15 into a crowd?

16 A Yes.

17 Q And this doesn't say that there was a water bottle  
18 laying on the ground and somebody went to go for the water  
19 bottle. It says that the water bottle was thrown causing the  
20 woman to jump and impacting his knee.

21 Is that what I'm saying?

22 MR. WARD: That's argumentative.

23 THE COURT: It is. Sustained. Ask you to rephrase.

24 MR. BAKER: What did I do?

25 THE COURT: I think the nature of the objection was that

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1 it was argumentative, but I think you can rephrase your  
2 question if you'd like.

3 BY MR. BAKER:

4 Q It doesn't say on the ground, does it? It said it  
5 was thrown? Is that fair to say?

6 A Said it was thrown his way. That's what the  
7 document says.

8 Q And that's kind of what you were trying to prevent  
9 when you conveyed to your staff that it was foreseeable that  
10 somebody could be injured if a bottle was thrown?

11 A Correct.

12 Q Would you turn to 60, please? Are you at 60?

13 A Uh-huh.

14 Q Is that the guest employee voluntary statement?

15 A Yes.

16 Q Is this a statement that was generated on a form by  
17 the Palms Hotel?

18 [Pause]

19 Q Is this a Palms' form?

20 A It looks like a Palms' form.

21 Q And these are the type of forms that the Palm  
22 maintains and is a custom of running its business?

23 A This is not my department. I don't know that.

24 MR. BAKER: I move to have this admitted as well, Your  
25 Honor.

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1 THE COURT: Any objection?

2 MR. WARD: No objection, Your Honor.

3 THE COURT: 60 is admitted.

4 [Plaintiff's Exhibit 60 Received]

5 BY MR. BAKER:

6 Q And this, again, says that,

7 "During commercial breaks the casino Palms'  
8 girls were throwing gifts out to us and they threw  
9 in the air a water bottle. The guy next to me,  
10 standing" -- wait.

11 "The guy next to me standing was thrown one,  
12 but he fumbled it. And when it hit his hands there  
13 was a lady sitting directly in front of me that got  
14 up and ran, and then she dove for the water bottle  
15 and her shoulder hit my left knee. She tackled my  
16 knee for a water bottle."

17 Do you see that statement?

18 THE COURT: Are you on 60 or some other page?

19 THE WITNESS: I don't -- I'm not following you.

20 MR. BAKER: Oh, I'm sorry, 59. You could have stopped me  
21 earlier.

22 THE WITNESS: Well, I was trying to figure out where you  
23 were reading from.

24 MR. BAKER: I'm used to getting these looks  
25 [demonstrating], so if you feel it necessary, go ahead.

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1 THE WITNESS: Okay.

2 BY MR. BAKER:

3 Q That's a Palms' form, as well?

4 A Yes.

5 MR. BAKER: Move to admit 59, Your Honor.

6 THE COURT: Any objection?

7 MR. WARD: No objection, Your Honor.

8 THE COURT: 59 is admitted.

9 [Plaintiff's Exhibit 59 Received]

10 BY MR. BAKER:

11 Q What I just read you, that was --

12 [Counsel and Clerk Confer]

13 THE COURT: 59 and 60 have both been admitted. And 58  
14 was previously admitted, I think.

15 MR. BAKER: Right. Yes.

16 BY MR. BAKER:

17 Q And once again, the type of injury that's now being  
18 related by Enrique Rodriguez, that's just the type of thing  
19 that you wanted to avoid when you were saying that promotional  
20 items into the audience was inappropriate?

21 A Inappropriate. Correct.

22 Q Is that fair to say?

23 A Correct.

24 Q And if you would turn to 60, please? And this is an  
25 independent witness, Chris Poe [phonetic throughout], do you

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1 see that?

2 A Uh-huh.

3 Q Is that yes?

4 A Yes.

5 Q And is this on a form generated by the Palms?

6 A Yes.

7 MR. BAKER: Your Honor, move to re-admit 60.

8 THE COURT: It's already in, Mr. Baker. How many times  
9 are you going to admit it?

10 MR. BAKER: I like this one.

11 BY MR. BAKER:

12 Q And this independent witness also said,

13 "The MC threw a Palms' water bottle at me and  
14 it bounced onto the ground. The woman in front of  
15 me, in a green" -- does that say "hat"? "Coat?"  
16 -- "and blonde hair jumped out of a chair to get the  
17 bottle. I leaned down to grab it, and she ran into  
18 the man next to me because she was going for the  
19 bottle also. I grabbed it and she kept going for  
20 it. This occurred at approximately 7:30 p.m."

21 Despite the fact I can't read most of the  
22 handwriting, does that accurately portray what's on that  
23 document?

24 A To the best of my reading it, as well, yes.

25 Q And is this consistent with what Mr. Rodriguez

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1 reported, that we just read a half a second ago?

2 MR. WARD: That's speculative

3 MR. BAKER: I'm just asking her if it's consistent. I  
4 don't think that's speculative, Your Honor.

5 MR. WARD: That's what I mean. The documents speak for  
6 themselves. One says one thing, one says another.

7 THE COURT: They do. Sustain the objection. Ask you to  
8 rephrase.

9 BY MR. BAKER:

10 Q Again, this is the type of injury now reported by an  
11 independent witness that resulted from the inappropriate  
12 behavior of throwing a water bottle into the audience, is that  
13 fair to say?

14 A Fair to say.

15 Q The next one I can't even read so I really won't put  
16 that one into evidence.

17 Was there a time that a formal policy was  
18 implemented that there would be no throwing of water bottles  
19 at promotional events?

20 A Not that I'm aware of.

21 Q There's still no memo like that, saying that water  
22 bottles should not be thrown or promotional items shouldn't be  
23 thrown?

24 A Not that I'm aware of.

25 MR. BAKER: Your Honor, if you give me just one sec, I

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1 might pass the witness.

2 THE COURT: Sure.

3 [Counsel Confer]

4 BY MR. BAKER:

5 Q Oh, you were the marketing director at this point in  
6 time, is that right?

7 A Director of marketing.

8 Q Was there also a marketing manager?

9 A Yes.

10 Q Who is that?

11 A It would have been either Denise or Maureen. I  
12 think at the time that the incident happened it was Denise.  
13 Maureen was gone.

14 Q And is it fair to say you didn't tell your marketing  
15 manager to tell the girls not to throw water bottles after you  
16 found out water bottles were -- or other promotional items  
17 were being thrown in the Key West Room?

18 A I don't recall.

19 Q You don't recall whether you did or did not tell  
20 your marketing manager not to permit that type of activity?

21 A I don't remember at all.

22 Q And your marketing manager would likely have greater  
23 contact with the promotional girls than you would?

24 A Yes.

25 Q Do you recall the time you took your deposition with

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1 me?

2 A Yes.

3 Q And it's not such a big point, but let me look at  
4 something real quick, quick.

5 You had staff meetings with different directors from  
6 different departments in the course of your services as  
7 marketing director, is that correct?

8 A Uh-huh. Yes.

9 Q And during those staff meetings you would bring up  
10 different topics that were important to you, is that correct?

11 A Correct.

12 Q And is it fair to say that you did not bring up the  
13 issue that promotional items should not be thrown at a  
14 promotional event during any of those staff meetings?

15 A I don't remember.

16 Q Okay.

17 MR. BAKER: Your Honor, I'll pass the witness.

18 THE COURT: Very well. Mr. Ward.

19 MR. WARD: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. WARD:

22 Q Good morning, Ms. Long.

23 A Hi.

24 Q You ever testified before in a court?

25 A No.

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1 Q A little nervous?

2 A A little.

3 Q Wanted to ask you a couple of things. We have the  
4 statements in front of us. The number 59 -- Exhibit  
5 Number 59. That's the statement from Mr. Rodriguez there,  
6 right? Okay.

7 A Yes.

8 Q Now, Number 60 is from Mr. Chris Poe?

9 A Yes.

10 Q Now, Mr. Poe seems to have a problem with his dates,  
11 is that right? In the upper right-hand corner?

12 A Yes.

13 Q Mr. Poe thought it was November 21st, but we assume  
14 Mr. Poe made a mistake. It's actually November 22nd?

15 A Yes.

16 Q And we have Mr. Poe's address, correct? Up at the  
17 top, Chris Poe?

18 A It says --

19 MR. BAKER: You're asking if it is correct, or --?

20 MR. WARD: No, I'm asking do we have his address there?

21 MR. BAKER: Okay.

22 THE WITNESS: It's 1250 Kelly Drive?

23 BY MR. WARD:

24 Q Yeah, I'm not asking for what the address is? I'm  
25 just asking do we have the address there?

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1 A It is there.

2 Q Yeah, okay. And his telephone number's there?

3 A Yes.

4 Q And where he's staying at the time is there?

5 A Yes.

6 Q And the next one, which is 61, that's Mr. Josh  
7 Gonzales [phonetic throughout]?

8 A Yes.

9 Q And Mr. Gonzales is a little better with the dates  
10 than Mr. Poe is?

11 A Yes.

12 Q He's got November 22? And we've got an address for  
13 Mr. Gonzales?

14 A Yes.

15 Q And we've got where he's staying?

16 A Yes.

17 Q And we've got a telephone number?

18 A Yes.

19 Q And we have a statement from him?

20 A Yes.

21 Q And he says that his friend had the bottle in his  
22 hand and she ran -- the lady ran into him, is that correct?

23 A Yeah, that's what he wrote. Yes.

24 Q Okay. And Chris Poe said the water bottle was  
25 bouncing on the ground and the woman ran to -- and ran or dove

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1 to get it, is that right?

2 A Yes.

3 Q Okay. So if someone said we didn't get statements  
4 from the people that were there at the incident, that wouldn't  
5 be correct, would it?

6 A Correct.

7 Q Now, has -- during the period of time you've been at  
8 the Palms, and that's almost since it's been open?

9 A Yes.

10 Q You're going to be celebrating your tenth  
11 anniversary sometime in the next 12 months?

12 A Yes.

13 Q Have you ever had a problem like this with people  
14 throwing -- has this been a big issue, people throwing things  
15 into crowds?

16 A No, it's not been a big issue.

17 Q Okay. Has there been a need to put something  
18 specifically in the manual?

19 A No.

20 Q And a comment was made about the room -- what was  
21 the first room, the bingo room?

22 A Key West.

23 Q The Key West Room? And somebody threw something  
24 once in the Key West Room?

25 A Correct.

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1 Q And they were told not to do it?

2 A Correct.

3 Q Did that ever happen again in the Key West Room?

4 A No. No.

5 Q And -- now, what year was that?

6 A It was either '02 or '03, during football season.

7 Q Okay. So it was either one year or two years before  
8 this incident?

9 A Right.

10 Q Have you had any intervening issues?

11 A No.

12 Q Had you ever had a problem with people throwing  
13 things in the Sports Bar [sic]?

14 A No.

15 Q Did Brandy Beavers have employment -- was she  
16 actually employed by the Palms on November 22, 2004?

17 A No. She was not our employee.

18 Q Thank you.

19 THE COURT: Mr. Baker, any follow-up?

20 MR. BAKER: Yes, just a little bit.

21 REDIRECT EXAMINATION

22 BY MR. BAKER:

23 Q At your hotel when they mop the floor, they put up a  
24 warning sign, is that right? Do you know?

25 A I don't know. I've seen it sometimes, but I do not

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1 know the procedures in that department.

2 Q Do you know whether your security manual has a  
3 requirement that signs be put up when people are mopping the  
4 floor?

5 A I do not know.

6 Q If it does have that requirement, it's probably  
7 because it's foreseeable that --

8 MR. WARD: Object. Argumentative.

9 MR. BAKER: Your Honor, I just don't see how that's  
10 argumentative.

11 MR. WARD: Well, the question was, "If it does happen,  
12 then it's for this reason." That's arguing the case. That's  
13 not eliciting testimony.

14 THE COURT: Sustain the objection.

15 BY MR. BAKER:

16 Q Hypothetically, if there is a requirement that  
17 warning signs be put up, would you assume it's because it's  
18 foreseeable that someone could get hurt if they're not?

19 MR. WARD: It's still arguing his case. He's not asking  
20 this witness to testify as to anything that's in her  
21 knowledge. He's asking for an opinion about something that  
22 she's not even sure if it exists.

23 MR. BAKER: Fine. I think we got my point.

24 THE COURT: I think so.

25 MR. BAKER: Thanks.

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1 THE COURT: Sustain the objection, in any event. Again.

2 MR. BAKER: No further questions, Your Honor.

3 THE COURT: All right. Any follow-up?

4 MR. WARD: No, Your Honor.

5 THE COURT: Thank you, ma'am. You may be excused.

6 THE WITNESS: Thank you.

7 [Designation of record ends at 12:01 p.m.]

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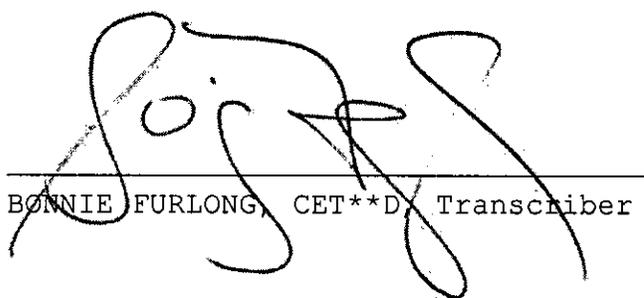
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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.



BONNIE FURLONG, CET\*\*D, Transcriber



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DISTRICT COURT  
CLARK COUNTY, NEVADA

*Alvin D. Lavin*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 FIESTA PALMS LLC, )  
 )  
 Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MONDAY, OCTOBER 25, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF VIKKI KOONGA

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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Bench Trial

Plaintiff's Witness(es):

Vikki Kooinga..... 3

Defendant's Witness(es):

None

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1 Q And in fact, you began in the Security Department,  
2 is that right?

3 A Actually, I began in food and beverage.

4 Q And then moved into security?

5 A [No Audible Response]

6 Q How long were --

7 A Yes.

8 THE COURT: Excuse me for the interruption, but we need a  
9 little more volume.

10 THE WITNESS: Yes.

11 [Court and Witness Confer]

12 THE COURT: Sorry about that, Mr. Baker. We need to make  
13 sure we have a good recording.

14 BY MR. BAKER:

15 Q How long were you in the Security Department?

16 A I've been in security since December of '01.

17 Q And were you in security or the risk management  
18 department in November '04, at the time of this incident?

19 A Both. Risk --

20 Q Did those departments ever -- interrelate?

21 A Yes.

22 Q Could you explain that to the Court, please?

23 A Risk management is in with security. It -- I work  
24 within the Security Department, and my direct manager that I  
25 answer to is the security director.

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1 Q In the hierarchy of management in the Security  
2 Department, where do you fall and where did you fall in  
3 November of 2004?

4 A The director of security?

5 Q No, I'm asking in the hierarchy. I'm assuming  
6 there's a director and then somebody under them and somebody  
7 under them.

8 A Yes.

9 Q In November of 2004, where did you fall in that  
10 hierarchy?

11 A Directly below the director.

12 Q So you're the second head guy?

13 A Yes.

14 Q And you're familiar with the operation of the  
15 Security Department, is that right?

16 A Yes.

17 Q I believe you had told me that no security guard was  
18 prominently placed or stationed during the promotional events  
19 at the Sportsbook, is that correct? In November of 2004?

20 A Yes. Can I clarify something on the last question?

21 Q Yes.

22 A You said that I directly -- what did you state?  
23 That I directly supervise security?

24 Q No.

25 A Oh. Okay.

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1 Q I said you were the second guy in charge?

2 A But not of security.

3 Q But you're part of the Security Department?

4 A Yes.

5 Q And familiar with the operation of the Security  
6 Department?

7 A Yes.

8 Q Okay. And in fact you've explained to me in the  
9 past that there was no security guard directly assigned to the  
10 promotional events at the time the promotional events  
11 occurred, is that right?

12 A Correct.

13 Q And that, again, there was no security part of your  
14 manual of policies and procedures with respect to what should  
15 be permitted and what should not be permitted at promotional  
16 events, is that right?

17 A Correct.

18 Q And that includes promotional events where  
19 promotional items are thrown out into the crowd, is that  
20 correct as well?

21 A Rephrase that, please?

22 Q And that includes promotional events when bottles  
23 and t-shirts and things are thrown out to the crowd. No  
24 security guard is specifically assigned to those types of  
25 parties?

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1           A     No security officers are assigned to -- specifically  
2 to the promotional events at that time.

3           Q     That was my question. Thank you for straightening  
4 that on out for me. Okay?

5                     And it's also true that there is no policy or  
6 procedure implemented with respect to the Palms Hotel through  
7 security on what behavior should or should not be permitted at  
8 the promotional events?

9           A     Within security?

10          Q     Yes. A written manual.

11          A     Correct.

12          Q     You expect the security guards to use their reason  
13 and their sense, is that right?

14          A     In the scope of their job or the promotion?

15          Q     In the scope of their job, which would include,  
16 wouldn't it, providing security and, in a general sense,  
17 preventing injuries and accidents at promotional events?

18                     Do you understand my question?

19          A     No, I do not.

20          Q     You have security guards in the hotel, is that  
21 right?

22          A     Correct.

23          Q     Part of what they do is they try to get people to  
24 behave appropriately within the hotel, is that right?

25          A     Correct.

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1 Q And part of the reason for that is because you're  
2 attempting, in your hotel, to create a safe and reasonable  
3 environment for the patrons of your hotel. Is that fair to  
4 say?

5 A Correct.

6 Q And the security guards, with respect to the  
7 promotional events, are expected to use their reason to permit  
8 or not permit certain behaviors? That's fair to say?

9 A That's fair to say, yes.

10 Q And you, yourself, you think it's inappropriate to  
11 throw promotional items at a promotional event?

12 A I do.

13 Q Okay. And you've explained, and I'm sure you'll  
14 tell the Court now, that's because of the foreseeability that  
15 somebody could get hurt?

16 A Correct.

17 Q As well as the foreseeability that any number of  
18 events could happen when balls are being thrown and people are  
19 scrambling around. Is that fair to say?

20 A Yes.

21 Q And you, as -- well, occupying the position that you  
22 have in risk management and security, would expect a security  
23 guard to stop someone from throwing promotional items if it  
24 was occurring within the Sports Bar [sic]? Is that right?

25 A I would expect that, yes.

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1 Q And you even spoke to me about the fact that you  
2 believe that that's the standard of care. That it would be  
3 required of them to stop people from throwing promotional  
4 event objects into the crowded promotional event, is that  
5 right?

6 A I would expect them to stop that, yes.

7 Q And you heard the testimony of Brandy Beavers, where  
8 she said there was a security guard in the area during the  
9 promotional event, is that right?

10 A In the area, yes.

11 Q And you understand as well that she spoke about the  
12 fact that this promotional items throwing was going on  
13 throughout the whole Monday Night Football game, is that  
14 right?

15 A Correct.

16 Q And you would anticipate, because of the structure,  
17 how it's formed, of the Sports Bar to the -- I keep saying  
18 Sports Bar. It's the Sportsbook, right?

19 A Correct. It's Sportsbook and Sports Bar [sic].

20 Q But you understand that the incident occurred in the  
21 Sportsbook?

22 A Correct.

23 Q And you understand I'm just being dumb by saying  
24 Sports Bar? I mean Sportsbook.

25 A I understand that, yes.

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1 Q And your questions that you answered, you took each  
2 of them from me to mean the Sportsbook, is that right?

3 A Correct.

4 Q And you would anticipate, because of the structure,  
5 how it's open to the casino and because of the route taken by  
6 the security guards, that a security guard in that area would  
7 have had the opportunity to see promotional items being  
8 thrown?

9 A Yes, they could have had that opportunity.

10 Q And yet the promotional items kept getting thrown,  
11 is that right?

12 A I'm -- I have no knowledge of it. I wasn't present.

13 Q Okay. If the promotional items were thrown more  
14 than one occasion, every commercial break or many commercial  
15 breaks during this football game, would you have anticipated  
16 that a security guard in the area would have stopped those  
17 promotional items from being thrown?

18 A I would expect him to, had he had knowledge, yes.

19 Q And that's because that comports what you understand  
20 the standard of care to be, is that right?

21 A Yes.

22 Q And because you don't want people getting injured in  
23 that and it's foreseeable that if the promotional items are  
24 thrown, exactly what happened in this case could happen in the  
25 Sportsbook. Is that fair to say?

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1 A Yes.

2 MR. BAKER: I don't think I have any further questions,  
3 Your Honor.

4 THE COURT: Okay. Mr. Ward.

5 CROSS-EXAMINATION

6 BY MR. WARD:

7 Q Ms. Kooinga.

8 A Yes.

9 Q I've been working with you longer than Mr. Baker, so  
10 I had to learn how to pronounce your name.

11 A You can pronounce it.

12 Q Did you have any awareness of anyone throwing  
13 promotional items at the Palms prior to this incident?

14 A No, I did not.

15 Q Have you had a chance to go back and check whether  
16 there have been any other injuries claimed at the Palms as a  
17 result of items being thrown into the crowd?

18 A Yes, I have.

19 Q Has that ever occurred at any other time with the  
20 Palms?

21 A No.

22 Q This is the only time?

23 A That I know of, yes.

24 Q Thank you.

25 MR. WARD: No questions.

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1 THE COURT: Any follow-up?

2 MR. BAKER: Follow-up, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. BAKER:

5 Q Yes. You've heard Brandy Beavers' testimony where  
6 she and Denise Demuckis sat down and actually created where  
7 they could have a field goal in the Sportsbook area to throw  
8 footballs?

9 A Yes.

10 Q And you heard that testimony, right?

11 A Yes, I did.

12 Q Doesn't that suggest to you that probably if  
13 somebody at the Palms knew that footballs were going to be  
14 thrown in the Sportsbook, to go out and construct field goals  
15 to do it?

16 A I believe that if they had that conversation,  
17 someone, yes, would have known.

18 Q Okay. Thank you.

19 THE COURT: Any follow-up, Mr. Ward?

20 MR. WARD: No, Your Honor.

21 THE COURT: Okay. With the thanks of the Court, ma'am,  
22 you may step down.

23 THE WITNESS: Thank you.

24 [Designation of record ends at 3:35 p.m.]

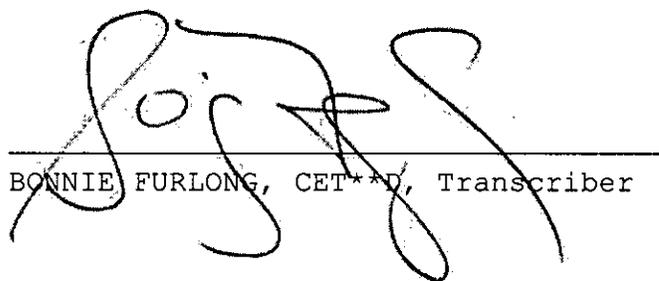
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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.



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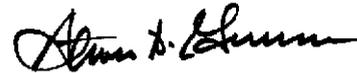
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DISTRICT COURT



CLARK COUNTY, NEVADA

CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
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Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS, LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, OCTOBER 26, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF ENRIQUE RODRIGUEZ  
VOLUME I

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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Plaintiff's Witness(es):

Enrique Rodriguez..... 3

Defendant's Witness(es):

None

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EXHIBITS

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PLAINTIFF'S:

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DEFENDANT'S:

None

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1 TUESDAY - OCTOBER 25, 2010 - 1:14 P.M.

2 [Designation of record begins at 1:14 p.m.]

3 THE COURT: Good afternoon. Please be seated.

4 THE MARSHAL: Now that the Judge is seated, we can -- do  
5 we need to call the case?

6 THE COURT: Remain standing, please, while the Clerk  
7 swears you in.

8 ENRIQUE RODRIGUEZ, PLAINTIFF'S WITNESS, SWORN

9 THE CLERK: State and spell your name for the record.

10 THE WITNESS: My name is Enrique Rodriguez.

11 E-N-R-I-Q-U-E. Rodriguez, R-O-D-R-I-G-U-E-Z.

12 THE COURT: Whenever you're ready, Mr. Baker.

13 MR. BAKER: Good morning, Your Honor.

14 THE WITNESS: Good morning.

15 THE COURT: Afternoon, Mr. Baker.

16 MR. BAKER: Oh. Good afternoon, Your Honor.

17 DIRECT EXAMINATION

18 BY MR. BAKER:

19 Q Enrique, you've been waiting a long time for this.

20 A Yes, I have.

21 Q Are you nervous?

22 A Actually, a little bit.

23 Q Okay.

24 A Or actually a lot, yes.

25 Q There's water next to you, and if you need a break

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1 I'm sure we can ask Her Honor to accommodate you. I know that  
2 sometimes it can get ocerwhelming.

3 A Thank you.

4 Q Is that fair to say?

5 Let's just make a brief introduction of you. Where  
6 were you born?

7 A I was born in Los Angeles, California.

8 Q How long did you live in Los Angeles?

9 A All my life. Pretty much.

10 Q Mostly in Riverside?

11 A Mostly in Riverside.

12 Q What other areas of Los Angeles did you live in?

13 A The area of Long Beach.

14 Q And you went to high school in Long Beach?

15 A Yes.

16 Q Which high school did you attend?

17 A I went to Banning High School.

18 Q Were you involved in sports and activities during  
19 your high school years?

20 A Yes.

21 Q Can you explain to the Judge some of the physical  
22 things that you liked to do, just growing up and living into  
23 young adulthood?

24 A I liked -- when I was in high school, even in junior  
25 high school, I participated in track, cross-country.

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1     Actually, I was one of the youngest ones to participate in the  
2     Palos Verdes Marathon.

3             Q     What's the Palos Verdes Marathon?

4             A     It's a annual marathon that they had in the City of  
5     Palos Verdes, next to Rolling Hills. And I was just in junior  
6     high school when I ran that marathon. It was a non-stop  
7     marathon. And I did that in junior high school. So I was  
8     really proud of being able to do that.

9             Q     And did you also participate in sports and  
10    activities in your high school years?

11            A     Yes, I did.

12            Q     Will you talk about things that you liked to do?

13            A     In high school I was on the track team and the  
14    cross-country team.

15            Q     So you were a runner?

16            A     Yes, I was.

17            Q     And is that something that you enjoyed as part of  
18    your daily activities, something that gave you comfort?

19            A     Absolutely.

20            Q     How long did you keep running? My wife's a  
21    marathoner is why I'm asking.

22            A     Pretty much all my life.

23            Q     There was a point in time that that stopped, is that  
24    correct?

25            A     Yes.

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1 Q And it stopped as associated with the incident that  
2 we're here to discuss today?

3 A Correct.

4 Q Prior to the incident that we're here to discuss  
5 today, explain to the Judge some of the other things that you  
6 like to do?

7 A In the physical, I like doing pretty much anything  
8 that involved physical activity, whether it was racquetball,  
9 whether it was jogging, running, playing basketball. Me and  
10 my life care companion, partner of 28 years, we --

11 Q You've been concerned whether or not to call her a  
12 wife in this courtroom?

13 A Or spouse. We've been together for 28 years. So we  
14 raised foster kids for over ten years in Riverside, so we were  
15 licensed foster parents.

16 Q And how many foster children would you have in the  
17 house?

18 A At one time we had up to nine foster children. We  
19 had a very large home.

20 Q Now, you hear sometimes stories about foster homes  
21 being unhappy places. Would you describe to the Judge how  
22 your house was with these nine kids?

23 A Well, our house was fun. We had up to 100 children  
24 that went through our home. And fortunately, we put them  
25 through high school. And I spent my time -- we spent our time

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1 raising the kids. So our life was fun. We did sports with  
2 them. I was on the booster club.

3 Q What's the booster club?

4 A At that high school that we put them through was  
5 Poly High School in Riverside. And the booster club was a  
6 club with Poly High School that participated in high school  
7 and boosting the football team.

8 So before Poly High School had the football game, we  
9 would have a barbecue for them. So they would walk across the  
10 street to one of the homes and we would barbecue for everybody  
11 on the football team before the football game. So I would  
12 barbecue with them. And it was just kind of an encouragement  
13 for the kids.

14 Q It makes you a little more comfortable to talk about  
15 your family now, huh?

16 A Yeah, because, you know, when you were asking me  
17 about sports, that's something that I participated. And I was  
18 fortunate with my type of work in real estate to be able to be  
19 there for them. So I would go and actually I can actually say  
20 I've never missed any of the football games. Or even any of  
21 their practices.

22 Q Now, that's an interesting topic that you're  
23 bringing up. The kind of interplay between the lifestyle that  
24 you chose for the children and the lifestyle that you chose  
25 with the real estate. Can you speak to the Judge a little

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1 about that?

2 A Well, ever since high school I got involved in real  
3 estate as an investor. And fortunately as an investor, I was  
4 able to make a very good living in real estate. That gave me  
5 the opportunity to spend time with friends, family, and with  
6 all the kids that we were raising.

7 So when it came to all my kids, I was able to go to  
8 their practices after school. I was able to -- for example, a  
9 lot of my kids were in football. So I was able to be at their  
10 practices. I was able to go to their games. Some of my kids  
11 were in cross-country.

12 So whatever sports they liked, I was able to be  
13 there to encourage them. And --

14 Q The question was, how did that interplay in with  
15 your real estate lifestyle?

16 A With my real estate lifestyle? Well, because of the  
17 time constraints, I guess, most people work 9:00 to 5:00. I  
18 was able to not have that 9:00 to 5:00. I was able to make my  
19 own hours. If that's --

20 Q Yeah, that's what I'm saying.

21 A Pretty much --

22 Q Would you explain to the Judge really how that  
23 worked? I mean, I have more than a 9:00 to 5:00 job. Go  
24 ahead and -- and she has a 6:00 a.m. to 3:00 a.m. job. So can  
25 you please explain to her a little bit of the leisure that you

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1 were able to achieve?

2 A Okay. So whether I was on the side of purchasing  
3 the property, fixing the property up, it wasn't always 9:00 to  
4 5:00. At times I would have subcontract people to work, and  
5 it wasn't always having to be there. And fortunately, the  
6 escrow, the title, they took care of their side. I took care  
7 of my side.

8 And fortunately the checks still came in. So there  
9 was always food on the table. And there was always time for  
10 me and our kids.

11 Q Were there times that you closed a big deal and  
12 simply took off unlimited time spend with the kids?

13 A Oh, absolutely. You know, when -- I was a lucky  
14 guy, you know. When I looked at my checks it wasn't \$279 or  
15 \$789. It was \$78,000. So those are the checks that I looked  
16 at. And I was blessed, you know. I was able to learn a  
17 system, I was able to learn techniques, I was able to look at  
18 it like that because I started right out of high school to  
19 learn how to do real estate.

20 Q Let's talk about that. How do you start out of high  
21 school to learn how to do real estate?

22 A Well, when I was still in high school I was  
23 fortunate that I met a gentleman that did real estate in  
24 Gardena, California.

25 Q In where?

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1           A     Gardena, California.

2           Q     Okay. Go ahead.

3           A     And he was in real estate already. And he had a  
4 broker's license. And as a matter of fact, I'm still friends  
5 with him. And he was a -- and he still is a private  
6 investigator for a real estate mortgage insurance company.

7           Q     What is his name?

8           A     His name's Dudley [phonetic]. And at that time his  
9 company was building condominiums. So he called on me and he  
10 said, "Hey, we just built all these condominiums," like 200 of  
11 them, and they were ready to go on the market.

12                     So I'm just in high school and he calls me, and next  
13 thing you know he says, "Hey, would you like to get involved?  
14 They're brand-new. All we need is to kind of clean the  
15 windows, prepare them for agents or whatever to be sold." So  
16 he goes, "I'll pay you basically whatever you want. Eight,  
17 ten dollars an hour." Here I am, still in high school.

18                     And I'm like, "How can I miss an opportunity like  
19 that?"

20                     "You know, you don't have to be on the time clock.  
21 Just write down on your own what time you come in and what  
22 time you leave. And I'll come every day and I'll take you out  
23 to lunch."

24                     So I'm like, "That sounds pretty good."

25                     So I start working like that. And he comes every

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1 day for lunch and he takes me out and he treats me for lunch.

2 So I realized at that time, all I gotta do is do a  
3 good job and be honest. And not cut any corners. And do my  
4 time clock right. And if I do that, I'm a lucky guy.

5 And I did exactly that.

6 Q Were your parents okay with that?

7 A Absolutely. Because he became friends with my  
8 family.

9 Q Did your parents instill in you this balanced  
10 lifestyle? Work and love and family?

11 A Absolutely, yes.

12 Q Would you tell the Judge a little bit about the  
13 makeup of your family when you were growing up?

14 A I come from a family of eight brothers and two  
15 sisters. And my parents were very into everybody should go to  
16 college and get an education. And everybody went to college  
17 and got an education.

18 Q Did you?

19 A I was pretty much the one that went to college, went  
20 to fire science, and wanted to become a firefighter. At that  
21 very time is when I met Dudley. And it's kind of strange,  
22 because my stepson became the firefighter and he's a  
23 firefighter with the City of Los Angeles, and he's a paramedic  
24 firefighter.

25 Q Up to the time of this accident, were you close with

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1 your mom, your dad, your sisters and your brothers?

2 A I still am, and I am very close, yes.

3 Q Did you take joy in your relationship with them?

4 A Absolutely.

5 Q Would you explain for the Judge some of the things  
6 that your family would do?

7 A Some of the things that my family would do. We'd  
8 always get together, have barbecues. We get together on birth  
9 dates. We're -- our nuclear family is very close.

10 Q Did you say eight brothers and two sisters?

11 A Eight brothers and two sisters.

12 Q Other than you?

13 A With me it's eight.

14 Q No wonder you were comfortable in the foster home  
15 environment. You had a tribe of your own, huh?

16 A Yeah, you know, Maria always said, "When we get a  
17 big house let's fill it up with kids."

18 Q When did you meet Maria?

19 A I met Maria 28 years ago.

20 Q Where did you meet her?

21 A She happened to be my next-door neighbor.

22 Q Did you grow up with her?

23 A Actually not. I didn't grow up with her.

24 Q When did she become your next-door neighbor?

25 A She became my next-door neighbor when she became a

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1 widow. Her husband passed away.

2 Q Sorry.

3 A And then she came back home to the neighborhood with  
4 her little son. And I raised her son.

5 Q Did he want to be a fireman when he was little?

6 A Actually, he wanted to be a trash can man.

7 Q Right.

8 A Yeah, that's what he wanted to be.

9 Q That's a "Sesame Street" thing?.

10 A Yeah.

11 Q Okay. And have you and Maria been together  
12 consistently since she moved back in the neighborhood?

13 A Ever since. Yes.

14 Q And prior to the time of this accident, can you  
15 describe your relationship with her? Was it a loving one?

16 A Yes. Yeah, it was very -- it was great.

17 Q Who was considered to be the bread earner in the  
18 family?

19 A Me.

20 Q Is that a position you took pride in?

21 A Absolutely, yes.

22 Q Is that something you also learned from your family?

23 A Yes.

24 Q Was there a time, shortly before the incident  
25 occurred, that Maria had an unfortunate medical scare?

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1 A Yes.

2 Q Would you explain to the Judge what occurred?

3 A Well, what happened is I had a great insurance  
4 policy with Blue Cross or Blue Shield, and they discovered  
5 that she had some lumps in her breast. And we went through  
6 several months with that problem, and fortunately they were --  
7 it wasn't as bad as it could have been, so we got the all  
8 clear.

9 And so we decided, "Let's go to Las Vegas. Let's  
10 clear our head. Let's go out there and just kind of relax.  
11 Get away." It was really tough.

12 So we came to Las Vegas.

13 Q How'd you get to Las Vegas?

14 A We drove.

15 Q Did you drive together?

16 A Yes.

17 Q And is it kind of a laughing, "Oh, thank God" kind  
18 of trip?

19 A Yes.

20 Q Where were you staying?

21 A At Harrah's Casino.

22 Q Why were you staying at Harrah's? If you could tell  
23 the Judge?

24 A Why at Harrah's? Well, we had a diamonds card.  
25 Diamonds players card. So we were kind of, you know,

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1 complementary this, complementary that. So it was -- it was  
2 at Harrah's Casino, and I believe were comped at Harrah's  
3 Casino. And Maria really enjoyed playing the slot machines.  
4 And so that's why we came to Harrah's Casino.

5 Q Yes. I'm sorry, go ahead.

6 A And we came to that particular casino because they  
7 set us up really good in a nice suite.

8 Q And that's kind of enjoyable, isn't it?

9 A Oh, absolutely. It was.

10 Q And after you got to the casino, would you explain  
11 to the Judge what you and Maria did for the first few hours?

12 A Well, for the first few hours, you know, we had a  
13 good time. Everything was good. And then basically what  
14 happened was when the evening came she was feeling a little  
15 tired. Because she was actually on medication.

16 So I tucked her into bed. I remember this very  
17 clearly. I tucked her into bed. And she said, "Why don't you  
18 go out, have fun? And -- now that I'm very comfortable, go  
19 see if you can find one of your friends out here in Las Vegas.  
20 And, because I'm just going to fall asleep and, you know, you  
21 really took care of me, so just go out and have some fun."

22 Q Why did you have friends here in Las Vegas?

23 A Because some of my friends moved from California to  
24 Las Vegas.

25 Q During the boom?

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1 A Yeah.

2 Q And were you going to try to see somebody in  
3 particular?

4 A Not really, but I did have an option of different  
5 friends.

6 Q Okay. Were you able to find anybody?

7 A No.

8 Q And what happened then?

9 A What happened then? On my way back I'm just driving  
10 down, I believe Flamingo, and there's a marquee that said  
11 "Monday Night Football," at the Palms. And I --

12 Q Have you been to the Palms before?

13 A Pardon me?

14 Q Have you been to the Palms before?

15 A Yes.

16 Q Okay. Have you been to the Sportsbook inside the  
17 Palms before?

18 A No.

19 Q All right. How many times have you been at the  
20 Palms before?

21 A About six times.

22 Q And what did you do when you were in the Palms  
23 before?

24 A Played slot machines.

25 Q Is that because you were with Maria the other times

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1 you were at the Palm?

2 A Yes.

3 Q And slot machines is kind of her thing?

4 A Slot machines is kind of her thing, so I kind of  
5 hang around her. And she loves the slot machines.

6 Q Do you love them?

7 A Not really. Not as much as her.

8 Q So this time she wasn't there and you didn't have to  
9 play the slot machines, is that fair to say?

10 A Yes, and I just went to watch Monday Night Football.

11 Q About what time did you arrive at the hotel?

12 A About 6:00.

13 Q What did you do?

14 A Arrived at the hotel and went straight to the Race  
15 and Sportsbook area.

16 Q And is the Sportsbook in the Race and Sportsbook  
17 area?

18 A There's a --

19 Q Is it the same thing?

20 A Yes.

21 Q Did you know how to get there or did you have to ask  
22 directions?

23 A I just walked in the doors and just kind of went in  
24 there. I pretty much knew how to get there.

25 Q What'd you do then?

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1           A     Once I got there, walked in the open area and just  
2 stood there and watched the TV on the big screen TVs.

3           Q     By the way, do you remember how the Monday Night  
4 Football was advertised? Was it -- I'm forgetting, "Monday  
5 Night Football Frenzy with Brandy Beavers"?

6           MR. WARD:  Objection; leading.

7           THE COURT:  Sustained.

8           BY MR. BAKER:

9           Q     Do you remember how it was advertised?

10          A     Yes.

11          Q     How was it advertised?

12          A     Pretty much the way you said it.

13          MR. BAKER:  It was a little leading, but I didn't think  
14 it was that important.

15          BY MR. BAKER:

16          Q     Did you have any idea who Brandy Beavers was when  
17 you saw that sign?

18          A     No.

19          Q     So was it an issue that you were going to see Brandy  
20 Beavers or were you going to go see a football game?

21          A     A football game.

22          Q     When you arrived at the Sportsbook, would you  
23 describe to the Judge, please, the environment that was going  
24 on side the Sportsbook?

25          A     The --

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1 Q What was happening?

2 A The environment was, I would say rowdy.

3 Q What was happening?

4 A Well, besides the -- watching the football game, the  
5 Palm employees were throwing -- actually were throwing several  
6 different items in the air. And some of them were t-shirts,  
7 some of them were the water bottles, and some of them were  
8 actually NFL footballs.

9 And one of the footballs that they threw actually  
10 hit a television set that was mounted on the wall. And when  
11 that hit that television set, there was a couple that was  
12 sitting right underneath it. And it moved it so crazy that  
13 the people that sat underneath it kind of just ran, because it  
14 almost fell on top of them.

15 And also, the girls that were doing this were not  
16 only throwing these things, but they were blindfolding each  
17 other and spinning each other around at the same time they  
18 were throwing this. And yeah, that's the -- it was kind of --  
19 that was the environment.

20 Q Would you describe to the Judge the layout of the  
21 Sportsbook as you remember it? The physical layout.

22 A The physical layout? It was -- you have the  
23 entrance that was kind of like crowded. It was kind of like  
24 -- like, to the right of me, it was open. But there was  
25 people to the right of me. And then you had the monitors in

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1 front of me with some chairs. And straight ahead was an aisle  
2 where I can see the employees that were doing this.

3 Q The girls?

4 A The girls. And then up front you could see the big  
5 screen TVs.

6 Q Where were you standing?

7 A I was standing at the entrance where you can walk in  
8 to the actual -- if you want to keep going in, there was an  
9 entrance where I was standing.

10 Q Was that the best view of the football screen?

11 A I would say no.

12 Q And what were you doing when you were standing  
13 there?

14 A I was just standing there, watching TV.

15 Q Were you watching the football game?

16 A Yes.

17 Q And how long were you watching the football game  
18 before anything happened?

19 A Can you repeat the question?

20 Q How long were you watching the game before anything  
21 happened?

22 A I would say a little over an hour. Yeah.

23 Q Were you drinking?

24 A No.

25 Q Were you smoking?

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1 A No.

2 Q Were you speaking to anybody around you?

3 A No, not really.

4 Q Watching a big screen TV?

5 A Just watching the big screen TV.

6 Q During that period of time, did you have the  
7 opportunity to see other promotional items being thrown into  
8 the audience?

9 A Yes.

10 Q How many occasions were promotional items thrown  
11 into the audience by the girls who were throwing them into the  
12 audience?

13 A From what I saw and from what I recall, I would say  
14 about six occasions.

15 Q How many girls were there?

16 A I recall three girls.

17 Q And how were they dressed?

18 A They were dressed in like cheerleader outfits.

19 Q And you've seen cheerleader outfits before on the  
20 football fields, right?

21 A Yeah. Yes.

22 Q Describe to the Judge what would happen with respect  
23 to when they would throw the promotional items out. What  
24 would they do and how the environment in the bar was  
25 responsive?

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1           A     Well, it was like to motivate the audience. It was  
2 to make -- it was to entice the audience. It was to get a  
3 response.

4           MR. WARD: Calls for speculation opinion testimony. Move  
5 to strike.

6           THE COURT: With respect to the characterization of  
7 response, but otherwise I think his response was fine.

8           MR. BAKER: Thank you, Your Honor.

9 BY MR. BAKER:

10          Q     And was the crowd responding? Reacting?

11          A     Yes.

12          Q     And in what fashion?

13          A     Well, people jumping. People putting their hands in  
14 the air [demonstrating]. People moving. People going  
15 wherever items went. People basically going where items were  
16 thrown, whether it was a t-shirt, whether it was a football.  
17 Or, like I said, a football -- actually an NFL football, if  
18 you know what a football is --

19          Q     I do.

20          A     It hit that TV. There was movement where that  
21 landed. There was movement.

22                     So yeah, it made movement. It made people respond.  
23 There was impact.

24          Q     Is there a point in time that something occurred to  
25 you?

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1           A     Yes.

2           Q     What -- would you please tell the Judge what  
3 happened?

4           A     Well, what happened to me is a water bottle was  
5 thrown in my direction. And it happened so fast that there  
6 was this lady sitting down in front of me at a monitor where  
7 there was a TV. I'm standing there, watching the big screen  
8 TV. And when the ball's in flight hands move in the air  
9 [demonstrating] and this lady, for whatever reason, she  
10 decided to get up out of her chair, turn around, and run. I  
11 mean literally run towards where I'm standing and just take a  
12 total dive, body dive.

13                     And while I'm standing, she lands right on my knee.  
14 And my knee just goes inwards. While I'm standing there. And  
15 when it goes inwards I hear a pop. And there wasn't really  
16 much I can do about it. I mean, it happened so fast.

17           Q     How did your body move as a result of being impacted  
18 on the side?

19           A     Well, there wasn't so much I can do. So --

20           Q     Are you okay?

21           MR. BAKER: Your Honor, can I approach the witness?

22           THE COURT: Sure.

23 BY MR. BAKER:

24           Q     Do you need a second?

25           A     [Nodding]

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1 MR. BAKER: Your Honor, can we take a minute?

2 THE COURT: Sure. Do you want a five-minute break or  
3 something?

4 THE WITNESS: Well --

5 MR. BAKER: Yeah. If that's okay.

6 THE COURT: Sure.

7 [Recess]

8 THE CLERK: Court is back in session.

9 THE COURT: Please be seated.

10 Okay. Mr. Baker, whenever you're ready to resume,  
11 we're ready.

12 MR. BAKER: Thank you, Your Honor.

13 Recall Enrique Rodriguez.

14 THE COURT: Okay. Please come forward, sir.

15 THE WITNESS: Thank you.

16 THE COURT: Whenever you're ready, Mr. Baker.

17 MR. BAKER: Thank you, Your Honor.

18 THE WITNESS: Thank you.

19 ENRIQUE RODRIGUEZ, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

20 DIRECT EXAMINATION CONTINUED

21 BY MR. BAKER:

22 Q Mr. Rodriguez --

23 THE WITNESS: Thank you, Your Honor.

24 BY MR. BAKER:

25 Q -- I'm going to take you through it a little bit

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1 faster. I think that would be better for all.

2 But as a result of being impacted on your knee, you  
3 described what your body did to some detail. Did your body  
4 come into contact with anyone else's bodies in the Sportsbook?

5 A Yes, it did. There was a gentleman standing next to  
6 me, and when the impact hit my knee, my body went backwards,  
7 it fell back. I hit the gentleman next to me when I twisted,  
8 and my body torqued. And the gentleman standing next to me, I  
9 landed on him, and instead of me falling all the way to the  
10 ground, he kind of broke my fall. And then I remember  
11 apologizing to him, and I apologized to him and he said,  
12 "Don't worry about it. It wasn't your fault."

13 And there was like a little metal stand next to us  
14 that we crushed together, and so I kind of tried to get my  
15 balance and my equilibrium, and I kind of came back up. And  
16 then I remember trying to extend my knee, and it just was --  
17 it hurt, and I couldn't -- I couldn't put any weight on it.  
18 And I just thought, "This is bad. This ain't good."

19 Q What did you do next?

20 A What I did next is, I waited for a moment and I  
21 thought, "Wow, what do I do next?"

22 So it wasn't too much after that that the lady went  
23 back to her seat, and there was a gentleman with her. So it  
24 wasn't too much after that that they took off. So I decided  
25 to hop to that vacant seat, and I sat there. And I thought,

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1 "Wow. What do I do next?"

2 So I thought, "Well, I better go find a security to  
3 make a report." And that's what I did next.

4 Q And continue.

5 A So from there I started to look for security, and I  
6 kind of hopped, wobbled out of there because I really didn't  
7 want to bring attention there. There was a lot of people, and  
8 I didn't want to bring attention to myself. So I started  
9 going out of that little area, and there's a bar right outside  
10 of there. So I just started going out, walking out, and I  
11 continued looking for a security area. And I remember running  
12 into an employee there, and I asked them, "Where is the  
13 security office here?".

14 Q How far of a distance did you have to go?

15 A All the way to that area, from what I recall, it was  
16 -- at this moment, I don't recall.

17 Q How was your knee feeling during that time?

18 A I was in pain. It was -- it was hurt.

19 Q Describe it.

20 A It was aching. It was a sharp pain, pressure.

21 There was a lot of pressure in my knee. And I remember when I  
22 ran into that employee, I said, "Can you get me a wheelchair?"

23 Q Had you ever felt anything like that with your knee  
24 before?

25 A No, never.

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1 Q Had you ever been treated for your knee before?

2 A No.

3 Q Had x-rays of your knee before?

4 A No.

5 Q MRIs of your knee before?

6 A No.

7 Q Okay. This was new to you?

8 A Yes.

9 Q Okay. What happened then?

10 A I asked the employee for a wheelchair, and they  
11 said, "Well, the security podium is real close. Just follow  
12 me." So I'm like, "All right. I'll follow you." So here I  
13 go, just hopping, hopping, hopping, following their  
14 instructions.

15 So I finally make it to the podium, and I start  
16 explaining, "Hey, this is what happened." So they gave me a  
17 sheet. "All right. Just fill out the -- the accident report,  
18 voluntary sheet. And we need your California driver -- your  
19 I.D."

20 So I comply and I give them everything. And then  
21 they say, "Just fill it out." And then so I'm thinking, "Wow,  
22 just like that?"

23 And so I looked around and I think, well, where do I  
24 sit at to fill this out? So the area that were there were  
25 slot machines. So I hopped to a slot machine and -- and I

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1 tell them at the podium, I said, "Why don't you go and get  
2 witnesses? There were witnesses there. Go find some  
3 witnesses, because they saw what happened. I told them  
4 everything that happened."

5 So a little bit after that, I see no action, and I'm  
6 right there at the slot machine, and nothing's happening. So  
7 I go back there to the podium and I said, "You got to go find  
8 some witnesses." So eventually --

9 Q How far was the podium from the slot machine? Was  
10 it right there?

11 A Yeah. From where I was at it was very close because  
12 I can see it.

13 So eventually a security guy comes to me and says,  
14 "Well, I'm going to go look for those security -- for the  
15 witnesses, but I'm going to instruct them not to fill it out  
16 because it's voluntary only. So I'm going to advise them not  
17 to fill it out."

18 And I'm thinking in my head, "That doesn't sound  
19 right."

20 So then I thought -- I'm right here on the slot  
21 machine filling it out, this guy just told me this. I  
22 thought, "No, no, no." And he starts taking off.

23 So then I figured, "I better follow him because I --  
24 I better point them out," because I remembered who I fell  
25 into. So with that kind of a response from him, I think it

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1 would be more prudent for me to kind of go with him. So here  
2 I go again hopping on my good leg. So here I go hopping back  
3 to the area.

4 Now about that time, when I was with him, I said --  
5 they said, "Do you need medical attention?"

6 I said, "Yeah, go ahead and call them for me."

7 So by that time, me filling out the report, and all  
8 this going on, by the time we get back to the area of the  
9 incident, the medical comes. So right when I'm getting there,  
10 the medical gets there at the same time. So I'm ready to  
11 point everybody out, and the medical comes for me.

12 Q Why was it important to you to point everybody out?

13 A It was important because I felt that this injury --  
14 all of a sudden the -- the way that it felt, and what  
15 happened, I thought that it would be necessary that it would  
16 be reported, that it would be on paper, that -- I -- I just --  
17 you know, I'm just the kind of guy that, you know, certain  
18 things in life -- I just felt like that.

19 Q Were you afraid somebody might deny it happened?

20 A Yes.

21 Q Okay. What happened next?

22 A So we -- we all get there at the same time, and  
23 right before I go into that same area the -- the emergency  
24 team comes, so I don't make it in that area. They say, "Can  
25 you have a seat in the bar area."

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1           So I sit there, I get my attention. Security guy  
2 goes inside, and they tend to me. So they take my vitals, and  
3 they do all that, and then they say, "Do -- would you like to  
4 be transported?"

5           Q     I'm a little confused. Is this the same ambulance  
6 service, or did they come back to the hotel?

7           A     Yeah. Eventually they do come back. They do come  
8 back. And the reason they came back -- what ended up  
9 happening, at that time they tell me, after they do my vitals  
10 -- I tell them, "You know what, I'm still filling out the  
11 security report, okay? It hasn't been filled out. I'm kind  
12 of wanting this guy to get the -- the -- the witnesses."

13           So I have these concerns on my mind. I want him to  
14 get the witnesses. They're tending to me, and all of a sudden  
15 one of the EMTs says, he goes, "Where -- where are you staying  
16 at?"

17           I say, "Well, I'm parked in valet here."

18           He says, "Oh, then you can drive to the hospital  
19 because the hospital is right around the corner." He says, "I  
20 think you can drive to the hospital because it's your left  
21 knee."

22           And I'm thinking, "Okay." He goes, "It's just  
23 around the corner."

24           So with that is what -- is what he's telling me. So  
25 I'm thinking, "Wow. Oh, okay." So then they decide to leave

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1 and they told me that.

2 So then I'm thinking, okay. And I haven't filled  
3 out this report. The podium has my driver's license, and he  
4 just told me that. So I'm stuck here with that information.  
5 I haven't filled out the report. So then I looked a little  
6 further and I see some tables.

7 So they decide to leave.

8 Q Who is they?

9 A The emergency.

10 So then I see not too far from there some tables.  
11 So then I hop to the tables, and I sit there, and then I start  
12 filling it out again. And then the security comes out, and he  
13 passes by the tables, and I ask him, "Did you -- did you get  
14 any witnesses?"

15 And he kind of ignored me. And I said, "Did you get  
16 any witnesses' statements?"

17 He goes, "Well, maybe -- maybe I did; maybe I  
18 didn't; maybe a couple." And I'm like, "Okay."

19 So I continued filling it out, and then he did make  
20 a comment during all this conversation that I talk to him, the  
21 same security guy. He says, "Either way, you cannot sue the  
22 casino because it wasn't an employee that hit you." And I  
23 looked at him, and I just kind of shrugged my shoulders, and I  
24 thought, "Wow, where did that come from?"

25 So I'm sitting at the table and I'm filling

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1 everything out, and then that -- and then all of a sudden I  
2 begin to sweat really badly, and I'm thinking, "Wow, I think  
3 this is a little bit more than I can handle."

4 So then I tell the security guys, I said, "You know  
5 what, I don't think I'm going to be able -- you know, my pain  
6 is excessive. I'm not feeling good anymore. Can you please  
7 call 9-1-1 for me?"

8 And then the security guard that's right here says,  
9 "We're not calling 9-1-1 for you. You already blew it. We  
10 called them; you didn't go with them."

11 And I looked at -- I looked at them, and then the --  
12 another security guard that was sitting with him looked at him  
13 and said, "We can't do that to him. We have to call 9-1-1 for  
14 him."

15 Q Did they call?

16 A Yeah, they eventually called.

17 Q How long after that statement was it that 9-1-1 came  
18 and the EMTs came to the casino?

19 A How long after that statement? That guy took a  
20 couple minutes before he decided to call 9-1-1 after --

21 Q How --

22 A -- yeah.

23 Q -- were you feeling at this time?

24 A You know, I was -- I was hurt. I was very hurt  
25 pain-wise. But after that statement, you know, I was kind of

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1 frustrated. You know, I -- I was very shocked.

2           And then to make matters even worse, the guy comes,  
3 I says, "Can you please make me a copy of my voluntary report  
4 that I just filled out, and please bring me a copy of my drive  
5 -- please bring me my driver's license, too."

6           Q     How is your knee feeling at this time?

7           A     Oh, my knee was -- it was pain. It was -- it was  
8 like -- like it just wanted to buckle in.

9           Q     Were you placed on a gurney by the EMTs?

10          A     Yes.

11          Q     Were you taken from the casino to the hospital?

12          A     Yes, I was.

13          Q     What hospital did you go to?

14          A     I believe it was Spring Valley, or Sunrise -- Spring  
15 Valley.

16          Q     Was it right around the corner?

17          A     Yeah, it was -- it wasn't -- well, when you're in a  
18 gurney, you really can't see it. But it wasn't too far.

19          Q     And did they then move the gurney into the hospital?

20          A     Yes.

21          Q     What happened then?

22          A     They took me into the hospital, and they took me  
23 into a room.

24          Q     Okay. What kind of room?

25          A     Just your typical hospital room.

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1 Q Did they put you into a bed?  
2 A Yes.  
3 Q And how long was it until you were seen by a doctor?  
4 A It didn't take too long.  
5 Q Was it hours?  
6 A I would say it wasn't hours. It was pretty -- it  
7 was pretty average.  
8 Q Did they do anything to your leg while you were in  
9 the room before the doctor got there?  
10 A Did they do anything to my --  
11 Q At the hospital.  
12 A They just observed it. They didn't touch it because  
13 my leg was real sensitive.  
14 Q Okay. Did they wrap it?  
15 A No.  
16 Q All right. And so you waited for the doctor to  
17 come?  
18 A Yes.  
19 Q Did the doctor -- is that Dr. Heaps?  
20 A Yes.  
21 Q Did he perform an examination of you?  
22 A Yes.  
23 Q Did you tell him what occurred in the accident?  
24 A Yes.  
25 Q Did he seem to be more concerned with recording

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1 information or just caring for you?

2 A Caring for me.

3 Q Did he perform an examination of you?

4 A Yes.

5 Q What did the examination involve?

6 A The examination involved: Could I stretch it; could  
7 I move it; could I put weight on it; verbally, how does it  
8 feel; could he touch it, you know.

9 Q Were you then released from the hospital?

10 A Yes.

11 Q When you were released from the hospital, did they  
12 give any apparatus? Did they give you any assisted walked  
13 devices or --

14 A Yeah. I was released with some crutches, and a knee  
15 brace, an immobilizer device.

16 Q An elastic type, or something else?

17 A Yeah. It's almost -- it's like a -- like a Velcro  
18 one that has straps, and it's kind of set up so that you can't  
19 move your knee.

20 Q Have you ever had one of those before?

21 A No.

22 Q Okay. And were you told to go see a doctor when you  
23 got home?

24 A Yes.

25 Q How'd you get home?

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- 1           A     We drove -- Maria drove in the car.
- 2           Q     Okay.  Maria drove you?
- 3           A     Yes.
- 4           Q     Did you ever go see a Dr. Nork?
- 5           A     Yes.
- 6           Q     What kind of doctor is he?
- 7           A     An orthopedic specialist.
- 8           Q     How did you find Dr. Nork?
- 9           A     On the internet.
- 10          Q     Okay.  And when you went to Dr. Nork, did he do an  
11           examination?
- 12          A     Yes.
- 13          Q     Okay.  And what did his examination involve?
- 14          A     His examination involved the -- pretty much the  
15           general type of the same type of examination:  Can you stretch  
16           it; can you move it to your left, your right; they sit you on  
17           the table, examination table; you lay down; how low can you  
18           bring it; the range of motion; they have this little tool with  
19           a rubber thing on it that they want to hit your knee, which I  
20           told them that can't be done to my knee because it hurts too  
21           much.
- 22          Q     Don't hit, it would hurt, with a hammer?
- 23          A     With a sledge hammer, in this case, yeah.
- 24          Q     Yeah.  It sounds like good advice.
- 25          A     Yeah.

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1 Q And what else did he do?

2 A Then he prescribed -- prescribed a prescription for  
3 therapy, medication.

4 Q Did he also send for an MRI?

5 A And I also had -- was sent for an MRI, correct.

6 Q And that's an interesting point I'd like to make.  
7 Could you turn -- is it Exhibit 9? There's a book behind you.

8 MR. BAKER: May I get that for him, Your Honor?

9 THE COURT: Sure.

10 MR. BAKER: And, Your Honor, that's Exhibit 9, beginning  
11 with page number 1.

12 THE COURT: Thank you. Is that volume --

13 MR. BAKER: I have a copy for it -- for you if you would  
14 like me to bring it to you?

15 THE COURT: Volume 1?

16 MR. BAKER: Volume 1.

17 MR. CARDENAS: It's Volume 1, Exhibit 9.

18 THE COURT: Volume 1.

19 THE WITNESS: Exhibit 9.

20 BY MR. BAKER:

21 Q Would you -- do you remember during my opening when  
22 I was speaking about the fact that you couldn't get some  
23 treatment because you were having a problem with your lawyer?

24 A Yes.

25 Q Do you remember when this exhibit was then

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1 referenced, speaking about the fact that my company's name was  
2 on a document much earlier on than we suggested?

3 A Yes.

4 Q It -- I'd like you to look at page number 1 in  
5 Exhibit 9, and is this the bill that was generated in the  
6 course of your care and treatment?

7 A Yes.

8 Q Is this a bill that you've reviewed in the course of  
9 your care and treatment?

10 A Yes.

11 Q And you know this to be a bill that was generated  
12 with respect to your care and treatment?

13 A Yes.

14 MR. BAKER: Your Honor, I'd like this admitted just for  
15 the purpose of it being a bill, not for reasonableness and  
16 necessity of the bill.

17 THE COURT: Any objection to that, Mr. Ward?

18 MR. WARD: No, Your Honor.

19 THE COURT: Very well.

20 [Plaintiff's Exhibit 9 Received]

21 BY MR. BAKER:

22 Q And it gets a treatment date, is there not --

23 MR. BAKER: Your Honor, I have it for you.

24 ///

25 BY MR. BAKER:

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1 Q There's a treatment date that's at the top that  
2 speaks about February in '05; is that right?

3 A Correct.

4 Q There's a date down below that it speaks about the  
5 date purportedly when it was sent out. Is that September 6  
6 of '05?

7 A Correct.

8 Q So is it your understanding that this bill was sent  
9 to my office according to a request in September of '05, not  
10 in February of '05?

11 MR. WARD: Object.

12 THE WITNESS: Correct.

13 MR. WARD: Calls for speculation.

14 THE COURT: Sustained.

15 MR. WARD: Move to strike.

16 BY MR. BAKER:

17 Q Do you know if I received this bill in September  
18 of '05?

19 MR. WARD: Calls for speculation.

20 MR. BAKER: I'm asking if he knows, Your Honor.

21 THE COURT: Overruled. You can answer the question, sir.

22 BY MR. BAKER:

23 Q Correct?

24 A Correct.

25 Q When did you hire me?

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1 A I hired you in July of '05.

2 Q And do you remember that specifically?

3 A Yes.

4 MR. BAKER: Your Honor, I'd like to have marked a copy of  
5 my retainer agreement to be last in order, which I'd like to  
6 submit as an exhibit which shows the date that I was actually  
7 retained.

8 THE COURT: Very well.

9 MR. BAKER: Can we have that marked?

10 THE COURT: Marked next in order.

11 MR. BAKER: Last in order, I think, is how we're kind of  
12 doing it.

13 THE COURT: Right. Next, last in order.

14 MR. WARD: This has not been marked before?

15 THE COURT: Which?

16 MR. WARD: This document that I've seen.

17 MR. BAKER: It has not.

18 MR. WARD: It's not one of the -- it's not one of the  
19 things that's on the exhibit list.

20 THE COURT: Is that the retainer agreement?

21 MR. BAKER: It is, Your Honor. It is not on the exhibit  
22 list, and I'm -- I'm introducing it now specifically for the  
23 purpose of addressing issues that were brought up in opening.

24 THE COURT: That's the one we're talking about right now,  
25 Mr. Ward, that the Clerk is in the process of marking. Do you

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1 object to it coming in?

2 MR. WARD: I do.

3 THE COURT: On what basis?

4 MR. WARD: On the basis that it wasn't previously  
5 provided.

6 THE COURT: So, Mr. Baker?

7 MR. BAKER: Your Honor, it would be extremely unusual to  
8 provide retainer agreements in any type of case. There -- and  
9 I'm not saying allegations, but there were issues that were  
10 brought up to this Court that are in both of the records,  
11 presentations that I made to this Court as an individual and a  
12 lawyer, and with respect for corroborating what Mr. Rodriguez  
13 says.

14 The prejudice of introducing a retainer agreement is  
15 absolutely minimal because the only argument that's being made  
16 is that the -- our statement that he didn't receive treatment  
17 from Dr. Shannon was because of lawyer choice. He's going to  
18 testify to it. This gives voracity to it, and, Your Honor,  
19 it's respectfully suggested it should be admitted.

20 THE COURT: Anything further on this subject?

21 MR. WARD: I would simply say Counsel's the one who  
22 opened the door on this, and now to open the door and now to  
23 use that to get a whole bunch of issues into evidence, that  
24 shouldn't have been raised to begin with, about insurance and  
25 ability to get surgery. Now he's got his contingency fee

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1 arrangement, and I think it's improper. I object to it.

2 THE COURT: All right. Mr. Baker, what you told me a  
3 moment ago was that this was in response to something that  
4 came up in opening statement.

5 MR. BAKER: Correct, Your Honor.

6 THE COURT: All right. It will be admitted.

7 [Plaintiff's Exhibit \*\*XX Received]

8 MR. BAKER: Thank you, Your Honor.

9 BY MR. BAKER:

10 Q Enrique, is this a contingency fee agreement you  
11 signed with me?

12 A Yes.

13 Q And is that your signature at the bottom of the  
14 agreement?

15 A Yes, it is.

16 Q And could you read into the record the day you  
17 retained me, please.

18 A "July 13th, 2005."

19 Q And do you recall when your surgery was with  
20 Dr. Shannon associated with the date of July 13th? When was  
21 your surgery with Dr. Shannon?

22 A It was October 4th, 2006.

23 Q Within two-and-a-half months or so of the date you  
24 signed the retainer agreement?

25 A Yes.

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1 MR. BAKER: And, Your Honor, we move to have exhibit last  
2 in order, my retainer agreement, admitted into evidence.

3 THE COURT: All right. The Court admitted it already.  
4 What number is it?

5 THE CLERK: It's going to be after all the other exhibits  
6 are admitted, and we don't have --

7 THE COURT: So we don't have a number yet?

8 THE CLERK: No, not yet.

9 THE COURT: All right.

10 MR. BAKER: Okay.

11 BY MR. BAKER:

12 Q Where you sent to any physical therapy by your  
13 orthopedic surgeon?

14 A Yes.

15 Q Where was that?

16 A Rancho Physical Therapy.

17 Q And what sort of things did they do for you at  
18 Rancho Physical Therapy?

19 A Aquatic therapy in an indoor swimming pool; land  
20 therapy which consisted of stretching, which consisted of  
21 range of motion, which consisted of rubber bands to keep -- to  
22 keep my muscles from wasting, to keep my -- ultra sound; ice  
23 packs; heat; things of that nature.

24 Q You think you tried hard?

25 A Absolutely.

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1 Q Did you want to get better?

2 A Absolutely.

3 Q How was your knee feeling physically during that  
4 period of time?

5 A Just the -- just like a screw driver picking  
6 underneath my kneecap constantly. Just pain. Just a sharp  
7 pain, like if it always wanted to buckle on me.

8 Q How'd you feel about that?

9 A Sad.

10 Q Okay. How long did you go to Rancho Physical  
11 Therapy before seeing your next doctor?

12 A I continuously went.

13 Q Okay. Did you ever see Dr. Shannon?

14 A Yes.

15 Q And when did you see Dr. Shannon?

16 A I don't recall at this moment when.

17 Q My records reflect it's around March of '05.

18 A Okay.

19 Q How did you get referred to Dr. Shannon?

20 A I got referred to Dr. Shannon --

21 [Pause]

22 MR. BAKER: If you don't recall, that's okay.

23 THE WITNESS: I don't recall.

24 ///

25 BY MR. BAKER:

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1 Q Why did you go see a second orthopedic surgeon?

2 A Well, let me -- let me just interfere here real  
3 quick just so that I don't sound like I'm just way out there.  
4 Because of my condition that I'm in right now, RSD or complex  
5 regional pain syndrome, my anxiety, depression, everything  
6 that I'm under, I'm trying to maintain everything. So I'm on  
7 a -- I'm on a cornucopia of medicines. And a lot of them have  
8 side effects. Some of them are short-term memory. A lot of  
9 them are constipation. So with all these medications that I'm  
10 on just to try to keep me balanced, and they're working,  
11 unfortunately, you guys got to bear with me. And that's why  
12 sometimes, even the questions that you ask me, they're --  
13 they're hard to remember.

14 Q And, Enrique, you've --

15 A So I'm trying as hard as I can.

16 Q -- you've been to several providers and no one  
17 remembers every day of everything, right?

18 A Yeah. So --

19 Q So just do the best you can, okay?

20 A Okay.

21 Q When you saw Dr. Shannon, what did she do for you?

22 A Dr. Shannon, she evaluated me.

23 Q Okay. What'd she do in the course of her  
24 evaluation?

25 A Examination. She looked at my knee. She did the

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1 range of motion; she sat me on the evaluation table, see how  
2 much I can stretch it out; she laid me down, she how much  
3 flexion I had.

4 Q And can you tell the Judge, were you comfortable  
5 with Dr. Shannon?

6 A Yes. I was very comfortable with her.

7 Q Did you feel like she did a thorough investigation?

8 A Absolutely, yes.

9 Q Did she demonstrate and express concern with getting  
10 you better and your condition?

11 A Yes.

12 Q Did she recommend anything for you?

13 A Yeah, she recommended that I get treatment, and I  
14 get --

15 MR. WARD: Object. Move to strike.

16 THE WITNESS: -- the necessary --

17 MR. WARD: Hearsay.

18 THE WITNESS: -- surgery.

19 MR. WARD: Hearsay.

20 THE COURT: Sustained. I'd ask you to rephrase it.

21 BY MR. BAKER:

22 Q What course of treatment did she place you on?

23 A She placed me on continuous --

24 MR. WARD: Move to strike. It's hearsay.

25 MR. BAKER: A course of treatment doesn't beg a question,

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1 Your Honor.

2 THE COURT: No, I don't think that -- I don't think  
3 that's hearsay, Mr. Ward. Overruled.

4 MR. BAKER: Thank you.

5 THE WITNESS: That I -- that I continue physical therapy,  
6 and that I get, you know, the surgery.

7 BY MR. BAKER:

8 Q So was a surgery part of your recommended treatment  
9 course?

10 A Yes.

11 Q Okay. And what type of surgery did you understand  
12 that you were supposed to undergo?

13 A Surgery for a meniscus --

14 MR. WARD: This is hearsay.

15 THE WITNESS: A meniscus.

16 MR. WARD: It also calls for expert testimony.

17 MR. BAKER: No, it's not.

18 THE COURT: Overruled.

19 MR. BAKER: Thank you.

20 BY MR. BAKER:

21 Q So what recommended surgery was placed in place, for  
22 lack of a better way of saying it?

23 A Surgery for a torn meniscus and other things.

24 Q Was it your understanding you had a torn meniscus?

25 A Yes.

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1 Q Was it your understanding you had other soft tissue  
2 problems in your knee?

3 A Yes.

4 Q Now when did that surgery actually occur?

5 A October 4th.

6 Q Okay. So that was -- when was it recommended? Was  
7 that in March?

8 A In March, yes.

9 Q Can --

10 THE COURT: Could we have -- could we have a year,  
11 Mr. Baker, of the sur- -- the year the surgery was --  
12 BY MR. BAKER:

13 Q Please -- what year was that recommended --

14 THE COURT: -- recommended?

15 BY MR. BAKER:

16 Q -- and take place?

17 A That was recommended on March of 2006.

18 Q The first surgery to your knee by Dr. Shannon?

19 A I believe so, yes.

20 Q Okay. The --

21 A Oh, no, the first surgery --

22 Q Yes, please.

23 A -- was March -- October of 2005.

24 Q Was that several months after the first surgery was  
25 first recommended?

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1 A Yes.

2 Q Approximately how many, if you know?

3 A It was several months.

4 Q Okay. Could you explain to the Judge why there was  
5 this delay between the time your surgery was recommended and  
6 the time it occurred?

7 A Because of the other attorneys that I had at that  
8 moment.

9 Q Go ahead and explain.

10 A What happened was, I had originally retained a law  
11 firm, and they said that they can get my surgery done. So me  
12 living in California, calling them on the phone, "Yeah, we're  
13 ready. We're ready. We're going to get it done. We're going  
14 to get it done." Nothing happened.

15 MR. WARD: Object. This is hearsay.

16 THE WITNESS: So --

17 MR. WARD: And move to strike.

18 THE COURT: I don't think this is hearsay. Overruled.  
19 Please continue.

20 THE WITNESS: So nothing's going on. So I -- we even  
21 made trips back and forth, back and forth, to the office.  
22 "Hey, what's going on with my surgery? I'm in pain. It's  
23 hurting." Nothing's going on. Nothing's going on. And I  
24 just kept hearing that back and forth, back and forth.

25 So then eventually I said, "Well, you know, I better

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1 start interviewing someone else, because it sounds like  
2 they're not going to get it done, and I need it done. I'm  
3 hurting. I need it done."

4 So I interviewed and eventually I came to this law  
5 firm.

6 Q And the Court isn't interested in anything that we  
7 discussed. So is that what commissioned the delay in your  
8 surgery?

9 A Yes.

10 Q Was it shortly thereafter that surgery was available  
11 to you through Dr. Shannon?

12 A Yes.

13 Q And did you undergo that surgery?

14 A Yes, I did.

15 Q Were you recommended for further therapy?

16 A Yes.

17 Q To where were you recommended -- I'm going to end  
18 with a preposition. Where were -- where'd you for therapy?

19 A To Rancho Physical Therapy.

20 Q Okay. Is that the same Rancho in California that  
21 you went to previously?

22 A Yes.

23 Q And this time was it by Dr. Shannon's recommendation  
24 or somebody else's?

25 A It was by Dr. Shannon's recommendation, yes.

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1 Q So she sent you to therapy down there?

2 A Yes.

3 Q And what type of things did you do at that therapy?

4 A The aquatic therapy, once again; range of motion;  
5 stretching; ultra sounds; heat; cold. Just whatever it took  
6 to -- to get well. I wanted to get well.

7 Q And during this period of time, did you still  
8 require assisted walking devices?

9 A Absolutely.

10 Q Would you explain to the Judge what types of devices  
11 and how you would use them.

12 A Unfortunately I -- I wasn't getting well. So I used  
13 crutches, canes. I had to like cycle them because it was  
14 hurting my hands, my wrist, my shoulders. So if it wasn't one  
15 day I'm using the crutches, I'd use the cane, a walker. It  
16 was -- it's terrible.

17 Q Did you notice any pain in your lumbar, your lower  
18 back area?

19 A Yes.

20 Q Was that associated more with using one assisted  
21 device than another?

22 A Yes.

23 Q Could you tell the Judge about that.

24 A Well, you know, if it wasn't -- for example, there  
25 were times all of a sudden that my right ankle would give out.

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1 So it's like, no, man, not my right ankle give out. So here  
2 comes a cane. And all of sudden just -- I'm just standing in  
3 the hallway and I can't walk because of my right ankle. Now  
4 where did that come from?

5 Q Now with respect to your lumbar spine, did you feel  
6 it irritated by one type of assisted device more than another?

7 A Yes.

8 Q Which -- which one hurt you the most?

9 A Well, it -- once again, it was just a cycle. It was  
10 just a cycle, whether it was the crutch, using the crutch.  
11 Sometimes I'd have to use one crutch. Sometimes I'd have to  
12 use two. Sometimes I'd have to -- it was a cycle of rotation.

13 Q And I hope it's not a delicate question, but were  
14 you experiencing weight gain during this period of time?

15 A Yes.

16 Q And why?

17 A Well, you know, I was the kind of guy that just get  
18 up in the morning, go take a jog, or play racquetball, or  
19 watch my eating habits. Now all of a sudden it's like --

20 Q It's fair to say you were never thin, though?

21 A It's fair to say I was never thin, but I was always  
22 muscular. And still am pretty muscular up here, so. You  
23 know, they say muscle weighs more than fat.

24 Q There's a t-shirt that says, "I'm not fat. I'm  
25 Italian." Are you familiar with that?

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1 A Yes.

2 Q Okay. I get it.

3 And did you complain to anybody about the lumbar  
4 pain that you were feeling, or the surgical pain, or the pain  
5 in your hands?

6 A Yes.

7 Q Did you complain to any of the doctors as early as  
8 March about tingling in your fingers?

9 A Yes.

10 Q And we'll hear testimony about that later, but was  
11 this tingling in your finger, or your neck, or your back, was  
12 that your main focus? Was that your main concern?

13 A No.

14 Q Could you explain to the Judge what your main focus  
15 and main concern was.

16 A My knee. My knee. It was my knee.

17 Q And did that appear to you to be the same focus and  
18 concern of your treating physicians?

19 A Yes.

20 Q Okay. Did you continue in therapy?

21 A Yes.

22 Q How were you doing emotionally during this period of  
23 time?

24 A Oh, can -- can I ask a question?

25 Q Sure.

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1 A Is it okay if I move around a little?

2 Q Yes. Wait, I don't get to say that.

3 THE COURT: Sure.

4 MR. BAKER: So --

5 THE COURT: Yes, you may.

6 MR. BAKER: -- I'm sorry, Your Honor.

7 THE WITNESS: Is that --

8 THE COURT: Sure.

9 MR. BAKER: My back's hurting.

10 THE COURT: Take a little stretch break, sir.

11 THE WITNESS: Thank you.

12 BY MR. BAKER:

13 Q Enriquez, could you take down Exhibit 51. It's in  
14 Volume 4. It's in Volume 3. And it begins stamp number  
15 zero --

16 MR. CARDENAS: Your Honor, can I help him open it?

17 THE COURT: Yes.

18 THE WITNESS: Oh, it's over there?

19 MR. CARDENAS: Let me open it for you.

20 THE WITNESS: Yeah.

21 THE COURT: Give you a workout just lifting these volumes  
22 of paperwork around.

23 MR. BAKER: Monique, could you please show him your  
24 bicep?

25 MR. WARD: I carry cases.

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1 THE COURT: What number was it, Mr. Baker?

2 MR. BAKER: It's Volume 3, Tab 50, Bates numbers 23  
3 through 64.

4 THE WITNESS: Okay.

5 THE COURT: 51.

6 MR. BAKER: I'm sorry. 51, thank you, Your Honor.

7 THE COURT: 50 -- Exhibit 51?

8 MR. CARDENAS: Yes, Your Honor.

9 MR. BAKER: It's Exhibit 51, Volume 3.

10 THE COURT: Volume 4, then. Bates Number 20, did you  
11 say?

12 MR. BAKER: My -- my 51 is in volume 3, Your Honor. Yes.

13 THE COURT: Mine, too.

14 MR. BAKER: Okay.

15 THE COURT: My -- my --

16 MR. BAKER: And it's Bates Number 28.

17 THE COURT: Twenty-eight, thank you.

18 MR. BAKER: May I approach the witness, Your Honor?

19 THE COURT: Yes.

20 BY MR. BAKER:

21 Q Well, let me ask you a couple questions, first. How  
22 are you feeling emotionally during this period of time where  
23 your knee was aching, you were in therapy, you were using  
24 these assisted devices, your life activities were limited?

25 A Emotionally, extremely sad, frustrated, depressed.

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1 I guess you could say angry. A lot -- a lot of different  
2 things went through my head.

3 Q Were you on medication at that time?

4 A At that time -- what -- what time are we talking  
5 about?

6 Q After your knee surgery.

7 A After my knee surgery? Just -- I believe probably  
8 just pain pills.

9 Q Have you ever had problems with anxiety before?

10 A No.

11 Q Okay. Had you ever seen a psychiatrist before?

12 A No.

13 Q A psychologist before?

14 A No.

15 Q Had you ever been given any mood-altering -- now I  
16 understand you had Ritalin as a young adult or something.

17 A Oh, yeah.

18 Q Are the -- when was that?

19 A That was a long time ago, probably ten years ago or  
20 so.

21 Q Other than that Ritalin, had you ever been on any  
22 neurologically changing, altering mood drugs, or anything of  
23 that sort?

24 A No.

25 Q Okay. Now I'm going to ask you to turn to page 28

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1 in Exhibit --

2 MR. BAKER: It's 51, Your Honor?

3 THE COURT: Yes, thank you.

4 MR. BAKER: 50 -- I'm asking for your help.

5 THE COURT: It is.

6 MR. BAKER: Thank you.

7 BY MR. BAKER: '

8 Q -- 51.

9 A Page 28?

10 Q Yeah. It's marked 00028.

11 A 002 --

12 THE COURT: You're going to have to help him.

13 BY MR. BAKER:

14 Q Am I going to have to help you?

15 THE COURT: Yeah.

16 MR. BAKER: Hang on.

17 May I, Your Honor?

18 THE COURT: Sure.

19 THE WITNESS: Twenty-eight? Here?

20 BY MR. BAKER:

21 Q These numbers on the bottom are called Bates number.

22 A All right.

23 Q So when I refer to them, you look in the lower,  
24 bottom corner and you'll find the numbers.

25 A Okay.

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1 Q Do you remember filling out a variety of  
2 questionnaires at Dr. Mortillaro's -- Mortillaro's office?

3 A Yes.

4 Q And is this questionnaire, which is designated  
5 beginning 28, "Mental Status and Personality Factors  
6 Questionnaire," is that in your handwriting?

7 A Yes.

8 Q Is that a questionnaire that you filled out at Dr.  
9 Mortillaro's office?

10 A Yes.

11 Q And if you go to page 64, is that your signature on  
12 the bottom of that questionnaire?

13 A 64?

14 Q 00006 --

15 MR. BAKER: May I show it to him on my copy, Your Honor?

16 THE COURT: Yes.

17 THE WITNESS: Yes.

18 BY MR. BAKER:

19 Q And is this something that you filled out in the  
20 course of your treatment with Dr. Mortillaro?

21 A Yes.

22 MR. BAKER: Your Honor, I move that those portions of  
23 Exhibit 51 be entered only for purposes of establishing his  
24 writings thereon, and not for reasonableness and necessity at  
25 this time.

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1 THE COURT: Bates Number 28 and Bates Number 65?

2 MR. BAKER: Bates Number 28 through 64.

3 THE COURT: Through 64.

4 THE CLERK: Through 64.

5 THE COURT: Any objection, Mr. Ward?

6 MR. WARD: Your Honor, there's an awful lot of pages  
7 here. I'd like to look at it before --

8 THE COURT: Sure.

9 MR. WARD: -- perhaps at the end of the day, or the next  
10 break?

11 MR. BAKER: With that --

12 THE COURT: Or maybe before the witness is concluded with  
13 his testimony?

14 MR. WARD: Sure.

15 THE COURT: Okay.

16 MR. BAKER: May I question him on it --

17 THE COURT: Yes.

18 MR. BAKER: -- prior to its admission, Your Honor?

19 Thank you.

20 BY MR. BAKER:

21 Q Enrique, if you could turn to page 000028, oh,  
22 excuse me, 00047.

23 A Got it.

24 Q Do you see where it says "Opinion about diagnosis"?  
25 Are you there now?

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1 A Yes.

2 Q Okay. And that's in your handwriting?

3 A Yes.

4 Q Okay. And it says, "Opinion about diagnostics."  
5 And there's one, two, three, four different boxes; is that  
6 true?

7 A Yes.

8 Q And one talks about that you have no diagnosable  
9 medical condition; is that right?

10 A Yes.

11 Q And the second one is, "I don't know or understand  
12 my doctor's diagnosis;" is that right?

13 A Yes.

14 Q And you didn't check either of those boxes. And  
15 there's a third box, but there's a fourth box that you did  
16 check; is that fair to say?

17 A Yes.

18 Q And is -- am I reading it correctly when I say, "I  
19 agree with my doctor's diagnosis, and the medical diagnostic  
20 tests, and/or consultations that I have received, but I think  
21 the following medical tests and/or consultations should be  
22 provided"? Do you see where it says that?

23 A Yes.

24 Q And do you see the date of this particular report?  
25 Enrique, is it 9/1 of '05? Let me show you on mine.

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1           A     Yes.

2           Q     Would you read, please, what you wrote in after you  
3 checked the box which says, "I agree with the diagnosis, but I  
4 think the following medical tests and consultations should be  
5 provided"?

6           A     "Neck and back complete tests.  Head test.  Hand  
7 test."

8           Q     So in -- is it fair to say in September of '05, that  
9 you checked off to Dr. Mortillaro that you had been  
10 experiencing problems with your neck and your back, and you  
11 thought you needed tests for that?

12          A     Yes.

13          Q     And is that the neck and the back pain that you're  
14 talking about when you explained to the Judge how it was  
15 developing and you were using the assisted devices and/or  
16 limping?

17          A     Yes.

18          Q     Okay.  At a certain point in time, did you see  
19 anyone for your back or your neck?

20          A     No.

21          Q     Did you see Dr. Falgot [phonetic]?

22          A     No.

23          Q     You don't recall seeing Dr. Falgot?

24          A     Oh, did I see Dr. Fal- -- yes.  Sorry.

25          Q     Okay.  And what did you see Dr. Falgot for?

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1 A For my neck and back.

2 Q Did you also see a Dr. Nicola?

3 A Yes.

4 Q And that was for your neck and back?

5 A Correct.

6 Q And we'll start talking about your neck and back  
7 again in a little while. Because we've been focusing on your  
8 knee, I think it's important to keep --

9 A Yeah.

10 Q -- a pattern. I can see you're confused here.

11 A Yeah.

12 Q All right. How was your knee feeling after your  
13 surgery with Dr. Shannon?

14 A My knee was feeling pretty much the same. I just  
15 experienced a non-stop, like if it just wanted to buckle. To  
16 just buckle. Like when I walk, I just want to buckle in. And  
17 the constant like a screw driver picking underneath my  
18 kneecap. Just wanted it to fit. All the time, all the time,  
19 sharp pain. Pressure, pressure, pressure. Even when I go to  
20 physical therapy and inside the pool, when they say, "Do ten  
21 squats," I couldn't even do ten squats inside the pool because  
22 if I did, my knee just wanted to blow up, just like pop on me.  
23 That's -- that's how it felt.

24 Q Okay. And did you still have a follow-up visit with  
25 any other orthopedic knee surgeon?

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1 A Pardon me?

2 Q Did you have a follow-up visit with any other  
3 orthopedic knee surgeon? Did you see a Dr. Tauber?

4 A A Tauber?

5 Q Uh-huh.

6 A Oh, yes.

7 Q Okay. Do you recall about when you saw Dr. Tauber?

8 A Dr. Tauber, let's see. He was a doctor. I saw him  
9 in September of 2006.

10 Q Okay. You had seen him. When was the first time  
11 you saw Dr. Tauber? Was it just -- does February of '06 sound  
12 familiar?

13 A That -- that sounds pretty -- pretty accurate,  
14 because it was in '06.

15 Q How were you referred to Dr. Tauber?

16 A I was referred to Dr. Tauber -- it might have been  
17 through Dr. Koka.

18 Q Okay. Is that Govind Koka?

19 A Yes.

20 Q All right. And Dr. Tauber was located where?

21 A In Beverly Hills, California.

22 Q And did Dr. Tauber do an examination of you?

23 A Yes.

24 Q And did Dr. Tauber -- well, explain his examination.  
25 Was it consistent with the other -- that the other surgeons

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1 had done?

2 A Yes.

3 Q Okay. And what did Dr. Tauber recommend?

4 MR. WARD: Hearsay. Tauber.

5 THE COURT: Sustained.

6 BY MR. BAKER:

7 Q What course of treatment were you placed on by  
8 Dr. Tauber?

9 MR. WARD: Still hearsay, Your Honor.

10 MR. BAKER: Your Honor, hearsay -- it's asking a question  
11 in out-of-state court. It's not a statement from a person not  
12 in the court for the truth of the matter asserted. It's not a  
13 statement.

14 THE COURT: Well --

15 MR. BAKER: And he's asking for what the doctor  
16 recommended as treatment, which is exactly the same thing as  
17 what did the doctor say was the treatment. Obviously, it was  
18 recommended by the doctor, and that's hearsay.

19 THE COURT: I think if he knows what treatment he  
20 underwent, he can testify to that. Overruled.

21 THE WITNESS: Dr. Tauber recommended MRI.

22 MR. WARD: I'll object. Move to strike.

23 THE COURT: Sustain the objection. Ask you to rephrase,  
24 Mr. Baker.

25 MR. BAKER: You'd like me to rephrase his response, Your

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1 Honor?

2 THE COURT: Rephrase your question so that we get a  
3 response --

4 BY MR. BAKER:

5 Q Was part of your treatment --

6 THE COURT: -- based on the Court's ruling.

7 BY MR. BAKER:

8 Q -- course by Dr. Tauber an MRI?

9 A Yes.

10 Q And did Dr. Tauber review the MRI with you?

11 A Yes.

12 Q And as part of your treatment course, were you then  
13 recommended for meniscus surgery?

14 A Yes.

15 MR. WARD: Object. Hearsay. I -- I agree with Your  
16 Honor that he can testify as to what treatment he underwent.  
17 But that's not the questions he's being asked. He's  
18 continually being asked what did the doctor recommend; what  
19 did the doctor say; what did the doctor review.

20 MR. BAKER: Those are all different things, Your Honor.

21 THE COURT: Yeah.

22 MR. BAKER: And, again, hearsay is an adequate statement  
23 that's for the truth of the matter asserted, and the person is  
24 not on the stand. And none of those questions ask for a  
25 statement.

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1 THE COURT: The last question was having to do with what  
2 sort of surgery he had. Overrule the objection as to that  
3 question. You may answer --

4 MR. BAKER: Thank you, Your Honor.

5 THE COURT: -- the question.

6 THE WITNESS: An MRI.

7 BY MR. BAKER:

8 Q Okay. Did you have knee surgery after that?

9 A Yes, I did.

10 Q Was that performed by Dr. Tauber?

11 A Yes, it was.

12 Q What type of knee surgery was it?

13 A It was an arthroscopic --

14 MR. WARD: Hearsay.

15 MR. BAKER: How is that hearsay?

16 THE COURT: Overruled. Noted for the record.

17 BY MR. BAKER:

18 Q What type of surgery did you have?

19 A Arthroscopic surgery.

20 Q On your left knee?

21 A Correct.

22 Q The same knee that had been previously operated on  
23 by Dr. Shannon?

24 A Yes.

25 Q After that surgery, did your pain change?

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1 A Yes, it did.

2 Q Describe that to the Judge, please.

3 A All the same symptoms that I originally had, they  
4 continued. But added on to everything else, started a burning  
5 pain. So all of a sudden I had the same problems. My knee  
6 wanted to buckle, but it was like burn came to my knee, like  
7 -- like if I -- and until this day, it's like -- like a torch  
8 is constantly on my knee. It just doesn't turn off. It's  
9 like -- it's like I want to cry all day. That's the type of  
10 pain that I have.

11 Q Do you need anything, sir?

12 A No, I'm good.

13 Q And did you continue to treat with Dr. Tauber now  
14 for that burning, relentless, agonizing pain?

15 MR. WARD: Argumentative.

16 THE COURT: Overruled.

17 BY MR. BAKER:

18 Q Yes?

19 A Yes.

20 Q And after your treatment with Dr. Tauber, were you  
21 recommended for a course of evaluation and treatment of  
22 resect- -- Reflex Sympathetic Dystrophy?

23 A Yes.

24 Q And did you see --

25 MR. WARD: Object.

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1 THE COURT: Noted for the record. Overruled.

2 BY MR. BAKER:

3 Q Is that right?

4 A Could you repeat the question, please?

5 Q And after your continued treatment by Dr. Tauber,  
6 were you recommended for a course of evaluation and treatment  
7 of Reflex Sympathetic Dystrophy?

8 A Yes.

9 Q And what was your understanding of what Reflex  
10 Sympathetic Dystrophy was?

11 A That it is a debilitating -- debilitating thing that  
12 nobody wants. That it's painful. That if you have a surgery,  
13 that it can spread to other parts of your body. That, is like  
14 I describe, it's just a non-stop burn. It was exactly what I  
15 had.

16 Q Did you notice any weird physical things -- I don't  
17 know how else to say it but weird -- occurring with your left  
18 knee and leg area at around the same time you were  
19 experiencing that type of relentless pain that you discussed?

20 A Yeah. I noticed swelling. I noticed one day when I  
21 went to see Dr. Tauber my knee was swollen for no reason. So  
22 he took me into his x-ray room and he thought my knee was  
23 broke.

24 Q And that's --

25 A Oh, no, excuse me. It was my ankle. He thought my

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1 ankle was broke.

2 Q How about skin changes?

3 A My skin came to become shiny. My hair became to get  
4 -- I started losing it around my lower extremities. My toe --  
5 my nails on my toes changed.

6 I just -- it just became exactly terrible what  
7 Dr. Tauber told me what I had. He said, "You're -- first of  
8 all, your knee will never be the same." And then with the  
9 RSD, it was exactly what he told me in his room. And I was  
10 like, "My world. I'm that little frags [sic] in the people  
11 that could have got it." And, yeah, that was -- it's sad.  
12 It's sad living with this condition, because it doesn't turn  
13 off. It doesn't turn off.

14 Q Now at the same time you were living with it -- did  
15 I interrupt you?

16 A No. You're good.

17 Q At the same you were living with this condition,  
18 were you also living with your neck and back pain?

19 A Yes.

20 Q Did you see a -- a Dr. Kidwell?

21 A Yes.

22 Q And was Dr. Kidwell seen for your neck and back  
23 pain?

24 A Yes.

25 Q And do you recall approximately where you saw

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1 Dr. Kidwell?

2 A Approximately, no, I don't recall.

3 Q Does March of 2006 sound about right?

4 A Yes.

5 Q What did Dr. Kidwell do for you?

6 A Painful injections to my neck, to my lower back,  
7 epidural steroids, whatever treatments they were trying to do  
8 to minimize the pain. So a series of -- I think it was at the  
9 Goldring Surgery Center or something. Just what -- whatever.  
10 I was -- you know, I was just -- just hoping that things just  
11 turned off, pain. I -- there's so much pain. So I was hoping  
12 that their -- their expertise was just going to help me. So  
13 needles to neck, that's what he did for me.

14 Q How do you feel about needles?

15 A I hate them.

16 Q And could you describe -- the Judge knows, but could  
17 you -- were you able to observe the needles?

18 A I try to avoid them as much as I could, but -- you  
19 know, for almost six years I have gone through so much that  
20 you just --

21 Q Is constant pain part of your life?

22 A Yeah. Yeah.

23 Q Why don't you take a second, would you?

24 A Yeah. I just -- I'll just have a sip of water.

25 Q Yeah. I'm sorry. I didn't --

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1 A I'm okay.

2 Okay. Let's go on. I'm ready.

3 Q Did you ever see a Dr. Shefiney [phonetic  
4 throughout]?

5 A Yes.

6 Q Do you remember about when you saw Dr. Shefiney?  
7 Was in late of '06?

8 A Yes, late of '06.

9 Q I'm sorry, late of '07? Do you recall Dr. Shefiney?

10 A Yes.

11 Q Can you describe Dr. Shefiney?

12 A He was a very pleasant, young guy.

13 Q Okay. And was he treating your knee?

14 A No, he was involved for a spinal cord stimulator.

15 Q Okay. Did you ever receive a temporary cord  
16 stimulator?

17 A Yes.

18 Q Was that implanted by Dr. Shefiney?

19 A Yes, it was.

20 Q What happened after you got that temporary spinal  
21 cord stimulator with respect to your pain?

22 A I had a smile on my face. That's what happened?

23 Q Well, why?

24 A Because it worked. What it did, it actually helped.  
25 I can actually say it worked. That was July 14th. I woke up

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1 on my birthday, July 15th --

2 Q Of which year?

3 A That was of --

4 Q Was that '08?

5 A '08.

6 Q Tell -- tell the Judge about the resolution of your  
7 pain and how you felt about it.

8 A Yeah, it was a tingling sensation. I woke up and I  
9 smiled because the -- it turned the pain into a tingling  
10 sensation and I actually was able to smile. It worked.

11 Q And --

12 A And then I walked and I smiled and I laughed and I  
13 was amazed. But I smiled. It changed. It was like, wow,  
14 this little thing worked. I was like, whoa.

15 Yeah, there was other problems. I mean, I was still  
16 wrestling with my torn ligament here, and carpal tunnel  
17 syndrome here, and my neck, and -- yeah, but the focus on my  
18 knee, it was like, wow, it worked. It was like, wow.

19 Q Would you recommend to just have a permanent pain  
20 stimulator?

21 A Yes.

22 Q How'd you feel emotionally that were going to be  
23 able to get a permanent pain stimulator?

24 A Oh, I was -- I was happy. Yeah, I was -- I was  
25 happy.

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1 Q Are you still waiting for it.  
2 A Yes.  
3 Q How come you haven't received it?  
4 A Because of financial situations, funding.  
5 Q For the procedure itself?  
6 A Correct.  
7 Q And you've attempted to get that funding?  
8 A Yes.  
9 Q Okay. Let me talk to you about a couple of things.  
10 You -- by the way, have ever had neck pain prior to this  
11 accident?  
12 A No.  
13 Q Did you have to see a doctor for a cervical  
14 condition?  
15 A No.  
16 Q Have x-rays of your neck?  
17 A No.  
18 Q MRI of your neck?  
19 A No.  
20 Q It was -- were you ever debilitated because of your  
21 neck?  
22 A No.  
23 Q Same questions with respect to your back?  
24 A No.  
25 Q Now, can we -- you were -- you described to us at

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1 the beginning, it seems like a while ago, of our -- of our --  
2 in your testimony, how your life was, in Los Angeles with  
3 Maria and the kids and your family before this accident; is  
4 that right?

5 A Correct.

6 Q And part of it is that you -- you were a real estate  
7 investor; is that right?

8 A Correct.

9 Q Are you still a real estate investor?

10 A No.

11 Q Why are you not a real estate investor?

12 A Because I'm disabled. I -- the whole process of  
13 being in real estate is -- a lot of the aspect is -- is  
14 physical aspects. Being involved in the property, walking  
15 upstairs, going into an attic, if there needs to be service on  
16 a roof, you got to get on a ladder. I can't do those things  
17 anymore. I have problems walking up a -- a driveway. I have  
18 problems walking around here, you know.

19 Q Were you more of a physically oriented work person?

20 A Yeah.

21 Q Are you a paperwork person?

22 A No, not really.

23 Q You're smiling. Are -- are you good or bad at  
24 paperwork?

25 A I'm bad.

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1 Q But you enjoyed the real estate?

2 A Absolutely.

3 Q Okay. And -- and if the Judge can have an  
4 understanding, what particular activities that you had to do,  
5 are you precluded from doing now because of your physical  
6 condition?

7 A Well, whether you mean involving in real estate?

8 Q Sure.

9 A Well, when a property needed a -- the -- a fence, a  
10 wooden fence painted, I had a spray gun. I can't do that no  
11 more. Sometimes when I'm eating a salad, I drop the fork. I  
12 go to a Chevron to put gasoline -- I can't even use the  
13 squeegee because I drop the squeegee. Simple, little things  
14 like that.

15 Q Would you go into attics?

16 A I'd go into attics to make sure that everything in  
17 the attic is -- is fine. I -- I'm not -- I wasn't the kind of  
18 guy that would resell a property without me making sure that I  
19 do all my due diligence.

20 Q And due diligence would include looking at the roof?

21 A Absolutely.

22 Q Looking at the basement?

23 A Absolutely.

24 Q Attending the -- an inspection with an inspector?

25 A Yes.

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1 Q Are you able to do any of those things anymore?

2 A No.

3 Q Okay. Do you consider yourself disabled?

4 A Yes.

5 Q Have you ever applied for social security  
6 disability?

7 A Yes.

8 Q And can you explain to the Judge the process of  
9 applying for social security disability?

10 A Well, the process is, you have to have material --

11 MR. WARD: Objection, relevance.

12 THE COURT: Uh-huh. What's the relevance, Mr. Baker?

13 MR. BAKER: Because there's been a determination that  
14 he's totally disabled by social security.

15 MR. WARD: And that's hearsay unless social security --  
16 someone from Social Security comes in and explains what they  
17 find -- what they found based on --

18 MR. BAKER: And partially, Your Honor, I want to put it  
19 in for the purposes of how he supported himself during this  
20 time in terms of monetary. And a finding of social security  
21 disability, while normally precluded by the collateral source  
22 rule, can be waived by the Plaintiff needing that type of  
23 evidence. And it -- it just speaks to what he had to go  
24 through as just part of the whole part and parcel of being  
25 disabled. Making this application to governmental agency and

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1 the impact that it has upon him emotionally, as well.

2 THE COURT: Mr. Ward, any response to the argument about  
3 Plaintiff waiving his -- waiving the collateral source rule?

4 MR. WARD: Well, he can waive it if he wants. It doesn't  
5 matter to me whether he waives it. But that's not the issue  
6 that's here. What he's trying to do is, he's trying to get a  
7 finding, by somebody else who's not going to come in and  
8 testify, as to why they made such a finding. And that's the  
9 basis for my objection, is that we've had all kinds of medical  
10 testimony here without ever having a doctor on the stand. And  
11 -- and I object to -- to the determination of this finding  
12 without knowing what it was based on. Because, unless it's  
13 based on the accident, it's totally irrelevant to this case.  
14 And there's no -- there's not any supporting evidence that --  
15 that anything that happened to him was caused by this  
16 accident. That is the --

17 THE COURT: Sustain the objection.

18 MR. BAKER: Thank you, Your Honor.

19 Your Honor, the -- the basis for, just for the  
20 record, for sustaining it, it was a hearsay objection?

21 THE COURT: The basis is, it's part hearsay, but it's  
22 also part a foundational reason. Because -- well, your  
23 question, I think, was to him, what was the process in  
24 applying for the social security disability when I don't know  
25 that the Court needs to hear that.

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1 MR. BAKER: That's how --

2 THE COURT: I suspect --

3 MR. BAKER: -- I would lay the foundation, Your Honor.

4 THE COURT: I suspect Mr. Ward's correct that -- it may  
5 be relevant, but I think there may be some hearsay issues.  
6 So, I'll sustain it on that basis.

7 MR. BAKER: On a hearsay basis, Your Honor?

8 THE COURT: Yes.

9 MR. BAKER: Thank you.

10 BY MR. BAKER:

11 Q Can we take -- and then I'm going to let you from  
12 the stand. Can you tell the Judge how your life has changed  
13 from before and after this accident?

14 A How my life has changed?

15 Q Yes.

16 A Well, before we, as a couple, we had fun. We were  
17 spontaneous. We can get up and go. Financially, there was no  
18 problem. Physically, there was no problem. Things that  
19 happened in the bedroom, there was no problem. Intimacy,  
20 there was no problem. Now, there's a problem everywhere.

21 I used to be a good emotional support to Maria.  
22 And, now, I can say I'm a -- I can be a frustrated, pain in  
23 the butt to her.

24 If I had to run to save my life, I can't. And  
25 that's sad. And that's one thing I never had to worry about.

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1 I was able to out run everybody in this room. And, now,  
2 that's one thing that I can't. I'd be the last one out of  
3 here. And that's something that -- that I wish I was never in  
4 that position.

5 So, there is -- there is just a stack of things that  
6 has changed. You know, living on social security for \$845 a  
7 month, compared to the way I used to live, is so sad. Renting  
8 a room, when I used to have hundreds of homes throughout my  
9 lifetime. That is so sad.

10 Q That is so sad?

11 A Those are the homes -- those are the home you would  
12 reflect --

13 Q Let me --

14 MR. WARD: I would object and move to strike about his  
15 current income, social security benefits. It's  
16 non-responsive.

17 THE COURT: Sustained.

18 THE WITNESS: So -- so my life has just totally -- and  
19 then living with -- with the constant pain. I'm constantly in  
20 pain. At the end of my day, when I'm getting ready to sleep,  
21 I have to put a CPAP machine on because my weight's changed.  
22 I'm not the physical guy that I used to be. I try to do my  
23 best, eating habits, eating fruits, vegetables. Changing  
24 everything, because I -- I can't do enough to keep maintained.  
25 So now when I go to sleep, here comes the CPAP machine.

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1 BY MR. BAKER:

2 Q Enrique, can I ask you, if you're given the  
3 opportunity to give this permanent spinal cord stimulator,  
4 would you undergo that surgery?

5 A Yes.

6 MR. BAKER: I'll pass the witness, Your Honor.

7 THE COURT: Okay.

8 MR. BAKER: Thank you.

9 THE COURT: Do we need a short break before we continue?

10 MR. BAKER: Yes, please, Your Honor.

11 THE COURT: Let's take about a five-minute break.

12 [Recess]

13 CROSS-EXAMINATION

14 BY MR. WARD:

15 Q Mr. Rodriguez, when we went on the break, or just  
16 before we went on the break, you were talking about a CPAP  
17 machine, correct?

18 A Correct.

19 Q And what's a CPAP machine?

20 MR. BAKER: Your Honor, can we have a sidebar for a  
21 second?

22 THE COURT: Sure.

23 [Sidebar Conference Not Transcribed]

24 THE COURT: Please, proceed.

25 BY MR. WARD:

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1 Q Would you tell us what a CPAP machine is?

2 A A CPAP machine is a device that sends air into your  
3 system when you go to bed. And it helps you to keep air in  
4 your system so you can sleep better. And you can put, what  
5 they call, little pillows on your nostrils or a mask, at least  
6 the little ones that I have. And you place it on yourself to  
7 go to sleep. And it diminishes a snoring or, in some places,  
8 it's -- it helps you sleep.

9 Q And what they told you that you have was sleep  
10 apnea?

11 A Correct.

12 MR. BAKER: Objection. Hearsay, Your Honor.

13 THE COURT: Overruled. Now, you Mr. Baker?

14 MR. BAKER: I had to do it.

15 THE COURT: You too?

16 MR. BAKER: I had to do it.

17 THE COURT: Overruled.

18 BY MR. WARD:

19 Q And how long have you had sleep apnea?

20 A I've had it for a couple of years now.

21 Q Okay. You had it before this accident; didn't you?

22 A No.

23 Q No?

24 A No.

25 Q Are you familiar with a treating facility called

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1 Magnolia?

2 A No.

3 Q Never heard of Magnolia?

4 A Never.

5 Q Have you ever had any issues with snoring?

6 A Never.

7 Q You never had any issues with snoring? Are you  
8 familiar with Magnolia Avenue?

9 A In what city?

10 Q Any city.

11 A Yes.

12 Q Are you familiar with Magnolia Avenue in Riverside?

13 A Yes.

14 Q Is your date of birth July 15, 1963?

15 A Yes.

16 Q On March 24, 2003, did you go to Magnolia Clinica  
17 Medica Familiar at 9939 Magnolia Avenue in Riverside,  
18 California?

19 A Never.

20 Q Never? Were you ever seen by a doctor Javier R.  
21 Rios, M.D.?

22 A Never.

23 Q How about a Dr. Balbuena?

24 A Never.

25 Q B-A-L-B-U-E-N-A?

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1 A Never.

2 Q Were you ever seen by a Dr. Guillermo Gomez?

3 A Never.

4 Q Are you familiar with an insurance carrier called  
5 Sequoia?

6 A No.

7 Q Did you ever have sinus problems?

8 A Not that I recall.

9 Q Did you ever have acute tonsillitis?

10 A No.

11 Q Did you ever have a pulmonary embolism?

12 THE COURT: I'm sorry, what was the question, Mr. Ward?

13 MR. WARD: Did he ever have a pulmonary embolism.

14 MR. BAKER: Objection, Your Honor, relevance.

15 THE COURT: Well, I guess it could be relevant.

16 Overruled.

17 THE WITNESS: In what year would that be?

18 BY MR. WARD:

19 Q Any. I'm just asking, I mean, if I'd had a  
20 pulmonary embolism, I would remember. That's why I'm asking  
21 if you -- if you remember ever having had one.

22 A Can you define a pulmonary embolism?

23 Q I'm just asking if you had that -- if you ever heard  
24 that term.

25 A I don't recall.

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1 Q You never heard that term?

2 A Not that I recall.

3 Q Okay. Okay. Now, after this accident you -- you  
4 went from the Sportsbook to the security department; is that  
5 correct?

6 A Correct.

7 Q Now, I wanted to ask you, Mr. Rodriguez, we -- there  
8 has been a little bit of confusion, perhaps, on my part. So,  
9 I wanted to ask you about the way this accident happened. Is  
10 it correct that the -- the item that we're talking about is a  
11 water bottle?

12 A Correct.

13 Q A plastic water bottle?

14 A Correct.

15 Q We're not talking about a bottle of water?

16 A Correct.

17 Q Okay. We're talking about just the plastic part  
18 that weighs a few ounces?

19 A Correct.

20 Q Okay. Now, the way this happened is someone threw  
21 it -- well, let me -- let me go back and I'll -- I'll strike  
22 that. Let me ask another question.

23 You -- your deposition was taken in this case,  
24 right; do you remember that?

25 A Yes.

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1 Q And you remember being asked why you were in Las  
2 Vegas?

3 A Yes.

4 Q And your answer was, you were there on vacation?

5 A Yes.

6 Q Okay. And you didn't say anything about your --  
7 your spouse's surgery; isn't that correct?

8 A Correct.

9 Q Okay. And you were asked where your spouse was that  
10 night and you said she was in another casino; isn't that  
11 right?

12 A Correct.

13 Q You didn't say she was home in bed? You didn't say  
14 she was at the casino in bed?

15 A Correct.

16 Q You just said she was at another casino?

17 A Correct.

18 Q Now, how long before the time you went to Las Vegas  
19 did your wife have the medical issue?

20 A Can you repeat the question, please?

21 Q Sure. How long before you went to Las Vegas did  
22 your wife have the medical issue?

23 A She had it for several weeks.

24 Q But the resolution was a biopsy or something  
25 evolved?

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1           A     Correct.

2           Q     And how long before you went to Las Vegas had that  
3     been done?

4           A     I don't recall.

5           Q     Did you wait until she was up and around and  
6     comfortable before you went to Las Vegas?

7           A     Correct.

8           Q     So, by the time you got to Las Vegas, she was  
9     feeling okay?

10          A     Much better.

11          Q     In fact, you were both feeling pretty good because  
12     it was benign?

13          A     Correct.

14          Q     Okay. But she didn't accompany you on the night in  
15     question?

16          A     Correct.

17          Q     And that's because she wasn't feeling well?

18          A     She was in bed.

19          Q     Right. So, when you said she was at another casino,  
20     what you meant was, she was at a hotel in bed?

21          A     Correct.

22          Q     Okay. And was she feeling poorly?

23          A     I would say she was in bed, asleep.

24          Q     Okay. But she was in bed, asleep, because she  
25     wasn't feeling well?

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1           A     I -- I would say she was in bed, asleep, not feeling  
2 well if you want to phrase it that way, yeah.

3           Q     Well, that's the way you phrased it; isn't it?

4           A     Okay.

5           Q     I mean, this is 6:00 at night, right?

6           A     She was comfortable in bed.

7           Q     Right. Okay. Not feeling well?

8           A     Okay.

9           Q     And you didn't meet anyone else, correct?

10          A     Outside of the casino?

11          Q     Right. That night, you didn't meet anyone -- you  
12 didn't meet any friends; did you?

13          A     No.

14          Q     No. So, do they not have televisions at Harrah's?

15          A     Yes, they do.

16          Q     Okay. Well, if your wife's not feeling well and  
17 she's up in the room, why did you go to another casino to  
18 watch television?

19          A     Because I wanted to go somewhere else.

20          Q     Oh, okay. Now, on the night in question, the way  
21 the incident occurred, was that you went to the Sportsbook and  
22 you saw people throwing things around; is that right?

23          A     Correct.

24          Q     And they were announcing before they would throw  
25 something. They'd say I'm going to toss out a something and

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1 then they would throw it out?

2 A Not that I heard.

3 Q Did you think it was dangerous what was going on?

4 A I went there to watch Monday Night Football, not to  
5 be entertained by what was going on.

6 Q You said that you went to see Monday Night Football  
7 with Randy Beavers; isn't that right?

8 MR. BAKER: Misstates his testimony, Your Honor.

9 THE COURT: I think it may. Sustained.

10 BY MR. WARD:

11 Q Is that not what you said?

12 A Can you repeat the question?

13 Q Sure. Did you not say you went to see Monday Night  
14 Football with Randy Beavers?

15 MR. BAKER: Same objection, Your Honor.

16 THE COURT: Sustained.

17 BY MR. WARD:

18 Q Let me ask you this; the objection has been  
19 sustained so, both you and I will get into trouble if we keep  
20 talking, so we -- I have to ask you a new question.

21 A Okay.

22 Q Okay. I'm not trying to cut you off.

23 Did you think that what was happening at the  
24 Sportsbook that night when you were there was dangerous?

25 A I went to watch Monday Night Football on the walls

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1 on big screen TVs. My attention was on big screen TVs. I did  
2 not know who Randy Beavers was.

3 Q Okay. I accept all that. I'm just trying to get an  
4 answer to my question.

5 A Okay.

6 Q And my question is -- well, let me ask you a  
7 different way. You testified that at least six things had  
8 been thrown into the audience before this incident had  
9 occurred, right? So, you were aware that people were throwing  
10 things into the audience, right?

11 A Correct.

12 Q So, my question is, did you think it was dangerous?

13 A No, I didn't.

14 Q No. If you had thought it was dangerous you would  
15 have left, right?

16 A Yes, I would have left.

17 Q Okay. But a patron did something that was pretty  
18 unusual?

19 A I believe so, absolutely.

20 Q Okay. You didn't know she was going to do that; did  
21 you?

22 A Not at all.

23 Q Okay. It didn't appear that anybody else knew she  
24 was going to do that; isn't that right?

25 A Correct.

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1 Q Okay. And especially because she didn't get out of  
2 her chair until the water bottle was already on the ground;  
3 isn't that right?

4 A It -- that's the way it happened.

5 Q Right. So, someone tossed a water bottle. It  
6 landed on the floor. It was already on the floor. And after  
7 it landed on the floor, this woman that you hadn't noticed  
8 before, got out of her chair and ran over and jumped for the  
9 water bottle, right?

10 A Correct.

11 Q And a complete surprise to you?

12 A Absolutely.

13 Q And as best as you can tell, a complete surprise to  
14 everybody else who was there?

15 A Correct.

16 Q She wasn't racing to get a water bottle that was  
17 flying through the air; was she?

18 A No.

19 Q Because the water bottle was already on the ground?

20 A Correct.

21 Q Now, after the incident occurred, the Palms called  
22 an ambulance for you; didn't they?

23 A Correct.

24 Q Yes. So, they tried to get you medical attention,  
25 correct?

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1           A     Correct.

2           Q     And you told the ambulance to go away, you weren't  
3 going to go with them?

4           A     Not in those words.

5           Q     I -- I didn't try to attribute to you any particular  
6 words. What I meant the conclusion was, you -- you, not  
7 somebody else, told the ambulance you're not going with them,  
8 they can leave?

9           A     Much better. Correct.

10          Q     And -- and if you -- you want to tell us exactly  
11 what you said, that's fine. But I -- I --

12          A     Okay.

13          Q     I don't need you to do that unless you want to.

14          A     Correct.

15          Q     Okay. But it wasn't the Palms who told the  
16 ambulance to leave?

17          A     No.

18          Q     It was you?

19          A     Yes.

20          Q     They were there to take care of you, if that's what  
21 you wanted them to do?

22          A     Correct.

23          Q     And, so, after you sent the ambulance away, the  
24 Palms asked you to sign something; isn't that true?

25          A     No.

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1 Q No?

2 A No.

3 Q The Palms never asked you to sign a form saying that  
4 you had refused medical attention?

5 A No.

6 Q So, you never told anyone you were angry because the  
7 Palms had tried to get you to sign something?

8 A Yes, but it wasn't that. It was two papers that  
9 said please, sign these, two contracts, that said release of  
10 liability. Those were presented to me.

11 Q By whom?

12 A By security guards.

13 Q Who's security?

14 A The -- one of the security guards that refused to  
15 call the ambulance. It was never medical.

16 Q And that person's name is what?

17 A I don't recall the person's name.

18 Q And where's the copy of the form you got?

19 A My attorneys have it and his signature is on the --  
20 my statement that I wrote because I got a copy of it.

21 Q Okay. And you didn't sign it, right?

22 A Which one?

23 Q Any of them?

24 A I signed my voluntary statement. But I was never  
25 presented a medical one.

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1 Q Okay. But you never, other than your statement, you  
2 never signed anything else?

3 A No.

4 Q Nobody --

5 A Not that I recall.

6 Q Nobody twisted your arm to sign anything?

7 A No.

8 Q And after you sent the ambulance away, then you  
9 stayed at the Sportsbook; isn't that correct?

10 A No.

11 Q No? Where'd you go?

12 A I hopped to the area where there were some tables to  
13 fill out the report.

14 Q Okay. You hadn't filled out the report when the  
15 ambulance people were there?

16 A Correct.

17 Q Okay. And after you filled out that report, what  
18 did you do next?

19 A Well, eventually I got a copy of my report and my  
20 driver's license and that's when I then requested that the  
21 ambulance, because I wasn't feeling good, and the ambulance  
22 came.

23 Q Okay. So -- so, the ambulance came back, correct?

24 A Correct.

25 Q And when they came in, you were sitting in your

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1 chair?

2 A Correct.

3 Q And you were not in any particular distress at that  
4 time?

5 A Describe distress.

6 Q I don't know how to describe it.

7 A Well, the way that the condition I was in, my  
8 forehead was sweating, my knee was hurting. Yes, I was in bad  
9 condition.

10 Q Okay. And you were having pain in your knee?

11 A Absolutely.

12 Q And the -- what would you rate the pain on a scale  
13 of one to ten?

14 A At that time, I might have rated it a six, seven.

15 Q Okay. You didn't have any complaints other than  
16 your knee; isn't that true?

17 A No, I believe not.

18 Q Okay. And, so, you walked over to the gurney and  
19 got on the gurney; isn't that true?

20 A I believe that's how it happened, yes.

21 Q Okay. They didn't bring the gurney over to where  
22 you were, you walked over to it?

23 A As close as that they could have brought it.

24 Q They didn't pick you up and put you on the gurney?

25 A I think they assisted me as close as I could have

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1 gotten.

2 Q Okay. And then you went to the -- you went to the  
3 clinic where you saw Dr. Heaps, correct?

4 A Correct.

5 Q And that's called Spring Valley Medical Center?

6 A Correct.

7 Q Now, this whole incident had occurred at around  
8 somewhere in the 6:00 to 7:00 time range; is that right?

9 A No, it was after 7:00.

10 Q Okay. How much after 7:00?

11 A I would say around 7:15.

12 Q Okay.

13 A Around there.

14 Q So, it happened 7:15 and it was after 12:30,  
15 midnight, 12:30, that you saw Dr. Heaps; isn't that correct?

16 A I do not recall exactly the time.

17 Q You knew it was a while later?

18 A I will believe so.

19 Q Okay. And if you actually saw him at 12:38, that  
20 would be about five -- five hours, almost a half after the  
21 incident occurred, correct?

22 A Okay.

23 Q Do you recall whether that's about when you saw him?

24 A I would not be surprised.

25 Q Okay. And you told Dr. Heaps that you had pain in

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1 your left knee, on the inside of you left knee; isn't that  
2 right?

3 A Correct.

4 Q And he did a complete examination of you; didn't he?

5 A Correct.

6 Q He didn't just examine your knee and your leg, but  
7 he examined your head and your neck?

8 A Correct.

9 Q And your arms?

10 A From what I recall, yeah.

11 Q And he listened in your back?

12 A Okay.

13 Q And he listened to your heart?

14 A Correct.

15 Q And your lungs? And at that time, you weighed about  
16 225 pounds; isn't that correct?

17 A If that's what was written down, correct.

18 Q Okay. And anything that you had wrong with you that  
19 night, you told Dr. Heaps about it?

20 A Correct.

21 Q And Dr. Heaps ultimately discharged you and  
22 suggested that if you had further problems you should follow  
23 up with an orthopedic doctor?

24 A Correct.

25 Q And you left?

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1 A Correct.

2 Q How'd you get back to the hotel or how did you get  
3 back to the Palms?

4 A Taxi.

5 Q And then you were able to drive over to your hotel?

6 A Correct.

7 Q And then you went home?

8 A Correct.

9 Q Home was California?

10 A Correct.

11 Q Now, at the time of this incident, which was  
12 November 22, 2004, right?

13 A Correct.

14 Q You had been a real estate investor?

15 A Correct.

16 Q And you had owned hundreds of properties; isn't that  
17 true?

18 A Correct.

19 Q But you sold a property in early 2004?

20 A Correct.

21 Q And after you sold -- that -- that was a property  
22 that you lived in, right?

23 A Correct.

24 Q And who was your -- who was your mortgage holder on  
25 that property?

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1 A I don't -- I don't recall.

2 Q Was it Chase Manhattan Mortgage Company?

3 A I don't recall.

4 Q Now, how long had you lived there in that house?

5 A I'm going to say less than six months.

6 Q Less than six months. And that was at 996 Dahlia  
7 Court?

8 A Yes.

9 Q In Hemet?

10 A Hemet.

11 Q And in the six months you had owned that house, or  
12 less than six months that you owned that house, had you been  
13 intending to sell it the whole time?

14 A Yes.

15 Q So, you bought that less than six months before  
16 February of 2004?

17 A I believe so.

18 Q Yeah. Why did you sell it?

19 A Because the market was good.

20 Q It's that the only reason?

21 A Yeah.

22 Q Who'd you sell it to?

23 A My real estate agent sold it for me.

24 Q Okay. Was it in foreclosure?

25 A A lot of the properties that I buy may be in

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1 foreclosure.

2 Q Right. No, I'm not asking about the properties you  
3 buy. I'm asking about the property you sold. Was that  
4 property, at 996 Dahlia Court, in foreclosure?

5 A I don't recall if that particular property was.

6 Q Okay. But you've lived in other -- other properties  
7 that have been in foreclosure?

8 A Not typically.

9 Q But you -- but you have, maybe not typically --

10 A Not typically.

11 Q -- but you -- you -- but you have lived in other  
12 properties that have been in foreclosure?

13 A Not typically.

14 Q Does that mean you've never lived in a property  
15 that's been in foreclosure?

16 MR. BAKER: Relevance, Your Honor.

17 THE COURT: I'm sort of wondering myself.

18 Mr. Ward, what's the relevance of this line of  
19 questioning?

20 MR. WARD: The relevance is that this gentlemen is a real  
21 estate investor and he has not been a real estate investor  
22 since about nine months before this accident. And he is  
23 claiming that his inability to be a real estate investor is a  
24 result of this accident. And what I'm asking questions about  
25 are things that relate directly to being a real estate

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1 investor.

2 THE COURT: Mr. Baker?

3 MR. BAKER: I -- I don't even understand that, Your  
4 Honor. There's no relevance whether or not he lived in a  
5 foreclosure house. He's explained the system of how real  
6 estate investing works. What's the relevance of -- of living  
7 in a foreclosed house?

8 THE COURT: Sustain the objection.

9 BY MR. WARD:

10 Q You have never owned a house since February of 2004;  
11 isn't that correct?

12 MR. BAKER: The same objection, Your Honor.

13 THE COURT: I'll allow that. I just hope we don't get  
14 too far afield.

15 THE WITNESS: Repeat the question.

16 BY MR. WARD:

17 Q Sure. You've never owned a house since February of  
18 2004?

19 A You're assassinating my character --

20 MR. BAKER: Enrique --

21 THE WITNESS: -- and I don't appreciate that.

22 MR. BAKER: Enrique, answer his question.

23 THE WITNESS: Yes, I have.

24 BY MR. WARD:

25 Q You -- have you been in the real estate investment

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1 since November -- since February of 2004?

2 A Absolutely.

3 [Pause]

4 Q You weren't working between the time of -- between  
5 February of 2004 and the time of this accident; isn't that  
6 true?

7 A That's true.

8 Q Okay. And there wasn't any reason why you weren't  
9 working?

10 A No.

11 Q You just weren't working?

12 A Correct.

13 Q And wasn't 2004 a pretty good time to sell real  
14 estate?

15 A Correct.

16 Q Is there any reason now why you weren't working in  
17 the industry?

18 A Well, that -- my business affords me the luxury of  
19 making good money. That particular house and that particular  
20 time, I was able to have over \$100,000 of cash.

21 Q Okay.

22 A And me and Maria like to spend time with our  
23 grandkids, with our foster kids, and that type of business  
24 affords us that luxury. And whenever I want to pick up a  
25 house, at that time I'm able to pick up a house. And whenever

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1 I want to flip a house, I'm able to flip house. And that's  
2 the reason.

3 Q When did you last have foster children?

4 A When my son graduated from Polly High School. And I  
5 don't recall exactly what year that was.

6 Q Ten years ago?

7 A I'm going to say a little bit over ten years ago.

8 Q A little over ten years ago?

9 A Yes.

10 Q So, in the year 2004 you didn't have any foster  
11 kids?

12 A No.

13 Q Now, you saw Dr. Nork?

14 A Correct.

15 Q Or after -- you got his name out of the -- from the  
16 internet?

17 A Internet marketing, a publication.

18 Q And so you went to see Dr. Nork?

19 A Correct.

20 Q Did you have any records with you?

21 A Would you repeat that question?

22 Q Did you have any medical records with you?

23 A When I went to see him?

24 Q Right.

25 A I don't recall.

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1 Q Now, you told Dr. Nork that on the night of the  
2 accident that you had been injured and you couldn't walk and  
3 you went to the hospital by ambulance, correct?

4 A Correct.

5 Q And you told Dr. Nork that when you were examined by  
6 Dr. Heaps that your knee was swollen?

7 A Okay.

8 Q Isn't that true?

9 A Correct. Correct.

10 Q You -- you told Dr. Nork that on the night of the  
11 injury your knee was swollen?

12 A I don't recall.

13 Q Was anyone with you when you went to see Dr. Nork?

14 A I don't believe so.

15 Q Do you know of any place Dr. Nork would have gotten  
16 his information other than from you?

17 A I don't believe so. I don't know.

18 Q Okay. Now, Dr. Nork saw you a couple of times?

19 A Yes.

20 Q And nothing Dr. Nork did seemed to help; isn't that  
21 true?

22 A Correct.

23 Q And he sent you to physical therapy?

24 A Yes.

25 Q And nothing they did at physical therapy seemed to

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1 help; isn't that true?

2 A Correct.

3 Q And you were still only complaining of knee pain;  
4 isn't that correct?

5 A At that time, yes.

6 Q Okay. So, two months after the accident the -- the  
7 only complaint you still had was knee?

8 A Correct.

9 Q And -- now, who's the next treater that you went to?

10 A If my memory serves me, there might be a Eric  
11 Campbell, Simpson, someone in Wildomar.

12 Q Sure. How did you get to Eric Campbell?

13 A By car.

14 Q Okay. How did you -- how did you determine that you  
15 were going to go see Eric Campbell?

16 A I don't recall.

17 Q Was he recommended by someone?

18 A I don't recall.

19 Q But you had -- Campbell was a chiropractor, correct?

20 A I don't recall his specialty.

21 Q Do you know whether he was a medical doctor or a  
22 non-medical doctor?

23 A Yeah, he -- he was a medical doctor.

24 Q He was?

25 A Yes.

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1 Q And why did you start going to Dr. Campbell instead  
2 of Dr. Nork?

3 A Because I did not feel comfortable with Dr. Nork and  
4 what you would call bedside manners.

5 Q Okay. And somewhere along the line, you got -- some  
6 testing done; is that correct?

7 A Yes.

8 Q And that testing was done at a place called MRI of  
9 Inland; does that sound right?

10 A Yes.

11 Q And who sent you to MRI at Inland?

12 A I don't recall who referred me to that MRI of  
13 Inland.

14 Q Okay. But you did have an MRI done?

15 A Yes.

16 Q And that was done on January 28, '05?

17 A I would believe so, yes.

18 Q Did you talk to anyone about what they found when  
19 they did that MRI?

20 A Yes, I would've.

21 Q Okay. Who did you talk to?

22 A What year was this in?

23 Q We're talking a little over two months after the  
24 accident.

25 A A little over two -- that would've been in the

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1 offices of the doctors with -- with Will -- with Williams or  
2 Eric Campbell.

3 Q Okay. So, you talked to someone there about the  
4 MRI?

5 A Correct.

6 Q And did you learn that they were going to send it to  
7 someone else to read it again?

8 A I don't recall.

9 Q You don't recall?

10 A No.

11 Q So, you don't recall anyone explaining to you why  
12 they were going to send these to someone else to read it  
13 again?

14 A No, I don't recall.

15 Q Were you even aware of that?

16 A I don't recall.

17 Q And then you ended up going to Dr. Shannon, correct?

18 A Yes.

19 Q Did you ever see Dr. Simpson?

20 A Yes.

21 Q Why did you go to Dr. Simpson?

22 A Because I have continuous pain.

23 Q And why did you choose Dr. Simpson over  
24 Dr. Campbell?

25 A They worked in the same office, the same building.

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1 Q Did you make a conscious change to go to another  
2 treater there?

3 A A conscious change? They -- they were in the same  
4 group.

5 Q Okay. Here's -- here's what I'm trying to ask;  
6 sometimes I go to my doctor and he's on vacation or whatever  
7 and some other doctor sees me. Other times I go in and say  
8 I'd like to see a different doctor. I'm just trying to figure  
9 out how --

10 A It pretty happened like that. I think -- I -- from  
11 what I recall, I think one of them was -- had an office in  
12 Carson, California, 90 miles away, and he wasn't there one  
13 day, so it kind of worked out like that.

14 Q Now, that's it -- I'm just trying to find out.

15 A Yeah.

16 Q Okay.

17 A Pretty much like that.

18 Q Okay. And, so, it was mostly convenience issue?

19 A Convenience, yes.

20 Q Okay. And then you left that group and went to see  
21 Dr. Shannon?

22 A Correct.

23 Q Now, why did you do that?

24 A That was during the time that I was needing my  
25 surgery done for my knee.

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1 Q So, you went to Dr. Shannon for the very first time  
2 to have the surgery done?

3 A I went -- repeat that again.

4 Q Sure. Are you telling me that you went to  
5 Dr. Shannon to do the surgery before you'd seen Dr. Shannon?

6 A No.

7 Q So, then why did you change and go to Dr. Shannon?

8 A I'm getting a little confused here.

9 Q Sure. Want me to go back?

10 A Yes.

11 Q Okay. You were seeing Dr. Campbell, and then you  
12 saw Dr. Simpson, and then you left Dr. Simpson and went to see  
13 Dr. Shannon?

14 A Yes.

15 Q You had never seen Dr. Shannon before?

16 A Okay.

17 Q Correct?

18 A Correct.

19 Q And before you went to Dr. Shannon, you didn't know  
20 what she was going to tell you when you got there?

21 A Correct.

22 Q So, why did you go to Dr. Shannon? Why did you  
23 leave the Wellness Clinic that had Dr. Campbell and  
24 Dr. Simpson, and now you go to another doctor?

25 A Because those other doctors were not going to do

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1 surgery for me. That's why.

2 Q And, so, you wanted to go to a doctor who would do  
3 surgery?

4 A Exactly.

5 Q And that's why you went to the Dr. Shannon in the  
6 hopes that you could persuade her to do surgery?

7 MR. BAKER: That's argumentative, Your Honor.

8 THE COURT: Well, perhaps you could rephrase it,  
9 Mr. Ward.

10 MR. WARD: Sure. Yeah.

11 BY MR. WARD:

12 Q Hadn't you talked to Dr. Simpson about doing surgery  
13 on you?

14 A I went for evaluations.

15 Q Okay. And did they recommend surgery?

16 A Well, they -- I was evaluated.

17 Q Uh-huh.

18 A And I was working through the other attorneys at  
19 that time.

20 Q Okay. Well -- so, who recommended that you go see  
21 Dr. Shannon?

22 A That was what we spoke about with the other law firm  
23 that wasn't getting things done.

24 Q Okay. So, it was the other law firm who recommended  
25 that you go to Dr. Shannon?

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1 A Correct.

2 Q With the idea that Dr. Shannon would operate on you?

3 MR. BAKER: Again, Your Honor, that's argumentative and  
4 speculative and lack of --

5 THE COURT: Well, I think maybe sustain and ask you to  
6 rephrase it.

7 BY MR. WARD:

8 Q Sure. What -- when -- when the -- when you went to  
9 the other law firm, what did they tell you about Dr. Shannon?

10 A Well, they said that they recommend and they speak  
11 highly of an orthopedic specialist in Las Vegas that they've  
12 dealt with before, and go speak to her. And that's basically  
13 what I did. But during that time, nothing got done. So --

14 Q Right. And I'm -- and you're jumping ahead. And I  
15 apologize if my questions are maybe are doing that. But what  
16 I'm trying to get to is, I'm -- you said that once you got  
17 there the surgery didn't happen right away. I'm trying to  
18 find out before you went there. That's the area of time that  
19 I'm talking about, before you saw Dr. Shannon for the very  
20 first time. I'm trying to find out why it was you left  
21 Dr. Simpson and went to see Dr. Shannon. Why that change?

22 A Because of -- they were not going to do the surgery  
23 and after meeting those doctors, I'm the type of person that  
24 likes to be comfortable with doctors. And personally, myself,  
25 I went on the internet and did some research on one of those

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1 doctors and found something about that that I didn't like.  
2 So, I didn't want to continue with that particular doctor.

3 Q And, so, the reason you left the Wellness Clinic and  
4 went to see Dr. Shannon was because you didn't like something  
5 you'd found about the Wellness Clinic?

6 A Correct.

7 Q And, now, before you went to see Dr. Shannon, did  
8 you have any additional diagnostic testing performed?

9 A I don't recall.

10 MR. BAKER: Your Honor, can I interrupt for just one  
11 second? I'm very sorry to interrupt.

12 [Sidebar Conference Not Transcribed]

13 THE COURT: Very well. Whenever you're ready, Mr. Ward.

14 MR. WARD: Thank you, Your Honor.

15 BY MR. WARD:

16 Q On the night of the accident you had an x-ray of the  
17 knee; is that correct?

18 A Correct.

19 Q You remember that you were laid on the table and --

20 A Yes.

21 Q -- made this clunking-clanking sound as they slide  
22 the film into the various places and they try to get you to  
23 hold still and put bean bags around you and all that kind of  
24 stuff?

25 A Yes.

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1 Q And -- now, you've had MRIs, correct?

2 A Before?

3 Q No, just any time. You -- you know what an MRI is?

4 A Yes.

5 Q The MRI's a different procedure. It's not like the  
6 x-ray, right?

7 A Correct.

8 Q And I'm not talking about -- I'm not trying to turn  
9 you into an MRI expert. I just mean, what you experience when  
10 you go get an MRI is different from getting x-rays?

11 A Correct.

12 Q So, you had x-rays on the night of the accident and  
13 then you had an MRI that was conducted on January 28th, 2005?

14 A Correct.

15 Q And when that happened that's when you lay back on a  
16 -- on a thing and on a -- on a kind of a moving -- it's almost  
17 like a bed, they kind of prop you up and -- and then this loud  
18 -- it sounds like somebody hammering in the background?

19 A Correct.

20 Q Okay. It's kind of -- it's kind of disconcerting  
21 hearing that -- that sound?

22 A Correct.

23 Q All right. Okay. And -- and then because they were  
24 just doing your knee, you didn't have to go all the way  
25 through the machine, correct?

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1 A Correct.

2 Q Okay. But they did -- they did your knee?

3 A Correct.

4 Q And they took a film?

5 A Correct.

6 Q And did something with that film?

7 A Correct.

8 Q Between that -- that period of time, the day of the  
9 accident and the day you had the MRI, did you have anything  
10 done, from a diagnostic standpoint, other than the x-rays that  
11 you had the night of the accident?

12 A No, I don't believe so.

13 Q How many times have you had MRIs since that first  
14 time in January of 2005?

15 A Until now?

16 Q Yeah.

17 MR. BAKER: And -- if -- obviously, it's not just the  
18 MRIs are all at once.

19 BY MR. WARD:

20 Q The -- let's limit it to the MRIs, just tell me how  
21 many.

22 A I'm going to estimate maybe seven.

23 Q Seven MRIs and an eighth?

24 A Correct.

25 Q Now, were they all at the same place?

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1 A No.

2 Q I say same place, I don't mean same place on your  
3 knee, I mean --

4 A No.

5 Q -- the same facility.

6 A No.

7 Q Did you have any more at the place that we called  
8 Open MRI?

9 A What city?

10 Q Well, Open MRI is in California; isn't it? The  
11 first MRI you had on your knee was in California?

12 A Yeah, but there's an Open MRI in Las Vegas and --

13 Q Have you been to the Open MRI in Las Vegas?

14 A I've been -- yeah, I believe the first MRI that I  
15 went to -- I don't believe I've been back to the first place  
16 that I had my first MRI.

17 Q Okay. Okay. Now, you went to a Dr. Jacob Tauber,  
18 correct?

19 A Correct.

20 Q And Dr. Tauber is in Beverly Hills?

21 A Correct.

22 Q And you saw him for your knee?

23 A Correct.

24 Q And he asked you about the incident; didn't he?

25 A Correct.

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1 Q And he asked you to relay to him what happened?

2 A Correct.

3 Q And he asked you to relay to him what injuries you  
4 sustained?

5 A Correct.

6 Q And you told him that in that accident that you  
7 injured your left knee; is that correct?

8 A Correct.

9 Q And you told him that you injured your neck?

10 A Correct.

11 Q Okay. But you didn't injure your neck in that  
12 accident; did you?

13 MR. BAKER: Objection, Your Honor. It calls for a  
14 medical conclusion.

15 THE COURT: Overruled.

16 THE WITNESS: Repeat the question.

17 BY MR. WARD:

18 Q Sure. You didn't injure your neck in that accident;  
19 did you?

20 A Yes, I did.

21 Q You injured your neck in the -- in the accident on  
22 November 22?

23 A Yes.

24 Q Okay. But you didn't tell the ambulance that you'd  
25 injured your neck?

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1 A Well --

2 Q Is that true?

3 MR. BAKER: He was going to respond, Your Honor.

4 THE COURT: Yeah, I think he should be allowed to answer  
5 the question.

6 THE WITNESS: Okay. Repeat the question.

7 BY MR. WARD:

8 Q Sure. Isn't it true you didn't tell the ambulance  
9 attendants that you injured your neck that night?

10 MR. BAKER: That wasn't the question, Your Honor. That  
11 was the follow-up question.

12 MR. WARD: I don't remember my question. I will withdraw  
13 it. If you can remember it, I can -- if you lay it out, I'll  
14 ask you.

15 MR. BAKER: Did you injure in the accident -- in the  
16 accident?

17 MR. WARD: Okay. Then I'll withdraw --

18 THE COURT: Well, pick up wherever you'd like, Mr. Ward.

19 MR. WARD: Thank you, Your Honor. Any post-it notes or  
20 anything like that?

21 MR. BAKER: I just found it. I was there for you.

22 BY MR. WARD:

23 Q Isn't it true that you didn't tell the ambulance  
24 attendants that night that you injured your neck?

25 A I've told them exactly how the accident happened and

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1 how the lady hit my knee, how I fell back, how I twisted, how  
2 my body torqued, and how I hit the gentlemen. How they wrote  
3 it down, I don't know.

4 Q When they asked where you had pain, you didn't tell  
5 them that you had any pain in your neck; isn't that true?

6 A My pain primarily, at that time, was in my knee.

7 Q Isn't it true you that you did not tell them that  
8 you had any pain in your neck?

9 A I don't recall.

10 Q Isn't it true that you did not tell them that you  
11 had any pain in your back?

12 A I recall telling them that my knee was hurt, my shin  
13 was hurt where her whole body hit my lower -- my knee and I  
14 twisted and at that time I might not have felt the immediate  
15 pain to those areas, but they were there because I couldn't  
16 walk at that time.

17 Q So, is it true, then, that you didn't tell them you  
18 had pain in your back?

19 A You can -- you can phrase it that way.

20 Q Well, isn't that true?

21 A It could be phrased that way, correct.

22 Q Okay. And isn't it true you didn't tell them you  
23 had pain in your neck?

24 A It can be phrased that way, correct.

25 Q And when you saw Dr. Heaps that night?

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1 A Yes.

2 Q And you saw Heap's nurse?

3 A I believe so.

4 Q And you talked to both of them?

5 A Correct.

6 Q And you didn't tell either one of them you had pain  
7 in your neck?

8 A I explained to them exactly how I explained, and at  
9 that moment, my primary pain and concern was in my knee.

10 Q And isn't it true that you did not tell them that  
11 you had any pain in your neck?

12 MR. BAKER: Hasn't this been asked and answered?

13 THE COURT: Yes. Sustained.

14 BY MR. WARD:

15 Q Isn't it true that you didn't tell them you had any  
16 pain in your back?

17 MR. BAKER: Same objection, Your Honor.

18 THE COURT: I think we've already covered this. And I  
19 think he's answered the question, so sustain the objection.

20 BY MR. WARD:

21 Q You saw Dr. Nork?

22 A Correct.

23 Q A week or two later? Isn't it true that you didn't  
24 tell Dr. Nork that you had any pain in your neck?

25 A No, that's not true.

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1 Q Isn't it true that you didn't tell Dr. Nork that you  
2 had any pain in your back?

3 A No, I don't believe so.

4 Q Did you fill out a -- a pain drawing with Dr. Nork?

5 A I'm sure --

6 Q You know what a pain drawing is?

7 A -- I did, yeah.

8 Q You know what a pain drawing is?

9 A Yes.

10 Q And -- and the -- it's a -- it's like a body?

11 A Yeah.

12 Q And you're asked to put down the areas of your body  
13 that you have complaints about?

14 A Correct.

15 Q And when you saw Dr. Nork, the only thing that you  
16 checked was the knee, right?

17 A I don't recall.

18 Q You don't recall that?

19 A No. If I see it, I might recall it.

20 Q Okay. Now, when you saw Dr. Tauber, you told  
21 Dr. Tauber that you got out, but you were not able to walk;  
22 isn't that correct?

23 A When I saw Tauber -- repeat that again, please.

24 Q Isn't it true that when you saw Dr. Tauber, you told  
25 him that you got out, but you were not able to walk?

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1 A Possibly, yes.

2 Q And you told Dr. Tauber that you had injured your  
3 neck and your back and your knee in that accident; isn't that  
4 true?

5 A Correct.

6 Q Who did you see for sleep apnea?

7 MR. BAKER: Objection, Your Honor. Relevance for sleep  
8 apnea. That's not going to be part of our case-in-chief.

9 THE COURT: What's the relevance, Mr. Ward?

10 MR. WARD: The relevance is that this witness has been  
11 claiming that it's part of the things related to this injury  
12 and I will demonstrate that it's one of the conditions that he  
13 had prior to this accident.

14 MR. BAKER: I'll stipulate to that. I'm not -- I'm not  
15 intending to admit to that.

16 MR. WARD: Well, the witness just denied that it ever  
17 happened. So, it -- then it's become a credibility issue.

18 MR. BAKER: I'm not sure I'm following this kind of  
19 questioning. He's -- first of all, asking him for a medical  
20 connotation of whether or not he's saying he had the sleep  
21 apnea that's related to this accident.

22 MR. WARD: I'm not asking him for medic- -- I apologize,  
23 I didn't mean to interrupt you.

24 MR. BAKER: He did ask him for that specifically, Your  
25 Honor. Sleep apnea is something that is not going to be a

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1 part of our case at issue, therefore it's not relevant to the  
2 subject matter and he should be able to question him on sleep  
3 apnea.

4 THE COURT: Well, I'm going to sustain the objection. I  
5 think Counsel's already made the point with respect to the  
6 credibility issue.

7 MR. WARD: If --

8 THE COURT: I'll ask that you move on, Mr. Ward.

9 MR. WARD: Yes, Your Honor.

10 BY MR. WARD:

11 Q Now, Mr. Rodriguez, isn't it true that earlier in  
12 this litigation that you did not have any federal tax returns  
13 to provide to us for analysis?

14 A Correct.

15 Q And you met with an expert and that expert's name  
16 was Mr. Dineen?

17 A Correct.

18 Q And you saw him out here in the hallway earlier?

19 A Correct.

20 Q And you met with Mr. Dineen in 2008?

21 A Correct.

22 Q And he told you -- well, let me ask you this; do you  
23 know why you met with Mr. Dineen?

24 A Yes.

25 Q Why?

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1           A     Because I was going to give him my information of  
2 paperwork that I had.

3           Q     And because he was going to take a look at your  
4 information and come in and tell the Court about your -- your  
5 loss of earning capacity or your wage loss; isn't that right?

6           A     Correct.

7           Q     And, so, he told you that he needed information?

8           A     Correct.

9           Q     And -- and you told -- he told you that he needed a  
10 tax return from you for the year 2004?

11          A     He wanted to provide -- he want me to provide  
12 information.

13          Q     Right. And he specifically asked you for tax  
14 returns, correct?

15          A     Correct.

16          Q     And, in particular, he asked from you for tax  
17 returns for 2004?

18          A     No, not -- he just asked me for tax returns.

19          Q     Okay. Did he ask you for tax returns from the  
20 period of 1999 to 2004?

21          A     I don't recall.

22          Q     You, thereafter, created tax returns; isn't that  
23 right?

24          A     Created?

25          Q     Sure.

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1 MR. BAKER: I'm guessing -- objection to argumentative,  
2 Your Honor, and vague.

3 THE COURT: Well, I'll ask you to rephrase it. I'm not  
4 real sure what you mean by that question, Mr. Ward.

5 BY MR. WARD:

6 Q The -- the tax return that you gave for Mister -- to  
7 Mr. Dineen for the year 2004 was signed by you in 2009; isn't  
8 that right?

9 A It was prepared, yeah, and signed.

10 Q In 2009?

11 A Correct.

12 Q Yeah, not before?

13 A Correct.

14 Q In 2009 is five years after 2004; isn't it?

15 A Correct.

16 Q And the tax return from 2001 was also prepared in  
17 2009; isn't that right?

18 A Correct.

19 Q And how about the tax return from 1999; when was  
20 that prepared?

21 A I don't recall what -- what date.

22 Q And there was no tax return for 2002 and 2003; isn't  
23 that correct?

24 A I believe so.

25 Q And there was no tax return for the 2000; isn't that

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1 correct?

2 A I don't recall.

3 Q Okay. And you said that you had provided Mr. Dineen  
4 with all of your records to show him your income; isn't that  
5 correct?

6 A Correct.

7 Q You -- that you would show him all of the backup  
8 information that would support your loss of income, correct?

9 A Correct.

10 Q As a -- as a real estate investor?

11 A Correct.

12 Q And you've been a real estate investor for some  
13 period of time?

14 A Correct.

15 Q You've sold well over 100 houses?

16 A Correct.

17 Q And 2004 was probably one of the hottest years for  
18 real estate investors, such as yourself, since you've been  
19 doing that; isn't that true?

20 A Correct.

21 Q And you didn't do anything in 2004 after you sold  
22 your house in Charwood, correct?

23 A Correct.

24 Q And now, tell me, sir, just basically as a real  
25 estate investor, if we're going to know how much your earnings

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1 are, we're going to have to know how many properties you own?

2 MR. BAKER: Your Honor, that causes for an expertise in  
3 calculation in loss of wages and vocational areas, and he's  
4 not that type of expert.

5 THE COURT: What kind of evidence are we going to hear  
6 about lost wages?

7 MR. BAKER: Do you want me to summarize for the Court?

8 THE COURT: Yes.

9 MR. BAKER: That a -- to the best that I understand it,  
10 Your Honor, that there will be some evidence of the houses  
11 that he had sold, some transactional evidence which gave a  
12 high, about \$208,000, that Mr. Dineen did not utilize that  
13 high, even though they -- they were trying to suggest they  
14 were the basis of -- of them establishing earning capacity.  
15 But rather took an average, which was cumulative, of all of  
16 the information that he had for sales, plus CPI and standard  
17 governmental issued statistics regarding income of people of  
18 his age.

19 THE COURT: Now, I forgot what your objection was,  
20 Mr. Baker.

21 MR. BAKER: My objection --

22 THE COURT: I'm so sorry.

23 MR. BAKER: My objection was is he was attempting to lay  
24 through Mr. Rodriguez a foundation for why somebody  
25 calculating his losses would be, or the loss that somebody as

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1 an income investor. And that's properly within the expert  
2 realm of either a vocational rehabilitationist or a vocational  
3 rehabilitationist sanc- -- segued with a vocational economist,  
4 which is what Mr. Dineen is. He simply can't lay that  
5 foundation.

6 THE COURT: Mr. Ward --

7 MR. WARD: That's not what I'm trying to do.

8 THE COURT: -- do you remember your question?

9 MR. WARD: Oh, I do remember my question. That's not  
10 what I'm trying to do.

11 THE COURT: Could you repeat your question to me again?

12 MR. WARD: Sure. Did you -- actually, I can't remember  
13 my question. I know where I was going, but I can't remember  
14 my specific question.

15 THE COURT: All right. Let's proceed then.

16 BY MR. WARD:

17 Q I want to ask you some very basic questions in this  
18 area, Mr. Rodriguez. You've been a real estate investor for,  
19 what, 20 years?

20 A Correct.

21 Q Now, what a real estate investor does, such as  
22 yourself, is to buy and sell houses; is that correct?

23 A Correct.

24 Q Okay. You don't -- you haven't dealt in the  
25 commercial market?

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1 A No, I prefer residential.

2 Q Right. Right. Okay. And, so, you have bought and  
3 sold houses?

4 A Correct.

5 Q Now, to -- you have some basic understanding of how  
6 to make money in the real estate market; isn't that correct?

7 A Correct.

8 Q Okay. So, I'm just going to ask you about some  
9 basics. We're going to figure out how much money you earn, as  
10 a real estate investor, on any particular sale. One of the  
11 things we're going to need to know is what you sold a house  
12 for, correct?

13 A Correct.

14 Q One of the other things we're going to need to know  
15 is how much you paid for the house, correct?

16 A Correct.

17 Q One of the things we're going to need to know is how  
18 long you owned the house?

19 MR. BAKER: And -- and, Your Honor, I just want to show  
20 that the record is reflecting that these questions are being  
21 asked from the perspective of -- if a real estate investor  
22 wants to know how much his income loss was, that he might need  
23 to -- need these things, not other experts in the area of  
24 calculating wage loss or economic wise.

25 THE COURT: Very well. Please, proceed, Mr. Ward.

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1 MR. WARD: Thank you, Your Honor.

2 BY MR. WARD:

3 Q So, we need to know how long you owned the house,  
4 correct?

5 A Correct.

6 Q I mean, there's a cost of money, right? And we need  
7 to know how much work or money you put into the house between  
8 the time you bought it and the time you sold it?

9 A Correct.

10 Q And that's -- that's the basics of what we're going  
11 to need to know, whether you're making money as a real estate  
12 investor; isn't that correct?

13 A Correct.

14 Q Things like real estate commissions, those kinds of  
15 things are usually covered on the closing costs?

16 A Correct.

17 Q They -- they printout in the escrow statement. But  
18 the escrow statement doesn't tell you what you pay for the  
19 house. The escrow statement doesn't tell you how much work  
20 you put in the house. The escrow statement doesn't tell you  
21 how long you owned the house; isn't that true?

22 A Correct, typically.

23 Q It tells you -- it tells you what you sold the house  
24 for. It tells you if there's going to be any termite work  
25 taken out of the escrow. It tells you what the real -- what

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1 the real estate experts, or the realtors charge, and it tells  
2 you how much loans and fees you have to pay out, correct?

3 A Correct.

4 Q Okay. But you have to know these other things that  
5 I was talking about, how much you paid for the house, how much  
6 you put into the house, and how long you owned the house to be  
7 able to get some basic calculations as to whether you're  
8 making money as real estate investor or not, correct?

9 A Correct.

10 Q And, so, did you provide all of that information to  
11 Mr. Dineen?

12 A Correct.

13 Q You provided him all that information so he could  
14 calculate what your earnings were for the year 2004?

15 A Correct.

16 Q And you provided him with all the information so  
17 that he could calculate what your earnings were for 2003?

18 A Correct.

19 Q And 2002, 1, 2000, and 1999 as well?

20 A Correct.

21 Q Okay. Now, did Mister -- did Mr. Dineen tell you  
22 that you could get copies of any tax forms that you had filed  
23 by writing to the federal government?

24 A Can you repeat that question?

25 Q Sure. Did Mister -- Mr. Dineen met with you and

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1 told you he wanted some tax returns, correct?

2 A Correct.

3 Q Did he tell you that you could get them, if you  
4 filed them, by writing to the federal government and asking  
5 for them?

6 A Yes.

7 Q So, you knew that?

8 A Yes, I knew that.

9 Q Did you ever do that?

10 A Repeat the last one.

11 Q Sure. Did you ever do that?

12 A My accountant prepared all my taxes.

13 Q Right. That's not my question. My question is,  
14 after Mr. Dineen told you that one of the ways you could get  
15 tax returns to give him is you could write to the federal  
16 government and they would give you copies of any tax returns  
17 that you had filed --

18 A Uh-huh.

19 Q Right, he told you that?

20 A Yes.

21 Q So, my question is, did you do that?

22 A No.

23 Q No. Did you -- did Mr. Dineen tell you that -- that  
24 if you would show him your -- your FICA, F-I-C-A, report, that  
25 that would demonstrate what your gross earnings were as

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1 received by the federal government?

2 A No.

3 Q He didn't tell you that? Did you know that already?

4 A No.

5 Q Have you ever gotten one of those statements in the  
6 mail?

7 A I don't believe so.

8 Q No, never have?

9 A I don't recall.

10 Q Okay. So, you don't know anything about that, those  
11 statements?

12 A I don't recall that at this moment.

13 Q Okay. And is it your testimony that you haven't  
14 been able to do anything with respect to buying and selling  
15 houses since this accident?

16 A Correct.

17 Q Because of the injuries you sustained?

18 A Correct.

19 Q Can you ride in cars?

20 A Yes.

21 Q Have you attempted to drive around some  
22 neighborhoods, look at houses?

23 A Yes.

24 Q Have you attempted to go on the internet -- you --  
25 you do go on the internet, right?

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1 A Yes.

2 Q That's where you found your doctors?

3 A Yes.

4 Q Did you go on the internet and look for houses to  
5 buy?

6 A No.

7 Q Why not?

8 A Because I don't have any income to buy houses.

9 Q Has that been the case since February of 2004?

10 A At that time, like I said before, I chose to spend  
11 time with my family, my grandkids, and it was different then.

12 MR. WARD: Your Honor, I'm going to be a while. I see  
13 we're a quarter to 5:00. Is it a good time stop?

14 THE COURT: I think so. How much longer do you think  
15 you'll be for scheduling purposes?

16 MR. WARD: For scheduling purposes, I do not anticipate  
17 being more than a half-hour to 45 minutes.

18 THE COURT: Mr. Baker will have some follow-up, I  
19 imagine?

20 MR. BAKER: Yeah, and I don't know how much. We're --  
21 Your Honor, we've -- are --are we still on his record or are  
22 we --

23 THE COURT: No, we can go off record. I think we're  
24 finished for the day. Sir, if you wanted to get up and move  
25 around, you're free to do so.

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1                   We'll resume tomorrow.

2           THE WITNESS: Thank you.

3           THE COURT: Sure. We can go off the record, now.

4           [Proceedings Concluded at 4:39 p.m.]

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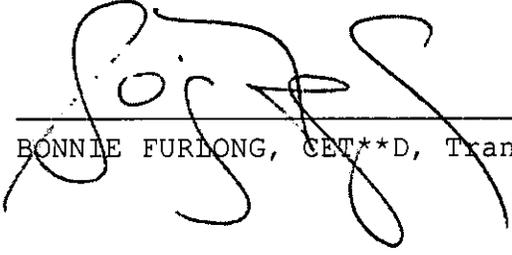
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1 ATTEST: I do hereby certify that I have truly and correctly  
2 transcribed the audio/video recording in the above-entitled  
3 case to the best of my ability.  
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15 BONNIE FURLONG, CET\*\*D, Transcriber  
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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

\_\_\_\_\_ /

**APPELLANT'S APPENDIX**  
**VOLUME 7**

**ROBERT L. EISENBERG (Bar # 0950)**  
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**ATTORNEYS FOR APPELLANT**

CHRONO INDEX

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89.	Defendant's Motion for A New Trial, etc.	07/05/11	16	3187 - 3212



DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

ENRIQUE RODRIGUEZ, . CASE NO. A-531538  
Plaintiffs, . DEPT. NO. X  
vs. .  
FIESTA PALMS, LLC, . **TRANSCRIPT OF**  
Defendant. . **PROCEEDINGS**  
 . **\*\*\*PARTIAL TRANSCRIPT\*\*\***  
 .  
 . . . . .

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

**BENCH TRIAL - DAY 1**  
**(OPENING STATEMENTS AND DEPOSITION OF NATHAN HEAPS, M.D.)**

MONDAY, OCTOBER 25, 2010

APPEARANCES:

FOR THE PLAINTIFF: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
*Benson, Bertoldo & Baker*

FOR THE DEFENDANT: KENNETH C. WARD, ESQ.  
*Archer Norris*

COURT RECORDER:

VICTORIA BOYD  
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC  
Englewood, CO 80110  
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.



1 THE COURT: Okay, thank you.

2 MR. WARD: Good morning, Your Honor. K.C. Ward. I  
3 represent the Palms. My paralegal Virginia Lowe [phonetic].

4 THE COURT: Good morning.

5 MR. WARD: She will be assisting me with -- to try  
6 to hold down on the fumbling of documents and things.

7 THE COURT: Nice to have -- nice to have some help,  
8 isn't it, Mr. Ward?

9 MR. WARD: Yes, it is. Someone who does this a lot  
10 better than I do.

11 THE COURT: Do you have a representative here as  
12 well?

13 MR. WARD: My representative is here, Vicki Coenga  
14 (phonetic) from the Palms.

15 THE COURT: Good morning. Who else is present?

16 MR. WARD: And we have a trial observer who is not a  
17 -- not a party or affiliated with the party and won't be  
18 testifying as a witness.

19 THE COURT: Okay. Someone you've made arrangements  
20 to be here?

21 MR. WARD: Yes.

22 THE COURT: Oh, okay. Very well. This is the time  
23 set for trial. Are the parties ready to proceed?

24 MR. WARD: Yes, Your Honor.

25 MR. BAKER: Yes, Your Honor.

1 THE COURT: Very well. Mr. Baker.

2 PLAINTIFF'S OPENING STATEMENT

3 MR. BAKER: Good morning, Your Honor. Counsel --  
4 and it could please the Court, would you like me to approach  
5 the lectern?

6 THE COURT: Wherever you would like, Mr. Baker.

7 MR. BAKER: You know I'm going to be wondering  
8 around a little bit.

9 THE COURT: That's fine.

10 MR. BAKER: Your Honor, this is Enrique Rodriguez.  
11 He lives in Riverside, California with his long-term partner,  
12 Maria. They've been together since 1983.

13 And in the middle of 19 -- excuse me, in the middle  
14 of 2004, they were doing pretty good. He had a nice business,  
15 he was selling real estate at the time. He had a very good  
16 relationship with his significant other, they had been  
17 together for about 20 years at the time. He comes from a very  
18 nice, large family which is very social and a great support  
19 mechanism. He was living a nice life.

20 Unfortunately, and thank God not tragically, at one  
21 point in time Maria was found to have some lumps in her breast  
22 and they removed those lumps and when they were biopsied, they  
23 were found not to be cancer.

24 And in celebration, Enrique brought her to Las  
25 Vegas. She still wasn't feeling that good. They drove into

1 town and checked into Harrah's. Maria wasn't feeling very  
2 well and he tucked her into bed. And she said, you know, go  
3 out and have a good time, go find one of your friends.

4 He went to find his friend and he couldn't. And  
5 then was driving down Flamingo; is that right? And saw the  
6 big marquee outside that said Monday night football. And  
7 especially, it was Monday night football frenzy with Brandy  
8 Beavers. And Brandy was a kind of rah, rah promotional girl  
9 for Monday night football at the Palms.

10 He was standing in the Sports Book area. And you're  
11 familiar with the Sports Book areas. It's TV monitors, a bar  
12 area, and there were promotional tables set up. And Brandy  
13 Beaver and several other promotional girls were kind of trying  
14 to invigorate the crowd, getting going, getting into the ball  
15 game and throwing promotional items out into the crowd.

16 And it's important for this Court to understand that  
17 this Monday night football used to occur in a very large room  
18 called the Key West Room which -- you know what, Your Honor,  
19 can I evoke the exclusionary rule?

20 THE COURT: Sure. Any witnesses who are present  
21 who --

22 MR. WARD: Your Honor, she's the corporate  
23 representative. The corporate representative is allowed to be  
24 just like a party, is allowed to --

25 MR. BAKER: I agree with that, Your Honor.

1 THE COURT: That's true, Mr. Ward, I agree.

2 MR. BAKER: I forgot, K.C. Used to be in a large  
3 room which was the Key West Room, about 8,000 square feet.  
4 And promotional items were thrown in that room and Sherry Long  
5 (phonetic), who is the director of promotions at the Palms,  
6 will testify to you that she thought that was wrong, that  
7 promotional items should not be thrown out into the crowd and  
8 she has testified because it's foreseeable that someone could  
9 get hurt as a result of these promotional items being thrown.

10 Apparently, she had a meeting with other people  
11 within the Palms Hotel and said, "We can have these  
12 promotional parties, but I don't want promotional items being  
13 thrown out." And then the promotion was then moved from the  
14 Key West Room into the Sports Bar, which is a much smaller,  
15 more contained area, a lot less walkable room, a lot less room  
16 to move about.

17 However, promotional items were still being thrown  
18 by Brandy Beavers in the Sports Bar on the night that Enrique  
19 Rodriguez arrived at the Palm.

20 Brandy Beavers has testified that the Palms knew she  
21 threw the promotional items. As a matter of fact, they even  
22 erected field goal in the Sports Book area in order to throw  
23 these promotional items, and that she spoke regularly and  
24 consistently with a Denise and I can't really pronounce her  
25 last name, who is in the promotion department at the Palms,

1 and Denise completely said, go ahead, throw the promotional  
2 items. We're there to make money, we want to get the crowd  
3 kind of revved up for Monday night football.

4           Brandy Beavers is an interesting girl. She's a  
5 party and she was defaulted. She did a live reality  
6 television show about Vegas. She's appeared on Howard Stern.  
7 Very nice girl, but she understood it was her role there to  
8 invigorate the audience. I believe she might have said get  
9 them rowdy, something of that type, and to get things moving.

10           And in order to do that, she brought in these small,  
11 either Coors or Palms water bottles, threw them while Enrique  
12 was standing there watching the game on television,  
13 essentially minding his own business.

14           A woman, then, who Brandy Beavers has testified was  
15 drunk, that she had seen at several of these promotional  
16 events drunk. She assumes that she was a homeless person who  
17 -- one of those people who kind of feed off of the casinos and  
18 get the promotional items and eat the free food, they gave out  
19 free drink tickets at the promotional event, went to leap for  
20 a water bottle, hit Enrique on the side of his knee, causing  
21 his body to torque and rotate, falling into several other  
22 patients at the -- several other patrons at the Sports Bar.  
23 He immediately reported pain to his knee.

24           Security came over, and at that time asked if he  
25 wanted to be transported. He said, "No, I think I'll be

1 okay," and after sitting for a little while, recognized he had  
2 a real problem with his knee and asked for transportation to  
3 the hospital.

4 He was transported to the hospital. And I'm going  
5 to read certain testimony by a Dr. Nathan Heaps, I've  
6 subpoenaed him for trial today, but he's not able to attend  
7 and I have an affidavit for you.

8 He was the emergency room doctor. Again, a very  
9 nice, young emergency room doctor. And he testified that he  
10 palpated Enrique's knee, found pain immediately right above  
11 the meniscus area, which is the subject of his knee injury,  
12 and diagnosed him at that time as having torn tissue inside of  
13 his knee.

14 Enrique stayed in town for another day or so and  
15 Maria drove him back to California and he sought treatment by  
16 a Dr. Nork (phonetic) who is a doctor in California who he  
17 found on the internet. Dr. Nork sent him to physical therapy  
18 at Rancho Physical Therapy. And the physical therapy records  
19 will show that he had no real improvement in his pain  
20 condition.

21 He came back to Las Vegas and hired a lawyer. His  
22 lawyer introduced him to Mary Ann Shannon, who is an  
23 orthopedic surgeon in town and I know that she's testified in  
24 this court before. MRIs were taken. A medial meniscus tear,  
25 and posterior torn [inaudible] in exactly the same place that

1 Dr. Heaps noted it, was found on MRI examination and she  
2 scheduled him for surgery.

3 Now, unfortunately, and this is something I  
4 typically wouldn't talk about at a jury trial, but I think  
5 it's appropriate for the bench to know.

6 Enrique was represented by a different group of  
7 attorneys at that same time, and apparently whatever they  
8 needed to do to have Dr. Shannon sign off on the surgery, I  
9 don't know if it was lien basis, or if it was a funding issue,  
10 they were unable to accomplish.

11 And Enrique had his surgery in 10/4 of '05,  
12 approximately six to seven months after he first saw Dr.  
13 Shannon, for the reason that apparently he was calling and  
14 calling and seeing how to get this set up, they could not set  
15 up the surgery. He came to our office and we were able to get  
16 a lien base surgery done by Dr. Shannon.

17 She performed the surgery. The technique was good,  
18 seemed like everything was well, but he never seemed to get  
19 better. His knee just keep -- seemed to be aching him in a  
20 mechanical way. And he'll testify that he experienced this  
21 pain that felt to him like a screwdriver being wiggled into  
22 his knee, and dug around in his knee, a constant pain.

23 And during the time between the accident which  
24 occurred in November of '04, and when he had his knee surgery  
25 from Dr. Shannon in 10 of '05, he was just miserable. He --

1 do you have a question, Your Honor?

2 THE COURT: No.

3 MR. BAKER: He was gaining weight, because he wasn't  
4 able to be active and mobile anymore. It happens to some of  
5 the best of us, I think.

6 But some more significant things were happening, is  
7 he couldn't walk and put full weight on his leg, so he used a  
8 variety of different assisted devices. He had a cane. And  
9 you'll see in the medical records and the doctors will  
10 testify, about three months into this, he started complaining  
11 of tingling and numbness in his hands to his doctor in  
12 California.

13 And he got into a cycle where he would switch hands  
14 with the cane, and then switch back and sometimes use crutches  
15 and then sometimes switch back to the cane and then sometimes  
16 try to walk, even though he has, and you'll notice and the  
17 doctors and the doctors note, a pronounced limp without an  
18 assisted device.

19 And over time, the doctors will testify, there's  
20 just this cascading effect where he developed a carpal tunnel  
21 syndrome bilaterally in his hands. And then he would switch  
22 to the crutches, and his back began to ache, and his neck  
23 began to ache because of postural changes. And there's a very  
24 clear record of all of this, Your Honor.

25 In 10 of '05, he went to see a chiropractor called

1 Dr. Nicola. And Dr. Nicola took X-rays from a chiropractic  
2 point of view. And those X-rays were read by Strehlow  
3 Radiology. And those X-rays noticed a change in the  
4 biomechanical structure of his cervical area and his back, and  
5 they specified that it was due to postural changes.

6 Now, the issue is, is there's a gap in the  
7 treatment; the gap from when he first started complaining of  
8 his neck and back pain, and when he first had those entered  
9 into the medical records.

10 But you'll see a very interesting note by Dr.  
11 Mortillaro, who I also know who has also testified in this  
12 court. And the Court knows Dr. Mortillaro is a  
13 neuropsychologist, and he does a very, kind of, exquisite job  
14 of taking patient history. And he has a form to fill out that  
15 asks questions like are you happy with your medical treatment,  
16 are you happy with your doctors, do you think you're getting  
17 the right medical treatment.

18 And in October of '05, after the note of the  
19 postural changes on the X-ray, after seven months of cane to  
20 crutches, to limping, to cane, to weight gain, 45 pound weight  
21 gain during this period of time, he writes in Dr. Mortillaro's  
22 intake that he's happy with his doctors. He thinks they're  
23 doing a good job for him with respect to what they're  
24 treating. But he feels that they're overlooking caring for  
25 his neck and his back. And he wrote that to Dr. Mortillaro.

1 I wish I could say that things got better for him  
2 around this point in time. He went to see Dr. Kidwell and Dr.  
3 Shifini first for his knee and was -- ultimately went to a Dr.  
4 Jacob Taubert, who is coming in from L.A. to testify, who is a  
5 doctor in Los Angeles who performed a second knee surgery, so  
6 a second traumatic assault to this knee in February of '06.

7 And you'll see and you'll hear from Dr. Taubert, it  
8 was a repair to the posterior horn of the medial meniscus, a  
9 very frequently seen post-surgical change in somebody  
10 requiring additional surgery.

11 And this is, unfortunately, where Enrique's story  
12 gets sad is the pain he had, which was the constant kind of  
13 grinding, like a screwdriver being placed into his knee,  
14 became a burning, horrible pain that wouldn't go away.

15 He noticed that he would feel pain, which the  
16 doctors will testify is called an allodynia, where everything  
17 seems to make your knee hurt. If you touch it, it seems to  
18 make your knee hurt. Putting on clothes is excruciatingly  
19 painful.

20 He had hyperesthesia which is that the pain was more  
21 than you would reasonably expect. His toenails started  
22 growing at different lengths. His skin became waxy on his  
23 leg. He began losing hair on his leg. And he was sent by a  
24 doctor to see the head pain specialist at UCLA Medical Center,  
25 which is Dr. Ferrante who diagnosed him at that time with RSD.

1 And I know the Court is familiar with RSD, as well.

2 RSD is reflex sympathetic dystrophy. It's a disease  
3 that happens, this will be explained, when the nerves in both  
4 the autonomic nervous system, motor nerves, sensory nerves,  
5 the system is just kind of tilted for some reason.

6 Those nerves interrelate with respect to their  
7 function, and things like motor impulses which should normally  
8 have no sensory component begin to have a sensory component.  
9 And because it's sympathetically mediated, meaning it's coming  
10 through the sympathetic nervous system, the same nervous  
11 system that has the fight or flight type of response to it, he  
12 had completely objective, sympathetically mediated component  
13 to his pain, which was, his doctors measured his two legs and  
14 his two legs were of different temperature. They appeared a  
15 different color.

16 And based upon that, he met five of the criterion of  
17 the six criteria for having a reflect sympathetic dystrophy.  
18 That was with Dr. Miller and Dr. Ferrante in California.

19 He came back to Nevada to see Joe Shifini. And Dr.  
20 Joe Shifini is a pain management doctor. And Dr. Shifini gave  
21 him initially a sympathetic block.

22 That sympathetic block did not resolve his pain,  
23 which is usually diagnostic. So Dr. Shifini said, well,  
24 perhaps the sympathetic component is not there; it might not  
25 be a true RSD anymore, but it is a complex regional pain

1 syndrome, which is like RSD, but instead of being mediated  
2 through the sympathetic nerve, it is mediated through that  
3 constellation of autonomic nerves, parasympathetic nerves,  
4 motor nerves and sensory nerves.

5           So he said, let's see what we can do to help this  
6 guy. Let's see if we can help. And I'm going to put in a  
7 temporary pain stimulator for him. And you'll hear evidence  
8 that the temporary pain stimulator has two purposes. One is  
9 to diagnostic.

10           If you have a neurologically mediated pain and it  
11 turns it off, well, then you know it's a neurological pain.  
12 And second is, it works to relieve that pain. And for the  
13 first time when he put it in, in a couple of years, Enrique  
14 had 100 percent resolution of the pain in his knee, and an 80  
15 percent resolution of the pain that was mechanical to his  
16 back. And it was just -- it was a wonderful break for him.

17           Unfortunately, the aspect of that was it was  
18 temporary. And he was sent to get a referral to have a  
19 permanent pain stimulator put in by Dr. Shifini to Dr. Badder  
20 (phonetic), who said, yeah, great idea, let's get him the  
21 permanent pain relief. Let's put in the permanent pain  
22 stimulator.

23           And at this point in time, it's -- are you okay? At  
24 this point in time it just gets sad again, because we've been  
25 unable to get the funding to have the pain stimulator put in

1 and he's been waiting for that period of time to come to this  
2 Court and put his case before you, and see if we can get him  
3 some resolution of the excruciating, burning sympathetic pain  
4 that he's been in since the day of this accident.

5 The witnesses that we're going to call are some from  
6 the Palms. And you're going to hear from Vicki, who's last  
7 name I can never pronounce.

8 MS. COENGA: Coenga (phonetic).

9 MR. BAKER: Coenga? Thank you, Vicki. Vicki and  
10 Coenga. And Vicki has testified that she was the risk manager  
11 at the Palms. She started in security and is familiar with  
12 the security department of the Palms. She was the risk  
13 coordinator at the Palms at this time that it happened.

14 She'll talk about the fact that she has admitted on  
15 behalf of the corporation that Palms had this duty to provide  
16 a reasonably safe environment within their hotel.

17 She'll tell you that they never got a separate event  
18 manual setting out protocol for safety at any of these  
19 promotional events. And she'll tell you that in her opinion,  
20 as a risk manager and as an ex-security person at the hotel,  
21 that it was inappropriate to throw items out, promotional  
22 items, in the context of that small, or smaller, sports bar.

23 She'll tell you also that if there were security  
24 guards in the area, she would expect the security guards, from  
25 her position, to stop people from throwing promotional items

1 inside a crowded bar area. She will also tell you that they  
2 were never trained, anything at the hotel, specific to crowd  
3 control and she'll have no opinion about Enrique's injuries.

4           You'll then hear from Sherry Long. Sherry is also a  
5 very nice woman. She worked for years in advertisement at the  
6 Palace Station. Then she went over to the Palms when it  
7 opened up in October of '01. She was the -- excuse me, she  
8 was the director of marketing. And again, as the director of  
9 marketing, she never received any specific training from the  
10 Palms and crowd control, or in policies and procedure to  
11 promote safety, there's a lot of "P's," at these promotional  
12 events.

13           She was in charge at the time of this incident of  
14 all advertising, club promotions, special events and  
15 entertainment at the Palms with a budget of one and a half to  
16 two million dollars.

17           And the reason that she moved the event from the Key  
18 West room, that larger room, into the sports bar area, or the  
19 Sports Book area was to reduce the expense in her promotional  
20 budget of holding that in the larger room, of having to put up  
21 TVs and do the remainder, even though that room had a much  
22 greater moving area or walking area or free area for people in  
23 the bar.

24           She'll testify, too, that the purpose of the Monday  
25 night football was simply, you know, to increase patronage.

1 You want people to get in there, you want them to spend, and  
2 then you want them to buy. And she'll tell you again that the  
3 promotion department had no separate safety manual. They had  
4 no staff meetings with respect to how do we run these events  
5 in a safe and reasonable way.

6           And most importantly, she'll admit to you that she  
7 thought that it was inappropriate for promotional items to be  
8 thrown, that it was beneath the standard of care for  
9 promotional items to be thrown, that they knew that it was a  
10 foreseeable risk of harm if promotional items -- and she  
11 alleges at one point in time she had a meeting specifically to  
12 say, promotional items should not be thrown with a woman that  
13 I talked to named Denise who is also there.

14           And Brandy Beavers' testimony will show you very  
15 clearly that her guideline was to throw these promotional  
16 devices, do anything that you need to do to get people up and  
17 moving.

18           In summary, with respect to what the evidence is  
19 going to show, the evidence is going to show that this was  
20 really avoidable, that the circumstances were unfortunate.  
21 That this is very foreseeable with respect to the injury, and  
22 the best evidence of that is the promotional director saying,  
23 yeah, it was foreseeable.

24           And they also changed that practice after this  
25 incident occurred where promotional items are no longer

1 allowed to be thrown. And Brandy Beavers will testify, too,  
2 that that didn't happen until after the incident with Enrique  
3 happened.

4 So where does that leave him? I mean, Enrique was  
5 innocent, standing, watching a football game with his  
6 significant other tucked into a bed after her surgery.

7 And if anyone was minding their own business, nobody  
8 standing like this, watching a television could be more  
9 minding their own business.

10 And he was struck through no fault of his own and  
11 has very significant injuries with apparently around \$500,000  
12 worth of past meds. And a life care plan that I'm going to  
13 put on to you through Terry Denene (phonetic) and Kathleen  
14 Hartman which they're adjusting it slightly right now for  
15 present dollar value, and K.C. had the opportunity to take  
16 their depositions.

17 And you'll hear about future economic damages and  
18 life care plan probably about in the million and a half range.  
19 We're backing out some of the treatment based upon some of the  
20 doctors' testimony, or anticipated testimony.

21 And we thank you for your time.

22 I'm going to try to direct this in as streamlined a  
23 way for you. We'll be calling Dr. Shifini, who will testify  
24 to his treatment of the knee and to the existence of RSD. Dr.  
25 Shifini will testify with respect also to his review, excuse

1 me, of the records which includes Dr. Miller and Dr.  
2 Ferrante's records who diagnosed RSD. So that's three  
3 doctors. Dr. Thalgott said RSD is a very reasonable  
4 diagnosis, so that's four doctors.

5 Dr. Kidwell will speak to you about not only the  
6 treatment that he rendered to Enrique, but just about how  
7 normal the course of his treatment was with respect of the  
8 evidencing of the neck and the back pain, how that change in  
9 mechanical gait almost invariably caused that.

10 And, in fact, he'll share with a study that he's  
11 aware of that if you put a lift in someone's shoe, in one  
12 shoe, a person with a heavy back and if it alters there gait,  
13 they're going to experience lumbar and cervical problems over  
14 time.

15 You'll hear from Terry Denene who will do the  
16 economic losses and discount to present dollar value the life  
17 care plan. Kathleen Hartman, who is the life care planner,  
18 she's a registered nurse who reviewed the medical records for  
19 the doctors' recommendations of the future medical care needs  
20 for Enrique.

21 And am I forgetting anybody, Rob? Rob doesn't think  
22 I'm forgetting anybody. So, Your Honor, I appreciate it and  
23 we'll get to it.

24 THE COURT: Thank you, Mr. Baker. Mr. Ward?

25 MR. BAKER: Your Honor, before K.C. starts, can Mr.

1 Rodriguez have permission to stand up at times and move  
2 around?

3 THE COURT: Yes, feel free to do so, sir.

4 THE DEFENDANT: Thank you, Your Honor.

5 THE COURT: If you need to leave the courtroom, feel  
6 free to do so as well.

7 THE DEFENDANT: Thank you, Your Honor.

8 THE COURT: Okay.

9 DEFENDANT'S OPENING STATEMENT

10 MR. WARD: Good morning, Your Honor.

11 THE COURT: Good morning, Mr. Ward.

12 MR. WARD: Your Honor, the -- the opening statement  
13 given by Mr. Baker and I'm -- I might add that in the event  
14 there's any confusion, I have a great deal of respect for Mr.  
15 Baker. He and I have been getting along just fine in this  
16 litigation. So this is not about kids fighting as sometimes  
17 trials appear to be.

18 The opening statement of Mr. Baker illustrates  
19 exactly what Your Honor's going to hear in this case. And  
20 what that is, is that there's a whole bunch of people that are  
21 going to get up and say things, they're going to get up and  
22 say things happened, and they're going to get up and say  
23 people found certain findings.

24 And when you get down to the bottom of that and  
25 strip away all the things and get to the base of it where it

1 all started, you find out that's not really what it was.  
2 That's not really what they said. That's not really what they  
3 found.

4           It -- this accident happened almost six years ago.  
5 Your Honor will hear that there are over 50 treatment  
6 providers. I've never seen a case with 50 treatment  
7 providers. There are more treatment providers than I can even  
8 remember.

9           On this particular night, we just heard about --  
10 about the condition of Mr. Rodriguez's significant other on  
11 the night of the incident. How they had come to Las Vegas to  
12 celebrate, all of which is good. Las Vegas is a great place  
13 to celebrate. Wouldn't it be nice if the whole world came to  
14 Las Vegas to celebrate, especially in these times.

15           THE COURT: I agree.

16           MR. BAKER: Stipulated.

17           MR. WARD: And to celebrate her recovery from  
18 surgery. And that there was a great relief and he had tucked  
19 her into bed and she insisted that he go out, and he was  
20 driving down the street and saw this sign and decided to go  
21 in.

22           I'm not sure whether the idea is to generate  
23 sympathy or what the idea is to generate, but it's interesting  
24 that when Mr. Rodriguez takes the stand, he will tell you that  
25 when he was deposed, he was asked where his -- why he had come

1 to Las Vegas and he said he came for a vacation. And when he  
2 was asked where his significant other was at the time of the  
3 accident, he said she was in another casino. He said she was  
4 over at Harrah's. He didn't say anything about tucking her  
5 into bed.

6 Now, maybe he did tuck her into bed and just didn't  
7 tell us about it. I don't know, I wasn't there. But he also  
8 told us that he'd been to the Palms for Monday night football  
9 six or seven times before, this was not the first time.

10 And he said that this was the first time that he'd  
11 ever seen anyone throw anything. In fact, he said he'd never  
12 been anywhere where anyone had ever thrown anything, at a  
13 sporting event, or anything else. He'd never even experienced  
14 anything like that.

15 Now, you will hear from our security expert who will  
16 tell you that there's nothing wrong with throwing things.  
17 People throw things all the time. They did it then, they  
18 still do it now. If you go to a basketball game, you go to a  
19 baseball game, you're going to find people throwing things,  
20 throwing things into the crowd.

21 Now, irrespective of that, the Palms will tell you  
22 that it was their policy that they didn't want things thrown  
23 into the crowd, and they thought that it was inappropriate to  
24 throw things into the crowd on this particular day. There's  
25 nothing wrong with someone wanting to have a more strict

1 policy than what normally is accepted by the general public,  
2 but they did. They did, nonetheless.

3           This was a very unusual accident, incident, however  
4 you choose to characterize it, in which a woman, according to  
5 Mr. Rodriguez -- again, I wasn't there -- Mr. Rodriguez said  
6 that a water bottle was laying on the floor. And a woman got  
7 up out of her chair and decided to dive for the water bottle.

8           And so according to Mr. Rodriguez, she wasn't  
9 trying to catch anything, it was something that was already  
10 laying on the floor and it was a few feet away from him. And  
11 said that she dove and ran into his knee. I don't dispute  
12 that. No one disputes that, that's what he said.

13           Now, what Mr. Rodriguez has told several of the  
14 treatment providers, and we'll tell you from the witness  
15 stand, is that one of things that was very upsetting that  
16 night is that -- is that he said the Palms told him that they  
17 would have people not sign statements. And he said the Palms  
18 tried to get him to sign some sort of document giving up any  
19 rights that he had, and he was very angry about that. And  
20 that's one of the things that caused so much anger for him.

21           Your Honor will have an opportunity to see that  
22 document, because it's been marked as an exhibit, and it will  
23 be admitted into evidence. That document is something that  
24 simply says I -- it's called a Waiver of Medical Treatment.  
25 "I, Enrique Rodriguez, acknowledge that I have been offered

1 medical attention for an injury or illness reported to have  
2 occurred on Palms Casino Resort Property. I further  
3 acknowledge that no offer of payment for personal expenses  
4 arising from this reported injury or illness has been made to  
5 me, either by the Palms Casino Resort, or by any agent or  
6 employee thereof." Mr. Rodriguez refused to sign that.

7 All that says is he was offered medical treatment.  
8 It's not a -- it's not anything that says that he can't make a  
9 claim against them, that he was trying to get them to keep  
10 from making a claim.

11 But the circumstances surrounding this become sort  
12 of interesting, because the Palms called for an ambulance for  
13 Mr. Rodriguez, because Mr. Rodriguez said he was hurt. And  
14 the ambulance arrived.

15 Now, before the ambulance arrived, Mr. Rodriguez had  
16 been in the Sports Book area and decided that he wanted to  
17 talk to the security people. So he started walking around  
18 trying to find the security desk, and ultimately found the  
19 security desk, which was at least 100 feet away.

20 And he talked to the people at the security desk  
21 about what they could do, and about getting names of the  
22 witnesses. And Your Honor will see if it becomes an issue,  
23 the names of witnesses were procured, witness statements were  
24 procured. And they essentially confirmed what happened.  
25 There's no dispute about what happened.

1           So then, when Mr. Rodriguez got back down to the  
2 area, the ambulance was there. The ambulance was there to  
3 take Mr. Rodriguez to the hospital. Mr. Rodriguez said he  
4 didn't want to go.

5           So that's why the document that says, medical  
6 treatment was offered to you, they asked him to sign. Simply  
7 to confirm that they had offered him medical treatment. He  
8 said he was injured and they offered him medical treatment.  
9 So Mr. Rodriguez said, no, he didn't want to go, so the  
10 ambulance left.

11           Now, Mr. Rodriguez then said later on that he  
12 decided he didn't need to go by ambulance because he would  
13 drive himself. The evidence will show that Mr. Rodriguez had  
14 a car with an automatic transmission, his injury was to his  
15 left knee, not his right knee.

16           Mr. Rodriguez, after talking to the people at the  
17 Palms, whoever it was he talked to that the Sports Book, then  
18 said that he couldn't drive to the hospital. So he called the  
19 ambulance again. So this time the ambulance came back.

20           And the evidence will show, Your Honor, that the  
21 record from the ambulance people that transported him will say  
22 that they came in, they brought the gurney in, Mr. Rodriguez  
23 got up out of his chair, walked over to where the gurney was,  
24 got onto the gurney, and they put him in the ambulance and  
25 they took him down to the treatment facility, to I believe

1 it's Springhill Hospital, Spring Valley Medical Center.

2 Spring Valley Medical Center, where Mr. Rodriguez  
3 was seen by Dr. Heaps. Now, you heard that Dr. Heaps made a  
4 diagnosis. You heard that in opening statement, that Dr.  
5 Heaps confirmed that Mr. Rodriguez had, and I'm not sure how  
6 it was characterized, damage to his left knee in some manner.

7 What you will see from the medical records of Spring  
8 Valley, and what you will hear from the testimony of Dr.  
9 Heaps, and what you will hear from the testimony of Mr.  
10 Rodriguez, are a few things that I'm going to digress for a  
11 moment and talk about, because I think they're significant.

12 The evidence will show that Mr. Rodriguez says he is  
13 in the business of real estate investments, and says that he's  
14 been in that business for a long time. And as Your Honor will  
15 see and hear from the medical providers, Mr. Rodriguez will  
16 testify that he worked as a -- as a real estate investor right  
17 up until the time of this accident. And as a result of this  
18 accident, he was unable to work as a real estate investor  
19 anymore.

20 What Mr. Rodriguez told us in the deposition, and I  
21 assume he'll tell us from the witness stand is that this  
22 accident which occurred November 22, 2004, that Mr. Rodriguez  
23 sold his last house in February of that year, February of  
24 2004. This is November. November is nine months after  
25 February.

1           Mr. Rodriguez didn't do anything with respect to  
2 real estate investing in the nine months between the time he  
3 sold the last house and the time he sold -- and the time this  
4 accident occurred.

5           Mr. Rodriguez will tell you that he didn't have any  
6 particular reason for not doing that. Mr. Rodriguez will tell  
7 you that ever since the day of this accident, he's been unable  
8 to do anything with respect to his business of buying and  
9 selling single family dwellings.

10           He will tell you he didn't do a lot of the painting,  
11 any of the big work. He -- to the extent that needed to be  
12 done, he generally hired somebody. He'll tell you that  
13 sometimes he bought and sold houses and didn't do anything,  
14 didn't do any work at all.

15           So there's this interesting issue of how it is that  
16 Mr. Rodriguez, who lives in California, is able to drive back  
17 and forth to Las Vegas to get medical treatment, and yet he's  
18 unable to do anything with respect to buying and selling  
19 houses for the last, now almost seven years, or anything else  
20 for that matter.

21           Mr. Rodriguez will tell you that, that he was in  
22 good shape and enjoying life the day of this accident and that  
23 as a result of this accident, he's gained weight. And as a  
24 result of gaining weight, he's -- that has caused further  
25 medical problems.

1           What Dr. Heaps will tell you from the Spring Valley  
2 Medical Records is that on the night of this incident, when  
3 Mr. Rodriguez presented himself at Spring Valley Medical  
4 Center, that he was five feet six inches tall, which is the  
5 same height I am, and he weighed 225 pounds.

6           So the memory with respect to when the weight was  
7 gained seems to have moved a little bit over the last six  
8 years. I cite that as an example, because what Your Honor's  
9 going to hear throughout the course of the trial is that a  
10 whole bunch has moved over the years and the conclusionary  
11 statements that are made in many instances are not supported  
12 by the evidence.

13           Now, so what did Dr. Heaps find on that night?  
14 Here's what Dr. Heaps found. Dr. Heaps had a patient who came  
15 to him and said, my knee hurts, explained how the accident  
16 happened and said, my knee hurts. Dr. Heaps examined him and  
17 drew a conclusion, sprained left knee.

18           I submit to you, any one of us could walk into our  
19 doctor right now and say to the doctor I just fell and hurt  
20 myself and my knee really hurts, and have the doctor examine  
21 us and find nothing. And the doctor would write down,  
22 sprained knee. Doctors are not in the habit of  
23 cross-examining patients and telling patients that what  
24 they're saying isn't true.

25           So Dr. Heaps did write down in his medical chart

1 that Mr. Rodriguez had a sprained left knee. What did he base  
2 that on? He based it on Mr. Rodriguez telling him now the  
3 accident happened.

4 Now, did he do a physical examination? Yes. He did  
5 a physical examination and just like any other emergency room  
6 doctor, he not only examined the left knee, he examined his  
7 whole body. What did he find? Nothing. He didn't find  
8 anything.

9 When he actually did the examination as emergency  
10 rooms often are, it was a little after midnight, I think it  
11 was 12:30, 12:45, something like that. This accident happened  
12 somewhere in the neighborhood of 7:00 o'clock. So we're  
13 talking about a period of somewhere around six hours after the  
14 happening of this accident is the time that the examination  
15 took place.

16 Now, why is that significant? The reason that's  
17 significant is because if you have an injury of any  
18 significance to your knee, if Your Honor's ever had one, or  
19 known someone who's had one, one of the very first things that  
20 happens is your knee swells up. You get fluid on your knee.

21 Now, you can have an injury. You can bang your knee  
22 without having fluid, but that is one of the manner in which  
23 physicians determine the severity of the injury. If they --  
24 because they may or may not find other things, but they may  
25 find fluid.

1 MR. BAKER: Your Honor, I'm sorry to interrupt but  
2 this is argument. I know the Court gave me some laxity, but  
3 I'm not really hearing what the evidence is going to talk  
4 about and this is really pure argument coming from no witness.

5 THE COURT: Very well. Please proceed with that in  
6 mind, Mr. Ward.

7 MR. WARD: Yes, Your Honor. That -- there will be  
8 testimony from the doctor that it is significant that the  
9 patient did not have any fluid on his knee.

10 And so counsel, Mr. Baker, got up and told you that  
11 Dr. Heaps found that there was an injury, and what I'm simply  
12 saying is that I don't think Dr. Heaps will say that. I think  
13 Dr. Heaps will say that he wrote down, sprained knee, but he  
14 didn't find anything.

15 And that he checked, and he checked his neck and he  
16 checked his back and he checked his knee and he checked  
17 everything else and he didn't find anything.

18 Now, what happens next? What happens next is that  
19 Mr. Rodriguez gets back to the casino and I'm not sure how,  
20 because we didn't ask him that in the deposition, but he does  
21 testify that when he got back to the casino, he got his car  
22 and drove the car back to wherever it was he was staying that  
23 night.

24 Then he got back to California. And then he went  
25 back and forth from California to Las Vegas for lawyers,

1 hiring the lawyers, Mr. Baker said, and for medical treatment.

2 Now, one of the things that Mr. Baker asked Mr.  
3 Heaps that you will hear when Mr. Heaps deposition was read is  
4 a question about did -- did Dr. Heaps do an MRI on the night  
5 of the accident because the MRI, as he asked him, is the gold  
6 standard as to find out whether in fact there is an injury.  
7 Dr. Heaps will testify that, no, he didn't do that.

8 Now, Mr. Rodriguez started seeing doctors. And when  
9 he started seeing doctors, the one thing that you're going to  
10 hear over and over again from all of these doctors is that  
11 most of them didn't find anything wrong in the short run.

12 Now, when Mr. Rodriguez was seen by Dr. Heaps on the  
13 night of the accident, and when he was examined by the  
14 ambulance attendants on the night of the accident, he did not  
15 complain about anything, except his knee. He didn't have neck  
16 problems, he didn't have back problems, he didn't have hip  
17 problems, he didn't have thigh problems. He complained about  
18 pain in his knee.

19 He went to physical therapy, and this is the first  
20 of many. Physical therapy didn't help him any. He went to  
21 see Dr. Nork, Dr. Nork didn't help him any. Saw him over and  
22 over again, didn't find very much, if anything, didn't help  
23 him.

24 Now, this is where frankly I would have objected to  
25 what Mr. Baker said, but since we're -- don't have a jury here

1 and Mr. Baker said it, I want to clarify it, because --  
2 because what Mr. Baker said was that -- was that Mr. Rodriguez  
3 had another lawyer, and that when they were trying to schedule  
4 surgery with Dr. Shannon -- I think I heard him correctly and  
5 if I misheard and misquote, I apologize to both Mr. Baker and  
6 to the Court. But I believe he said something like they  
7 needed to get surgery by Dr. Shannon and they couldn't get the  
8 surgery done, and so Mr. Baker was able to help him make  
9 arrangements to do that, but that's why the surgery didn't  
10 take place until far later.

11 Well, I submit to Your Honor the evidence is going  
12 to show something a little bit different, because here's what  
13 the evidence is going to show. The evidence is going to show  
14 that, among other things, that Mr. Rodriguez, and pretty much  
15 everyone else has been using the phraseology that he had the  
16 accident at the Palms on the night in question, and this woman  
17 dove into him and blew out his knee. I hear blew out his knee  
18 over and over and over again, blew out his knee. I know  
19 that's a non-medical term, but that's the terminology that  
20 suggests that he has a significant injury.

21 Now, Your Honor, on January 28 of 2005, we're  
22 talking two months post-accident. This was at a period of  
23 time after Dr. Heaps didn't find any swelling, after Dr. Nork  
24 couldn't find much of anything wrong, after he wasn't  
25 responding to the physical therapy that he was getting, and he

1 continued to complain of pain and continued to complain of  
2 pain. And so what happens, as Your Honor will hear from the  
3 treating physicians, is if you complain of pain, people will  
4 see and people do diagnostic things.

5           So January 28 of 2005, he had an MRI of the left  
6 knee. That MRI was read by Adam Atune (phonetic), D.O., which  
7 stands for osteopath. There are so many names, and Your Honor  
8 may be familiar with these. I want to just run through them  
9 briefly, because it will come out to offer an explanation.

10           An osteopath is a physician who is -- who comes at  
11 things slightly different from your typical medical doctor,  
12 but has similar kinds of credentials, and are authorized to  
13 prescribe drugs or authorized to do surgery, authorized to do  
14 many of the things that regular doctors do.

15           An osteopath is not a chiropractor. A chiropractor  
16 does -- doesn't prescribe restrictive drugs. Chiropractors  
17 don't do surgery, they don't do other kinds of things. I'm  
18 not suggesting that one's good and one's bad, I'm just talking  
19 about the difference in the level of education for the people.

20           Now, Dr. Atune not only did an MRI, but read the MRI  
21 with the images being viewed on a digital workstation with a  
22 multi-planar reformatted, and three dimensional reconstructive  
23 sequences performed by the radiologist at the time of  
24 interpretation as needed.

25           So Dr. Atune read this MRI with special equipment,

1 you'll see the bills, he charge \$550 extra for reading it  
2 under this special equipment. He read this MRI of January 28,  
3 2005, two months after the accident, and here's what you're  
4 going to hear are his findings.

5           "The distal femur is anatomically aligned with the  
6 proximal tibia. The cortical margins appear grossly well  
7 demarcated without disruptions. The marrow signal  
8 characteristics are homogeneous. Both menisci show gross,  
9 normal morphological characteristics. The anterior and  
10 posterior cruciate ligaments, the medial and lateral  
11 collateral ligaments, the patella and quadriceps tendons  
12 remain taut. The physiologic amount of intra articular fluid  
13 is present," but the doctor will explain is that there's a  
14 certain amount of fluid supposed to be on the knee, and that  
15 amount of fluid was present. "The visualized extra capsular  
16 soft tissues are unremarkable. Impression, there is no  
17 evidence of acute internal derangement."

18           That was the MRI two months after the accident, yet  
19 we continue to hear that he blew out his knee. We had this  
20 accident, blew out his knee, ruined his life. That's what we  
21 hear over and over again.

22           Now, the reason I bring this up with respect to the  
23 comments made by Mr. Baker, is that, what you will see is that  
24 that report from that doctor was sent to a law firm. And what  
25 you'll see is that's the last time that law firm was present.

1 What you will see is that the Benson Bertoldo firm appears on  
2 an itemized statement from February of 2004, not with respect  
3 to the involvement of Dr. Shannon, but with respect to another  
4 read.

5 Mr. Rodriguez had apparently been seeing a  
6 chiropractor named Eric Campbell of the Wellness Group in  
7 California. And so Dr. Campbell apparently made arrangements  
8 to have the MRI sent to another chiropractor and have it read  
9 by the chiropractor.

10 And that read, and that report, which is the first  
11 involvement of the new law firm, looks at exactly the same  
12 MRI, except this chiropractor doesn't look at it under the  
13 high resolution viewer that the prior -- that the prior  
14 osteopath read it. And what a surprise, he found lots of  
15 things that the other guy didn't find.

16 But even what he found is limited, because what he  
17 says, "There appears to be thickening, intermediate signal  
18 change and equivocal redundancy/laxity of the interior  
19 cruciate ligament. It's noteworthy, however, that there are  
20 intact fibers running the entire course of the anterior  
21 cruciate ligament. The posterior cruciate ligament is  
22 completely intact and normal. There is a slight amount of  
23 intermediate -- a slight amount of intermediate change in the  
24 posterior horn of the medial meniscus suggested for early  
25 degenerative change. The remaining menisci are normal."

1           And his impressions are, "Some degree of thickening  
2 intermediate signal change and equivocal redundancy/laxity of  
3 the anterior cruciate ligament consistent with a possible  
4 partial tear and/or early mucoid degeneration. Early grade 1  
5 degeneration of the posterior horn of the medial meniscus. No  
6 evidence of joint effusion," meaning, fluid, "or fracture."

7           MR. BAKER: Your Honor, again, I know -- I know that  
8 this is a bench trial, but we're testifying on things that  
9 aren't in evidence. I -- and that's my objection.

10          THE COURT: Noted for the record. Please proceed.

11          MR. WARD: Yeah. This will all be introduced  
12 through our experts, Your Honor, if it doesn't come out with  
13 the other experts before.

14          Now, the significance of that is that we have two  
15 very early diagnostic things that are actually only one  
16 diagnostic thing.

17          We have a MRI that is done and read under a high  
18 resolution reader, which finds everything's normal. And we  
19 have a plaintiff, who sustains some sort of an injury on the  
20 night of November 22, 2004.

21          The question, the serious question, aside from the  
22 liability issues, are how serious was that injury. And I  
23 submit to Your Honor that all of the evidence that you're  
24 going to hear is that that injury wasn't severe at all, and it  
25 was one of those things that people get better. You know, we

1 all do things, like bang our elbow on something and we can  
2 have pain, but it doesn't mean we have problems the rest of  
3 our life, that one thing leads to another leads to another  
4 leads to another.

5 Now, somewhere along the line, Dr. Shannon does  
6 surgery. You're going to hear about Dr. Shannon's surgery,  
7 but Dr. Shannon's surgery is long after this MRI.

8 And what you're going to hear from all of these  
9 orthopedists is that if you want to have knee problems, I'll  
10 guarantee you, one way you can have knee problems, is gain 75  
11 to 100 pounds over what you ought to be weighing and start  
12 walking around, because you're going to develop knee problems  
13 pretty soon.

14 And Mr. Rodriguez already weighed 75 pounds over his  
15 normal body weight at the time of this accident. The doctors  
16 will tell you that degenerative changes that existed weren't  
17 caused by an accident that happened two months before. And  
18 there's some question as even the extent of those degenerative  
19 changes.

20 Your Honor, we're going to be here awhile, and  
21 there's all these treaters and all this testimony. I'm not  
22 going to go through every one because Your Honor's going to  
23 hear it.

24 But what I submit that Your Honor will hear is that  
25 if there is something, such as the MRI, that is one of the few

1 objective ways to, in fact, check whether somebody has an  
2 injury, add that to the examination by the treating doctor on  
3 the night of the accident, some six hours after the accident,  
4 that there was no swelling, no fluid on his knee.

5           Add this to someone who you're going to hear about  
6 wage loss claims, you're going to hear someone who can't seem  
7 to find any of the records to support his wage loss claims.  
8 You're going to hear a vocational rehabilitation expert, the  
9 economist, who's going to come in and give you a large  
10 projected wage loss, and he's going to base it all on things  
11 that are not supported and things that are sketchy and things  
12 that don't support the claims that are made.

13           And so what Your Honor will have the opportunity to  
14 do, since the jury's not here to do it, Your Honor will have a  
15 opportunity to do it is to cut through the statements, the  
16 statement that the guy blew out his knee on the night of the  
17 accident, to take a look at what actually happened, to take a  
18 look at what actually is in the records, what actually is in  
19 the testimony, and what actually comes across has happened.

20           And I submit that what Your Honor will see is that  
21 there will not be the evidence to support that there was any  
22 injury on the night of this accident that caused all of the  
23 problems that Mr. Rodriguez claims.

24           Thank you, Your Honor.

25           THE COURT: Thank you, Mr. Ward.

1           Let's take about a five minute break before we hear  
2 from the first witness.

3           MR. BAKER: Thank you, Your Honor.

4           (Court recess from 10:15 a.m. to 10:31 a.m.)

5           THE COURT: Please be seated.

6           Okay, first witness, Mr. Baker?

7           MR. BAKER: Thank you, Your Honor. One quick sec,  
8 Your Honor.

9           THE COURT: Sure, take your time.

10                         (Pause in the proceedings)

11           MR. BAKER: Just as a little housekeeping, Your  
12 Honor, may I approach?

13           THE COURT: Sure.

14           MR. BAKER: Your Honor, I'd like to show the Court  
15 we have filed an Affidavit of Non-Service upon Nathan Heaps,  
16 M.D., who is out of the state and unavailable to testify. It  
17 was my intention to read his deposition pursuant to NRC  
18 32(b).

19           THE COURT: Okay. You're moving for the admission  
20 of this, right?

21           MR. BAKER: Yes, Your Honor.

22           THE COURT: Very well; so ordered.

23           MR. BAKER: Thank you, Your Honor. Your Honor, I'd  
24 like to call Rob Cardenas Heaps to the stand, please.

25           THE COURT: Mr. Cardenas, please come forward to the

1 witness box.

2 MR. BAKER: And, Your Honor, I believe I deposited a  
3 copy of Dr. Heaps' deposition for you. Is that it?

4 THE COURT: Thank you. Thank you, Mr. Baker.

5 MR. BAKER: If it pleases the Court. Oh, you have  
6 it.

7 THE COURT: Thank you, I have one.

8 MR. BAKER: And K.C. has the original sealed  
9 version, which he says he's going to have transferred to the  
10 Court.

11 MR. WARD: Your Honor, I apologize to the Court. We  
12 sent the -- all the stuff over and it wasn't available for us  
13 to pick up, and we found out it has been delivered but there  
14 was some confusion. But our hope at the end of the day we'll  
15 be able to get that and have it to the Court tomorrow morning.

16 THE COURT: You don't have any objection to reading  
17 the copy of the depo, do you, Mr. Ward?

18 MR. WARD: Absolutely not, Your Honor. No, not at  
19 all.

20 THE COURT: All right. Then we need to swear this  
21 witness in for the deposition testimony.

22 THE CLERK: Yes, Your Honor. Please stand, raise  
23 your right hand.

24 ROBERT S. CARDENAS, SWORN, AS READER  
25 OF DEPOSITION OF DR. NATHAN HEAPS, M.D.

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THE CLERK: Thank you.

THE COURT: So Mr. Cardenas is reading for Nathan Heaps, M.D.

MR. BAKER: Correct, Your Honor. And Mr. Ward and I had a discussion off the record. It was my attention at first just to read the cross-examination, which was my examination of the doctor. He said that he would then read the other part, so I'm just going to read it all into evidence.

THE COURT: Any problem with that, Mr. Ward?

MR. WARD: No, Your Honor.

THE COURT: Okay. Very well.

MR. BAKER: For right now, I am assuming the role of Marsha Stephenson.

THE COURT: Well, it will be a stretch, but okay. I'll try -- I'll try to put myself there, okay.

MR. BAKER: Ms. Stephenson needs a shave, I think.

THE COURT: Here's the thing. By the way, I appreciate you reading this in context, especially since this is a bench trial. So, thank you.

MR. BAKER: You're welcome, Your Honor.

THE COURT: Please proceed.

(Deposition read as follows:)

NATHAN HEAPS, M.D.

DEPOSITION READ BY ROBERT S. CARDENAS

1 BY MR. BAKER:

2 Q Would you please state your full name for the  
3 record?

4 A It's Nathan Dale Heaps.

5 Q Dr. Heaps, have you ever had your deposition taken  
6 before?

7 A Once.

8 Q Okay. How long ago was that?

9 A Approximately one year.

10 Q Okay. Is that in connection with your treatment of  
11 a person?

12 A It was as an expert witness.

13 Q Okay. You were retained by one side or the other in  
14 that case?

15 A Correct.

16 Q And do you recall which side retained you?

17 A It was the plaintiff's side.

18 Q Do you want me to go through the deposition  
19 admonitions or do you feel comfortable with the process?

20 A If you would go through them, actually I would  
21 prefer that.

22 Q You understand that your testimony is under oath  
23 today?

24 A Yes.

25 Q And we'll be asking you questions with respect to a

1 patient that you treated, Enrique Rodriguez, in November of  
2 2004. And we -- I will attach for the record a copy of the  
3 medical records from the Spring Valley Medical Center which  
4 reflect your treatment to Mr. Rodriguez. We'll be asking you  
5 some questions, a little bit about that treatment that -- that  
6 you gave to him in 2004.

7 All of our questions and answers are being put on  
8 the record and after the deposition, the Court Reporter will  
9 put that information into a booklet form and you can look at  
10 the questions and answers.

11 If you have any changes to any of your responses,  
12 you can make those changes at the time you have a chance to  
13 review the transcript. Not that it will probably apply in  
14 this case, but if you make any substantive changes to your  
15 deposition, I, or other counsel can comment on these changes  
16 if the case proceeds to a trial or whatever formal proceeding.

17 Please answer all the questions audibly, yes, no,  
18 nods, shrugs, things like that, because everything needs to be  
19 taken down by the Court Reporter, okay?

20 A Okay.

21 Q If you don't understand a question, please let me  
22 know. And if you answered the question, we're going to assume  
23 that you understood the question. I don't anticipate this to  
24 take very long, and from my review of your records, you saw  
25 this individual, Mr. Rodriguez, one time. Mr. Rodriguez,

1 however, is suing my client, the Fiesta Palms, Palms Casino  
2 and Resort with respect to the injuries that you saw him for  
3 in November of 2004.

4 MR. BAKER: Can we go off the record for a second.

5 MS. STEPHENSON: Yes.

6 (A discussion is held off the record.)

7 Q (By Mr. Baker) Do you have any questions?

8 A No.

9 Q Okay. Before we get into the treatment of Mr.  
10 Rodriguez, give me a little of your background. Obviously,  
11 you're a medical doctor. Tell me where you graduated from  
12 college, medical school and things like that.

13 A I did my undergraduate education at the University  
14 of Utah and double majored in biology and chemistry. I have  
15 degrees in both, Bachelor's of Science degrees in both. I  
16 did --

17 Q What year was that, Doctor?

18 A That was 1992 to 1997.

19 Q Okay. And then what?

20 A And from 1997 to 2001, I was in medical school at  
21 the University of Utah, as well. In 2001, I received my M.D.  
22 degree. From 2001 to 2004, I did specialized training in  
23 emergency medicine at the University of Pittsburgh in  
24 Pennsylvania. In 2004, when I completed my residency, I then  
25 moved out and began working here in Las Vegas for Doctor's

1 Emergency Medical Services, and our group here staffs all five  
2 of the Valley hospital emergency departments.

3 Q And that includes --

4 (Stop reading of deposition)

5 MR. WARD: May I interrupt one second?

6 MR. BAKER: Sure.

7 MR. WARD: I apologize. With Dr. Heaps on the  
8 witness stand, we would have been offering the exhibits to his  
9 deposition into evidence. I would stipulate that those can be  
10 received into evidence along with the testimony.

11 THE COURT: Mr. Baker?

12 MR. BAKER: Yes, Your Honor. I would -- thank you,  
13 K.C., I would love that. And for the record, then, I move to  
14 admit what's been marked as Plaintiff's Exhibits Number 3, 4  
15 and 5.

16 THE COURT: Three, four and five?

17 MR. BAKER: Right. Which respectively, Your Honor,  
18 it's the medical records and billing statement for Spring  
19 Valley Hospital Medical Center which is number 3; medical  
20 records and billing statements from Desert Radiologist which  
21 is number 4; and 5 is medical records and billing statement  
22 from Shadow Emergency Physicians, which is number 5.

23 THE COURT: Very well, they will be admitted,  
24 Plaintiff's 3, 4 and 5.

25 (Exhibit 3, 4 and 5 are received into evidence)

1 MR. BAKER: Who was that, K.C.?

2 MR. WARD: I'm sorry, I'm --

3 MR. BAKER: Okay. We were talking about -- I found  
4 it.

5 MR. BAKER: Is the next question --

6 MR. CARDENAS: It's line 4.

7 (Resume reading of deposition)

8 BY MR. BAKER:

9 Q What was that year, Doctor?

10 A It was at --

11 Q Page 7, line 17?

12 A No, page 8, line 4.

13 Q Thank you. And that would be included, that's true.  
14 Spring Valley Medical Center?

15 A That's correct.

16 Q When did you -- well, you said you had went through  
17 residency through -- until 2004?

18 A Correct.

19 Q When did you finish that residency in 2004?

20 A I believe it was -- as I recall, it was either May  
21 or June of 2004.

22 Q And then you came to Las Vegas?

23 A Correct.

24 Q Okay. Because it looks like you saw Mr. Rodriguez  
25 in November of 2004.

1 A That's correct.

2 Q So how long had you been employed with Doctor's  
3 Emergency Medical Services in November of 2004?

4 A I believe my start date with the group here in Las  
5 Vegas was September 1st of 2004. So almost three months.

6 Q Okay. Are you a board certified in emergency  
7 medicine?

8 A I am.

9 Q When did you get that board certification?

10 A The -- I believe I completed the oral board exam at  
11 the beginning of 2005.

12 Q And what about the written portion?

13 A That was completed, if I -- if my memory serves me  
14 correctly, roughly November -- it may have been November of  
15 2004.

16 Q And you're currently board certified in emergency  
17 medicine?

18 A That is correct.

19 Q And have you been with Doctor's Emergency Medical  
20 Services since September 2004 to present?

21 A I have.

22 Q And are you still seeing patients at Spring Valley  
23 Medical Center?

24 A Lately I've worked primarily at Centennial, Valley  
25 and Summerlin. So it has been a while that I have -- since

1 I've worked at Spring Valley. I am still on the staff at  
2 Spring Valley though.

3 Q Okay. And I think you were provided before the  
4 deposition today some records from Spring Valley Medical  
5 Center which I'm going to identify as SPMC for Spring Valley  
6 Medical Center 0001 through 11 and five 0's in between, if  
7 that makes a difference. Do you have a copy? Actually, it  
8 looks like those aren't Bates labeled in front of you.

9 A That are not what?

10 Q They don't have Bates numbers at the bottom on the  
11 side.

12 A It looks actually like they may --

13 Q Oh, just --

14 A -- have been cut off.

15 Q -- got cut off.

16 A I think they were cut off in the copying it looks  
17 like.

18 MR. BAKER: Why don't you let him use your copy and  
19 attach the same.

20 MS. STEPHENSON: I was just going to make sure that  
21 we -- it was the same number of pages here.

22 MR. BAKER: So the University of Utah?

23 THE WITNESS: Uh-huh.

24 MR. BAKER: The witness -- oh, go ahead.

25 THE WITNESS: Uh-huh.

1 MR. BAKER: Are you getting tired of being teased  
2 about whole fusion?

3 THE WITNESS: No, no. I haven't actually heard that  
4 term for a long time.

5 MS. STEPHENSON: I'm going to mark this copy and  
6 attach that as an exhibit to the deposition and --

7 BY MR. BAKER:

8 Q And, Doctor, did you have a chance to briefly look  
9 at these records with respect to the treatment of Mr.  
10 Rodriguez on November 22nd, 2004, at Spring Valley?

11 A Yes, I did.

12 Q And was it your understanding in reviewing of these  
13 records that Mr. Rodriguez arrived by ambulance?

14 A I believe so.

15 Q And before I go on, it's my understanding that you  
16 have no specific recollection of having treated Mr. Rodriguez;  
17 is that accurate?

18 A That is correct. I don't independently remember --  
19 remember treating him, but on review of the records, these are  
20 clearly in my records and he was a patient that I took care.

21 Q Back in 2004, if you could just generally go through  
22 with me about the protocol, if someone comes in by ambulance;  
23 who would they see first and how would they get to you?

24 A They're -- they are triaged. Whether they come in  
25 by their own vehicle or their own mode of transportation or by

1 triage, they are triaged. We have a triage nurse who  
2 determines the level of acuity and urgent -- and the urgency  
3 with which they need to be seen.

4           So, for instance, patients with strokes or heart  
5 attacks or cardiac arrests obviously are seen much more  
6 rapidly than, you know, than stable patients with muscular  
7 skeletal injuries and things like that.

8           Q     And it looks like from the record here, at least on  
9 Bates labeled page 3, that Janice Owen, she was the triage  
10 nurse? At least from looking at the records? Yeah, you know,  
11 it would actually be easier to look at this copy. It's got  
12 the page numbers.

13          A     Okay.

14          Q     The bottom has got the signature of Janice Owen?

15          A     It looks like the triage signature is -- I'm not  
16 sure if that wasn't Erin or someone else that actually saw  
17 them. Janice Owen, I believe, was the primary nurse taking  
18 care of the patient once the patient was brought into the ER  
19 and cared for. But I think that another nurse did the triage.  
20 I don't recognize that signature, so I'm not sure who it was.

21          Q     Now --

22                                 (Stop reading of deposition)

23           MR. WARD: Can I interrupt one second? That -- my  
24 assumption is that that was a Court Reporter typo and she put  
25 Erin, E-r-i-n, when she meant RN, registered nurse.

1 THE COURT: Oh.

2 MR. CARDENAS: Oh.

3 THE COURT: That would make sense.

4 MR. CARDENAS: There, okay.

5 THE COURT: Does that make sense, Mr. Baker? Or is  
6 there somebody named Erin?

7 MR. BAKER: I'm not seeing where you're talking  
8 about.

9 MR. CARDENAS: Line 17.

10 MR. BAKER: Yes, that makes sense.

11 THE COURT: Thank you.

12 MR. WARD: You're welcome.

13 (Resume reading of deposition)

14 BY MR. BAKER:

15 Q Does that -- what does that category signify, if you  
16 know?

17 A Well, level -- you know, higher level patients, it's  
18 based -- it based on a level 1 through 5 triage system. So  
19 the level 1 and 2 patients are the sickest patients and the  
20 most urgent. Five are the least urgent. And it looks like  
21 they triaged Mr. Rodriguez as kind of right in the middle.

22 (Stop reading of deposition)

23 MR. BAKER: For the Court, did I skip page 12, lines  
24 23 through 25 when I was reading?

25 MR. CARDENAS: Yes.

1 THE COURT: I think so.

2 MR. BAKER: Would you like me to read them into the  
3 record?

4 THE COURT: Sure.

5 (Resume reading of deposition)

6 BY MR. BAKER:

7 Q Now, also looking at the same page, 3, there's a  
8 category up at the top left and there's a 3 in there?

9 A Correct.

10 Q Does that -- what does that category signify, if you  
11 know?

12 A Well, level -- you know, higher level patients, it's  
13 based -- it's based on a level 1 through 5 triage system. So  
14 the level 1 and 2 patients are the sickest patients and the  
15 most urgent. Five are the least urgent. And it looks like  
16 they triaged Mr. Rodriguez as kind of right in the middle.

17 Q And that was the triage category, so to speak, would  
18 have been determined by the nurses in the triage?

19 A Correct, the triage nurse, exactly.

20 Q So then, just generally again, tell me how the  
21 patient gets -- or how the nurse determines, if the nurse  
22 determines it, how that patient goes to actually see the  
23 doctor.

24 A Every patient will see -- will ultimately be seen by  
25 a physician, either a physician or a mid-level provider. In

1 our group, actually, even if they're seen by a mid-level  
2 provider, they're still seen and contacted by a physician  
3 during their treatment.

4 Q Would the nurse typically take X-rays? Or would  
5 those X-rays be ordered by you as the physician?

6 A Generally -- generally the X-rays are ordered by the  
7 physician and at this point in time, we have some standing  
8 protocols. So sometimes, patients will have X-rays that are  
9 protocolled ordered by the nurse under our discretion  
10 essentially. But at this time, at Spring Valley Hospital,  
11 there were no protocols in place and so therefore this -- this  
12 X-ray would have been ordered by me generally.

13 Q If you'd look again on page 3, it says "Left" on the  
14 right, kind of upper top, "Left knee X-ray." So that's --  
15 would that be your writing?

16 A This is not my writing, but often times I will tell  
17 the nurse go ahead and order an X-ray, go ahead and get an X-  
18 ray on that patient. So I'm verbally giving the order and  
19 then the nurse will write that in.

20 Q And you can verbally give that order even if you  
21 hadn't actually examined the patient yourself?

22 A Correct. I could have even done a quick purview of  
23 the patient or seen the patient rolling by and then the triage  
24 nurse may have come to me and say, this person injured their  
25 left knee, there's no other injuries. Then I would tell that

1 nurse, okay, let's go ahead and get an X-ray.

2 Q Now at least in looking at page 3, apparently the  
3 only complaint that the triage nurse noted was left knee pain,  
4 correct?

5 A Correct.

6 Q And hyperextension is also written there?

7 A Correct.

8 Q And what's hyperextension basically?

9 A Hyperextension, if you think of extension as  
10 straightening of the leg at the knee, hyperextension is when  
11 it straightens further than it actually should. And usually  
12 that's associated with, you know, injuries to the knee. So  
13 what she's doing is she's stating the patient has left knee  
14 pain and the mechanism of the injury is the hyperextension.

15 Q Would the nurse typically put down any information  
16 as to what the patient relayed to her, or how they felt their  
17 injury occurred?

18 A Often not unless they feel like it's -- it's really  
19 relevant in understanding what their chief complaint is.

20 Q And actually, let's go back to page 2 before we go  
21 on. The copy, it looks like there was something sticky over a  
22 portion of that. Would there be anything in the spinal  
23 diagnosis section, page 2, that we're missing?

24 A We generally don't use -- from a physician's  
25 standpoint, we generally don't use this sheet for identifying

1 any information. So I don't -- I don't -- as far as I know,  
2 there would not be anything unless there was some hospital-  
3 generated information that was included in there.

4 Q Fair enough. Let's go back to page 3 again. Would  
5 all of this be filled out by one of the nurses in the triage  
6 department?

7 A Generally -- generally, the chief complaint, the  
8 insurance information, the current medications, all of that is  
9 filled out by the triage nurse. At this time -- we've changed  
10 our form since then, but at this time, you can see under  
11 medications and interventions, that is my handwriting.

12 Q Okay.

13 A So those are orders that I placed for this patient  
14 myself and then under diagnosis, that is my handwriting and  
15 then obviously my signature at the bottom.

16 Q Okay. Now, does triage, do they usually take  
17 someone's height and weight or just ask them?

18 A They generally do. They generally do the vitals as  
19 a whole. They will take height and weight at times. It's --  
20 to be honest, it can go either way. Sometimes they'll  
21 physically measure. Usually, with children, they don't  
22 physically measure, because we base our medication dosing on  
23 weights, so we want very specific weights. But honest,  
24 honestly, most of the time with adults, I think they just ask  
25 them their height and weight.

1 Q So basically the -- and we've got it -- looks like  
2 vital information over on the upper right-hand corner. The  
3 triage nurses would take the vitals of the patient no matter  
4 what their specific complaint is?

5 A Correct.

6 Q And all of this looks normal. This is normal  
7 basically?

8 A Yeah. The vitals at the -- at that time were all  
9 normal, within normal range, yes.

10 Q Do you see anything else on this particular page 3  
11 that the triage nurse would have done that we haven't already  
12 talked about?

13 A Nothing -- nothing in particular, no.

14 Q Okay.

15 A And again, the -- you know, the purpose of the  
16 triage nurse really is to determine how sick they are, how  
17 quickly they need to be seen.

18 Q And for the most part, this patient was kind of in  
19 the middle of the scale?

20 A Uh-huh.

21 Q So, then, at this point, once -- once this portion  
22 of the chart's been filled out, at least the left portion of  
23 the chart's been filled out by the triage nurse, and then it's  
24 just a matter of time when you're able to see -- you, as the  
25 emergency doctor, is able to see the patient?

1           A     Exactly.  And some of that's determined by when  
2 there is room in the emergency department available.  So it  
3 looks like -- you know, my guess is, in reviewing the chart,  
4 that he was probably seen initially by the triage nurse as he  
5 came in by ambulance.  And then possibly placed out in the  
6 waiting room until a bed became available in the emergency  
7 department for -- for him to be seen.

8           Q     Okay.  Now, if the patient expressed any other  
9 complaints on other body parts on his body, you would expect  
10 that to be relayed here by the nurses?

11          A     Correct, correct.

12                                 (Stop reading of deposition)

13          MR. BAKER:  Did I read that correctly?

14          THE COURT:  No, but it's quite all right.  I  
15 followed your --

16          MR. BAKER:  All right.

17          THE COURT:  -- followed the thought.

18                                 (Resume reading of deposition)

19 BY MR. BAKER:

20          Q     And it looked like the nurse circled that he was in  
21 moderate pain then?

22          A     Yes.

23          Q     Okay.  And obviously that's a suggestive --

24          A     Exactly.  It's a pain scale.

25          Q     -- indicator?

1           A     It's a verbal pain scale. Generally, they ask the  
2 patient on a scale of 1 to 10, how bad is your pain with 10  
3 being the worse pain you've ever experienced in your life and  
4 then they generally state a number.

5           Q     Okay. So at that point, the patient's waiting,  
6 then, someplace for you?

7           A     Exactly.

8           Q     And then we go back to page 4 and this actually is,  
9 most of page 4, filled out by you or is also part of your  
10 triage nurse's report?

11          A     This is -- this is all filled out by the -- it looks  
12 -- actually this is the primary nurse. So if you look now at  
13 the bottom, it's Janice Owens, that's the primary nurse.

14          Q     Or if we look at page 4, then, obviously, it looks  
15 like there was more of an examination done then to the left  
16 knee?

17          A     Correct.

18          Q     Is that typical?

19          A     Correct. This is the nurse's assessment of the  
20 patient, complete assessment of the patient, that is correct.  
21 And this is typical. The triage nurse kind of determines the  
22 level of acuity, then once the patient -- then at a given  
23 time, the patient will be fully evaluated by the primary  
24 nurse.

25          Q     Now, looking at this, why don't we just go through

1 this quickly, basically what different, you know, things he --  
2 the -- the primary nurse would see from Mr. Rodriguez.

3 A Basically going through it, it's organized by  
4 system. So under cardiovascular, you can see she checked off  
5 no known problems. Under neurosensory, she said the patient  
6 was alert. The patient was opening his eyes spontaneously,  
7 was oriented to his environment and who he was. He was  
8 following commands normally.

9 Psychosocially, there was no communication barrier.  
10 The patient was calm according to her assessment of the  
11 patients affect. He was cooperative. Under respiratory  
12 there's no -- she checked no known problems. Under skin, the  
13 skin was intact. It looked normal to her. It was warm and  
14 dry which is normal.

15 Under gastrointestinal she wrote no known problems.  
16 Under musculoskeletal she wrote that the patient has left knee  
17 pain. And under limitations she wrote that there's some  
18 mobility limitation because of that left knee pain. So that  
19 was pretty much the extent of her assessment.

20 Q Now, just looking at the left knee pain and  
21 mobility, would you know what kind of tests she would have  
22 done to arrive at that?

23 A There's a variety of testing that she could have  
24 done. She didn't specify as most often they don't. You know,  
25 oftentimes they're just asking the patient to either lift

1 their legs off the bed, or are you able to walk. And you  
2 know, if the patient can't walk, then they'll document that as  
3 a limitation in their mobility.

4 Q Would you have expected, if he had any bruising, any  
5 swelling, anything like that to be noted by the nurse? Or  
6 would that be something you would look for?

7 A Generally, my exam is more comprehensive, more  
8 focused than theirs.

9 Q So when you would see the patient, you would have  
10 basically pages 3 and 4, the portions that are filled out by  
11 the triage nurse and the primary nurse?

12 A Exactly.

13 Q And you looked at that before you went in to see the  
14 patient?

15 A Exactly, and use that as a reference to guide my  
16 history taking and -- yes.

17 Q So basically looking at what we've already looked  
18 at, you go and primarily focus on his left knee?

19 A Correct, correct. I'll generally do kind of a  
20 comprehensive exam and take a history and, you know, gather  
21 information. It's not uncommon in my history and physical  
22 exam to uncover things that the nurses don't uncover or --  
23 so --

24 Q So then if we go to page 5, it looks like that it's  
25 something that's filled out by the nurse after --

1 A At the end of their treatment.

2 Q After you see the patient?

3 A Exactly, exactly.

4 Q Let's go to your sheet which I think is the  
5 emergency physician record, page 6, right?

6 A That's correct.

7 Q Okay. So do you have, like a -- did you have back  
8 in 2004 some kind of standard protocol you would use to  
9 examine the patient when he first came in?

10 A Yeah. And I think that protocol still holds true.  
11 It's generally going through the process of obtaining a  
12 history, obtaining any specific past medical history, social  
13 history, family history that might be pertinent to the case,  
14 reviewing the vital signs and then doing a physical exam.

15 Q And it looks like you -- you would actually, you  
16 know, probably say, you know, what happened or ask him, you  
17 know, why they're --

18 A Exactly, exactly.

19 Q And it looks like here, is this your writing under  
20 the context?

21 A This whole page is all my writing, yes.

22 Q So --

23 A It looks like I saw him at 12:38 a.m. in room 19 and  
24 essentially he came in. His chief complaint was an injury to  
25 the left knee. This is what's a T-sheet, so they're

1 preformatted sheets based on what the patient's complaint is,  
2 just to facilitate documentation.

3           He had indicated that it had occurred just prior to  
4 his arrival in the emergency department, it had occurred at a  
5 casino. And briefly he was -- he stated to me that he was at  
6 the Palms and he jumped for a water bottle and in doing so,  
7 hyperextended his knee. He said to me his severity of pain  
8 was moderate.

9           Q     Before we go on, someone's saying, I jumped for a  
10 water bottle -- bottle and hyperextended. He wouldn't have  
11 said, hyperextended his knee, would he?

12           A     He might have. Yeah, a lot of -- a lot of --  
13 sometimes they'll -- they'll actually say that. Sometimes  
14 they'll describe it and then I'll translate it into medical  
15 terms.

16           Q     Okay. But generally this is what he told you,  
17 jumped for -- he wouldn't say, you know, I jumped three feet  
18 off the ground or what, you know, how he jumped, the mechanics  
19 of the jump, or anything like that?

20           A     Yeah. If I feel like those mechanics play a role in  
21 my medical decision-making and my diagnosis, then I will put  
22 them. So, for instance, if a person says, well, I fell off a  
23 ladder. Well, if they fell one foot, then I might not include  
24 that information. But if they fell eight feet or ten feet off  
25 a ladder, then I would definitely include that information.

1 Q So if it was something that you thought an injury  
2 could occur from, from being a hop for a water bottle, to  
3 hyperextend your knee?

4 A Possibly. You know, it all depends on how he  
5 jumped, how he landed. You know, you can twist your knee  
6 doing very menial things really.

7 Q But at least as you sit here today, this is all you  
8 recall based upon your notes?

9 A Exactly, exactly.

10 Q So then go ahead and tell me what you --

11 A So then --

12 Q -- see.

13 A -- you know, in review of systems to try to  
14 determine the extent of the injury, he had noted to me that he  
15 didn't have any numbness or tingling, that there was no  
16 suspected foreign body or, you know, laceration to the skin.  
17 He had said that there was no head, neck or other injuries.  
18 And then under his past medical history, he indicated to me  
19 that he had a history of asthma and that he had had his  
20 appendix taken out. He indicated that he did not smoke, drink  
21 or do drugs, to me.

22 Q Now, would you, at this point, once you know he's  
23 obviously coming in for a knee injury, would you have -- you  
24 would not be observing him walk before you're talking to him,  
25 examining him?

1           A     Correct, correct.

2           Q     So you wouldn't know if he was limping or anything  
3 like that?

4           A     Exactly. So then on my physical exam, I relatively  
5 focus -- a relatively focused exam, you can see I examined his  
6 foot, his ankle, his leg and then the thigh, and then the hip,  
7 all of which were normal on my exam. And basically, I look at  
8 the skin. I look for any signs of bruising, I palpate or feel  
9 those areas to see if there's any tenderness, any deformity,  
10 or anything like that. And those all looked okay.

11                     On my knee exam, I did note that he had tenderness  
12 and I referred to the diagram where I circled -- made a little  
13 circle and put a "T" and that's where his tenderness was at.  
14 So kind of on the inside of his knee, what we call his medial  
15 knee is where he was tender.

16           Q     And that was from you pressing or putting light  
17 pressure in the area?

18           A     Correct, correct. Touching it and pressing it.

19           Q     Okay.

20           A     I did not note that he had any --

21                     (Stop reading of deposition)

22                     MR. BAKER: Ecchymosis?

23                     MR. CARDENAS: -- ecchymosis, thank you.

24                     (Resume reading of deposition)

25           A     -- that's bruising and I did not note that he had

1 any swelling or joint infusion. Oftentimes, you injure the  
2 knee, you can actually end up with a bunch of fluid in the  
3 knee joint itself, and I didn't note any of those at that  
4 time. I did note that he had limited range of motion, that he  
5 -- that he couldn't move it well and -- because it was painful  
6 to move.

7 Q Do you know what -- would you have gone through the  
8 full range of motion?

9 A Yeah, I would have. I would have asked him to move  
10 his knee and essentially observe how well he was able to move  
11 it.

12 Q So did he moved, versus you?

13 A Versus me actually moving it.

14 Q Okay.

15 A Yeah, that -- that would be based on him moving it.

16 Q Okay. And he basically -- this was his statement  
17 that he was having pain in some of the movement?

18 A Correct, correct. Now, my -- as far as my exam, as  
19 far as moving the knee on my exam, I'm more interested in the  
20 actual function of the ligaments of the knee, because you can  
21 -- you can have complete tears of, you know, any one of a  
22 number of ligaments in the knee. So under my ligament exam,  
23 you can see that I noted that all the ligaments were stable,  
24 so -- and that's basically looking at the anterior and  
25 posterior cruciate ligaments, as well as the medial and

1 lateral collateral ligaments, and then the patellar ligament  
2 as well.

3 Q So with respect to the "stable" under ligaments,  
4 that would have been done, you would have come to that  
5 conclusion that the ligaments were stable from you doing  
6 certain things to --

7 A Manipulating the knee, exactly. Putting various  
8 stressors on the knee manually to determine that, correct.

9 Q And you would have done that in the four areas  
10 mentioned there; anterior, posterior, medial and lateral?

11 A Correct.

12 Q And that's done when someone's -- when the patient's  
13 on the -- on the --

14 A Usually on the gurney.

15 Q Okay.

16 A Uh-huh.

17 Q And tell me how you can distinguish a ligament  
18 that's stable versus one that's not stable, or loose?

19 A Basically, the laxity. When you -- when you -- you  
20 know, when you essentially push the knee in certain  
21 directions, you should only get a certain amount of movement  
22 in that direction before the ligament is taut and it's not  
23 able to move any further. If you have laxity, if you get more  
24 movement in those, in that direction, then that would suggest  
25 an unstable or completely ruptured ligament.

1 Q But as we're talking about your examination, you  
2 don't know if you would have the X-ray at this point or not?

3 A You know, I may have, because it does look like this  
4 initial order given for the X-ray was early on. It was at  
5 21:55 -- 9:55. So by the time I say him, you know, 00:38, I  
6 may have had the X-ray result.

7 Q Okay.

8 A It's hard to know one way or the other.

9 Q Would there be anything on the X-ray that would  
10 assist you with the ligaments [inaudible]?

11 A No.

12 Q That's just the bone?

13 A Exactly.

14 Q And since we're talking about X-ray, obviously there  
15 appear to be nothing that was abnormal about any of the bony  
16 areas of the knee, correct?

17 A Correct, correct, yeah. The X-ray's looking  
18 primarily at the bones, the alignment of the bones, whether  
19 there's any dislocation or fracture in the bones. And at that  
20 point, there was nothing -- none that appreciated on the X-  
21 ray.

22 Q Okay. Can a hyperextension cause a looseness in the  
23 ligaments itself?

24 A It can. If there's a complete tear of a ligament in  
25 the knee, then definitely.

1 Q Okay. And then -- okay, Doctor, go ahead, then?

2 A So then, you know, looking at his gait, his gait was  
3 limited by pain. Again, that -- oftentimes, that's by sitting  
4 the patient up and either seeing, can you walk, how does it  
5 feel to walk, if they're unable to really put weight on it or  
6 if they're limited in how they walk, oh, I can't walk, it just  
7 hurts too much, then I'll check that they're limited by pain.

8 Q Okay.

9 A Neurovascularly, I noted that he was intact, his  
10 sensation, his motor was intact in that leg, which suggests  
11 that there's no nerve injury that I could detect on my exam at  
12 that time.

13 Q So did -- before we go to page 7, on page 6 at the  
14 bottom, on gait limited by pain, does that mean that you  
15 actually tried to have him walk?

16 A Yeah. Oftentimes we'll kind of stand him up and see  
17 if he's able to move it much, yes.

18 Q And he wasn't putting -- well, what's the  
19 distinction between limited by pain and unable to bear weight?  
20 Just can't put any weight on the leg or what?

21 A Yeah. Oftentimes, you know, in the process of  
22 sitting them up, they won't even -- they won't even attempt to  
23 walk, because it's too painful. So we may just put that  
24 they're limited by pain. Oftentimes, I won't have them bear  
25 full weight on their leg if I'm really concerned about an

1 injury anyway. So --

2 Q Can you tell by looking at your notes here whether  
3 that would have been the case?

4 A I can't. I can't distinguish.

5 Q Okay. Okay. So I think we've covered everything on  
6 that page.

7 A Uh-huh.

8 Q And we're still going through your -- you're  
9 continuing your examination?

10 A The exam, yes. So as I mentioned, neurologically he  
11 was intact which suggests that on my exam, I did not find any  
12 nerve injury. I did not find any vascular injury, because he  
13 is -- there was no evidence of vascular compromise. His skin  
14 was warm and dry and then the remainder of his exam as far as  
15 head, neck, back, chest and abdomen were all normal on my exam  
16 as well.

17 Q With respect to the neurovascular tendon --

18 (Stop reading of deposition)

19 MR. BAKER: That might be some sort of typo, too.

20 (Resume reading of deposition)

21 Q -- what -- do you do, some specific test?

22 A Yeah. Essentially what I would do is test --  
23 primarily test sensory to light touch. So lightly touch the  
24 foot, the toes, the ankle, the leg and see if there's any  
25 sensory deficient, because if there's any injury of the nerves

1 at the knee, the deficit is going to be distal to that point.

2 Q And you didn't find any of that?

3 A Correct, correct.

4 Q Okay. I guess with the box with head, head exam,  
5 look for any sign of injuries, swelling bruising, you didn't  
6 see any of that? Oh, sorry, okay. I guess we're at the box  
7 with head.

8 A Yeah. So you know I do a general kind of head exam,  
9 look for any signs of injury, swelling, bruising. I didn't  
10 see any of that. Look in the throat, the throat was normal.  
11 As far as the neck inspection, I'll usually palpate their  
12 spine to see if there's any tenderness or deformity. I'll  
13 have them move their neck in all directions to see if there's  
14 any pain. That -- that was normal according to my notation.  
15 Chest, again, I'll palpate, I'll listen to the breath sound,  
16 listen to his lungs and the same with the abdomen. I'll  
17 generally palpate the abdomen, listen to the abdominal sounds  
18 and I noted that all those were normal at that time.

19 Q So basically we've covered the whole body?

20 A Correct.

21 Q Okay. So you're focused on the left knee?

22 A Yeah. And the left knee seemed to be the only place  
23 of injury at that time -- at that time on my exam.

24 Q Okay.

25 A So, you know, my impression was, in looking at my

1 note, he did have tenderness medially on the left knee and  
2 that's right where the medial collateral ligament sits. And  
3 it's a common one to -- to be sprained, essentially. And what  
4 a sprain is, is a tearing of those fibers in that ligament.  
5 It may not be a complete rupture, and I noted that it wasn't a  
6 complete rupture because my limit exam -- ligament exam was  
7 intact, but it can be a partial, partial tear of that  
8 ligament.

9           And so at that point, what I did is I -- I, you  
10 know, essentially diagnosed him with a knee -- a left knee  
11 sprain and put him in a knee immobilizer to immobilize that  
12 extremity, put him on crutches. Oftentimes with strains, just  
13 immobilizing that joint for a couple of weeks, two to four  
14 weeks, taking the weight off of it and allowing it to heal up,  
15 oftentimes it will heal up on its own. Sometimes it requires  
16 more extensive treatment.

17           And then I put him on Motrin, which is an anti-  
18 inflammatory, to decrease any inflammation there from the  
19 injury, and then also Loritab which is a pain medication to  
20 help treat his pain. And I recommended that he followup with  
21 an orthopedist within ten days and I gave him the name and  
22 phone number of one of ours, Dr. Denny, that he could follow  
23 with Denny, D-e-n-n-y.

24           Q       Would you have actually put the immobilizer on him?  
25 Or would that be something --

1           A     Usually the technician will put it on, and then I do  
2 a reassessment to make sure that the immobilizer is in good  
3 position.

4           Q     Describe the immobilizer for me.

5           A     It's generally a -- kind of a large velcro structure  
6 that wraps around the leg. It goes maybe approximately from  
7 the mid-calf up to the mid-thigh and is secured with velcro.

8           Q     And when he was obviously attempting to walk, you  
9 recommended that he keep the immobilizer?

10          A     Exactly, yeah. And usually when I put them on a  
11 knee immobilizer and crutches, I'm recommending that they not  
12 bear weight on that -- that extremity.

13          Q     And basically not to bear any weight until he  
14 followed up with Dr. Denny or some other --

15          A     Dr. Denny or -- yeah, exactly.

16          Q     Prior records order, what's written there? Return  
17 something?

18          A     Oh, then return to ED, the RTED, is that what you're  
19 referring to?

20          Q     Yeah.

21          A     Just return to the emergency department for signs  
22 and symptoms of compress, of compartment syndrome. And what  
23 compartment syndrome is, is where you end up with -- it  
24 usually happens in an extremity, and it's where you end up  
25 with an injury that creates such swelling that it -- it -- it

1 can actually cut off the blood flow, the blood supply to that  
2 extremity.

3           So generally what I'll do is, I'll counsel the  
4 patient that if they start to have numbness, tingling,  
5 increasing pain, as opposed to decreasing pain, then they  
6 should return to the emergency department, so that we can re-  
7 evaluate it and make sure that they're -- that they're -- they  
8 still have good blood flow to that extremity and their problem  
9 isn't being complicated by this compartment syndrome.

10           Q     And let's go to page 9. Is there anything, okay,  
11 that looks like the medicine that you prescribed?

12           A     So then this is -- yeah, this is essentially a  
13 discharge sheet that we were using at that time, where we just  
14 gave discharge instructions to the patient.

15                     So this is -- this is all my writing here, except  
16 for his signature at the bottom, and his primary nurse's  
17 signature at the bottom. So essentially I -- I had just  
18 written under there in the prescriptions that I was  
19 prescribing him Loritab, and he was to take one tablet as  
20 needed for pain every four hours and Motrin one tablet three  
21 times daily. And then I instructed him to use the crutches  
22 while walking until he followed up, and wear the knee  
23 immobilizer until seen by his doctor.

24           Q     Now, would you have asked him if he had any prior  
25 complaints with the left knee?

1           A     Oftentimes, I will. I didn't see in my notation  
2 here that I had documented one way or the other.

3           Q     Now, I note it looks like he was a rather large,  
4 somewhat overweight individual. That's my term, although I  
5 think doctors use other terms, 5'6" and 225 seems a little  
6 bit --

7           A     Yeah, it's the -- I mean for his height -- for his  
8 height, if you were to do a body mass index, it would probably  
9 be -- it would probably be in the obese side, maybe not  
10 morbidly obese, but obese.

11          Q     Would that weight, in your opinion, put more  
12 pressure, more stress on the knee?

13          A     It certainly can. I mean, obesity really is a  
14 detriment to the back, to all the joints, because the extra  
15 weight he's having to carry is being carried by these joints.  
16 That being said, you can be a skinny, healthy person and still  
17 sprain knees and injure joints.

18          Q     Let me look at my notes for a second, by Ms.  
19 Stephenson.

20                   And Doctor, actually the first page, 01, is  
21 strapping -- I think it's just the billing, but it's the  
22 strapping, the immobilizer, is that what it would be?

23          A     You know, I noticed I was -- I was looking at that  
24 and this is actually hospital-generated billing, so this is  
25 not my personal billing.

1 Q Okay.

2 A And I'm not sure what that fee is referring to. I  
3 suspect, because I see a fee for the knee immobilizer down  
4 below, so I suspect that that strapping fee is probably the  
5 technician fee of putting the knee immobilizer on, fitting the  
6 patient for crutches as well. It could -- either that, I  
7 suspect or -- or IT maybe referring to the crutches  
8 themselves. It's probably one or the other.

9 Q And naturally, you probably don't know this either,  
10 it says -- it looks like a level 4 charge but --

11 A Yes.

12 Q It looks like -- is that the same category?

13 A No, that has nothing to do with the triage category.

14 Q Okay.

15 A Yeah, that has to do with the level of care that was  
16 ultimately provided to the patient during their course. And  
17 that's related more to billing, coding -- coding, charting and  
18 billing. It has nothing to do with the actual triage level.

19 Q Nothing about the injury or anything like that?

20 A Exactly.

21 Q Have you, in your practice as an emergency room  
22 physician, seen people come in with hyperextension of the knee  
23 where they really don't relate it to anything specific? I  
24 mean, like, I don't know what happened, all of a sudden I got  
25 this knee pain?

1           A     Well, I've seen -- I've seen people come in with,  
2 you know, hyperextension injuries even just walking. So it  
3 can happen in a relatively benign manner. It just requires  
4 placement of the, you know, knee and the -- you know, and the  
5 forces moving in the right direction, essentially at the knee  
6 to cause that.

7                     Just sort of random knee pain popping up, I really  
8 wouldn't be able to recall a hyperextension, because there  
9 wasn't that mechanism there, mechanism there. So, you know,  
10 referring to it as hyperextension is really more referring to  
11 the mechanism of how it happened. It's kind of like saying an  
12 ankle injury occurred with the aversion of the ankle. You're  
13 kind of describing the mechanism by which that injury  
14 occurred.

15           Q     Okay. And, Doctor, if you noted any other symptoms,  
16 bruising, swelling, anything like that, that would have been  
17 noted on your -- your examination report?

18           A     Correct, correct.

19                     (Discussion off the record.)

20           MR. BAKER:

21                     (Stop reading of deposition)

22           MR. BAKER: Can I take a two-second breath, Your  
23 Honor?

24           THE COURT: Sure, go ahead.

25           MR. BAKER: It's hard being somebody else.

1 THE COURT: It is, and you were reading along at a  
2 pretty good clip there.

3 MR. BAKER: I'm 45, Your Honor, but I read at a 48-  
4 year-old level. All right.

5 (Resume reading of deposition)

6 CROSS-EXAMINATION

7 BY MR. BAKER:

8 Q Doctor, my name's Steve Baker. I recommend Enrique  
9 regarding this matter. Nice to meet you, Doctor.

10 A Nice to meet you.

11 Q I'd like to talk to you just about a couple  
12 different things. You were speaking about your ligamentis  
13 examination and you said you didn't find any evidence of  
14 injury to the -- well, to the interior or posterior of the  
15 cruciate ligaments; is that true?

16 A Any instability, so that -- there's a big difference  
17 because you can have all sorts of different grades of injury  
18 to that ligament. But by doing the ligament exam that I do,  
19 you're looking for complete -- a complete tear of that  
20 ligament.

21 Q So your examination did not rule out any partial  
22 tears; is that true?

23 A No. In fact, by calling it a knee sprain, by  
24 ultimating, diagnosing with the knee sprain, that was my  
25 clinical impression, that there was a partial tear.

1 Q And that's where I was going to go as well. So your  
2 impression was that there was some fibrous damage to the  
3 medial collateral ligaments; is that correct?

4 A Correct.

5 Q And I'd like you to turn to page 1 and I don't have  
6 it numbered on the pain diagram.

7 MS. STEPHENSON: Six.

8 MR. BAKER: Six, thank you.

9 A Yes.

10 Q Now as well as being the area for the medial  
11 collateral ligament, there are other soft tissue bodies  
12 located in that area; is that not true?

13 A That's true.

14 Q And there's to be articular cartilaginous; is that  
15 true?

16 A Absolutely.

17 Q And, in fact, the meniscus, the medial meniscus is  
18 located exactly at that point where you drew the circle and  
19 noted tenderness; is that fair to say?

20 A Internally, yes.

21 Q And if he, then, was later diagnosed with a tear of  
22 the medial meniscus, that would be consistent with the  
23 location you noted tenderness on your examination; is that  
24 fair?

25 A Yeah.

1 MS. STEPHENSON: Object to the form. Go ahead.

2 A It would -- it would be -- it would be consistent to  
3 have medial pain associated with a medial meniscus tear.

4 Q And specifically, again, the area that you circled  
5 and noted with a "T" would be consistent with a finding later  
6 of a tear of the medial meniscus; is that fair to say?

7 A Yes.

8 Q A little bit about the mechanism of the injury. Was  
9 it your impression that he injured his knee when he leaped for  
10 a water bottle?

11 A It was my impression -- from what I wrote here, it's  
12 my -- it was my impression that the mechanism was that he  
13 jumped for a water bottle, and in doing so, hyperextended the  
14 knee.

15 Q And the witnesses who have been deposed and have  
16 testified in this case have described the mechanism of injury  
17 a little differently. And what they say is actually water  
18 bottles were being thrown out into the audience and someone  
19 jumped for a water bottle and directly contacted the lateral  
20 aspect of his knee.

21 A Hum.

22 Q Do you find that interesting?

23 A Yeah.

24 MS. STEPHENSON: I object to the form.

25 A I don't -- I really can't comment one way or the

1 other. All I can say is what I wrote down from what he told  
2 me.

3 Q And that would be a less benign injury than him just  
4 leaping for a water bottle himself, to have an actual  
5 traumatic impact with a person's body to the lateral aspect of  
6 his knee; would that be fair to say?

7 A That it would be a less --?

8 Q Less benign. You've described some of the injuries  
9 occurring in a benign fashion.

10 A Right, right.

11 Q But a direct impact to the knee would be more likely  
12 to cause a hyperextension injury; is that fair to say?

13 A It could go either way. I really could go either  
14 way.

15 Q But knowing that there was a direct traumatic impact  
16 to his knee by somebody's body, does not change your diagnosis  
17 of a hyperextension injury?

18 A No.

19 Q And neither does it change your diagnosis of a  
20 fibrous rupture in the area of the medial collateral ligament?

21 A Yeah, of a knee sprain. Exactly.

22 Q So your diagnosis stands, even though you know the  
23 mechanism of injury is a little different than --

24 A Correct.

25 Q Are those your opinions to a reasonable degree of

1 medical probability?

2 A Yes.

3 Q Okay. Now you noted that he had pain in range of  
4 motion; is that fair to say?

5 A Yes.

6 Q And that's your opinion to a reasonable degree of  
7 medical probability; is that right?

8 A Yes.

9 Q And limitations and mobility associated with that  
10 pain; is that correct?

11 A Definitely.

12 Q And so it's also your opinion to a reasonable degree  
13 of medical probability?

14 A Yes. Based on my clinical exam at that time, yes.

15 Q And you didn't see him after this point; is that  
16 true?

17 A Correct.

18 Q And diagnostic MRI or actual arthroscopic  
19 intervention are the gold standard in determining medial  
20 meniscus tears, not range of motion examination; is that fair  
21 to say?

22 A Absolutely.

23 Q So you would defer to the doctors who treated him  
24 later, both diagnostically and interventionally, with respect  
25 to the injuries he sustained?

1           A     Yeah, I'd defer to orthopedics. Again, most of the  
2 time with knee sprains, oftentimes these will heal on their  
3 own with no further type of intervention required. But in  
4 patients where their pain persists, or where their disability  
5 persists, it's necessary for them to have follow-up, to have  
6 further diagnostic studies, such as MRIs done, to determine  
7 articular injury, minuscule tears, cartilaginous injury,  
8 things like that.

9           Q     And ligamentous injuries would be more likely to  
10 heal by themselves than articulate cartilage because they're  
11 more highly vascular; is that true?

12          A     Not because they're more likely vascular, but they  
13 do tend to heal better than cartilage or meniscus injuries,  
14 definitely.

15          Q     So would you -- would you suspect a ligamentous  
16 injury would be more likely to spontaneous heal than that  
17 cartilage?

18          A     Yes.

19          Q     Okay. Now are these -- now we're looking at the  
20 Spring Valley Medical Center bill. Were these generated by  
21 your office or by the hospital staff?

22          A     These are generated by the hospital itself.

23          Q     But you're use to seeing bills associated with  
24 treatment you render at the hospital?

25          A     No. I often don't see them.

1           Q     When you look at the bills, can you tell me if this  
2 was a reasonable bill for the services provided to Enrique  
3 Rodriguez at Spring Valley Medical Center.

4                                 (Stop reading of deposition)

5           MR. BAKER:   And just for the Court's understanding,  
6 those are the exhibits that were attached and have been  
7 admitted into evidence via 3, 4 and 5.

8           THE COURT:   Thank you.

9                                 (Resume reading of deposition)

10          A     From the bills that I have seen, I think these are  
11 reasonable costs for an X-ray, for level 4 care, for a knee  
12 immobilizer, for the medical medications that were given, yes.

13 BY MR. BAKER:

14          Q     And these procedures and those examinations which  
15 were billed were necessary as associated with the injury he  
16 presented with?

17          A     Yes.

18          Q     And those injuries were causally related to the  
19 episode with the water bottle at the Palms Hotel and Casino?

20          A     From the -- from what I -- you know, in my history  
21 taking, I mainly focused on determining the mechanism. So I  
22 simply wrote down what the patient has told me, and I use that  
23 to guide my decision-making as far as diagnostic  
24 interventions, therapeutic interventions. So yes, based on  
25 what he was telling me and then on my physical exam, those --

1 those were all appropriate and necessary for me to proceed  
2 with his care.

3 Q And causally related to the subject accident?

4 A From what I determined, from the history that I  
5 took, I would say, yes.

6 Q Okay. Did you generate a separate bill?

7 A I did. My billing company is RTI, and they do  
8 generate a separate bill.

9 Q Do you have that?

10 A That I do not have with me.

11 Q Is that bill contained in any of these documents?

12 A So I have not seen these -- this one, it looks like  
13 this is my bill, Shadow Emergency.

14 MS. STEPHENSON: Are you going to attach that,  
15 Steve?

16 MR. BAKER: Yeah. What I'm going to do, if you  
17 don't mind, is attach what's my copy. You didn't attach  
18 yours, did you?

19 MS. STEPHENSON: Uh-uh.

20 MR. BAKER: You didn't?

21 MS. STEPHENSON: Yeah. That's the official record  
22 there because it's got the dates down.

23 MR. BAKER: Is there still a bill attached to what's  
24 been marked as Exhibit A?

25 MS. STEPHENSON: Yes.

1 BY MR. BAKER:

2 Q So with respect to Exhibit A, the bill from Spring  
3 Valley Medical Center, you have testified that they were  
4 reasonable, necessary and causally related; is that fair to  
5 say?

6 A From what the patient told me, yes.

7 Q Now, the separate billing that you handed me that  
8 was generated by you, is that what's in my hand right now?

9 A Yes. The second page.

10 Q Can you tell me the amount on that one?

11 A No, no, not this one. This one is generated by --

12 (Stop reading of deposition)

13 MR. BAKER: Where we are now?

14 MR. CARDENAS: You're at 21.

15 (Resume reading of deposition)

16 BY MR. BAKER:

17 Q Is it this one?

18 A Yes.

19 Q Yes?

20 A Yes. This is the bill generated by my company.

21 Q Would you hand that to the Court Reporter, real  
22 quick and have it marked as Exhibit D? I'll ask you to keep  
23 the Affidavit of Authenticity with it.

24 How much was the bill generated by your office with  
25 respect to your services?

1           A     It looked like -- it looks like there's a level 3  
2 bill which was \$275 and then there's a services requested bill  
3 that was \$25.

4           Q     Is the services requested bill mailing me the bill?

5           A     Is it what?

6           Q     Is it just a mailing [inaudible] the bill?

7           A     No. I believe that that's -- it looks like it's an  
8 attachment for being seen after hours.

9           Q     Okay. And so both of those two bills, the 273 and  
10 then 25, are bills associated to the treatment to Enrique  
11 Rodriguez?

12          A     Yeah, 275 and 25, for a total of 300, and they are  
13 associated with the treatment of Enrique Rodriguez.

14          Q     And is this the treatment on those bills reasonable  
15 necessary and causally related to the subject incident?

16          A     Yes.

17          Q     Could you hand that back to the Court Reporter,  
18 please.

19          A     Uh-huh.

20          Q     This is a Desert Radiologist bill.

21          A     Uh-huh.

22          Q     Before we mark that, is that a bill associated with  
23 the services received by Enrique Rodriguez?

24          A     Yes. It's the same date.

25          Q     How much is that bill?

1 A It looks like \$43.

2 Q Is that bill for the read of the X-ray?

3 A I believe so. Desert Radiology is the group that  
4 reads all of our X-rays. They are the radiology group that  
5 reads all the X-rays. So this is -- this is not the bill for  
6 shooting the X-ray. That's reflected in the hospital bill.  
7 But it looks like this is the professional fee for reading the  
8 X-ray, yes.

9 Q And was that reasonable and necessary and causally  
10 related to the subject incident?

11 A Yes.

12 Q And your answer was, yes?

13 A Yes.

14 MS. STEPHENSON: Did you attach that one, Steve?

15 MR. BAKER: Now, I will. If you go ahead, I'll mark  
16 and attach that.

17 BY MR. BAKER:

18 Q You haven't seen Enrique Rodriguez since the single  
19 hospital visit; is that fair to say?

20 A As far as I know.

21 Q And you haven't reviewed any medical information or  
22 followup care for Enrique Rodriguez; is that fair to say?

23 A No, no, I have not.

24 Q So is it fair to say at the time of trial you will  
25 not testify as to the reasonableness, necessity or causation

1 of any of this future treatment, the treatment past when you  
2 saw him on that single visit?

3 A Correct. I know of no additional treatment that  
4 he's received.

5 Mr. Baker: Thank you, Doctor, no further questions.

6 (End reading of deposition)

7 MR. BAKER: And then Mr. Baker, mini-script, and we  
8 went off the record. And I don't know why the rest of that is  
9 on the record.

10 THE COURT: Okay. Thank you, Mr. Cardenas.

11 THE COURT: Do you need a break now, Mr. Baker?

12 MR. BAKER: I'd like a couple minutes, if that would  
13 be --

14 THE COURT: Very good, let's take about a 10-minute  
15 break.

16 MR. BAKER: Thanks.

17 (Requested portion of proceedings concluded at 11:19 a.m.)

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<u>DESCRIPTION:</u>	<u>ADMITTED</u>
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**CERTIFICATION**

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

**AFFIRMATION**

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

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**APPELLANT'S APPENDIX**  
**VOLUME 6**

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**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
<b><u>Trial Transcripts</u></b>				
65.	Partial Transcript- Bench Trial (Opening statements; Dr. Heaps)	10/25/10	7	1315 - 1404
66.	Partial Transcript- Bench Trial (Sheri Long)	10/25/10	8	1405 - 1431
67.	Partial Transcript- Bench Trial (Vikki Kooinga)	10/25/10	8	1432 - 1444
68.	Partial Transcript- Bench Trial Vol. 1 (Enrique Rodriguez)	10/26/10	8	1445 - 1579
69.	Partial Transcript- Bench Trial (Dr. Maryanne Shannon)	10/27/10	9	1580 - 1777
70.	Partial Transcript- Bench Trial Vol. 2 (Enrique Rodriguez)	10/27/10	9	1778 - 1810
71.	Partial Transcript- Bench Trial (Dr. Joseph Schifini)	10/28/10	10	1811 - 1892
72.	Partial Transcript- Bench Trial (Dr. Joseph Schifini)	11/1/10	10	1893 - 2037
73.	Partial Transcript- Bench Trial Vol. 1(Dr. Russell Shah)	11/1/10	11	2038 - 2191
74.	Partial Transcript- Bench Trial Vol. 3 (Enrique Rodriguez)	11/2/10	11	2192 - 2220
75.	Partial Transcript- Bench Trial Vol. 2 (Dr. Russell Shah)	11/2/10	12	2221 - 2339
76.	Partial Transcript- Bench Trial (Forrest P. Franklin)	11/3/10	12	2340 - 2375
77.	Partial Transcript- Bench Trial (Maria Perez)	11/3/10	12	2376 - 2393
78.	Partial Transcript- Bench Trial (Nicholas Tavaglione)	11/4/10	12	2394 - 2426
79.	Partial Transcript- Bench Trial (Terrance Dinneen)	11/4/10	13	2427 - 2543

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
80.	Partial Transcript- Bench Trial (Dr. George Becker)	11/5/10	13 14	2544 - 2676 2677 - 2742
81.	Partial Transcript - Bench Trial (Dr. Jacob Tauber)	11/5/10	14	2743 - 2777
82.	Partial Transcript- Bench Trial (Dr. Walter Kidwell)	11/8/10	14	2778 - 2894
83.	Partial Transcript- Bench Trial (Dr. Louis Mortillaro)	11/9/10	15	2895 - 3004
84.	Partial Transcript- Bench Trial (Dr. Thomas Cargill)	11/9/10	15	3005 - 3061
85.	Partial Transcript- Bench Trial (Frank Sciulla)	11/9/10	15	3062 - 3073
86.	Partial Transcript- Bench Trial (Closing Arguments)	11/10/10	16	3074 - 3150

**Hearing Transcripts**

87.	Defendant's Motion for Jury Trial	10/20/10	16	3151 - 3163
88.	Defendant's Motion for Mistrial, etc.	01/27/11	16	3164 - 3186
89.	Defendant's Motion for A New Trial, etc.	07/05/11	16	3187 - 3212





CLERK OF THE COURT

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23 Attorneys for Defendant FIESTA PALMS, LLC, a  
24 Nevada Limited Liability Company, d/b/a/ THE  
25 PALMS CASINO RESORT

26 DISTRICT COURT  
27 CLARK COUNTY, NEVADA

28 ENRIQUE RODRIGUEZ,  
29  
30 Plaintiffs,

31 v.

32 FIESTA PALMS, LLC, et al.,  
33  
34 Defendants.

Case No. A531538

**NOTICE OF APPEAL**

35 Notice is hereby given that defendant FIESTA PALMS, LLC, appeals to the Nevada  
36 Supreme Court from the "Judgment on the Verdict," entered on April 12, 2011 (Exhibit A), the  
37 "Findings of Fact and Conclusions of Law in Support of Verdict," entered on April 21, 2011

1 (Exhibit B), the "Findings of Fact, Conclusions of Law, and Order Denying Defendant's  
2 Motion for New Trial," entered on September 29, 2011 (Exhibit C), and from all other orders  
3 and rulings made final and appealable by the foregoing.<sup>1</sup>  
4

5 DATED: 11/4/11  
6

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8   
9 ROBERT L. EISENBERG (Bar No. 0950)  
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ATTORNEYS FOR DEFENDANT  
FIESTA PALMS, LLC

<sup>1</sup> On September 19, 2011, the district court entered a document entitled "Findings of Fact, Conclusions of Law, and Order" (Exhibit D). This order granted defendant's motion to alter or amend the judgment, regarding language in the judgment dealing with interest. At the present time, however, the district court has not yet entered an actual amended judgment containing revised language relating to interest. Nevertheless, notice of entry of the district court's orders on post-judgment motions has been served. Although defendant's appellate counsel believes the time for appeal will commence upon entry (and notice of entry) of an amended judgment, appellate counsel is not entirely certain as to whether the time for appeal might have already commenced. Accordingly, this notice of appeal is being filed to protect the right to appeal, pursuant to *Fernandez v. Infusaid Corp.*, 110 Nev. 187, 192-93, 871 P.2d 292 (1994). Pursuant to *Fernandez*, appellate counsel intends to file a motion in the Nevada Supreme Court to determine appellate jurisdiction, at the appropriate time after the appeal has been docketed.

**EXHIBIT A**

**EXHIBIT A**



*Steven M. Baker*  
CLERK OF THE COURT

1 JUDGE  
2 STEVEN M. BAKER  
3 Nevada Bar No. 4522  
4 BENSON, BERTOLDO, BAKER & CARTER  
5 7408 W. Sahara Avenue  
6 Las Vegas, Nevada 89117  
7 Telephone : (702) 228-2600  
8 Facsimile : (702) 228-2333  
9 Attorneys for Plaintiff

10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

12 \* \* \*

<p>13 ENRIQUE RODRIGUEZ, an individual, 14 15 Plaintiff, 16 17 vs. 18 FIESTA PALMS, L.L.C., a Nevada Limited 19 Liability Company, d/baa/a PALMS CASINO 20 RESORT, BRANDY L. BEAVERS, 21 individually, DOES I through X, inclusive, 22 and ROE BUSINESS ENTITIES I through X, 23 inclusive, 24 25 Defendants.</p>	<p>CASE NO: A531538 DEPT NO: 10</p>
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26 JUDGMENT ON THE VERDICT

27 The above-entitled matter having come on for a bench trial on October 25, 2010  
28 before the Honorable Jessie Walsh, District Court Judge, presiding. Plaintiff ENRIQUE  
RODRIGUEZ appeared in person with his counsel of record, STEVEN M. BAKER, ESQ. of  
the law firm of Benson Bertoldo Baker & Carter. Defendant FIESTA PALMS, L.L.C.  
appeared by and through its counsel of record, KENNETH C. WARD, ESQ. of the law firm  
of Archer Norris. Defendant BRANDY BEAVERS is in default and was not in attendance.  
Testimony was taken, evidence was offered, introduced and admitted. Counsel argued the  
merits of their cases.



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The Honorable Jessie Walsh rendered a verdict in favor of Plaintiff and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, as to claims concerning negligence arising from premises liability resulting in the injuries to ENRIQUE RODRIGUEZ in the amount of \$376,773.38 for past medical expenses; \$1,854,738.00 for future medical expenses; \$1,243,350.00 for past pain and suffering; \$1,865,025.00 for future pain and suffering; \$289,111.00 for past lost income; \$422,592.00 for future lost income, for a total judgment against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS of \$6,051,589.38.

The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C.	60%
Defendant BRANDY BEAVERS	40%

NOW, THEREFORE, judgment upon the verdict is hereby entered in favor of the Plaintiff ENRIQUE RODRIGUEZ and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff ENRIQUE RODRIGUEZ, shall have and recover against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, the sum of SIX MILLION, FIFTY-ONE THOUSAND, FIVE HUNDRED EIGHTY NINE AND 38/100 DOLLARS (\$6,051,589.38).

Pre-judgment interest shall accrue on past damages at the legal rate of 5.25% (3.25 prime + 2) on the amount of \$1,909,234.38 pursuant to NRS 17.130, from the date of service of the Summons and Complaint (12/11/2006) until fully satisfied, such interest in the amount of FOUR HUNDRED TWENTY SEVEN THOUSAND TWENTY SEVEN AND 71/100



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DOLLARS (\$427,027.00) as of April 4, 2011 and accruing at a rate of TWO HUNDRED SEVENTY FOUR AND 62/100 DOLLARS (\$274.62) per diem thereafter.

Post-Judgment Interest shall accrue at the legal rate on future damages in the amount of \$4,142,355.00, until fully satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is entitled to his costs of \$149,146.<sup>18</sup> as the prevailing party under NRS 18.020 and NRS 18.010.

DATED this 11<sup>th</sup> day of Apr, 2011.

*Jessie Walsh*  
HONORABLE JESSIE WALSH  
District Court Judge

SUBMITTED BY:

*Steven M. Baker* 4/5/11

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Attorneys for Plaintiff

**EXHIBIT B**

**EXHIBIT B**



*Original*

*Alvin D. Shuman*  
CLERK OF THE COURT

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**FFCL**  
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Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
Attorneys for Plaintiff

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  Plaintiff,  vs.  FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/baa/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive,  Defendants.	CASE NO: A531538  DEPT NO: 10
--	-------------------------------------

**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
IN SUPPORT OF VERDICT**

THIS MATTER HAVING COME ON FOR TRIAL before the bench, commencing on October 25, 2011, and a verdict being entered on March 14, 2011, this Honorable Court Finds and Concludes as follows:

- 1) Liability in favor of the Plaintiff in this matter was determined as consistent with the Findings of Fact and Conclusions of law granting Directed Verdict pursuant to NRCP 52 entered in this matter on March 10, 2011.



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2) The Court finds the testimony of Plaintiff's treating physicians, including, but not limited to Dr. Shifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shaw, Dr. Shannon, and Dr. Tauber to be persuasive on the issue of the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial and, accordingly, and in this Court's discretion, awards as past medical expenses the amount of \$376,773.38 and future medical expenses in the amount of \$1,854,738.00.

3) Based upon the testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and "before and after" lay witnesses who testified at the time of trial, the Court finds that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that finding, and in this Courts discretion, awards as past pain and suffering the amount of \$1,243,350.00 and future pain and suffering in the amount of \$1,865,025.00.

4) The Court finds the testimony of Plaintiff's economist, Terrence Dineen, persuasive on the issue of Plaintiff's loss of economic opportunity, vocational disability, and loss of past and future earnings, finds and concludes the Plaintiff suffered significant detrimental impact to his ability to transact in the field of real-estate purchases, refurbishment, and sales due to his physical limitations resultant of the subject injury, finds that sufficient opportunity existed and exists in the repressed real estate market for Plaintiff to continue to profitably purchase, refurbish and sell real-estate absent said physical limitations, and is persuaded by and accepts the calculations of Mr. Dineen with respect to the same and, in this Court's discretion, awards



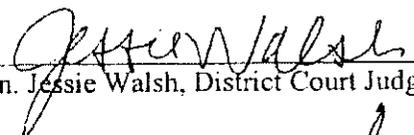
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past lost income in the amount of \$289,111.00 and future lost income in the amount of \$422,593.00.

5) As to the allocation of liability the Court finds liability against Defendant Fiesta Palms, LLC, as set forth in Finding and Conclusion #1, above, but finds that Defendant Beavers also failed to act in the manner of the average reasonable person under similar circumstances in a manner creating a foreseeable harm to patrons of the Palms by throwing promotional items into a crowded environment and in other and further manners as elucidated at the time of trial. The Court, in its discretion, therefore apportions liability at 60% to the Palms and 40% to Beavers, with no finding of comparative fault on the part of the Plaintiff.

WHEREFORE, this Court finds and concludes that a verdict be entered in said amounts as set forth on the stipulated Verdict form attached hereto as Exhibit #1.

Date: 19 Apr 2011

  
Hon. Jessie Walsh, District Court Judge

C. AL

CLERK OF THE COURT

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

**B** ENSON  
ERTOLDO  
AKER  
& CARTER  
ATTORNEYS AT LAW

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DISTRICT COURT

CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, an individual,

Plaintiff,

vs.

FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/b/a PALMS CASINO RESORT; BRANDY BEAVERS; DOES I through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive,

Defendants.

CASE NO: A531538

DEPT NO: 10

TRIAL DATE: 10/25/10

VERDICT

The Honorable Jessie Walsh, presiding judge in the above-entitled action, hereby finds for Plaintiff ENRIQUE RODRIGUEZ as follows:

1. The Court finds against Defendant FIESTA PALMS, L.L.C.
2. The Court finds against Defendant BRANDY BEAVERS.

Yes / No

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3. The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C.	<u>          (0) %</u>
Defendant BRANDY BEAVERS	<u>          40 %</u>

4. The total amount of the plaintiff's damages is divided as follows:

Past Medical Expenses	<u>\$ 376,773.38</u>
Future Medical Expenses	<u>\$ 1,854,738.</u>
Past Pain and Suffering	<u>\$ 1,243,350</u>
Future Pain and Suffering	<u>\$ 1,816,025.</u>
Past Lost Income	<u>\$ 289,111.</u>
Future Lost Income	<u>\$ 422,592.</u>

5. Further, the Court finds that Defendant Fiesta Palms, L.L.C. acted with conscious disregard of the rights or safety of others when it was aware of the probable dangerous consequences of its conduct and willfully and deliberately failed to avoid those consequences.

Yes / (No)

DATED this 15 day of Mar, 2011.

Jessie Walsh  
JESSIE WALSH, District Court Judge

**EXHIBIT C**

**EXHIBIT C**

[ ORIGINAL ]

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Attorneys for Plaintiff

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*Steven M. Baker*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
  
Plaintiff,  
  
vs.  
  
FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/baa/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,  
  
Defendants.

CASE NO: A531538  
DEPT NO: 10

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING  
DEFENDANT'S MOTION FOR NEW TRIAL

THIS MATTER having come on for hearing on July 5, 2011 with respect to Defendant's Motion for New Trial before the Honorable Jessie Walsh, presiding, and the Court having considered the evidence and the arguments of counsel and taken the matter under advisement for further consideration hereby finds,

FINDINGS OF FACT

In seeking a new trial, Defendant offered the following four (4) arguments:

1. Plaintiff's counsel engaged in misconduct;
2. The Court erred in allowing testimony of certain providers;
3. The evidence was insufficient to justify the verdict; and



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4. The Court erred in striking defense experts.

This Court makes the following Findings of Fact with respect to the following Conclusions of Law and Order as set forth herein.

**I. Plaintiff's Counsel Did Not Engage In Misconduct**

Defense counsel, during Opening Argument, the evidentiary phase of the trial, and Closing Argument, accused Plaintiff's counsel of engaging in a systematic "medical build-up," and manipulation of the medical records.

Post-trial, Defense counsel, in moving for a mistrial, then accused Plaintiff's counsel and this Court of engaging in a systematic *ex parte* conspiracy, rendering the trial unfair and impartial. At no time did this Court engage in unpermitted contact with the Plaintiff, nor did this Court rely on the contents and/or points and authorities contained in any "blind" briefing in support of its findings, conclusions, and/or verdict herein.

Post-judgment, Defense counsel, in moving for a new trial, argued that Plaintiff's counsel engaged in blatant premeditated and reprehensible misconduct.

Defendant argued that Plaintiff's counsel's alleged misconduct constituted an *irregularity in the proceedings*. Defense counsel argued that it was well settled under Nevada law that attorney misconduct constitutes an irregularity in the proceedings; however, they cited no Nevada law, or any authority, for that matter, in support of this position.

Defense counsel pointed to two (2) *examples* (arguments) of misconduct:

1. Plaintiff's counsel withheld evidence in regards to Plaintiff's tax returns; and
2. Plaintiff's counsel withheld evidence relied upon by Dr. Schifini.



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This Court finds that Plaintiff's counsel did not withhold evidence in regarding Plaintiff's tax returns.

Mr. Dinneen was asked to look at the vocational issues, the types of work that Plaintiff was able to do prior to his accident, to look at what vocational options he may have in the future and then calculate that loss. He was also asked to look at the costs of future medical care and calculate those values, as well.

Mr. Dinneen met with the Plaintiff, reviewed his medical records, three (3) years of tax returns, and social security materials in forming an opinion that Plaintiff was disabled.

Mr. Dinneen testified that Plaintiff was qualified by the Federal Government as being disabled.

Mr. Dinneen testified to a reasonable degree of economic and professional probability that Plaintiff's income was *reported*.

Defense counsel was critical of the fact that Mr. Dinneen, during his testimony at trial, and in response to defense counsel's inquiry as to whether Mr. Dinneen knew if any of Plaintiff's income was reported, indicated that he had received a letter from Plaintiff's tax preparer advising that the subject returns had, in fact been filed.

Mr. Dinneen's trial testimony occurred on November 2, 2010. The letter was dated October 20, 2010. Defense counsel did not mark the letter as an exhibit or move to admit the letter.

The subject letter was not the subject of direct examination, and the information relative to the same was brought out through cross-examination in response to counsel's inquiry as to whether Mr. Dinneen knew if any of Plaintiff's income was in fact reported. Mr. Dinneen was provided the letter from the tax preparer subsequent to his deposition, but

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merely days before his testimony. Defense counsel never moved to admit the document, but did question Mr. Dinneen as to the authenticity of the letter.

Equally, this Court finds that Plaintiff's Counsel did not withhold evidence relied upon by Dr. Schifini.

Defense counsel argued that Plaintiff's counsel withheld 100+ documents that Dr. Schifini relied upon in providing expert opinions at trial.

First, defense counsel decided **not** to depose Dr. Schifini.

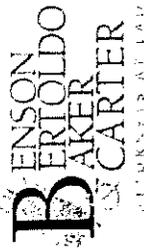
Secondly, Dr. Schifini reviewed *all* the medical records in the case.

Third, defense counsel's only objections relative to Dr. Schifini's testimony were foundation and hearsay. Defense counsel did not object to the records relied upon, or the introduction of the documents other than on a *foundation* and *hearsay basis*, which related to Dr. Schifini's ability to provide expert testimony, and not his reliance on the documents.

Fourth, the records that counsel referred to were introduced and admitted into evidence, with the only objections being *foundation* and *hearsay*. Each any every one of these documents had been previously disclosed to the Defendant and were no more than the records of other treating physicians contained in Dr. Schifini's file.

**2. The Court Did Not Err In Allowing The Testimony Of Certain Providers**

Defense counsel was also critical of the fact that this Court qualified and admitted certain treating providers during trial. Defense counsel's position was that none of the providers were designated as expert witnesses nor provided expert reports. Defense counsel's argument was that they never had notice of the testifying providers' opinions until trial and that they were *prejudiced* as a result.



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This Court finds that defense decided not to depose a single treating physician in a case where the Plaintiff was alleging a constellation of profound injuries.

Defense counsel was fully aware of the nature and substance of the claimed injuries and had also been given the medical records generated by all of Plaintiff's physicians. Defense counsel was free to depose the treating physicians. They chose not to do so.

**3. The Court Finds Evidence Was Substantial To Justify The Verdict**

This Court heard the extensive testimony of Plaintiff's treating physicians, including, but not limited to Dr. Schifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shah, Dr. Shannon, and Dr. Tauber on the issues of injury to the Plaintiff and the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial, and heard testimony regarding past medical expenses of \$376,773.38 and future medical expenses in the amount of \$1,854,738.00.

The Court also heard testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and "before and after" lay witnesses who testified at the time of trial that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that finding, awarded as past pain and suffering the amount of \$1,243,350.00 and future pain and suffering in the amount of \$1,865,025.00.

The Court heard the testimony of Plaintiff's vocational and economic loss expert, Terrence Dinneen, on the issue of Plaintiff's loss of economic opportunity, vocational



1 disability, and loss of past and future earnings, and heard evidence concerning the significant  
2 detrimental impact of Plaintiff's injuries upon his ability to transact in the field of real-estate  
3 purchases, refurbishment, was presented with evidence and testimony that sufficient  
4 opportunity existed and exists in the repressed real estate market for Plaintiff to continue to  
5 profitably purchase, refurbish and sell real-estate absent said physical limitations, was  
6 presented with the calculations of Mr. Dinneen with respect to the same and, in this Court's  
7 discretion, awarded past lost income in the amount of \$289,111.00 and future lost income in  
8 the amount of \$422,593.00.

10 As to the allocation of liability, the Court found liability against Defendant Fiesta Palms,  
11 LLC, and found that Defendant Beavers also failed to act in the manner of the average  
12 reasonable person under similar circumstances in a manner creating a foreseeable harm to  
13 patrons of the Palms by throwing promotional items into a crowded environment and in other  
14 and further manners as elucidated at the time of trial. In reaching its verdict, the Court heard  
15 and relied upon the testimony of Brandy Beavers with respect to the conduct of both herself  
16 and the Palms, and the testimony of Palms' employees regarding the fact the Palms know that  
17 promotional items were being thrown into crowds prior to the subject event, had a meeting  
18 and set up policies to prohibit said conduct, and then knowingly violated said policies. The  
19 Court, in its discretion, therefore apportioned liability at 60% to the Palms and 40% to  
20 Beavers, with no finding of comparative fault on the part of the Plaintiff.

23 **4. The Court Did Not Err In Striking Defense Experts**

24 Defendant presented two (2) non-medical experts in this trial, Dr. Thomas Cargill  
25 (Economist) and Forrest Franklin (Liability), neither of whom opined that their opinions were  
26 given to a reasonable degree of professional probability as required under Nevada law.



1 Forrest Franklin, Defendant's liability expert, was retained to develop and render an  
2 opinion with respect to the standard of care as it relates to throwing objects, memorabilia, and  
3 promotional articles into crowds.  
4

5 Mr. Franklin offered the following opinions:

- 6 1. Throwing memorabilia as a promotional effort into crowds is not  
7 a substandard protocol;
- 8 2. It is not unsafe to throw things into crowds; and
- 9 3. It is not below the standard of care to throw items into a crowd.

10 None of these opinions, however, were given to a reasonable degree of professional  
11 probability.

12 Dr. Cargill offered the following two (2) opinions at trial:

- 13 1. Plaintiff could not have made as much in the current financial market as he could  
14 have back in 2004 because the bubble burst in the housing market; and
- 15 2. Mr. Dineen's discount rates were inappropriate.

16 Neither of these opinions was given to a reasonable degree of professional/scientific  
17 probability.

18 **CONCLUSIONS OF LAW**

19 **1. Plaintiff's Counsel Did Not Engage In Misconduct**

20 This Court concludes as follows:  
21

22 As supported by substantial evidence, Plaintiff's counsel did not engage in  
23 misconduct.

24 Specifically, Plaintiff's counsel did not withhold evidence in regarding Plaintiff's tax  
25 returns. The information relied upon by Mr. Dinneen was of the type contemplated and  
26 permitted by NRS 50.275.  
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Equally, this Court concludes that Plaintiff's Counsel did not withhold evidence relied upon by Dr. Schifini.

Nevada law makes it clear that a new trial is not warranted on grounds of *surprise* based on testimony which, *with reasonable diligence*, could have been anticipated.

Furthermore, the "surprise" contemplated by Rule 59 (a) must result from some fact, circumstance, or situation in which a party is placed unexpectedly, to his injury, without any default or negligence of his own, and which ordinary prudence could not have guarded against.

Defense counsel did not exercise reasonable diligence and cannot argue *surprise* since they chose not to depose a single treating provider. As a result of this failure, defendant did not discover the entirety of the materials contained in Dr. Schifini's file.

The records about which Defendant complains were introduced and admitted into evidence, with the only objections being *foundation* and *hearsay*. Each and every one of these documents had been previously disclosed to the Defendant and were no more than the records of other treating physicians contained in Dr. Schifini's file. Accordingly, no documents were withheld by the Plaintiff, Defendants were timely provided with all documents serving as the basis of Dr. Schifini's opinion, and no prejudice resulted.

As such, the Court concludes that there was no misconduct on the part of Plaintiff's Counsel.



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2. The Court Did Not Err in Allowing The Testimony of Certain Providers

This Court concludes as follows:

Defense counsel cannot argue *surprise* with respect to the testimony of Plaintiff's treating physicians since they chose not to depose a single treating provider and did not exercise reasonable diligence.

The scope of a witness' testimony and whether that witness will be permitted to testify as an expert are within the discretion of trial court. *Prabhu v. Levine*, 1996, 930 P.2d 103, 112 Nev. 1538, rehearing denied.

Once the district court certifies an expert as qualified, the expert may testify to all matters within the expert's experience or training, and the expert is generally given reasonably wide latitude in the opinions and conclusions he or she can state. *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992); *Brown v. Capanna*, 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989) (a proposed medical expert should not be scrutinized by an excessively strict test of qualifications); *Freeman v. Davidson*, 105 Nev. 13, 15, 768 P.2d 885, 886 (1989) ("[a]n expert witness need not be licensed to testify as an expert, as long as he or she possesses special knowledge, training and education, or in this case, knowledge of the standard of care"); *Wright v. Las Vegas Hacienda*, 102 Nev. 261, 263, 720 P.2d 696, 697 (1986) ("[a] witness need not be licensed to practice in a given field ... to be qualified to testify as an expert").

Under Nevada law, treating physicians are not considered retained experts. They should be allowed to testify as to treatment, diagnosis (including causation), and prognosis based upon their treatment of the patient and their medical training. *Id.*



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Plaintiff's treating providers were not subject to the strict disclosure or reporting requirements under Nevada law. *Id.*

Even if this Court were to determine that Plaintiff's counsel failed to comply with the disclosure requirements, which it does not, the decision whether to permit expert witness to testify where there has been failure to comply with disclosure requirements is committed to the trial court's discretion. NRC P 26(b)(4). *Murphy v. Federal Deposit Ins. Corp.*, 1990, 787 P.2d 370, 106 Nev. 26.

Defense counsel was fully aware of the nature and substance of the claimed injuries and had also been given the medical records generated by all of Plaintiff's physicians. Defense counsel was free to depose the treating physicians. They chose not to do so.

Plaintiff's treating providers were permitted to rely on the opinions of non-testifying experts as a foundation for their opinions given at trial.

As such, the Court concludes that there was no error in allowing the testimony of certain providers.

**3. The Evidence In The Case Was Substantial And Sufficient To Justify The Verdict.**

The Court concludes that the testimony of Plaintiff's treating physicians, including, but not limited to Dr. Schifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shah, Dr. Shannon, and Dr. Tauber to be persuasive and to provide substantial evidence on the issues of Plaintiff's injury and the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial and, accordingly, and in this Court's discretion,



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awards as past medical expenses the amount of \$376,773.38 and future medical expenses in the amount of \$1,854,738.00.

Based upon the testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and “before and after” lay witnesses who testified at the time of trial, the Court concludes that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that conclusion, and in this Courts discretion, awards as past pain and suffering the amount of \$1,243,350.00 and future pain and suffering in the amount of \$1,865,025.00.

The Court concludes the testimony of Plaintiff’s vocational and economic expert, Terrence Dineen, was substantial and persuasive on the issue of Plaintiff’s loss of economic opportunity, vocational disability, and loss of past and future earnings, and concludes the Plaintiff suffered significant detrimental impact to his ability to transact in the field of real-estate purchases, refurbishment, and sales due to his physical limitations resultant of the subject injury, concludes that sufficient opportunity existed and exists in the repressed real estate market for Plaintiff to continue to profitably purchase, refurbish and sell real-estate absent said physical limitations, and is persuaded by and accepts the calculations of Mr. Dineen with respect to the same and, in this Court’s discretion, awarded past lost income in the amount of \$289,111.00 and future lost income in the amount of \$422,593.00.

As to the allocation of liability, the Court concludes that liability lies against Defendant Fiesta Palms, LLC, and concludes that Defendant Beavers also failed to act in the manner of the average reasonable person under similar circumstances in a manner creating a foreseeable harm to patrons of the Palms by throwing promotional items into a crowded environment and



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in other and further manners as elucidated at the time of trial. The Court's conclusion with respect to liability is made and based upon the testimony of Brandy Beavers with respect to the conduct of both herself and the Palms, and the testimony of Palms' employees to the fact the Palms knew that promotional items were being thrown into crowds prior to the subject event, had a meeting and set up policies to prohibit said conduct, and then knowingly violated said policies. The Court, in its discretion, therefore apportions liability at 60% to the Palms and 40% to Beavers, with no finding of comparative fault on the part of the Plaintiff.

As such, the Court concludes that the evidence in the case was substantial and sufficient to justify the verdict.

**4. The Court Did Not Err In Striking Defense Experts**

To testify as an expert witness under NRS 50.275, a witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Dr. Cargill and Mr. Franklin's testimony failed to satisfy the "assistance" requirement of NRS 50.275, in that neither expert provided opinions to a reasonable degree of professional/scientific probability.

Accordingly, their opinions did not rise to the level of "scientific knowledge" within the meaning of NRS 50.275.

The opinions of Dr. Cargill and Mr. Franklin offered insufficient foundation for this court to take judicial notice of the scientific basis of those conclusions.



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While counsel for the Defendant may have properly qualified said individuals as experts, the opinions rendered by the respective experts were speculative, as the court was not advised and the record does not reflect whether such opinions were made on the basis of “possibility” or some other standard lower than “a reasonable degree of professional probability.”

Accordingly, the testimony of Cargil and Franklin did not satisfy the “assistance” requirement of NRS 50.275.

Regardless, this Court determined both liability and damages independent of striking the testimony of Defendant’s two expert witnesses aforesaid, and determined the same upon the basis and weight of Plaintiff’s economics and vocational expert, Mr. Dineen, Plaintiff’s testimony, and the testimony of Defendant’s employees called in Plaintiff’s case-in-chief.

As such, this Court concludes that there was no error in striking Defense experts.

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ORDER

On the basis of the foregoing, it is hereby Ordered that Defendant's Motion for a New Trial be denied.

Dated this 26 day of Sept, 2011.

  
DISTRICT COURT JUDGE

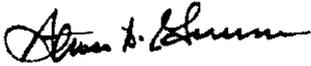
Submitted by:

BENSON, BERTOLDO, BAKER & CARTER, CHTD

  
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Attorneys for Plaintiff

**EXHIBIT D**

**EXHIBIT D**

  
CLERK OF THE COURT

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16 Attorneys for Defendant FIESTA PALMS, LLC, a  
17 Nevada Limited Liability Company, d/b/a/ THE  
18 PALMS CASINO RESORT

12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

15 ENRIQUE RODRIGUEZ,  
16 Plaintiffs,

17 v.

18 FIESTA PALMS, LLC, a Nevada Limited  
19 Liability Company, d/b/a/ The Palms  
20 Casino Resort, et al.,  
21 Defendants.

CASE NO.: A531538

DEPT NO: 10

BENCH TRIAL DATE: 10/25/10

HEARING DATE: 7/5/11

22 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

23 THIS MATTER having come on for hearing on July 5, 2011, with respect to Defendant's  
24 Motion to Amend Judgment on the Verdict, before the Honorable Jessie Walsh, presiding, and the  
25 Court having considered the evidence and the arguments of counsel and taken the matter under  
26 advisement for further consideration, this Court finds and concludes as follows:

1 FINDINGS OF FACT

2 Within the Judgment on the Verdict filed April 12, 2011, the reference to interest accrual  
3 on the Judgment is articulated as follows:

4 Pre-judgment interest shall accrue on past damages at the legal rate of 5.25%  
5 (3.25 prime + 2) on the amount of \$1,909,234.38 pursuant to NRS 17.130, from  
6 the date of service of the Summons and Complaint (12/11/2006) until fully  
7 satisfied, such interest in the amount of FOUR HUNDRED TWENTY SEVEN  
THOUSAND TWENTY SEVEN AND 71/100 DOLLARS (\$427,027.00 [sic])  
as of April 4, 2011 and accruing at a rate of TWO HUNDRED SEVENTY  
FOUR AND 62/100 DOLLARS (\$274.62) per diem thereafter.

8 Post-Judgment Interest shall accrue at the legal rate on future damages in the  
9 amount of \$4,142,355.00, until fully satisfied.

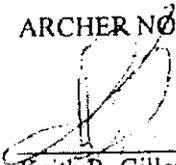
10 Defendant Fiesta Palms LLC (hereinafter, Defendant or "Palms") objected to this  
11 articulation of interest to be awarded as to post-judgment interest on past damages, as developed  
12 within its Motion to Amend Judgment. Plaintiff filed no opposition to said Motion, and concurred  
13 that the interest rate was improperly articulated.

14 CONCLUSIONS OF LAW

15 NRS 17.130 mandates that determination of post-judgment interest on past damages. The  
16 Judgment on the Verdict filed April 12, 2011 erroneously articulates the interest rate as "5.25%  
17 (3.25 prime + 2)."  
18

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21 Dated: July 26, 2011

ARCHER NORRIS

22  
23  
24   
25 Keith R. Gillette (Bar No. 11140)  
26 ARCHER NORRIS  
27 2033 North Main Street, Suite 800  
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Attorneys for Defendant FIESTA PALMS,  
LLC, a Nevada Limited Liability Company,  
d/b/a/ THE PALMS CASINO RESORT

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ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Amend Judgment on the Verdict is granted.

Dated: 14 Sept 2011

Jessie Walsh  
Hon. JESSIE WALSH  
DISTRICT COURT JUDGE *J*

ZA126/1187167-1

1 CERTIFICATE OF SERVICE

2 **Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC**  
3 **Court and Action No: District Court, Clark County, Nevada Action No. A531538**

4 I, Tracy Pico, certify that I am over the age of eighteen years and not a party to this action  
5 or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035, Walnut  
6 Creek, California 94596-3728. On September 22, 2011, I caused the following document(s) to  
7 be served: **NOTICE OF ENTRY OF ORDER ~ DEFENDANT'S MOTION TO AMEND**  
8 **JUDGMENT ON THE VERDICT**

9  by placing a true copy of the document(s) listed above, enclosed in a sealed envelope,  
10 addressed as set forth below, for collection and mailing on the date and at the business  
11 address shown above following our ordinary business practices. I am readily familiar  
12 with this business' practice for collection and processing of correspondence for  
13 mailing with the United States Postal Service. On the same day that a sealed envelope  
14 is placed for collection and mailing, it is deposited in the ordinary course of business  
15 with the United States Postal Service with postage fully prepaid.

11 Steven M. Baker, Esq.  
12 Benson, Bertoldo, Baker & Carter  
13 7408 W. Sahara Avenue  
14 Las Vegas, NV 89117  
15 Phone: 702.228.2600  
16 Fax: 702.228.2333  
17 *Attorneys for Plaintiff*  
18 Enrique Rodriguez

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Fiesta Palms, LLC a Nevada Limited  
Liability Company, d/b/a The Palms  
Casino Resort

17 John Naylor  
18 Lionel Sawyer & Collins  
19 300 S. 4th Street, Suite 1700  
20 Las Vegas NV 89101  
21 Phone: 702.383.8888  
22 Fax: 702.277.9568  
23 *Co-Counsel for Defendant*  
24 Fiesta Palms, LLC dba The Palms  
25 Casino Resort

23 I declare under penalty of perjury that the foregoing is true and correct. Executed on  
24 September 22, 2011, at Walnut Creek, California.

25   
26 \_\_\_\_\_  
27 An Employee of Archer Norris

1 CERTIFICATE OF SERVICE

2 Pursuant to NRC 5(b) I certify that I am an employee of Lemons, Grundy & Eisenberg and that  
3 on this date I deposited for mailing at Reno, Nevada, postage prepaid, a true copy of the attached  
4 document addressed to:

5 Marsha L. Stephenson  
6 STEPHENSON & DICKINSON, P.C.  
7 2820 West Charleston Boulevard  
8 Suite 19  
9 Las Vegas, Nevada 89102-1942

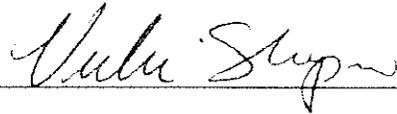
10 Kenneth C. Ward  
11 Keith R. Gillette  
12 ARCHER NORRIS  
13 A Professional Law Corporation  
14 2033 North Main Street, Suite 800  
15 P.O. Box 8035  
16 Walnut Creek, California 94596-3728

17 Steven M. Baker  
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19 7408 W. Sahara Avenue  
20 Las Vegas, Nevada 89117

21 John Naylor  
22 LIONEL SAWYER & COLLINS  
23 300 S. 4th Street, Suite 1700  
24 Las Vegas, Nevada 89101

25 Jeffery A. Bendavid  
26 MORAN LAW FIRM  
27 630 S. 4th Street  
28 Las Vegas, Nevada 89101

DATED this 4th day of Nov., 2011.

  
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Facsimile : (702) 228-2333  
Attorneys for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

CASE NO: A531538  
DEPT NO: 10

vs.

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/baa/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,

HEARING DATE: 12/1/11  
HEARING TIME: *chambers*

Defendants.

**OPPOSITION TO MOTION TO AMEND THE ORDER DENYING DEFENDANT'S  
MOTION FOR NEW TRIAL**

**I. Introduction**

Plaintiff concedes, although Defendant never opposed the issue in briefing or at the time of the hearing on the Motion for New Trial, that the subject Order should be revised/amended to reflect that the Defendant deposed two (2) medical providers, Dr. Nathan Heaps, the Emergency Room physician, and Dr. Louis Mortillaro, a Neuropsychologist.



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For the reasons discussed herein, however, no further revisions and/or amendments are warranted.

**II. Defendant Did Depose Two Providers**

In opposing Defendant’s Motion for New Trial, Plaintiff mistakenly argued that Defendant’s counsel opted not to depose a single medical provider. Defendant, neither in their Reply, nor at the time of the hearing in regards to this matter, raised any opposition, argument and/or concern with respect to that statement.

Thereafter, Defendant’s written objection to the Order contained no specific argument relative to this issue other than to simply indicate that the statements were “factually incorrect and misleading.”<sup>1</sup>

Upon receipt of the instant Motion, Plaintiff’s counsel was reminded that two (2) providers were, in fact, deposed.

While no other providers were deposed, it would be fair and just to amend the Order to reflect that Dr. Heaps and Dr. Mortillaro were deposed.

Although this amendment is in order, no further amendments are warranted, and certainly, the findings of fact and conclusions of law that Defense counsel did not exercise reasonable diligence and cannot argue surprise should remain.

**III. This Court Correctly Determined that Defendant Could Not Argue Surprise**

Plaintiff treated with approximately twenty-five (25) medical providers over the course of several years. Defense counsel deposed two (2) providers, neither of which was a

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<sup>1</sup> See Exhibit “1,” Counsel’s correspondence dated September 13, 2011.



1 medical doctor involved in Plaintiff's ongoing care for the constellation of physical  
2 complaints put into evidence at trial.

3 The basis of the Court's finding and conclusion of law related to, and was based on,  
4 the totality of the circumstances of this case: Defendant's lack of diligence in the discovery  
5 process and clear lack of surprise relative to Dr. Schifini's records are discussed below.

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8 **IV. The Facts Pertaining to the Records Produced and Relied Upon by Dr. Schifini are Correct, Factually Accurate and Supported by the Record**

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10 As this Court will recall, Defense counsel argued in their Motion for New Trial that  
11 Plaintiff's counsel withheld 100+ documents that Dr. Schifini relied upon in providing expert  
12 opinions at trial.

13 Specifically, Defendant argued as follows:

14 "Dr. Schifini was permitted to testify regarding approximately 117 pages of  
15 documents which the Palms were unaware of and the Palms were never been [sic]  
16 notified by Dr. Schifini or Plaintiff's counsel that such documents existed. Plaintiff's  
17 failure to disclose the documents put the Palms at a great disadvantage in its cross-  
examination of Dr. Schifini."

18 This, of course, as the Court determined, did not constitute a "surprise," as the Court  
19 found that Defense counsel failed to exercise due diligence.

20 First, as specifically found by this Court, defense counsel opted **not** to depose Dr.  
21 Schifini.

22 Second, all of said contested medical records were those of other of Plaintiff's medical  
23 providers as related to the instant matter, and all of such records had been previously  
24 produced to the Defendant.  
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Third, as determined by this Court and supported by the evidence presented, Dr. Schifini reviewed *all* the medical records in the case.<sup>2</sup> This is not an inaccurate or unsupported statement as now suggested by counsel; rather, it is supported by the Trial Testimony of Dr. Schifini.

Fourth, as determined by this Court, defense counsel's only objections relative to Dr. Schifini's testimony were foundation and hearsay.

Fifth, as determined by this Court, defense counsel did not object to the records relied upon as not having been produced and/or as constituting a surprise, or the introduction of the documents, other than on a *foundation* and *hearsay basis*, which related to Dr. Schifini's ability to provide expert testimony, and not his reliance on the documents.

Sixth, as this Court determined, the records that counsel referred to were introduced and admitted into evidence, with the only objections being *foundation* and *hearsay*.

Dr. Joseph Schifini was qualified as an expert in the areas of pain management, including neurologically mediated disease and modalities of which are used to treat those diseases.

MR. BAKER: I'm going to have him accepted by this Court as a treating physician, qualified as an expert in the areas of pain management, including neurologically mediated disease and the modalities of which are used to treat those diseases.

THE COURT: Any objection?

MR. WARD: No, Your Honor.

THE COURT: So ordered.<sup>3</sup>

As previously argued, an expert is permitted to rely upon inadmissible evidence.

<sup>2</sup> See Exhibit "2," Oct. 28, 2010, Trial Testimony, 6: 12-14.

<sup>3</sup> *Id.*, 6: 4-10.



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NRS 50.285, 50.295. *Barrett v. Baird*, 1995, 908 P.2d 689, 111 Nev. 1496.

In this case, however, and as determined by this Court, the documents were introduced and admitted.

Separately, while counsel argued that 100+ documents were presented, they did not identify the documents, and counsel's position that he had never seen them before was, as this Court found, illogical, as they were not new to the case, and were in fact stipulated into evidence.

V. Conclusion

Again, Plaintiff concedes that the subject Order should be revised/amended to reflect that the Defendant deposed two (2) medical providers, Dr. Nathan Heaps and Dr. Louis Mortillaro.

However, no further revisions and/or amendments are warranted.

Date: \_\_\_\_\_

BENSON, BERTOLDO, BAKER & CARTER

STEVEN M. BAKER  
Nevada Bar No. 4522  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
Attorneys for Plaintiff



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this \_\_\_\_ day of \_\_\_\_\_, 2011, I served a true and correct copy of the foregoing document was served as indicated below to the following interested parties:

Keith Gillette, Esq. Archer, Norris 2033 North Main Street, Suite 800 P.O. Box 8035 Walnut Creek, California 94596-3728 925-930-6600 Telephone 925-930-6620 Facsimile Attorneys for Fiesta Palms, L.L.C.	Robert L. Eisenberg, Esq. Lemons, Grundy & Eisenberg 6005 Plumas Street, Third Floor Reno, NV 89519 Co-Counsel for Fiesta Palms, L.L.C.
Marsha L. Stephenson, Esq. Stephenson & Dickinson 2820 West Charleston Blvd., Suite 19 Las Vegas, Nevada 89102-1942 Co-counsel for Fiesta Palms, L.L.C.	

\_\_\_\_\_  
An Employee of Benson, Bertoldo, Baker & Carter

**EXHIBIT 1**

6 App. 1264



**ARCHERNORRIS**  
A PROFESSIONAL LAW CORPORATION

2033 North Main Street, Suite 800  
Walnut Creek, CA 94596-3759  
925.930.6600  
925.930.6820 (Fax)  
www.archernorris.com

KEITH R. GILLETTE  
kgillette@archernorris.com  
925.952.5440  
Admitted to Practice in California, Nevada

September 13, 2011

VIA FAX & EMAIL C/O MONIQUE KRYPEK (MONIQUE@BENSONLAWYERS.COM)

Steven M. Baker, Esq.  
Robert Cardenas, Esq.  
Benson, Bertoldo, Baker & Carter  
7408 W. Sahara Avenue  
Las Vegas, NV 89117

Re: *Rodriguez v. Fiesta Palms, LLC., et al., Action No. A531538*

Gentlemen:

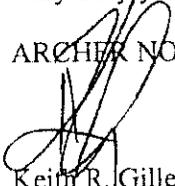
Please allow this to serve as our comments and requested revisions to plaintiff's proposed order on defendant's motion for new trial.

1. Page 4, line 7: At the end of this sentence, please add the following language: These documents were subject to a subpoena previously issued on this individual, but not produced pursuant to that subpoena.
2. Page 5, line 9: At the end of this sentence, please add the following language: The records produced by Dr. Schifini pursuant to the document subpoena issued on this individual did not reflect that this healthcare provider had been provided all the medical records in this case.
3. Page 5, lines 1-2: This sentence is factually incorrect. Please remove this letter.
4. Page 8, lines 10-13: These two paragraphs are factually incorrect and misleading. Please remove the two sentences.
5. Page 8, lines 15-17: The paragraph that begins with "Each and every one of these documents [ ]" is irrelevant and misleading. We ask that it be removed.

We reiterate our request that the proposed order, submitted to the Court on September 9, 2011 without our review or comment, be withdrawn. We similarly request that an amended proposed order be submitted for our review and comment in advance of its submittal to the Court, with an adequate amount of time within which to respond.

Steven M. Baker, Esq.  
September 13, 2011  
Page 2

Your anticipated courtesies are appreciated.

Very truly yours,  
ARCHER NORRIS  
  
Keith R. Gillette

KRG/tp  
ZA126/1221299-1

**EXHIBIT 2**

6 App. 1267

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TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ,	)	
	)	
Plaintiff,	)	CASE NO. A-531538
	)	
v.	)	DEPT. X
	)	
FIESTA PALMS LLC,	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 28, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. JOSEPH SCHIFINI

APPEARANCES:

For the Plaintiff:	STEVEN M. BAKER, ESQ. ROBERT S. CARDENAS, ESQ. Benson, Bertoldo & Baker
--------------------	---

For the Defendant:	KENNETH C. WARD, ESQ. Archer * Norris
--------------------	--

RECORDED BY: VICTORIA BOYD, COURT RECORDER

1 explain to the Court, as I've tried to say?

2 A They're similar, but there's major differences  
3 between them.

4 MR. BAKER: I'm going to have him accepted by this Court  
5 as a treating physician, qualified as an expert in the areas  
6 of pain management, including neurologically mediated disease  
7 and the modalities of which are used to treat those diseases.

8 THE COURT: Any objection?

9 MR. WARD: No, Your Honor.

10 THE COURT: So ordered.

11 BY MR. BAKER:

12 Q Now, you've reviewed all the medical records in this  
13 case. Is that fair to say?

14 A I have. Yes.

15 Q And you're aware of the manner in which Mr.  
16 Rodriguez was injured?

17 A Yes.

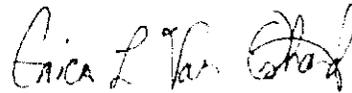
18 Q Would you explain to the Court, please, your  
19 understanding of this injury?

20 A My understanding of it is that Mr. Rodriguez was at  
21 the Palms Casino, watching or observing -- I believe it was a  
22 football game, some sort of sporting event on one of the big  
23 screen TVs. During the course of these events -- he was more  
24 kind of interested in the sporting event -- but during the  
25 course of the events, there was a promotional sort of giveaway

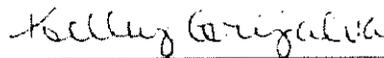
**AVTranz**

E-Reporting and E-Transcription  
Phoenix (602) 263-0885 • Tucson (520) 403-8024  
Denver (303) 634-2295

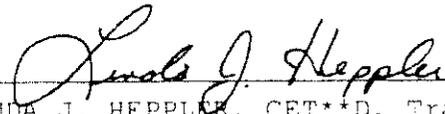
1 ATTEST: I do hereby certify that I have truly and correctly  
2 transcribed the audio/video recording in the above-entitled  
3 case to the best of my ability.  
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14 ERICA L. VAN OSTRAND, CET\*\*D, Transcriber  
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18 KELLEY GRIJALVA, CET\*\*D, Transcriber  
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22 LINDA J. HEPPLER, CET\*\*D, Transcriber  
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**AVTranz**

E-Reporting and E-Transcription  
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Denver (303) 634-2295



CLERK OF THE COURT

1 STEVEN M. BAKER  
2 Nevada Bar No. 4522  
3 BENSON, BERTOLDO, BAKER & CARTER  
4 7408 W. Sahara Avenue  
5 Las Vegas, Nevada 89117  
6 Telephone : (702) 228-2600  
7 Facsimile : (702) 228-2333  
8 Attorneys for Plaintiff

6 DISTRICT COURT  
7 CLARK COUNTY, NEVADA

8 \* \* \*

9 ENRIQUE RODRIGUEZ, an individual,  
10 Plaintiff,

CASE NO: A531538

DEPT NO: 10

11 vs.

BENCH TRIAL DATE: 10/4/10

12 FIESTA PALMS, L.L.C., a Nevada Limited  
13 Liability Company, d/b/a PALMS CASINO  
14 RESORT, BRANDY L. BEAVERS,  
15 individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,

16 Defendants.

17 ORDER

18 CAME ON FOR CONSIDERATION, Plaintiff's Motion to Reconsider Order Granting  
19 Defendant's Motion to Retax Costs. After considering the Motion, Opposition and pleadings  
20 and papers on file, the Court finds the Motion shall be granted.

21 IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration of the Order  
22 Granting Defendant's Motion to Retax Costs is hereby granted.  
23

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27 *Rodriguez v. Fiesta Palms, L.L.C.*  
28 Order Granting Motion for Reconsideration  
Page 1

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

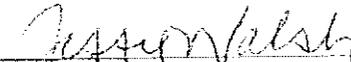
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BERTOLDO  
BAKER  
& CARTER  
ATTORNEYS AT LAW



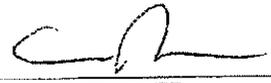
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IT IS FURTHER ORDERED that Plaintiff is awarded costs the amount of \$149,146.18, as previously included in the Judgment on the Verdict.

DATED this 16 day of Nov, 2011.

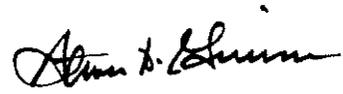
  
DISTRICT COURT JUDGE

SUBMITTED BY:



STEVEN M. BAKER  
Nevada Bar No. 4522  
BENSON, BERTOLDO, BAKER & CARTER  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
Attorneys for Plaintiff





CLERK OF THE COURT

1 AMEN

2 Robert L. Eisenberg (Bar No. 0950)  
3 LEMONS, GRUNDY & EISENBERG  
4 6005 Plumas Street, Third Floor  
5 Reno, Nevada 89519  
6 Telephone: (775) 786-6868  
7 Facsimile: (775) 786-9716

8 Attorneys for Defendant FIESTA PALMS, LLC, a  
9 Nevada Limited Liability Company, d/b/a/ THE  
10 PALMS CASINO RESORT

11 DISTRICT COURT  
12 CLARK COUNTY, NEVADA

13 ENRIQUE RODRIGUEZ,  
14 Plaintiffs,

15 v.

16 FIESTA PALMS, LLC, et al.,  
17 Defendants.

Case No. A531538

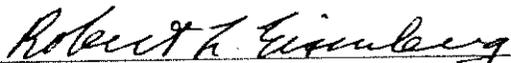
**AMENDED OR SUPPLEMENTAL  
NOTICE OF APPEAL**

18 Notice is hereby given that defendant FIESTA PALMS, LLC, appeals to the Nevada  
19 Supreme Court from the order entered on November 17, 2011 (Exhibit A), granting plaintiff's  
20 motion to reconsider costs, and awarding plaintiff's costs in the amount of \$149,146.18.

21 On September 19, 2011, the district court granted defendant's motion to amend the  
22 judgment regarding interest. At the present time, however, the district court has not yet entered  
23 an actual amended judgment containing amended language. Defendant filed a protective notice  
24 of appeal on November 4, 2011. In the meantime, the district court granted reconsideration of  
25 its previous order striking plaintiff's claimed costs; and the district court reinstated all of the  
26 costs. Plaintiff served notice of entry of the order granting reconsideration regarding costs.  
27 Although defendant's appellate counsel still believes the time for appeal will commence upon  
28

1 notice of entry of an amended judgment. appellate counsel is not entirely certain as to whether  
2 the time for appeal might have already commenced. Accordingly, defendant is filing this  
3 amended or supplemental notice of appeal to protect the right to appeal from the costs order,  
4 pursuant to *Fernandez v. Infusaid Corp.*, 110 Nev. 187, 192-93, 871 P.2d 292 (1994)  
5 (recognizing protective notice of appeal where appeal time is uncertain).  
6

7  
8 DATED: 12/13/11  
9

10   
11 ROBERT L. EISENBERG (Bar No. 0950)  
12 Lemons, Grundy & Eisenberg  
13 6005 Plumas Street, Third Floor  
14 Reno, Nevada 89519  
15 775-786-6868  
16 775-786-9716  
17 Email: [rlc@lge.net](mailto:rlc@lge.net)

18  
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ATTORNEYS FOR DEFENDANT  
FIESTA PALMS, LLC

**EXHIBIT A**

**EXHIBIT A**

CLERK OF THE COURT

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STEVEN M. BAKER  
Nevada Bar No. 4522  
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Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
Attorneys for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

CASE NO: A531538

DEPT NO: 10

vs.

BENCH TRIAL DATE: 10/4/10

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,

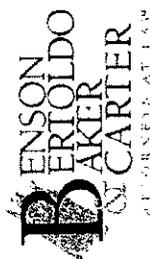
Defendants.

ORDER

CAME ON FOR CONSIDERATION, Plaintiff's Motion to Reconsider Order Granting  
Defendant's Motion to Retax Costs. After considering the Motion, Opposition and pleadings  
and papers on file, the Court finds the Motion shall be granted.

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration of the Order  
Granting Defendant's Motion to Retax Costs is hereby granted.

*Rodriguez v. Fiesta Palms, L.L.C.*  
Order Granting Motion for Reconsideration  
Page 1





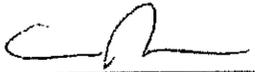
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IT IS FURTHER ORDERED that Plaintiff is awarded costs the amount of \$149,146.18, as previously included in the Judgment on the Verdict.

DATED this 16 day of Nov, 2011.

  
DISTRICT COURT JUDGE

SUBMITTED BY:



STEVEN M. BAKER  
Nevada Bar No. 4522  
BENSON, BERTOLDO, BAKER & CARTER  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
Attorneys for Plaintiff

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b) I certify that I am an employee of Lemons, Grundy & Eisenberg and that  
3 on this date I deposited for mailing at Reno, Nevada, postage prepaid, a true copy of the attached  
4 document addressed to:

5 Marsha L. Stephenson  
6 STEPHENSON & DICKINSON, P.C.  
7 2820 West Charleston Boulevard  
8 Suite 19  
9 Las Vegas, Nevada 89102-1942

10 Kenneth C. Ward  
11 Keith R. Gillette  
12 ARCHER NORRIS  
13 A Professional Law Corporation  
14 2033 North Main Street, Suite 800  
15 P.O. Box 8035  
16 Walnut Creek, California 94596-3728

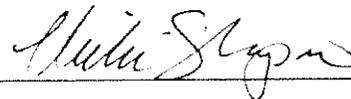
17 Steven M. Baker  
18 BENSON, BERTOLDO, BAKER & CARTER  
19 7408 W. Sahara Avenue  
20 Las Vegas, Nevada 89117

21 John Naylor  
22 LIONEL SAWYER & COLLINS  
23 300 S. 4th Street, Suite 1700  
24 Las Vegas, Nevada 89101

25 Jeffery A. Bendavid  
26 Adam S. Davis  
27 MORAN LAW FIRM  
28 630 S. 4th Street  
Las Vegas, Nevada 89101

Michael K. Wall  
HUTCHISON & STEFFEN  
10080 West Alta Drive, Suite 200  
Las Vegas, Nevada 89145

DATED this 13 day of Dec., 2011.

  
\_\_\_\_\_



ORIGINAL

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*Steven M. Baker*  
CLERK OF THE COURT

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

**B** ENSON  
ERTOLDO  
BAKER  
& CARTER  
ATTORNEYS AT LAW

1 STEVEN M. BAKER  
2 Nevada Bar No. 4522  
3 BENSON, BERTOLDO, BAKER & CARTER  
4 7408 W. Sahara Avenue  
5 Las Vegas, Nevada 89117  
6 Telephone : (702) 228-2600  
7 Facsimile : (702) 228-2333  
8 Attorneys for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

9		
10	ENRIQUE RODRIGUEZ, an individual,	CASE NO: A531538
11	Plaintiff,	DEPT NO: 10
12	vs.	
13	FIESTA PALMS, L.L.C., a Nevada Limited	
14	Liability Company, d/baa/a PALMS CASINO	
15	RESORT, BRANDY L. BEAVERS,	
16	individually, DOES 1 through X, inclusive,	
17	and ROE BUSINESS ENTITIES 1 through X,	
18	inclusive,	
19	Defendants.	

AMENDED JUDGMENT ON THE VERDICT

18 The above-entitled matter having come on for a bench trial on October 25, 2010  
19 before the Honorable Jessie Walsh, District Court Judge, presiding. Plaintiff ENRIQUE  
20 RODRIGUEZ appeared in person with his counsel of record, STEVEN M. BAKER, ESQ. of  
21 the law firm of Benson Bertoldo Baker & Carter. Defendant FIESTA PALMS, L.L.C.  
22 appeared by and through its counsel of record, KENNETH C. WARD, ESQ. of the law firm  
23 of Archer Norris. Defendant BRANDY BEAVERS is in default and was not in attendance.  
24 Testimony was taken, evidence was offered, introduced and admitted. Counsel argued the  
25 merits of their cases.  
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The Honorable Jessie Walsh rendered a verdict in favor of Plaintiff and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, as to claims concerning negligence arising from premises liability resulting in the injuries to ENRIQUE RODRIGUEZ in the amount of \$376,773.38 for past medical expenses; \$1,854,738.00 for future medical expenses; \$1,243,350.00 for past pain and suffering; \$1,865,025.00 for future pain and suffering; \$289,111.00 for past lost income; \$422,592.00 for future lost income, for a total judgment against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS of \$6,051,589.38.

The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C.	60%
Defendant BRANDY BEAVERS	40%

NOW, THEREFORE, judgment upon the verdict is hereby entered in favor of the Plaintiff ENRIQUE RODRIGUEZ and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff ENRIQUE RODRIGUEZ, shall have and recover against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, the sum of SIX MILLION, FIFTY-ONE THOUSAND, FIVE HUNDRED EIGHTY NINE AND 38/100 DOLLARS (\$6,051,589.38).

Pre-judgment interest shall accrue on past damages at the legal rate of 5.25% (3.25 prime + 2) on the amount of \$1,909,234.38 pursuant to NRS 17.130, from the date of service of the Summons and Complaint (12/11/2006), such interest in the amount of FOUR HUNDRED TWENTY SEVEN THOUSAND TWENTY SEVEN AND 71/100 DOLLARS (\$427,027.71) as of April 4, 2011. The entire judgment, including pre-judgment interest, shall

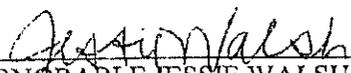


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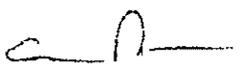
accrue interest at the legal rate from the date of entry of the judgment until the judgment is fully satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is entitled to his costs of \$149,146.18 as the prevailing party under NRS 18.020 and NRS 18.010.

DATED this 1<sup>st</sup> day of Feb, 2012.

  
HONORABLE JESSIE WALSH  
District Court Judge 

SUBMITTED BY:



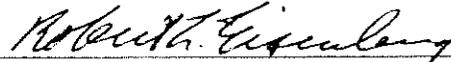
\_\_\_\_\_  
STEVEN M. BAKER  
Nevada Bar No. 4522  
BENSON, BERTOLDO, BAKER & CARTER  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff





1 including, to the extent necessary, the "Judgment on the Verdict" entered on April 12, 2011  
2 (Exhibit E).<sup>1</sup>

3  
4 DATED: March 19, 2012

5  
6 

7 ROBERT L. EISENBERG (Bar No. 0950)  
8 Lemons, Grundy & Eisenberg  
9 6005 Plumas Street, Third Floor  
10 Reno, Nevada 89519  
11 775-786-6868  
12 775-786-9716  
13 Email: [rlc@lge.net](mailto:rlc@lge.net)

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ATTORNEYS FOR DEFENDANT  
FIESTA PALMS, LLC

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<sup>1</sup> On September 19, 2011, the district court granted a motion to amend the judgment, but the district court did not actually enter the amended judgment until February 15, 2012. Defendant previously filed a protective notice of appeal and a supplemental/amended notice of appeal, due to jurisdictional uncertainty as to whether various orders and judgments were appealable prior to entry of the amended judgment. With entry of the amended judgment, any such jurisdictional uncertainty is now eliminated.

**EXHIBIT A**

**EXHIBIT A**

ORIGINAL

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*Alma D. Duran*  
CLERK OF THE COURT

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89123 • (702) 228-2600 • FAX (702) 228-2333

**BENSON BERTOLDO BAKER & CARTER**  
ATTORNEYS AT LAW

1 STEVEN M. BAKER  
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6 Telephone : (702) 228-2600  
7 Facsimile : (702) 228-2333  
8 Attorneys for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

9	ENRIQUE RODRIGUEZ, an individual,	CASE NO: AS31538
10	Plaintiff,	DEPT NO: 10
11	vs.	
12	FIESTA PALMS, L.L.C., a Nevada Limited	
13	Liability Company, d/baa/a PALMS CASINO	
14	RESORT, BRANDY L. BEAVERS,	
15	individually, DOES 1 through X, inclusive,	
16	and ROE BUSINESS ENTITIES I through X,	
17	inclusive,	
18	Defendants.	

AMENDED JUDGMENT ON THE VERDICT

18 The above-entitled matter having come on for a bench trial on October 25, 2010  
19 before the Honorable Jessie Walsh, District Court Judge, presiding. Plaintiff ENRIQUE  
20 RODRIGUEZ appeared in person with his counsel of record, STEVEN M. BAKER, ESQ. of  
21 the law firm of Benson Bertoldo Baker & Carter. Defendant FIESTA PALMS, L.L.C.  
22 appeared by and through its counsel of record, KENNETH C. WARD, ESQ. of the law firm  
23 of Archer Norris. Defendant BRANDY BEAVERS is in default and was not in attendance.  
24 Testimony was taken, evidence was offered, introduced and admitted. Counsel argued the  
25 merits of their cases.  
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The Honorable Jessie Walsh rendered a verdict in favor of Plaintiff and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, as to claims concerning negligence arising from premises liability resulting in the injuries to ENRIQUE RODRIGUEZ in the amount of \$376,773.38 for past medical expenses; \$1,854,738.00 for future medical expenses; \$1,243,350.00 for past pain and suffering; \$1,865,025.00 for future pain and suffering; \$289,111.00 for past lost income; \$422,592.00 for future lost income, for a total judgment against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS of \$6,051,589.38.

The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C.	60%
Defendant BRANDY BEAVERS	40%

NOW, THEREFORE, judgment upon the verdict is hereby entered in favor of the Plaintiff ENRIQUE RODRIGUEZ and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff ENRIQUE RODRIGUEZ, shall have and recover against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, the sum of SIX MILLION, FIFTY-ONE THOUSAND, FIVE HUNDRED EIGHTY NINE AND 38/100 DOLLARS (\$6,051,589.38).

Pre-judgment interest shall accrue on past damages at the legal rate of 5.25% (3.25 prime + 2) on the amount of \$1,909,234.38 pursuant to NRS 17.130, from the date of service of the Summons and Complaint (12/11/2006), such interest in the amount of FOUR HUNDRED TWENTY SEVEN THOUSAND TWENTY SEVEN AND 71/100 DOLLARS (\$427,027.71) as of April 4, 2011. The entire judgment, including pre-judgment interest, shall

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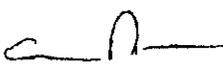
accrue interest at the legal rate from the date of entry of the judgment until the judgment is fully satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is entitled to his costs of \$149,146.18 as the prevailing party under NRS 18.020 and NRS 18.010.

DATED this 15 day of Feb, 2012.

  
HONORABLE JESSIE WALSH  
District Court Judge

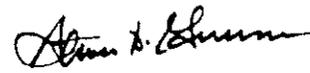
SUBMITTED BY:



STEVEN M. BAKER  
Nevada Bar No. 4522  
BENSON, BERTOLDO, BAKER & CARTER  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff

**EXHIBIT B**

**EXHIBIT B**



CLERK OF THE COURT

1 STEVEN M. BAKER  
2 Nevada Bar No. 4522  
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8 Attorneys for Plaintiff

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DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

9 ENRIQUE RODRIGUEZ, an individual,  
10  
11 Plaintiff,

CASE NO: A531538  
DEPT NO: 10

12 vs.

BENCH TRIAL DATE: 10/4/10

13 FIESTA PALMS, L.L.C., a Nevada Limited  
14 Liability Company, d/b/a PALMS CASINO  
15 RESORT, BRANDY L. BEAVERS,  
16 individually, DOES 1 through X, inclusive,  
17 and ROE BUSINESS ENTITIES 1 through X,  
18 inclusive,

19 Defendants.

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ORDER

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**CAME ON FOR CONSIDERATION**, Plaintiff's Motion to Reconsider Order Granting Defendant's Motion to Retax Costs. After considering the Motion, Opposition and pleadings and papers on file, the Court finds the Motion shall be granted.

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration of the Order Granting Defendant's Motion to Retax Costs is hereby granted.

*Rodriguez v. Fiesta Palms L L C*  
Order Granting Motion for Reconsideration  
Page 1

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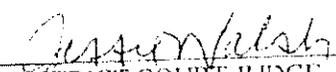




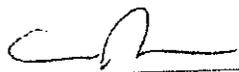
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IT IS FURTHER ORDERED that Plaintiff is awarded costs the amount of \$149,146.18, as previously included in the Judgment on the Verdict.

DATED this 16 day of Nov, 2011.

  
DISTRICT COURT JUDGE

SUBMITTED BY:

  
\_\_\_\_\_  
STEVEN M. BAKER  
Nevada Bar No. 4522  
BENSON, BERTOLDO, BAKER & CARTER  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
Attorneys for Plaintiff

**EXHIBIT C**

**EXHIBIT C**



[ ORIGINAL ]

1 STEVEN M. BAKER  
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Attorneys for Plaintiff

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*Alan D. Blum*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

9 ENRIQUE RODRIGUEZ, an individual,	CASE NO: A531538
10 Plaintiff,	DEPT NO: 10
11 vs.	
12 FIESTA PALMS, L.L.C., a Nevada Limited 13 Liability Company, d/baa/a PALMS CASINO 14 RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, 15 and ROE BUSINESS ENTITIES 1 through X, inclusive,	
16 Defendants.	

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING  
DEFENDANT'S MOTION FOR NEW TRIAL**

17  
18  
19 THIS MATTER having come on for hearing on July 5, 2011 with respect to  
20 Defendant's Motion for New Trial before the Honorable Jessie Walsh, presiding, and the  
21 Court having considered the evidence and the arguments of counsel and taken the matter  
22 under advisement for further consideration hereby finds,

**FINDINGS OF FACT**

23  
24 In seeking a new trial, Defendant offered the following four (4) arguments:

- 25 1. Plaintiff's counsel engaged in misconduct;
- 26 2. The Court erred in allowing testimony of certain providers;
- 27 3. The evidence was insufficient to justify the verdict; and
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4. The Court erred in striking defense experts.

This Court makes the following Findings of Fact with respect to the following Conclusions of Law and Order as set forth herein.

1. Plaintiff's Counsel Did Not Engage In Misconduct

Defense counsel, during Opening Argument, the evidentiary phase of the trial, and Closing Argument, accused Plaintiff's counsel of engaging in a systematic "medical build-up," and manipulation of the medical records.

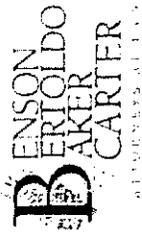
Post-trial, Defense counsel, in moving for a mistrial, then accused Plaintiff's counsel and this Court of engaging in a systematic *ex parte* conspiracy, rendering the trial unfair and impartial. At no time did this Court engage in unpermitted contact with the Plaintiff, nor did this Court rely on the contents and/or points and authorities contained in any "blind" briefing in support of its findings, conclusions, and/or verdict herein.

Post-judgment, Defense counsel, in moving for a new trial, argued that Plaintiff's counsel engaged in blatant premeditated and reprehensible misconduct.

Defendant argued that Plaintiff's counsel's alleged misconduct constituted an *irregularity in the proceedings*. Defense counsel argued that it was well settled under Nevada law that attorney misconduct constitutes an irregularity in the proceedings; however, they cited no Nevada law, or any authority, for that matter, in support of this position.

Defense counsel pointed to two (2) *examples* (arguments) of misconduct:

1. Plaintiff's counsel withheld evidence in regards to Plaintiff's tax returns; and
2. Plaintiff's counsel withheld evidence relied upon by Dr. Schifini.



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This Court finds that Plaintiff's counsel did not withhold evidence in regarding Plaintiff's tax returns.

Mr. Dinneen was asked to look at the vocational issues, the types of work that Plaintiff was able to do prior to his accident, to look at what vocational options he may have in the future and then calculate that loss. He was also asked to look at the costs of future medical care and calculate those values, as well.

Mr. Dinneen met with the Plaintiff, reviewed his medical records, three (3) years of tax returns, and social security materials in forming an opinion that Plaintiff was disabled.

Mr. Dinneen testified that Plaintiff was qualified by the Federal Government as being disabled.

Mr. Dinneen testified to a reasonable degree of economic and professional probability that Plaintiff's income was *reported*.

Defense counsel was critical of the fact that Mr. Dinneen, during his testimony at trial, and in response to defense counsel's inquiry as to whether Mr. Dinneen knew if any of Plaintiff's income was reported, indicated that he had received a letter from Plaintiff's tax preparer advising that the subject returns had, in fact been filed.

Mr. Dinneen's trial testimony occurred on November 2, 2010. The letter was dated October 20, 2010. Defense counsel did not mark the letter as an exhibit or move to admit the letter.

The subject letter was not the subject of direct examination, and the information relative to the same was brought out through cross-examination in response to counsel's inquiry as to whether Mr. Dinneen knew if any of Plaintiff's income was in fact reported. Mr. Dinneen was provided the letter from the tax preparer subsequent to his deposition, but



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merely days before his testimony. Defense counsel never moved to admit the document, but did question Mr. Dinneen as to the authenticity of the letter.

Equally, this Court finds that Plaintiff's Counsel did not withhold evidence relied upon by Dr. Schifini.

Defense counsel argued that Plaintiff's counsel withheld 100+ documents that Dr. Schifini relied upon in providing expert opinions at trial.

First, defense counsel decided **not** to depose Dr. Schifini.

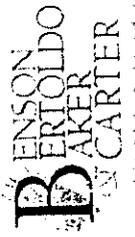
Secondly, Dr. Schifini reviewed *all* the medical records in the case.

Third, defense counsel's only objections relative to Dr. Schifini's testimony were foundation and hearsay. Defense counsel did not object to the records relied upon, or the introduction of the documents other than on a *foundation* and *hearsay basis*, which related to Dr. Schifini's ability to provide expert testimony, and not his reliance on the documents.

Fourth, the records that counsel referred to were introduced and admitted into evidence, with the only objections being *foundation* and *hearsay*. Each any every one of these documents had been previously disclosed to the Defendant and were no more than the records of other treating physicians contained in Dr. Schifini's file.

2. The Court Did Not Err In Allowing The Testimony Of Certain Providers

Defense counsel was also critical of the fact that this Court qualified and admitted certain treating providers during trial. Defense counsel's position was that none of the providers were designated as expert witnesses nor provided expert reports. Defense counsel's argument was that they never had notice of the testifying providers' opinions until trial and that they were *prejudiced* as a result.



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This Court finds that defense decided not to depose a single treating physician in a case where the Plaintiff was alleging a constellation of profound injuries.

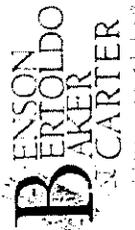
Defense counsel was fully aware of the nature and substance of the claimed injuries and had also been given the medical records generated by all of Plaintiff's physicians. Defense counsel was free to depose the treating physicians. They chose not to do so.

**3. The Court Finds Evidence Was Substantial To Justify The Verdict**

This Court heard the extensive testimony of Plaintiff's treating physicians, including, but not limited to Dr. Schifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shah, Dr. Shannon, and Dr. Tauber on the issues of injury to the Plaintiff and the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial, and heard testimony regarding past medical expenses of \$376,773.38 and future medical expenses in the amount of \$1,854,738.00.

The Court also heard testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and "before and after" lay witnesses who testified at the time of trial that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that finding, awarded as past pain and suffering the amount of \$1,243,350.00 and future pain and suffering in the amount of \$1,865,025.00.

The Court heard the testimony of Plaintiff's vocational and economic loss expert, Terrence Dinneen, on the issue of Plaintiff's loss of economic opportunity, vocational



1 disability, and loss of past and future earnings, and heard evidence concerning the significant  
2 detrimental impact of Plaintiff's injuries upon his ability to transact in the field of real-estate  
3 purchases, refurbishment, was presented with evidence and testimony that sufficient  
4 opportunity existed and exists in the repressed real estate market for Plaintiff to continue to  
5 profitably purchase, refurbish and sell real-estate absent said physical limitations, was  
6 presented with the calculations of Mr. Dinneen with respect to the same and, in this Court's  
7 discretion, awarded past lost income in the amount of \$289,111.00 and future lost income in  
8 the amount of \$422,593.00.

9  
10 As to the allocation of liability, the Court found liability against Defendant Fiesta Palms,  
11 LLC, and found that Defendant Beavers also failed to act in the manner of the average  
12 reasonable person under similar circumstances in a manner creating a foreseeable harm to  
13 patrons of the Palms by throwing promotional items into a crowded environment and in other  
14 and further manners as elucidated at the time of trial. In reaching its verdict, the Court heard  
15 and relied upon the testimony of Brandy Beavers with respect to the conduct of both herself  
16 and the Palms, and the testimony of Palms' employees regarding the fact the Palms know that  
17 promotional items were being thrown into crowds prior to the subject event, had a meeting  
18 and set up policies to prohibit said conduct, and then knowingly violated said policies. The  
19 Court, in its discretion, therefore apportioned liability at 60% to the Palms and 40% to  
20 Beavers, with no finding of comparative fault on the part of the Plaintiff.  
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23 **4. The Court Did Not Err In Striking Defense Experts**

24 Defendant presented two (2) non-medical experts in this trial, Dr. Thomas Cargill  
25 (Economist) and Forrest Franklin (Liability), neither of whom opined that their opinions were  
26 given to a reasonable degree of professional probability as required under Nevada law  
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1 Forrest Franklin, Defendant's liability expert, was retained to develop and render an  
2 opinion with respect to the standard of care as it relates to throwing objects, memorabilia, and  
3 promotional articles into crowds.

4 Mr. Franklin offered the following opinions:

- 5 1. Throwing memorabilia as a promotional effort into crowds is not  
6 a substandard protocol;
- 7 2. It is not unsafe to throw things into crowds; and
- 8 3. It is not below the standard of care to throw items into a crowd.

9 None of these opinions, however, were given to a reasonable degree of professional  
10 probability.

11 Dr. Cargill offered the following two (2) opinions at trial:

- 12 1. Plaintiff could not have made as much in the current financial market as he could  
13 have back in 2004 because the bubble burst in the housing market; and
- 14 2. Mr. Dineen's discount rates were inappropriate.

15 Neither of these opinions was given to a reasonable degree of professional/scientific  
16 probability.

### 17 CONCLUSIONS OF LAW

#### 18 1. Plaintiff's Counsel Did Not Engage In Misconduct

19 This Court concludes as follows:

20 As supported by substantial evidence, Plaintiff's counsel did not engage in  
21 misconduct.

22 Specifically, Plaintiff's counsel did not withhold evidence in regarding Plaintiff's tax  
23 returns. The information relied upon by Mr. Dinneen was of the type contemplated and  
24 permitted by NRS 50 275.

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Equally, this Court concludes that Plaintiff's Counsel did not withhold evidence relied upon by Dr. Schifini.

Nevada law makes it clear that a new trial is not warranted on grounds of *surprise* based on testimony which, *with reasonable diligence*, could have been anticipated.

Furthermore, the "surprise" contemplated by Rule 59 (a) must result from some fact, circumstance, or situation in which a party is placed unexpectedly, to his injury, without any default or negligence of his own, and which ordinary prudence could not have guarded against.

Defense counsel did not exercise reasonable diligence and cannot argue *surprise* since they chose not to depose a single treating provider. As a result of this failure, defendant did not discover the entirety of the materials contained in Dr. Schifini's file.

The records about which Defendant complains were introduced and admitted into evidence, with the only objections being *foundation* and *hearsay*. Each and every one of these documents had been previously disclosed to the Defendant and were no more than the records of other treating physicians contained in Dr. Schifini's file. Accordingly, no documents were withheld by the Plaintiff, Defendants were timely provided with all documents serving as the basis of Dr. Schifini's opinion, and no prejudice resulted.

As such, the Court concludes that there was no misconduct on the part of Plaintiff's Counsel.



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2. The Court Did Not Err in Allowing The Testimony of Certain Providers

This Court concludes as follows:

Defense counsel cannot argue *surprise* with respect to the testimony of Plaintiff's treating physicians since they chose not to depose a single treating provider and did not exercise reasonable diligence.

The scope of a witness' testimony and whether that witness will be permitted to testify as an expert are within the discretion of trial court. *Prabhu v. Levine*, 1996, 930 P.2d 103, 112 Nev. 1538, rehearing denied.

Once the district court certifies an expert as qualified, the expert may testify to all matters within the expert's experience or training, and the expert is generally given reasonably wide latitude in the opinions and conclusions he or she can state. *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992); *Brown v. Capanna*, 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989) (a proposed medical expert should not be scrutinized by an excessively strict test of qualifications); *Freeman v. Davidson*, 105 Nev. 13, 15, 768 P.2d 885, 886 (1989) ("[a]n expert witness need not be licensed to testify as an expert, as long as he or she possesses special knowledge, training and education, or in this case, knowledge of the standard of care"); *Wright v. Las Vegas Hacienda*, 102 Nev. 261, 263, 720 P.2d 696, 697 (1986) ("[a] witness need not be licensed to practice in a given field ... to be qualified to testify as an expert").

Under Nevada law, treating physicians are not considered retained experts. They should be allowed to testify as to treatment, diagnosis (including causation), and prognosis based upon their treatment of the patient and their medical training. *Id.*



1 Plaintiff's treating providers were not subject to the strict disclosure or reporting  
2 requirements under Nevada law. *Id.*

3 Even if this Court were to determine that Plaintiff's counsel failed to comply with the  
4 disclosure requirements, which it does not, the decision whether to permit expert witness to  
5 testify where there has been failure to comply with disclosure requirements is committed to  
6 the trial court's discretion. NRCP 26(b)(4). *Murphy v. Federal Deposit Ins. Corp.*, 1990, 787  
7 P.2d 370, 106 Nev. 26.

8  
9 Defense counsel was fully aware of the nature and substance of the claimed injuries  
10 and had also been given the medical records generated by all of Plaintiff's physicians.  
11 Defense counsel was free to depose the treating physicians. They chose not to do so.

12 Plaintiff's treating providers were permitted to rely on the opinions of non-testifying  
13 experts as a foundation for their opinions given at trial.

14 As such, the Court concludes that there was no error in allowing the testimony of  
15 certain providers.

16  
17 **3. The Evidence In The Case Was Substantial And Sufficient To Justify The Verdict.**

18 The Court concludes that the testimony of Plaintiff's treating physicians, including,  
19 but not limited to Dr. Schifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shah, Dr. Shannon, and Dr.  
20 Tauher to be persuasive and to provide substantial evidence on the issues of Plaintiff's injury  
21 and the reasonableness, necessity and causation of past and future medical expenses to  
22 include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future  
23 knee replacement, a spinal cord stimulator and replacement of batteries with respect to the  
24 same, future lumbar fusion, cervical modalities, and other and further past and future medical  
25 services and expenses as elucidated at trial and, accordingly, and in this Court's discretion,  
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awards as past medical expenses the amount of \$376,773.38 and future medical expenses in the amount of \$1,854,738.00.

Based upon the testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and "before and after" lay witnesses who testified at the time of trial, the Court concludes that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that conclusion, and in this Courts discretion, awards as past pain and suffering the amount of \$1,243,350.00 and future pain and suffering in the amount of \$1,865,025.00.

The Court concludes the testimony of Plaintiff's vocational and economic expert, Terrence Dineen, was substantial and persuasive on the issue of Plaintiff's loss of economic opportunity, vocational disability, and loss of past and future earnings, and concludes the Plaintiff suffered significant detrimental impact to his ability to transact in the field of real-estate purchases, refurbishment, and sales due to his physical limitations resultant of the subject injury, concludes that sufficient opportunity existed and exists in the repressed real estate market for Plaintiff to continue to profitably purchase, refurbish and sell real-estate absent said physical limitations, and is persuaded by and accepts the calculations of Mr. Dineen with respect to the same and, in this Court's discretion, awarded past lost income in the amount of \$289,111.00 and future lost income in the amount of \$422,593.00.

As to the allocation of liability, the Court concludes that liability lies against Defendant Fiesta Palms, LLC, and concludes that Defendant Beavers also failed to act in the manner of the average reasonable person under similar circumstances in a manner creating a foreseeable harm to patrons of the Palms by throwing promotional items into a crowded environment and



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in other and further manners as elucidated at the time of trial. The Court's conclusion with respect to liability is made and based upon the testimony of Brandy Beavers with respect to the conduct of both herself and the Palms, and the testimony of Palms' employees to the fact the Palms knew that promotional items were being thrown into crowds prior to the subject event, had a meeting and set up policies to prohibit said conduct, and then knowingly violated said policies. The Court, in its discretion, therefore apportions liability at 60% to the Palms and 40% to Beavers, with no finding of comparative fault on the part of the Plaintiff.

As such, the Court concludes that the evidence in the case was substantial and sufficient to justify the verdict.

**4. The Court Did Not Err In Striking Defense Experts**

To testify as an expert witness under NRS 50.275, a witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Dr. Cargill and Mr. Franklin's testimony failed to satisfy the "assistance" requirement of NRS 50.275, in that neither expert provided opinions to a reasonable degree of professional/scientific probability.

Accordingly, their opinions did not rise to the level of "scientific knowledge" within the meaning of NRS 50.275.

The opinions of Dr. Cargill and Mr. Franklin offered insufficient foundation for this court to take judicial notice of the scientific basis of those conclusions.



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While counsel for the Defendant may have properly qualified said individuals as experts, the opinions rendered by the respective experts were speculative, as the court was not advised and the record does not reflect whether such opinions were made on the basis of "possibility" or some other standard lower than "a reasonable degree of professional probability."

Accordingly, the testimony of Cargil and Franklin did not satisfy the "assistance" requirement of NRS 50.275.

Regardless, this Court determined both liability and damages independent of striking the testimony of Defendant's two expert witnesses aforesaid, and determined the same upon the basis and weight of Plaintiff's economics and vocational expert, Mr. Dineen, Plaintiff's testimony, and the testimony of Defendant's employees called in Plaintiff's case-in-chief.

As such, this Court concludes that there was no error in striking Defense experts.

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ORDER

On the basis of the foregoing, it is hereby Ordered that Defendant's Motion for a New Trial be denied.

Dated this 26 day of Sept, 2011.

  
DISTRICT COURT JUDGE

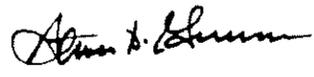
Submitted by:

BENSON, BERTOLDO, BAKER & CARTER, CHTD

  
STEVEN M. BAKER, ESQ.  
Nevada Bar No. 4522  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
(702) 228-2600 Telephone  
(702) 228-2333 Facsimile  
[monique@bensonlawyers.com](mailto:monique@bensonlawyers.com)  
Attorneys for Plaintiff

**EXHIBIT D**

**EXHIBIT D**



CLERK OF THE COURT

*Original*

1 FFCL  
2 STEVEN M. BAKER  
3 Nevada Bar No. 4522  
4 BENSON, BERTOLDO, BAKER & CARTER  
5 7408 W. Sahara Avenue  
6 Las Vegas, Nevada 89117  
7 Telephone : (702) 228-2600  
8 Facsimile : (702) 228-2333  
9 Attorneys for Plaintiff

10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

12 \* \* \*

13 ENRIQUE RODRIGUEZ, an individual,  
14 Plaintiff,

CASE NO: A531538

DEPT NO: 10

15 vs.

16 FIESTA PALMS, L.L.C., a Nevada Limited  
17 Liability Company, d/baa/a PALMS CASINO  
18 RESORT, BRANDY L. BEAVERS,  
19 individually, DOES 1 through X, inclusive,  
20 and ROE BUSINESS ENTITIES I through X,  
21 inclusive,

22 Defendants.

23 FINDINGS OF FACT AND CONCLUSIONS OF LAW  
24 IN SUPPORT OF VERDICT

25 THIS MATTER HAVING COME ON FOR TRIAL before the bench, commencing  
26 on October 25, 2011, and a verdict being entered on March 14, 2011, this Honorable Court  
27 Finds and Concludes as follows:

28 1) Liability in favor of the Plaintiff in this matter was determined as consistent with the  
Findings of Fact and Conclusions of law granting Directed Verdict pursuant to NRCP 52  
entered in this matter on March 10, 2011.





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2) The Court finds the testimony of Plaintiff's treating physicians, including, but not limited to Dr. Shifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shaw, Dr. Shannon, and Dr. Tauber to be persuasive on the issue of the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial and, accordingly, and in this Court's discretion, awards as past medical expenses the amount of \$376,773.38 and future medical expenses in the amount of \$1,854,738.00.

3) Based upon the testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and "before and after" lay witnesses who testified at the time of trial, the Court finds that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that finding, and in this Courts discretion, awards as past pain and suffering the amount of \$1,243,350.00 and future pain and suffering in the amount of \$1,865,025.00.

4) The Court finds the testimony of Plaintiff's economist, Terrence Dineen, persuasive on the issue of Plaintiff's loss of economic opportunity, vocational disability, and loss of past and future earnings, finds and concludes the Plaintiff suffered significant detrimental impact to his ability to transact in the field of real-estate purchases, refurbishment, and sales due to his physical limitations resultant of the subject injury, finds that sufficient opportunity existed and exists in the repressed real estate market for Plaintiff to continue to profitably purchase, refurbish and sell real-estate absent said physical limitations, and is persuaded by and accepts the calculations of Mr. Dineen with respect to the same and, in this Court's discretion, awards



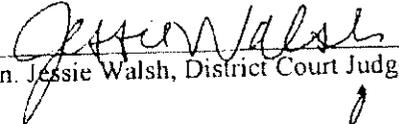
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past lost income in the amount of \$289,111.00 and future lost income in the amount of \$422,593.00.

5) As to the allocation of liability the Court finds liability against Defendant Fiesta Palms, LLC, as set forth in Finding and Conclusion #1, above, but finds that Defendant Beavers also failed to act in the manner of the average reasonable person under similar circumstances in a manner creating a foreseeable harm to patrons of the Palms by throwing promotional items into a crowded environment and in other and further manners as elucidated at the time of trial. The Court, in its discretion, therefore apportions liability at 60% to the Palms and 40% to Beavers, with no finding of comparative fault on the part of the Plaintiff.

WHEREFORE, this Court finds and concludes that a verdict be entered in said amounts as set forth on the stipulated Verdict form attached hereto as Exhibit #1.

Date: 19 Apr 2011

  
Hon. Jessie Walsh, District Court Judge

**EXHIBIT E**

**EXHIBIT E**

*Steven M. Baker*

CLERK OF THE COURT

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**JUDG**  
STEVEN M. BAKER  
Nevada Bar No. 4522  
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7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
Attorneys for Plaintiff

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

CASE NO: A531538  
DEPT NO: 10

vs.

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/baa/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,

Defendants.

**JUDGMENT ON THE VERDICT**

The above-entitled matter having come on for a bench trial on October 25, 2010 before the Honorable Jessie Walsh, District Court Judge, presiding. Plaintiff ENRIQUE RODRIGUEZ appeared in person with his counsel of record, STEVEN M. BAKER, ESQ. of the law firm of Benson Bertoldo Baker & Carter. Defendant FIESTA PALMS, L.L.C. appeared by and through its counsel of record, KENNETH C. WARD, ESQ. of the law firm of Archer Norris. Defendant BRANDY BEAVERS is in default and was not in attendance. Testimony was taken, evidence was offered, introduced and admitted. Counsel argued the merits of their cases.





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The Honorable Jessie Walsh rendered a verdict in favor of Plaintiff and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, as to claims concerning negligence arising from premises liability resulting in the injuries to ENRIQUE RODRIGUEZ in the amount of \$376,773.38 for past medical expenses; \$1,854,738.00 for future medical expenses; \$1,243,350.00 for past pain and suffering; \$1,865,025.00 for future pain and suffering; \$289,111.00 for past lost income; \$422,592.00 for future lost income, for a total judgment against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS of \$6,051,589.38.

The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C.	60%
Defendant BRANDY BEAVERS	40%

NOW, THEREFORE, judgment upon the verdict is hereby entered in favor of the Plaintiff ENRIQUE RODRIGUEZ and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff ENRIQUE RODRIGUEZ, shall have and recover against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, the sum of SIX MILLION, FIFTY-ONE THOUSAND, FIVE HUNDRED EIGHTY NINE AND 38/100 DOLLARS (\$6,051,589.38).

Pre-judgment interest shall accrue on past damages at the legal rate of 5.25% (3.25 prime + 2) on the amount of \$1,909,234.38 pursuant to NRS 17.130, from the date of service of the Summons and Complaint (12/11/2006) until fully satisfied, such interest in the amount of FOUR HUNDRED TWENTY SEVEN THOUSAND TWENTY SEVEN AND 71/100



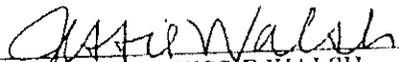
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DOLLARS (\$427,027.00) as of April 4, 2011 and accruing at a rate of TWO HUNDRED SEVENTY FOUR AND 62/100 DOLLARS (\$274.62) per diem thereafter.

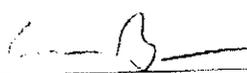
Post-Judgment Interest shall accrue at the legal rate on future damages in the amount of \$4,142,355.00, until fully satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is entitled to his costs of \$149,146.<sup>18</sup> as the prevailing party under NRS 18.020 and NRS 18.010.

DATED this 11<sup>th</sup> day of Apr, 2011.

  
HONORABLE JESSIE WALSH  
District Court Judge

SUBMITTED BY:

 4/5/11

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Nevada Bar No. 4522  
BENSON, BERTOLDO, BAKER & CARTER  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRC 5(b) I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date I deposited for mailing at Reno, Nevada, postage prepaid, a true copy of the attached document addressed to:

Marsha L. Stephenson  
STEPHENSON & DICKINSON, P.C.  
2820 West Charleston Boulevard  
Suite 19  
Las Vegas, Nevada 89102-1942

Kenneth C. Ward  
Keith R. Gillette  
ARCHER NORRIS  
A Professional Law Corporation  
2033 North Main Street, Suite 800  
P.O. Box 8035  
Walnut Creek, California 94596-3728

Steven M. Baker  
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Las Vegas, Nevada 89117

John Naylor  
LIONEL SAWYER & COLLINS  
300 S. 4th Street, Suite 1700  
Las Vegas, Nevada 89101

Jeffery A. Bendavid  
Adam S. Davis  
MORAN LAW FIRM  
630 S. 4th Street  
Las Vegas, Nevada 89101

Michael K. Wall  
HUTCHISON & STEFFEN  
10080 West Alta Drive, Suite 200  
Las Vegas, Nevada 89145

DATED this 13 day of March, 2012.



**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

\_\_\_\_\_ /

**APPELLANT'S APPENDIX**  
**VOLUME 5**

**ROBERT L. EISENBERG (Bar # 0950)**  
**Lemons, Grundy & Eisenberg**  
**6005 Plumas Street, Third Floor**  
**Reno, Nevada 89519**  
**775-786-6868**  
**Email: [rle@lge.net](mailto:rle@lge.net)**

**ATTORNEYS FOR APPELLANT**

CHRONO INDEX

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
1.	Complaint	11/15/06	1	1 - 10
2.	Defendant Fiesta Palm's LLC dba Casino Resorts Answer to Plaintiff's Complaint	04/23/07	1	11 - 19
3.	Plaintiff's 16.1 List of Documents and Witnesses	09/24/11	1	20 - 30
4.	Plaintiff's Fifth Supplemental Early Case Conference List of Documents and Witnesses	01/14/08	1	31 - 35
5.	Plaintiff's Sixth Supplemental Early Case Conference List of Documents and Witnesses	01/25/08	1	36 - 39
6.	Plaintiff's Seventh Supplemental Early Case Conference List of Documents and Witnesses	07/01/08	1	40 - 45
7.	Plaintiff's Eight Supplemental Early Case Conference List of Documents and Witnesses	07/25/08	1	46 - 50
8.	Plaintiff's Ninth Supplemental Early Case Conference List of Documents and Witnesses	10/13/08	1	51 - 55
9.	Plaintiff's Tenth Supplemental Early Case Conference List of Documents and Witnesses	10/30/08	1	56 - 60
10.	Demand for Jury Trial	4/14/09		61 - 63
11.	Plaintiff's Thirteenth Supplemental Early Case Conference List of Documents and Witnesses	5/01/09	1	64 - 68
12.	Plaintiff's Fourteenth Supplemental Early Case Conference List of Documents and Witnesses	5/01/09	1	69 - 72
13.	Amended Complaint	07/08/09	1	73 - 82
14.	Amended Order Setting Bench Trial	05/11/10	1	83 - 84
15.	Rebuttal Expert Disclosure [NRCP 16.1 (a)(2)]	07/14/10	1	85 - 125

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
16.	Motion to Compel Responses to Request for Production of Documents, to Compel Further Responses to Interrogatories; Request for Sanctions; and Motion to Compel Independent Medical Examinations of Plaintiff	07/28/10	1	126 - 134
17.	Plaintiff's Opposition to Defendant's Motion to Compel Responses to Request for Production of Documents, to Compel Further Responses to Interrogatories; Request for Sanctions; and Motion to Compel Independent Medical Examination of Plaintiff	08/09/10	1	135 - 137
18.	Plaintiff's Pre-Trial Memorandum	09/27/10	1	138 - 145
19.	Plaintiff's Motion to Strike	11/10/10	1	146 - 150
20.	Defendant The Palms' Opposition to Plaintiff's Motion to Strike	11/23/10	1	151 - 157
21.	Defendant Fiesta Palms, LLC Post-Trial Brief	11/24/10	1	158 - 187
22.	Plaintiff's Confidential Trial Brief	01/13/11	1	188 - 206
23.	Plaintiff's Opposition to Defendants' Motion for Mistrial	01/14/11	1	207 - 239
24.	Defendant Fiesta Palms, LLC's Motion for Mistrial, or, Alternatively, Motion to Strike Plaintiff's Confidential Pretrial and Trial Briefs on Ex Parte Application for Order Shortening Time; Order	01/20/11	1	240 - 248
25.	Reply in Support of the Palms' Motion for Mistrial, or, Alternatively, Motion to Strike Plaintiff's Confidential Pretrial and Trial Briefs	01/26/11	2	249 - 257
26.	Findings of Fact, Conclusions of Law, and Order [re: Motion for Mistrial]	03/10/11	2	258 - 261
27.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Strike Defendant's Post-Trial Brief]	03/10/11	2	262 - 264

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**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

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<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
28.	Findings of Fact, Conclusions of Law, and Order [re: Plaintiff's Rule 52 Motion on the Issue of Liability]	03/10/11	2	265 - 268a
29.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Strike Defendant's Experts]	03/10/11	2	269 - 272
30.	Verdict	03/14/11	2	273 - 274
31.	Plaintiff's Memorandum of Costs and Disbursements Pursuant to NRS 18.020	03/15/11	2	275 - 279
32.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, d/b/a The Palms Casino Resorts' Notice of Motion and Motion to Tax Costs	03/21/11	2	280 - 287
33.	Memorandum Re: Pre-Judgment Interest	03/22/11	2	288 - 292
34.	Defendant Fiesta Palms, LLC DBA The Palms Casino Resort's Memorandum of Points and Authorities in Support of its Motion for New Trial	03/25/11	2	293 - 324
35.	Declaration of Kenneth C. Ward in Support of Defendant Fiesta Palms, LLC's Motion for New Trial	03/25/11	2	325 - 411
36.	Declaration of Kenneth C. Ward (2nd) in Support of Defendant Fiesta Palms, LLC's Motion for New Trial	03/25/11	2	412 - 491
37.	Defendant Fiesta Palms, LLC DBA The Palms Casino Resort's Memorandum of Points and Authorities in Support of its Motion for New Trial	03/28/11	3	492 - 523
38.	Declaration of Kenneth C. Ward in Support of Defendant Fiesta Palms, LLC Motion for New Trial	03/28/11	3	524 - 686
39.	Defendant Fiesta Palms, LLC's Notice of Motion and Motion for New Trial	03/28/11	3	687 - 688

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**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
40.	Defendant Fiesta Palms, LLC's Reply Memorandum/Opposition to Plaintiff's Memorandum re: Pre-Judgment Interest	04/01/11	3	689 - 692
41.	Amended Memorandum re: Pre-Judgment Interest	04/05/11	3	693 - 696
42.	Opposition to Defendant Fiesta Palms, LLC., D/B/A The Palms Casino's Motion to Tax [sic] Costs	04/05/11	3	697 - 705
43.	Judgment on the Verdict	04/12/11	3	706 - 708
44.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, d/b/a/ The Palms Casino Resort's Reply to Plaintiff's Opposition to the Motion to Tax Costs	04/13/11	3	709 - 715
45.	Notice of Entry of Judgment	04/15/11	3	716 - 721
46.	Findings of Facts and Conclusions of Law in Support of Verdict	04/21/11	3	722 - 726
47.	Plaintiff's Opposition to Defendants' Motion for New Trial	04/22/11	4	727 - 820
48.	Notice of Motion and Motion to Amend Judgment on the Verdict	05/02/11	4	821 - 824
49.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, D/B/A The Palms Casino Resort's Reply to Plaintiff's Opposition to the Motion for New Trial	05/02/11	4	825 - 834
50.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Amend Judgment on Verdict]	09/19/11	4	835 - 837
51.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Tax Costs]	09/19/11	4	838 - 840
52.	Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion for New Trial	09/29/11	4	841 - 854

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**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
53.	Plaintiff's Motion for Reconsideration of Order Granting Defendant's Motion to Retax Costs; Ex Parte Application for Order Shortening Time; Order	10/5/11	4 5	855 - 976 977- 1149
54.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, D/B/A The Palms Casino Resort's Opposition to Plaintiff's Motion for Reconsideration of Order to Retax Costs	10/14/11	5	1150 - 1191
55.	Plaintiff's Reply to Defendant's Opposition to Motion for Reconsideration of Order Granting Defendant's Motion to Retax Costs	10/18/11	5	1192 - 1195
56.	Notice of Motion and Motion to Amend the Order Denying Defendant's Motion for a New Trial	10/18/11	5	1196 - 1197
57.	Memorandum of Points and Authorities in Support of Motion to Amend the Order Denying Defendant's Motion for New Trial	10/18/11	5	1198 - 1203
58.	Affidavit of Keith R. Gillette in Support of Motion to Amend Order Denying Defendant's Motion for New Trial	10/18/11	5	1204 - 1224
59.	Notice of Appeal	11/04/11	6	1225 - 1257
60.	Opposition to Motion to Amend the Order Denying Defendant's Motion for New Trial	11/04/11	6	1258 - 1270
61.	Order	11/17/11	6	1271 - 1272
62.	Amended or Supplemental Notice of Appeal	12/13/11	6	1273 - 1278
63.	Amended Judgment on the Verdict	02/15/12	6	1279 - 1281
64.	Second Amended or Supplemental Notice of Appeal	03/13/12	6	1282 - 1314

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
<b><u>Trial Transcripts</u></b>				
65.	Partial Transcript- Bench Trial (Opening statements; Dr. Heaps)	10/25/10	7	1315 - 1404
66.	Partial Transcript- Bench Trial (Sheri Long)	10/25/10	8	1405 - 1431
67.	Partial Transcript- Bench Trial (Vikki Kooinga)	10/25/10	8	1432 - 1444
68.	Partial Transcript- Bench Trial Vol. 1 (Enrique Rodriguez)	10/26/10	8	1445 - 1579
69.	Partial Transcript- Bench Trial (Dr. Maryanne Shannon)	10/27/10	9	1580 - 1777
70.	Partial Transcript- Bench Trial Vol. 2 (Enrique Rodriguez)	10/27/10	9	1778 - 1810
71.	Partial Transcript- Bench Trial (Dr. Joseph Schifini)	10/28/10	10	1811 - 1892
72.	Partial Transcript- Bench Trial (Dr. Joseph Schifini)	11/1/10	10	1893 - 2037
73.	Partial Transcript- Bench Trial Vol. 1(Dr. Russell Shah)	11/1/10	11	2038 - 2191
74.	Partial Transcript- Bench Trial Vol. 3 (Enrique Rodriguez)	11/2/10	11	2192 - 2220
75.	Partial Transcript- Bench Trial Vol. 2 (Dr. Russell Shah)	11/2/10	12	2221 - 2339
76.	Partial Transcript- Bench Trial (Forrest P. Franklin)	11/3/10	12	2340 - 2375
77.	Partial Transcript- Bench Trial (Maria Perez)	11/3/10	12	2376 - 2393
78.	Partial Transcript- Bench Trial (Nicholas Tavaglione)	11/4/10	12	2394 - 2426
79.	Partial Transcript- Bench Trial (Terrance Dinneen)	11/4/10	13	2427 - 2543

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
80.	Partial Transcript- Bench Trial (Dr. George Becker)	11/5/10	13 14	2544 - 2676 2677 - 2742
81.	Partial Transcript - Bench Trial (Dr. Jacob Tauber)	11/5/10	14	2743 - 2777
82.	Partial Transcript- Bench Trial (Dr. Walter Kidwell)	11/8/10	14	2778 - 2894
83.	Partial Transcript- Bench Trial (Dr. Louis Mortillaro)	11/9/10	15	2895 - 3004
84.	Partial Transcript- Bench Trial (Dr. Thomas Cargill)	11/9/10	15	3005 - 3061
85.	Partial Transcript- Bench Trial (Frank Sciulla)	11/9/10	15	3062 - 3073
86.	Partial Transcript- Bench Trial (Closing Arguments)	11/10/10	16	3074 - 3150
<b><u>Hearing Transcripts</u></b>				
87.	Defendant's Motion for Jury Trial	10/20/10	16	3151 - 3163
88.	Defendant's Motion for Mistrial, etc.	01/27/11	16	3164 - 3186
89.	Defendant's Motion for A New Trial, etc.	07/05/11	16	3187 - 3212

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	26.00	0.00	26.00

Date  
10/21/10

Check Number  
00011303

Check Amount  
\$ 26.00

NON-NEGOTIABLE

V

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
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 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11303

CHECK NO.  
00011303

\*\* TWENTY SIX DOLLARS AND 00 CENTS \*\*

DATE	AMOUNT
10/21/10	*****26.00

**PAY** Brandy Beavers  
**TO THE** 1973 Thunder Ridge Circle  
**ORDER** Henderson NV 89012  
**OF**

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: trial subpoena/rodriguez

⑈011303⑈ ⑆321270742⑆6733267691⑈

V

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	26.00	0.00	26.00

11303  
NET AMT.

Date  
10/21/10

Check Number  
00011303

Check Amount  
\$ 26.00

NON-NEGOTIABLE

Payee  
Brandy Beavers

V

**Heidi Castro**

---

**From:** Monique Krystek  
**Sent:** Thursday, October 21, 2010 10:15 AM  
**To:** Heidi Castro  
**Subject:** Rodriguez - URGENT CHECK REQUESTS  
**Importance:** High

Heidi,

I need these by noon:

\$26.00 each for trial subpoenas

Vicki Kooinga  
5416 Donna Avenue  
North Las Vegas, NV 89081

Sheri Long  
2238 Driftwood Tide Ave.  
Henderson, NV 89052

Brandy Beavers  
1973 Thunder Ridge Circle  
Henderson, NV 89012

I MUST SEND THESE OUT BY NOON, IF AT ALL POSSIBLE.

Thanks,

Mo

"This email and any attachments are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this message in error, please contact the sender(s) at (702) 228-2600 and delete all copies from your system. It is not the intent of the sender to solicit any person or business. Please note that any opinions in this email are solely those of the author and do not necessarily represent those of Benson, Bertoldo, Baker & Carter, Chtd. Any views or opinions are not to be considered legal advice. Should you need legal advice with Nevada, please contact Benson, Bertoldo, Baker & Carter, Chtd. The Attorneys at Benson, Bertoldo, Baker & Carter, Chtd. are licensed in Nevada. Finally, the recipient should check this email and any attachments for the presence of viruses. The company accepts no liability for any damage or loss caused by any virus transmitted by this email."

---

No virus found in this message.

Checked by AVG - [www.avg.com](http://www.avg.com)

Version: 10.0.1136 / Virus Database: 422/3210 - Release Date: 10/21/10

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	26.00	0.00	26.00

Date  
10/21/10

Check Number  
00011304

Check Amount  
\$ 26.00

NON-NEGOTIABLE

V

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 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11304

CHECK NO.  
00011304

\*\* TWENTY SIX DOLLARS AND 00 CENTS \*\*

DATE	AMOUNT
10/21/10	*****26.00

**PAY TO THE ORDER OF**  
 Vicki Kooinga  
 5416 Donna Avenue  
 North Las Vegas NV 89081

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: trial subpoena/rodriguez

⑈011304⑈ ⑆321270742⑆673326769⑈

V

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	26.00	0.00	26.00

11304

Date  
10/21/10

Check Number  
00011304

Check Amount  
\$ 26.00

NON-NEGOTIABLE

Payee  
Vicki Kooinga

V

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	26.00	0.00	26.00

Date  
10/21/10

Check Number  
00011305

Check Amount  
\$ 26.00

NON-NEGOTIABLE

V

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
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 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

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 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11305

CHECK NO.  
00011305

\*\* TWENTY SIX DOLLARS AND 00 CENTS \*\*

DATE	AMOUNT
10/21/10	*****26.00

**PAY TO THE ORDER OF** Sheri Long  
 2238 Driftwood Tide Avenue  
 Henderson NV 89052

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: trial subpoena/rodriguez

⑈011305⑈ 1:32127074 2:6733267691⑈

V

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	26.00	0.00	26.00

11305

Date  
10/21/10

Check Number  
00011305

Check Amount  
\$ 26.00

NON-NEGOTIABLE

Payee  
Sheri Long

V



*Rodriguez*

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	6314	14181-09	2050.00	0.00	2050.00
	6309	10676-05	754.00	0.00	754.00
	6294	12555-07	390.00	0.00	390.00
Date	6346	12552-07	234.00	0.00	234.00
09/30/10	6368	13490-0801	182.00	0.00	182.00
	6349	14721-10	1532.00	0.00	1532.00
Check Number	6347	10676-05	442.00	0.00	442.00
00011045	6359	14181-09	2574.00	0.00	2574.00

Check Amount \$ 8158.00

NON-NEGOTIABLE

*Monique*

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11045

CHECK NO. 00011045

\*\* EIGHT THOUSAND ONE HUNDRED FIFTY EIGHT DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF** Devinney & Dinneen Career & Vocational Service  
 445 Apple Street, Suite 102  
 Reno NV 89502

DATE 09/30/10 AMOUNT \*\*\*\*8,158.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: professional services

⑈0⑈1⑈0⑈4⑈5⑈ ⑆⑆3⑆2⑆1⑆2⑆7⑆0⑆7⑆4⑆2⑆⑆6⑆7⑆3⑆3⑆2⑆6⑆7⑆6⑆9⑆1⑈

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	6314	14181-09	2050.00	0.00	2050.00
	6309	10676-05	754.00	0.00	754.00
	6294	12555-07	390.00	0.00	390.00
Date	6346	12552-07	234.00	0.00	234.00
09/30/10	6368	13490-0801	182.00	0.00	182.00
	6349	14721-10	1532.00	0.00	1532.00
Check Number	6347	10676-05	442.00	0.00	442.00
00011045	6359	14181-09	2574.00	0.00	2574.00

Check Amount \$ 8158.00

NON-NEGOTIABLE

Payee Devinney & Dinneen Career &

10676-05



**DEVINNEY & DINNEEN CAREER AND VOCATIONAL ECONOMIC SERVICES, LTD.**

**INVOICE**

*(Handwritten mark)*

445 Apple Street, Suite 102, Reno, NV 89502  
Phone (775) 825-5558 • Toll Free (888) 235-6549 • Fax (775) 825-4511  
terry@dinneent.com

INVOICE #6309  
DATE: JULY 6, 2010

TO Mr. Steve Baker  
Benson, Bertoldo, Baker & Carter  
7408 West Sahara Ave  
Las Vegas, NV 89117

CASE NAME	OUR CASE NUMBER	PAYMENT TERMS	FEDERAL ID:
RODRIGUEZ, ENRIQUE	009 EXW 1492	Due on receipt	88-0237090

DESCRIPTION OF SERVICES	TOTAL HOURS
<b>JUNE BILLING:</b>  Contact with Attorney. Review file. Prepare and finalize report.	2.9 hrs.
	
2.9 Hours @ \$260/Hr:	\$754.00
Other:	--
<b>Balance Due:</b>	<b>\$754.00</b>

If you have any questions or concerns please give us a call! Make all checks payable to DeVinney and Dinneen  
**THANK YOU FOR YOUR BUSINESS!**



D<sup>o</sup>VINNEY & DINNEEN CAREER and VOCATIONAL ECONOMIC SERVICES, LTD.

Terrance B Dinneen, M.S., C.R.C., C.R.E.  
Lawrence J. Dinneen, Ph.D., C.R.C.  
Carol A. Dinneen, M.S.

July 6, 2010

Mr. Steve Baker  
Benson, Bertoldo, Baker & Carter  
7408 West Sahara Ave  
Las Vegas, NV 89117

RE: RODRIGUEZ, ENRIQUE

Dear Mr. Baker:

Enclosed is an invoice for my time over the last month on the RODRIGUEZ case. Please do not hesitate to contact our office if you have any questions or concerns regarding this invoice.

Respectfully Submitted,

*Terry Dinneen*

Terrance Dinneen, M.S., C.R.C., C.R.E.  
Certified Earnings Analyst #032  
Certified in Rehabilitation Economist #0022  
Certified Rehabilitation Counselor #20325

TD/mt  
Enclosure: Invoice

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
6314	14181-09	2050.00	0.00	2050.00
6309	10676-05	754.00	0.00	754.00
6294	12555-07	390.00	0.00	390.00
Date 6346	12552-07	234.00	0.00	234.00
09/30/10 6368	13490-0801	182.00	0.00	182.00
6349	14721-10	1532.00	0.00	1532.00
Check Number 6347	10676-05	442.00	0.00	442.00
00011045 6359	14181-09	2574.00	0.00	2574.00

Date 09/30/10  
 Check Number 00011045  
 Check Amount \$ 8158.00

NON-NEGOTIABLE

*Monique*

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 226-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11045

CHECK NO.  
 00011045

\*\* EIGHT THOUSAND ONE HUNDRED FIFTY EIGHT DOLLARS AND 00 CENTS \*\*

DATE 09/30/10 AMOUNT \*\*\*\*8,158.00

**PAY TO THE ORDER OF**  
 Deviny & Dinneen Career & Vocational Service  
 445 Apple Street, Suite 102  
 Reno NV 89502

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: professional services

⑈011045⑈ ⑆321270742⑆673326769⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
6314	14181-09	2050.00	0.00	2050.00
6309	10676-05	754.00	0.00	754.00
6294	12555-07	390.00	0.00	390.00
Date 6346	12552-07	234.00	0.00	234.00
09/30/10 6368	13490-0801	182.00	0.00	182.00
6349	14721-10	1532.00	0.00	1532.00
Check Number 6347	10676-05	442.00	0.00	442.00
00011045 6359	14181-09	2574.00	0.00	2574.00

Check Amount \$ 8158.00

NON-NEGOTIABLE

Payee  
 Deviny & Dinneen Career &



**DEVINNEY & DINNEEN CAREER AND  
VOCATIONAL ECONOMIC SERVICES, LTD.**

**INVOICE**

10676-05

445 Apple Street, Suite 102, Reno, NV 89502  
Phone (775) 825-5558 • Toll Free (888) 235-6549 • Fax (775) 825-4511  
terry@dinneen.com

INVOICE #6347  
DATE: AUGUST 5, 2010

TO Mr. Steve Baker  
Benson, Bertoldo, Baker & Carter  
7408 West Sahara Ave  
Las Vegas, NV 89117

CASE NAME	OUR CASE NUMBER	PAYMENT TERMS	FEDERAL ID:
RODRIGUEZ, ENRIQUE	009 EXW 1492	Due on receipt	88-0237090

DESCRIPTION OF SERVICES	TOTAL HOURS
<b>JULY BILLING:</b> Review of Independent Medical Exam report and Vocational report. Contact with Attorney.	1.7 hrs.
	<i>POSTED</i> <i>ACCOUNTING DEPT</i> <i>e</i>
	1.7 Hours @ \$260/Hr: \$442.00
	Other: --
	<b>Balance Due: \$442.00</b>

If you have any questions or concerns please give us a call! Make all checks payable to DeVinney and Dinneen  
**THANK YOU FOR YOUR BUSINESS!**

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	100.00	0.00	100.00

Date  
12/09/09

Check Number  
00008646

Check Amount  
\$ 100.00

NON-NEGOTIABLE

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 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

8646

CHECK NO.  
00008646

\*\* ONE HUNDRED DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
 Nevada Legal News  
 930 S. Fourth St. #100  
 Las Vegas NV 89101-6845

DATE: 12/09/09  
 AMOUNT: \*\*\*\*\*100.00

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: publication/rodriguez

⑈008646⑈ ⑆321270742⑆673326769⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	100.00	0.00	100.00

Date  
12/09/09

Check Number  
00008646

Check Amount  
\$ 100.00

Payee  
Nevada Legal News

NON-NEGOTIABLE

**Heidi Castro**

---

**From:** Monique Krystek  
**Sent:** Monday, December 07, 2009 2:54 PM  
**To:** Heidi Castro  
**Subject:** CHECK REQUEST by Wed., please  
Heidi,

I need a check for \$100.00 payable to Nevada Legal News for publication of the Amended Summons in the matter of

Enrique Rodriguez v. Fiesta Palms, L.L.C.  
10676-05

Thanks,

Mo

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RECEIVED  
ACCOUNTING DEPT  
12/07/09

*S. Rodriguez*

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	09-4173	11722-07	139.82	0.00	139.82
	09-4148	13389-08	188.05	0.00	188.05
	09-4116	10315-05	1618.38	0.00	1618.38
Date	09-4411	10535-05	63.06	0.00	63.06
06/26/09	09-4409	10676-05	12.07	0.00	12.07
	09-4412	10039-04	34.48	0.00	34.48
Check Number	09-4410	11824-07	31.53	0.00	31.53
00007269	09-4408	9921-04	43.90	0.00	43.90
	09-4147	11722-07	412.21	0.00	412.21
Check Amount	09-4123	10708-05	224.40	0.00	224.40
\$ 4855.94	09-4146	10595-05	54.91	0.00	54.91
	09-4098	12674-08	1890.47	0.00	1890.47
	09-4078	13337-0801	122.51	0.00	122.51
	09-4100	10315-05	20.15	0.00	20.15

NON-NEGOTIABLE

*Duran A.*

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
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 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

7269

CHECK NO.  
 00007269

\*\* FOUR THOUSAND EIGHT HUNDRED FIFTY FIVE DOLLARS AND 94 CENTS \*\*

DATE AMOUNT  
 06/26/09 \*\*\*\*\*4,855.94

PAY TO THE ORDER OF  
 The Litigation Document Group, Inc.  
 320 South 4th Street  
 Las Vegas NV 89101

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: Copy Jobs

⑈007269⑈ ⑆321270742⑆673326769⑆⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	09-4173	11722-07	139.82	0.00	139.82
	09-4148	13389-08	188.05	0.00	188.05
	09-4116	10315-05	1618.38	0.00	1618.38
Date	09-4411	10535-05	63.06	0.00	63.06
06/26/09	09-4409	10676-05	12.07	0.00	12.07
	09-4412	10039-04	34.48	0.00	34.48
Check Number	09-4410	11824-07	31.53	0.00	31.53
00007269	09-4408	9921-04	43.90	0.00	43.90
	09-4147	11722-07	412.21	0.00	412.21
Check Amount	09-4123	10708-05	224.40	0.00	224.40
\$ 4855.94	09-4146	10595-05	54.91	0.00	54.91
	09-4098	12674-08	1890.47	0.00	1890.47
	09-4078	13337-0801	122.51	0.00	122.51
	09-4100	10315-05	20.15	0.00	20.15

NON-NEGOTIABLE

Payee  
 The Litigation Document Group, Inc.



The Litigation Document Group

320 S. 4th Street  
Las Vegas, NV 89101  
Phone # (702)380-4283 Fax # (702)380-4286

# Invoice

Date	Invoice #
4/30/2009	09-4409

<b>Ordered By</b>
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

<b>Bill To</b>
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117 702-228-2600

Client Matter	Terms	Due Date	Rep	Due Time	Ordered By
10676-05 Rodriguez	Due on receipt	4/30/2009	CW		Susan A.

Quantity	Description	Amount
80	Light Litigation - Copying from bound and/or tabbed documents	11.20T

**POSTED**  
APR 30 2009  
ACCOUNTING DEPT.

Due on Receipt and Thank you for your business. Please see our General Terms and Conditions on back.

<b>Subtotal</b>	\$11.20
<b>Sales Tax (7.75%)</b>	\$0.87
<b>Total</b>	\$12.07
<b>Payments/Credits</b>	\$0.00
<b>Balance Due</b>	\$12.07

Please Mail Checks To: The Litigation Document Group, Inc. 320 S. 4th Street Las Vegas, Nv 89101  Sign: _____ Print: _____ Date: / /
---

TAX ID# 88-0504363

We accept all Major Credit Cards!

*Debit*

*Amount*

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	1045311	10676-05	638.00	0.00	638.00
	1046096	11338-06	151.50	0.00	151.50
	1046099	11338-06	287.00	0.00	287.00
Date	1046101	11338-06	189.50	0.00	189.50
07/22/09	1045992	11460-06	226.00	0.00	226.00
	1045572	11801-07	241.75	0.00	241.75
Check Number	1045679	11360-06	38.00	0.00	38.00
00007479	1045677	11360-06	618.25	0.00	618.25
	1045783	11372-06	524.00	0.00	524.00
Check Amount	1045674	9921-04	279.00	0.00	279.00
\$ 3645.50	1045857	11989-07	452.50	0.00	452.50

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 54-7074/3212

7479

CHECK NO.  
 00007479

\*\* THREE THOUSAND SIX HUNDRED FORTY FIVE DOLLARS AND 50 CENTS \*\*

DATE AMOUNT  
 07/22/09 \*\*\*\*3,645.50

**PAY TO THE ORDER OF**  
 All-American Court Reporters  
 2700 W. Sahara Avenue  
 Suite 430  
 Las Vegas NV 89102

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: Depo Transcripts

⑈007479⑈ ⑆321270742⑆6733267691⑈

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	1045311	10676-05	638.00	0.00	638.00
	1046096	11338-06	151.50	0.00	151.50
	1046099	11338-06	287.00	0.00	287.00
Date	1046101	11338-06	189.50	0.00	189.50
07/22/09	1045992	11460-06	226.00	0.00	226.00
	1045572	11801-07	241.75	0.00	241.75
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Check Amount	1045674	9921-04	279.00	0.00	279.00
\$ 3645.50	1045857	11989-07	452.50	0.00	452.50

7479

NON-NEGOTIABLE

Payee  
 All-American Court Reporters

10676-05

# INVOICE

ALL AMERICAN COURT REPORTERS  
2700 WEST SAHARA AVENUE  
SUITE 430  
LAS VEGAS, NV 89102  
Phone:702-240-4393 Fax:702-384-5506

<b>Invoice No.</b>	<b>Invoice Date</b>	<b>Job No.</b>
1045311	4/24/2009	964904
<b>Job Date</b>	<b>Case No.</b>	
4/17/2009	A531538	
<b>Case Name</b>		
Enrique Rodriguez vs. Fiesta Palms, LLC		
<b>Payment Terms</b>		
Net 30		

Steven M. Baker  
Benson, Bertoldo, Baker & Carter, Chtd.  
7408 W. Sahara Ave  
Las Vegas, NV 89117

ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF:	
Brandy Beavers	562.50
Exhibit	0.50
Half Day Per Diem	75.00
Condensed	0.00
e-transcript email	0.00
<b>TOTAL DUE &gt;&gt;&gt;</b>	<b>\$638.00</b>

Thank you for using Ben Hyatt Certified Deposition Reporters.  
We appreciate your business.

We moved! Our new address is...

17835 Ventura Blvd., Suite 310  
Encino, CA 91316

10676-05

POSTED  
JUL 13 2009  
ACCOUNTING DEPT.

Tax ID: 88-0473546

Please detach bottom portion and return with payment.

Steven M. Baker  
Benson, Bertoldo, Baker & Carter, Chtd.  
7408 W. Sahara Ave  
Las Vegas, NV 89117

Invoice No. : 1045311  
Invoice Date : 4/24/2009  
**Total Due : \$638.00**



Remit To: **ALL AMERICAN COURT REPORTERS**  
**2700 WEST SAHARA AVENUE**  
**SUITE 430**  
**LAS VEGAS, NV 89102**

Job No. : 964904  
BU ID : 3-VEGAS  
Case No. : A531538  
Case Name : Enrique Rodriguez vs. Fiesta Palms, LLC

# I N V O I C E

ALL AMERICAN COURT REPORTERS  
 2700 WEST SAHARA AVENUE  
 SUITE 430  
 LAS VEGAS, NV 89102  
 Phone: 702-240-4393 Fax: 702-384-5506

<b>Invoice No.</b>	<b>Invoice Date</b>	<b>Job No.</b>
1045311	4/24/2009	964904
<b>Job Date</b>	<b>Case No.</b>	
4/17/2009	A531538	
<b>Case Name</b>		
Enrique Rodriguez vs. Fiesta Palms, LLC		
<b>Payment Terms</b>		
Net 30		

Steven M. Baker  
 Benson, Bertoldo, Baker & Carter, Chtd.  
 7408 W. Sahara Ave  
 Las Vegas, NV 89117

ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF:	
Brandy Beavers	562.50
Exhibit	0.50
Half Day Per Diem	75.00
Condensed	0.00
e-transcript email	0.00
<b>TOTAL DUE &gt;&gt;&gt;</b>	
<b>\$638.00</b>	
Thank you for using Ben Hyatt Certified Deposition Reporters. We appreciate your business.	
We moved: Our new address is...	
17835 Ventura Blvd., Suite 310 Encino, CA 91316	

**Tax ID:** 88-0473546

*Please detach bottom portion and return with payment.*

Steven M. Baker  
 Benson, Bertoldo, Baker & Carter, Chtd.  
 7408 W. Sahara Ave  
 Las Vegas, NV 89117

Invoice No. : 1045311  
 Invoice Date : 4/24/2009  
**Total Due : \$638.00**

Remit To: **ALL AMERICAN COURT REPORTERS**  
**2700 WEST SAHARA AVENUE**  
**SUITE 430**  
**LAS VEGAS, NV 89102**

Job No. : 964904  
 BU ID : 3-VEGAS  
 Case No. : A531538  
 Case Name : Enrique Rodriguez vs. Fiesta Palms, LLC

10676-05

# INVOICE



## DEVINNEY & DINNEEN CAREER AND VOCATIONAL ECONOMIC SERVICES, LTD.

445 Apple Street, Suite 102, Reno, NV 89502  
Phone (775) 825-5558 • Toll Free (888) 235-6549 • Fax (775) 825-4511  
terry@dinneent.com

INVOICE #6013  
DATE: SEPTEMBER 3, 2009

TO Mr. Steve Baker  
Benson, Bertoldo, Baker & Carter  
7408 West Sahara Ave  
Las Vegas, NV 89117

CASE NAME	OUR CASE NUMBER	PAYMENT TERMS	FEDERAL ID:
RODRIGUEZ, ENRIQUE	009 EXW 1492	Due on receipt	88-0237090

DESCRIPTION OF SERVICES	TOTAL HOURS
Contact with Mr. Rodriguez. Review of file. Fax requested records to Attorney.	.9 hrs.
.9 Hours @ \$260/Hr: \$234.00	
Credit Balance from Inv. #5707: (\$300.00)	
Credit Balance -DO NOT PAY: (\$66.00)	

If you have any questions or concerns please give us a call! Make all checks payable to DeVinney and Dinneen  
THANK YOU FOR YOUR BUSINESS!



DeVINNEY & DINNEEN CAREER and VOCATIONAL ECONOMIC SERVICES, LTD.

Terrance B Dinneen, M.S., C.R.C., C.R.E.  
Lawrence J. Dinneen, Ph.D., C.R.C.  
Carol A. Dinneen, M.S.

September 8, 2009

Mr. Steve Baker  
Benson, Bertoldo, Baker & Carter  
7408 West Sahara Ave  
Las Vegas, NV 89117

RE: ENRIQUE RODRIGUEZ

Dear Mr. Baker:

Enclosed is an invoice for my time on the above mentioned case. Please do not hesitate to contact our office if you have any questions or concerns regarding this invoice.

Respectfully Submitted,

Terrance Dinneen, M.S., C.R.C., C.R.E.  
Certified Earnings Analyst #032  
Certified in Rehabilitation Economist #0022  
Certified Rehabilitation Counselor #20325

Enclosure: Invoice  
TD/mt

**INVESTORS TITLE COMPANY**  
 1850 South Sunset Lane, #202  
 San Bernardino, CA 92408  
 (909) 491-1208

**AMERICA**  
 275 Broadway, Suite 2100  
 San Francisco, CA 94111  
 (415) 774-2000

CHECK NO. 10013194

DATE 01/25/2004

AMOUNT \$2,000.00

PAY TO THE ORDER OF HENRY RODRIGUEZ

PAY TWO THOUSAND DOLLARS AND NO/100

VOID AFTER SIX MONTHS

THIS CHECK HAS AN ARTIFICIAL WATERMARK ON THE REVERSE. HOLD AT AN ANGLE TO VIEW.

INVESTORS TITLE COMPANY  
 COMMERCIAL TRUST ACCOUNT

VOID AFTER SIX MONTHS

⑆ 10013194 ⑆ ⑆ 121139522⑆ 1892372333⑆

Escrow No. 14007015 - 303 HL Check Date: 01/23/2004 Check No. 10013194

DESCRIPTION	CODE	AMOUNT
		\$2,000.00
Check Total		\$2,000.00

Seller/Buyer: Rodriguez/Cassady  
Property Address: 996 Dahlia Court Hemet, CA  
Tax Parcel Id:

Memo:

Dahlia  
2004

# PRELIMINARY CHANGE OF OWNERSHIP REPORT

FOR RECORDER'S USE ONLY

To be completed by transferee (buyer) prior to transfer of subject property in accordance with Section 480.03 of the Revenue and Taxation Code. A Preliminary Change of Ownership Report must be filed with each conveyance in the County Recorder's office for the county where the property is located; this particular form may be used in all 58 counties of California.

**THIS REPORT IS NOT A PUBLIC DOCUMENT**

SELLER/TRANSFEROR: ROY LUNA, JR.  
BUYER/TRANSFeree: HENRY JAVIER RODRIGUEZ  
ASSESSOR'S PARCEL NUMBER(S) 456-253-009-2  
PROPERTY ADDRESS OR LOCATION:  
996 DAHLIA  
HEMET, CA  
MAIL TAX INFORMATION TO: HENRY RODRIGUEZ  
Name  
Address 6667 INDIANA AVENUE #247F  
RIVERSIDE, CA 92506

**NOTICE:** A lien for property taxes applies to your property on March 1 of each year for the taxes owing in the following fiscal year, July 1 through June 30. One-half of these taxes is due November 1, and one-half is due February 1. The first installment becomes delinquent on December 10, and the second installment becomes delinquent on April 10. One tax bill is mailed before November 1 to the owner of record. **IF THIS TRANSFER OCCURS AFTER MARCH 1 AND ON OR BEFORE DECEMBER 31, YOU MAY BE RESPONSIBLE FOR THE SECOND INSTALLMENT OF TAXES DUE FEBRUARY 1.** The property which you acquired may be subject to a supplemental assessment in an amount to be determined by the San Bernardino County Assessor. For further information on your supplemental roll obligation, please call the San Bernardino County Assessor.

## PART I: TRANSFER INFORMATION

Please answer all questions.

- |                          |                                     |  |
|--------------------------|-------------------------------------|--|
| YES                      | NO                                  |  |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | A. Is this transfer solely between husband and wife (Addition of a spouse, death of a spouse, divorce settlement, etc.)?                           |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | B. Is this transaction only a correction of the name(s) of the person(s) holding title to the property (For example, a name change upon marriage)? |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | C. Is this document recorded to create, terminate, or reconvey a lander's interest in the property?  |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | D. Is this transaction recorded only to create, terminate, or reconvey a security interest (e.g. co-signer)?                                       |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | E. Is this document recorded to substitute a trustee under a deed of trust, mortgage, or other similar document?                                   |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | F. Did this transfer result in the creation of a joint tenancy in which the seller (transferor) remains as one of the joint tenants?               |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | G. Does this transfer return property to the person who created the joint tenancy (original transferor)?   |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | H. Is this transfer of property:   |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 1. to a trust for the benefit of the grantor, or grantor's spouse?   |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 2. to a trust revocable by the transferor?   |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 3. to a trust from which the property reverts to the grantor within 12 years?  |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | I. If this property is subject to a lease, is the remaining lease term 35 years or more including written options?                                 |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | J. Is this a transfer from parents to children or from children to parents?  |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | K. Is this transaction to replace a principal residence by a person 55 years of age or older?  |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | L. Is this transaction to replace a principal residence by a person who is severely disabled as defined by Revenue and Code Section 88.5?          |

If you checked yes to J, K, or L, an applicable claim form must be filed with the County Assessor. Please provide any other information that would help the Assessors to understand the nature of the transfer.

**IF YOU HAVE ANSWERED "YES" TO ANY OF THE ABOVE QUESTIONS EXCEPT J, K, OR L, PLEASE SIGN AND DATE, OTHERWISE COMPLETE BALANCE OF THE FORM.**

## PART II: OTHER TRANSFER INFORMATION

- A. Date of transfer if other than recording date \_\_\_\_\_
- B. Type of transfer. Please check appropriate box.
- |  |   |   |  |  |
|--|---|---|--|--|
| <input checked="" type="checkbox"/> Purchase                       | <input type="checkbox"/> Foreclosure                  | <input type="checkbox"/> Gift                   | <input type="checkbox"/> Trade or Exchange | <input type="checkbox"/> Merger, Stock, or Partnership Acquisition |
| <input type="checkbox"/> Contract of Sale - Date of Contract _____ | <input type="checkbox"/> Other: Please explain: _____ | <input type="checkbox"/> Termination of a Lease |  |  |
| <input type="checkbox"/> Inheritance - Date of Death _____         | <input type="checkbox"/> Assignment of a Lease        |   |  |  |
| <input type="checkbox"/> Creation of Lease                         |   |   |  |  |
| Date lease began _____   |   |   |  |  |
| Original term in years (including written options) _____           |   |   |  |  |
| Remaining term in years (including written options) _____          |   |   |  |  |
- C. Was only a partial interest in the property transferred?  Yes  No If yes, indicate the percentage transferred \_\_\_\_\_%

Search Results

RECEIVE  
OCT 22 2008

Page 1 of 1

Dean Heller  
Nevada Secretary of State  
Corporate Information



Name: MARY STAR ENTERPRISES, INC.

Type: Corporation	File Number: C7622-2004	State: NEVADA	Incorporated On: March 25, 2004
Status: Initial list of officers filed	Corp Type: Regular		
Resident Agent:	TERRANCE LEE DZVONICK (Accepted)		
Address:	4612 N KENNY WAY		
	NORTH LAS VEGAS	NV	89031-
President:	ENRIQUE JAVIER RODRIGUEZ		
Address:	6667 INDIANA AVE APT 247F		
	RIVERSIDE	CA	92506-
Secretary:	ENRIQUE JAVIER RODRIGUEZ		
Address:	6667 INDIANA AVE APT 247F		
	RIVERSIDE	CA	92506-
Treasurer:	MARIA ESTRELLA PEREZ		
Address:	6667 INDIANA AVE APT 247F		
	RIVERSIDE	CA	92506-

Return to search menu	Search for another Resident Agent
Search for another Officer	Search for another Corporation

STETSON  
Property  
Mary Star  
2004

4758

16-1808/1220

ODL  
C1776491  
EXT-15-02

LEONARD TAVAGLIONE

780-0745 687-8770  
2485 MARY  
RIVERSIDE, CA 92506

DATE 5-10-99

PAY  
TO THE  
ORDER OF

*Harry Rodriguez*

\$ 900.00

*Nine hundred and no/100*

DOLLARS

**CITY NATIONAL BANK**

THE INLAND EMPIRE  
3484 Central Avenue (213) 427-5050  
Riverside, California 92506

*[Signature]*

⑈004258⑈ ⑆122016066⑆ 075⑈04054⑈

4762

10-18667220

LEONARD TAVAGLIONE  
760-0745 657-5770  
2465 MARY  
RIVERSIDE, CA 92514

DATE 5/22/99

PAY TO THE ORDER OF *Mary Tavaglione* \$ 1000.00

*Leonard Tavaglione*

CITY NATIONAL BANK  
THE INLAND EMPIRE  
3484 Central Avenue (213) 427-5050  
Riverside, California 92506

⑈004762⑈ ⑆122016066⑆ 075⑈010494⑈

1999

LEONARD TAVAGLIONE

780-0745 887-5770  
2466 MARY  
RIVERSIDE, CA 92508

4772

10-1608/1220

DATE 6-9-99

PAY  
TO THE  
ORDER OF

Harry Padriaguez

\$ 600.00

Six hundred and no/100

DOLLARS

**CITY NATIONAL BANK**

THE INLAND EMPIRE  
3484 Central Avenue (213) 427-5050  
Riverside, California 92506

*[Signature]*

⑈004772⑈ ⑆122016066⑆ 075⑈010494⑈

10267 Via Pavon  
Moreno Valley, CA

MARCUS Mc LAUGHLIN  
ATTORNEY AT LAW  
ESCROW TRUST ACCOUNT  
6208 INDIANA #150  
RIVERSIDE, CA 92506  
(909) 941-7794



60 W. FOOTBRIDGE BLVD.  
RIVERSIDE, CA 92506  
R-1121  
1977

DATE March 26, 1999

15449

5 App. 1002

PAY EIGHTEEN THOUSAND TWENTY SEVEN AND 29/100  
TO THE ORDER OF

DOLLARS \$ 18,027.29

MARY ANN GIERZ

*Marcus Mc Laughlin*  
*Mary Ann Gierz*

⑆01549⑆ ⑆22241831⑆003 ⑆00990⑆

MARCUS Mc LAUGHLIN

15449

DATE

15,027.29

DESCRIPTION

10267 VIA PAVON, MORENO VALLEY, CA

AMOUNT

FOR SECURITY PURPOSE, THE BORDER OF THIS DOCUMENT CONTAINS MICROPRINTING

99-0183/1222 019117

MATCH THE AMOUNT IN WORDS WITH THE AMOUNT IN NUMBERS

\*\*\*\*\*  
 INLAND COMMUNITY BANK  
 W. FOOTHILL BLVD. RIALTO, CA 92378  
 (909) 874-4444  
 T-CALIFXXXXXX 19117

\*\*\*\*\*  
 TO THE ORDER OF HENRY RODRIGUEZ  
 PURCHASER:  
 HENRY RODRIGUEZ  
 VOID OVER \$10,227.29

SHIER'S CHECK

\*\*\*\*\*  
 \$10,227.29  
 TEN THOUSAND TWO HUNDRED TWENTY SEVEN DOLLARS AND 29 CENTS

MICROPRINTING

\*\*\*\*\*

THE REVERSE SIDE OF THIS DOCUMENT INCLUDES AN AUTHENTIC WATERMARK - HOLD AT AN ANGLE TO VIEW

NICK E. TAVAGLIONE  
2485 MARY ST. PH. 909-789-2904  
RIVERSIDE, CA 92508

90-4076 / 1222  
002116790

2335

DATE 10-7-02

PAY TO THE  
ORDER OF

*Henry Rodriguez* | \$ 5,265.00  
*Five Thousand Two Hundred Sixty Five* DOLLARS

INLAND EMPIRE  
NATIONAL BANK

SENIOR  
ADVANTAGE

NATIONAL CENTER OFFICE  
3111 AVENUE 4100 - RIVERSIDE, CA 92506-1001

MEMO

*Nick Tavaglione*

⑆ 22240751⑆ 2335⑆ 002⑆ 16790⑆

FAIR FAX 2001

**INVESTORS TITLE COMPANY**  
 1950 South Sunwest Lane, #102, San Bernardino, CA 92408  
 (909) 891-1208

**RECEIVED**  
 OCT 20 2008

**SELLERS CLOSING STATEMENT**  
 Estimated

Seller: Henry Rodriguez

2004

Escrow No: 14007015-303 HL  
 Close Date:  
 Proration Date:  
 Date Prepared: 02/17/2004

Property: 996 Dahlia Court  
 Hemet, CA

Description	Debit	Credit
<b>TOTAL CONSIDERATION:</b>		209,000.00
Total Consideration		
<b>ADDITIONAL CHARGES:</b>		
Property Taxes Due to RIVERSIDE COUNTY TAX COLL	940.87	
Home Warranty #	350.00	
Natural Hazard Disclosure to LGS	49.95	
<b>COMMISSIONS:</b>		
Commission	12,540.00	
\$6,270.00 to Brubaker-Culton		
\$6,270.00 to Century 21 Wright		
<b>PRORATIONS AND ADJUSTMENTS:</b>		
County Taxes From 02/10/04 To 07/01/04		491.76
Based on the Semi - Annual amount of \$627.78		
<b>PAYOFFS:</b>		
Payoff to CHASE MANHATTAN MORTGAGE CORP.	114,354.85	
\$100,002.90 Principal Balance		
\$8,750.25 Interest From 12/01/2003 to 03/01/2004		
\$80.98 FHA PREMIUM		
\$2,391.94 ESCROW IMPOUND BALANCE		
\$303.76 LATE CHARGES		
(\$1,500.00) CREDIT		
\$3,930.02 FORECLOSURE FEES		
\$395.00 FEES DUE		
<b>RECORDING FEES:</b>		
Recording Fees to Investors Title Company	20.00	
<b>ESCROW AND TITLE CHARGES:</b>		
Escrow Fee to Investors Title Company	772.50	
Document Preparation to Investors Title Company	50.00	
Notary Fee to Jefferson Mobile Notary	10.00	
Title Insurance to Investors Title Company	914.00	
Wire Transfer Fee to Investors Title Company	25.00	
Demand Fee to Investors Title Company	25.00	
Funds held for final audit to Investors Title Company	300.00	
Disbursed to Investors Title Company	5,000.00	
Sub Totals	135,352.17	209,491.76
Proceeds Due Seller	74,139.59	
Totals	\$209,491.76	\$209,491.76

CHECK NO. 10015267

INVESTORS TITLE COMPANY

1956 South Southwest Lane, #102  
San Bernardino, CA 92408  
(800) 891-1208

COMMERCIAL BANK OF CALIFORNIA  
228 Battery Street, 11th Fl  
San Francisco, CA 94111  
(415) 774-1211

DATE: 02/17/2004  
AMOUNT: \$83,227.69

PAY SIXTY THREE THOUSAND TWO HUNDRED TWENTY SEVEN DOLLARS and 69/100

INVESTORS TITLE COMPANY  
COMMERCIAL TRUST ACCOUNT

TO THE ORDER OF ENRIQUE JAVIER RODRIGUEZ  
6867 INDIANA AVE #247F  
RIVERSIDE, CA 92506

*[Handwritten Signature]*  
AUTHORIZED SIGNATURE

THIS CHECK HAS AN ARTIFICIAL WATERMARK ON THE REVERSE. HOLD AT AN ANGLE TO VIEW.

⑈ 10015267⑈ ⑆ 121137522⑆ 189237233⑈

INVESTORS TITLE COMPANY  
 1850 South Sunset Lane, #102  
 San Bernardino, CA 92408  
 (909) 891-1208

Commercial Bank - California  
 215 Bond Street, #100  
 San Francisco, CA 94111  
 (415) 397-1211

DATE: 02/19/2004  
 ES GROW NO: 14007015-303-HL  
 AMOUNT: \$3,485.46

CHECK NO. 40045553

252820

PAY THREE THOUSAND FOUR HUNDRED SIXTY FIVE DOLLARS and 46/100

TO THE ORDER OF HENRY RODRIGUEZ  
 955 DAVIDA COURT  
 HEMET, CA

INVESTORS TITLE COMPANY  
 COMMERCIAL TRUST ACCOUNT

YOUR APPEARANCE IS INVITED

AT THE REQUEST OF SIGNATURE

THIS CHECK HAS AN ORIGINAL WATERMARK ON THE REVERSE. HOLD AT AN ANGLE TO VIEW.

⑈ 10015553⑈ ⑆ 121137522⑆ 1892392333⑈

RECEIVED  
OCT 20 2008

STATEWIDE GROUP, INC.  
DBA STATEWIDE FORECLOSURE SERVICES

9-7-04

MARY STAR ENTERPRISES  
6677 INDIANA AVE #247-F  
RIVERSIDE, CA 92506

OUR TS#6672

ON 5/27/04, WE HELD TRUSTEE SALE #6672. THERE WERE SURPLUS FUNDS FROM OUR SALE. BASED UPON OUR REVIEW OF THE ABOVE FILE IT APPEARS YOU ARE ONE OF THE PROPER PARTIES TO RECEIVE THESE FUNDS. IN ORDER TO AVOID COSTLY AND TIME CONSUMING COURT ACTION TO DISBURSE THE ABOVE FUNDS, WE ARE ASKING THAT YOU SIGN A COPY OF THIS LETTER INDICATING YOUR AGREEMENT WITH THE FOLLOWING TERMS AND CONDITIONS:

1. IF A CLAIM IS MADE AGAINST THESE FUNDS AT A LATER DATE BY ANOTHER PARTY ASSERTING THEIR RIGHT TO THESE FUNDS, YOU WILL RETURN THEM TO US ON SEVEN (7) DAYS NOTICE
2. IF THE FUNDS ARE NOT RETURNED TO US BY YOU AND LEGAL ACTION ENSUES YOU AGREE TO PAY OUR ATTORNEY FEES TO DEFEND US IN THIS ACTION.
3. IF A COURT ULTIMATELY DETERMINES YOU WERE NOT THE CORRECT PARTY TO RECEIVE THESE FUNDS YOU WILL THEN RETURN THE FUNDS TO US, IF YOU HAVE NOT PREVIOUSLY DONE SO, WITHIN 3 DAYS OF THIS DETERMINATION.
4. YOU HAVE COMPLIED WITH ALL FEDERAL & CALIFORNIA LAWS WITH RESPECT TO YOUR RECEIVING TITLE TO THIS PROPERTY.

THE SURPLUS FUNDS TO BE DISBURSED TO YOU ARE:

SURPLUS FUNDS	\$ 58,977.14
LESS: DEDUCTIONS	
TRUSTEE ADMIN FEE	( 750.00)
HOUSEHOLD FINANCE	* (40,000.00)
<b>NET SURPLUS FUNDS</b>	<b>\$ 18,227.14</b>

+ \$ 5,000.00 =

\* ESTIMATED AMOUNT DUE. BALANCE WILL BE ADJUSTED WHEN ACTUAL AMOUNT IS RECEIVED FROM HFC.

\$23,227

THANK YOU FOR YOUR COOPERATION IN THIS MATTER.

SINCERELY,

ROBERT M. DODSON, PRESIDENT  
STATEWIDE FORECLOSURE SERVICES

*2004*

BY SIGNING BELOW I INDICATE MY AGREEMENT WITH THE ABOVE TERMS

MARY STAR ENTERPRISES, INC.  
A NEVADA CORP.

9/7/04  
DATE

3990 OLD TOWN AVENUE #A201 SAN DIEGO, CA 92110  
619-291-7877 FAX 619-291-7876



2001



RECEIVED  
OCT 20 2006

**Laincross Escrow, Inc.**  
1011 Marina Avenue, Suite A • Riverside, CA 92506  
(951) 694-2500 • FAX (951) 694-1368

DATE: September 18, 2001  
ESCROW NO: R402ZMA  
ESCROW OFFICER: Zina M. Anderson

TIME: 15:29:38  
CLOSING DATE: September 17, 2001

**SELLER FINAL CLOSING STATEMENT**

SELLER(S): Henry Rodriguez  
BUYER(S): Paul R. Chevler and Ann Maria T. Chevler  
PROPERTY: 3404 N. Fairfax Drive, San Bernardino, CA 92404

	\$ DEBITS	\$ CREDITS
<b>FINANCIAL:</b>		
Total Consideration		144,400.00
<b>PRORATIONS/ADJUSTMENTS:</b>		
Unpaid County Taxes at 08/10/03 Semi-Annual from 07/01/01 to 09/17/01	257.82	
Seller credit Repts for closing costs	3,400.00	
Lien amt trans to Tax Roll plus Release	60.22	
<b>TITLE CHARGES:</b>		
C.I.T.A Standard Policy for 144,400.00	654.00	
Documentary Transfer Tax	158.95	
Sub Escrow Fee	100.00	
Reconveyance Fee	65.00	
Reconveyance(s)	36.00	
Water Company Lien	127.80	
Release of Lien	28.00	
<b>ESCROW CHARGES</b>		
Escrow Fee	519.00	
Draw Deed	25.00	
Escrow Tech	15.00	
Notary	10.00	
<b>PAYOFFS - First Nationwide Mortgage</b>		
Total Payoff \$97,258.37		
Principal Balance	<del>88,053.15</del>	
Interest to 09/19/01	4,420.80	
Forwarding/Demand Fee	80.00	
Late Charges	212.46	
Impound Account	2,853.04	
Legal Fees	81.60	
O/S FC thru 9/15	1,521.88	
Unpaid fees	35.00	
Other Late Fee	85.95	
UPS	15.00	
<b>PAYOFFS - Nicholas E. Tavagnino INVESTMENT PROPERTY</b>		
Total Payoff \$26,682.43		
Principal Balance	18,500.00	
Additional	<del>8,482.43</del>	
Water Bill	200.00	
<b>COMMISSIONS:</b>		
Listing Brokers Commission to Armetrong Realty, Inc. 0.00%	3,720.00	
Selling Brokers Commission to Coldwell banker foothill Properties 3.00%	<del>4,332.00</del>	
<b>MISCELLANEOUS CHARGES:</b>		
Old Republic Home Warranty for Home Protection Policy	445.00	
Marla Booth Ramirez for payment of termite	195.00	

---

Hazard Disclosure	49.95
Comp Mill of California Inc. repair garage door	125.00

---

NET PROCEEDS DUE SELLER	\$ 6,157.82	+ \$ 26,682.43	= \$ 32,840.25
TOTALS	\$ 144,400.00	\$ 144,400.00	

SAVE THIS STATEMENT FOR INCOME TAX PURPOSES



with that heading  
Pages 281 to 009

PURCHASE AGREEMENT AND DEPOSIT RECEIPT

(Real Estate - Short Term)

DATE: May 16  
This deed shall be deemed completed unless accepted in writing within 5 days after this receipt, and acceptance is irrevocably confirmed to Buyer or Buyer's Broker within the period.  
The sum of \$ 200,000 authorized by  personal check, or  CASH, payable to Henry Rodriguez  
to be held undischarged until acceptance of this offer as a deposit toward completion of the foregoing property, situated in the City of San Jose County of San Jose State of California  
Real property: 23379 Via Aradon  
Personal property:

TERMS: The purchase price of \$ 250,000.00 to be paid as set forth below and in the following addendums:  
Addendum: 1. \_\_\_\_\_ 2. \_\_\_\_\_ 3. \_\_\_\_\_ 4. \_\_\_\_\_

This agreement contains \_\_\_\_\_ pages.  
AND IT IS FURTHER AGREED (check one blank or unblanked, not applicable):

- This offer shall be deemed accepted unless accepted in writing within 5 days after this receipt, and acceptance is irrevocably confirmed to Buyer or Buyer's Broker within the period. After acceptance, Seller's (or Seller's) are obligated to accept performance dates up to one month, including date of escrow.
- This transaction is an escrowed sale with Henry Rodriguez as the Buyer.
- Within five days after acceptance, the Buyer to deposit into escrow all instruments necessary to close escrow. Each party to pay its customary escrow costs and charges. Seller's Agent shall have the authority to accept or refuse to accept the Buyer's offer.
- The title to be insured by Buyer Richard Wood for of Bond and surety, other than type set forth above. The title shall be insured by First Title Company under a residential policy of First Title or First Title title policy of the same name and terms as set forth in Buyer's policy.
- Title to be subject to covenants, conditions, easements, restrictions and encumbrances of record.
- If an Owner's Association is involved,  Buyer has received and approved, or  Buyer to receive prior to closing Copies of articles, by-laws, CC&Rs, a statement of financial condition, policy of collecting assessments, and estimated operating budget. Monthly assessments currently charged by \$ \_\_\_\_\_ and in advance or special assessments are pending.
- Buyer will maintain  their own insurance, or  Buyer's insurance policy, or  Buyer will assume existing policy or policies.
- Taxes, assessment payments, rents, interest and other expenses shall be prorated by date of escrow unless otherwise provided.
- Use of this to be executed for any personal property, and an affidavit security for any note carried back by Seller or the Seller's Broker, Buyer to execute a security agreement and file a UCC-1 financing statement.
- Seller to provide a statement of all existing unpaid amounts payable to the lessor of visible fixtures attached by wood decking brackets, built-in fixtures, Seller shall pay for any correction work required.
- Home Warranty Policy to be obtained by and assigned to Buyer.
- Seller's improvement (including)  is included, or  to be signed and handed to Buyer on acceptance for Buyer's approval within five days after receipt. Seller has ten days after notice of any defects in case the defects, the Seller to cure, Buyer can cancel or reduce the price equal to the cost of repair and replacement of significant uncorrected property conditions discovered prior to closing.
- If Buyer has inspected the property and its improvements, or  Buyer to inspect per attached Property Inspection Agreement.
- This property is located in a Special District Zone and a parking permit may be required prior to business of any building permit for construction, addition or alterations to the property or its improvements.
- A master deed/contract exists in compliance with the law or shall be obtained at Seller's cost prior to close of escrow.
- Possession of the property and keys/access codes to be delivered on  date of escrow, or  on mutual occupancy Agreement.
- Seller shall maintain the property in good condition until possession is transferred.
- Fixtures and things attached to the property, including but not limited to, window air conditioning units, light fixtures, plumbing fixtures, certain tools, wall-to-wall carpeting, draperies, hardware, TV antennas, air condition and condenser, lawn, shrubs, pool/pools and other similar items, are included.
- If Seller is unable to convey title/hold title as provided, or if the improvements on the property are destroyed or completely damaged prior to closing, then Buyer may terminate this agreement and demand all instruments and funds be returned to the Seller immediately, and Seller shall pay all reasonable escrow costs and charges.
- Both Parties receive their rights to receive and upon to cooperate in effecting the National Automated Clearing House (ACH) Electronic wire to close of escrow, on either Party's written notice.
- Buyer is authorized to request the sale, its price and terms, and financing for dissemination and use of participants in the transaction funds notwithstanding the Seller's advice.
- Seller to pay the brokerage fee on the closing of escrow. The Party voluntarily providing design of commission to pay the brokerage fee. Seller's Broker and the Buyer's Broker, respectively, to show the brokerage fee
- Should Buyer breach this agreement, Buyer's liability to Seller is limited to \$ 200,000

Buyer's Broker: \_\_\_\_\_  
By: \_\_\_\_\_  
Is the agent of:  Seller exclusively; or  Buyer exclusively; or  both Seller and Buyer.  
 An attached Agency Disclosure Addendum.

Seller's Broker: \_\_\_\_\_  
By: \_\_\_\_\_  
Is the agent of:  Seller exclusively; or  both Seller and Buyer.  
 An attached Agency Disclosure Addendum.

I agree to the terms stated above.  
Date: 5-16-09 to 99  
Buyer: Richard Wood  
Buyer: Caroundra Richard Wood  
Address: 2285 Trinchese Lane #203  
Corona, CA 92609 714-673-9119  
Broker's Approval: \_\_\_\_\_

I agree to the terms stated above.  
Date: 5-16 to 99  
Seller: Henry Rodriguez  
Seller: Henry Rodriguez  
Address: 23379 Via Aradon, San Jose, CA 95131  
Phone: 415-247-8885  
Broker's Approval: \_\_\_\_\_

1999  
RECEIVED  
OCT 20 2008

MARCUS Mc LAUGHLIN  
 ATTORNEY AT LAW  
 ESCROW TRUST ACCOUNT  
 6820 INDIANA #159  
 RIVERSIDE CA 92506  
 (951) 684-7794



31 W. FOOTHILL BLVD.  
 RIVERSIDE, CA 92506  
 951-418-1722

15814

DATE June 9, 1999

BY THIRTY NINE THOUSAND FIVE HUNDRED FOUR AND 26/100 DOLLARS \$ 39,594.26  
 TO THE ORDER OF HENRY RODRIGUEZ

*Henry Rodriguez*  
 Henry Rodriguez

⑆015814⑆ ⑆1224⑆ ⑆831⑆ ⑆003 ⑆00990⑆

MARCUS Mc LAUGHLIN

DATE	DESCRIPTION	AMOUNT
June 9, 1999	Escrow # 6572 23379 Via Amador, Moreno Valley, CA	39,594.26
		15814

Escrow No. 14007015 - 303 HL

Check Date: 01/23/2004

Check No. 10013194

DESCRIPTION	CODE	AMOUNT
		\$2,000.00

Check Total \$2,000.00

Seller/Buyer: Rodriguez/Cassady  
 Property Address: 996 Dahlia Court Hemet, CA  
 Tax Parcel Id:

Memo:

INVESTORS TITLE COMPANY

1050 South Southwest Lane, #102  
San Bernardino, CA 92408  
(909) 891-1208

**Comerica**  
Comerica Bank - California  
975 Battery Street, #1100  
San Francisco, CA 94111  
(415) 774-1211

CHECK NO. 10013194

DATE	ESCROW NO.	AMOUNT
01/23/2004	14007015-80311	\$2,000.00

PAY TWO THOUSAND DOLLARS and no/100

TO THE ORDER OF HENRY RODRIGUEZ

INVESTORS TITLE COMPANY  
COMMERCIAL TRUST ACCOUNT

AUTHORIZED SIGNATURE

VOID AFTER SIX MONTHS

THIS CHECK HAS AN ARTIFICIAL WATERMARK ON THE REVERSE. HOLD AT AN ANGLE TO VIEW.

⑈10013194⑈ ⑆121137522⑆ 1892372333⑈

WARNING: THIS CHECK IS PROTECTED BY SPECIAL SECURITY FEATURES

INVESTORS TITLE COMPANY

1050 South Southwest Lane, #102  
San Bernardino, CA 92408  
(909) 891-1208

**Comerica**  
Comerica Bank - California  
975 Battery Street, #1100  
San Francisco, CA 94111  
(415) 774-1211

CHECK NO. 10013241

DATE	ESCROW NO.	AMOUNT
01/23/2004	14007015-80311	\$2,000.00

PAY TWO THOUSAND DOLLARS and no/100

TO THE ORDER OF ENRIQUE JAVIER RODRIGUEZ

INVESTORS TITLE COMPANY  
COMMERCIAL TRUST ACCOUNT

AUTHORIZED SIGNATURE

VOID AFTER SIX MONTHS

THIS CHECK HAS AN ARTIFICIAL WATERMARK ON THE REVERSE. HOLD AT AN ANGLE TO VIEW.

⑈10013241⑈ ⑆121137522⑆ 1892372333⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05		600.00	0.00	600.00

Date  
08/19/09

Check Number  
00007714

Check Amount  
\$ 600.00

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8180 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

7714

CHECK NO.  
00007714

\*\* SIX HUNDRED DOLLARS AND 00 CENTS \*\*

PAY TO THE ORDER OF  
Enrique Rodriguez

DATE AMOUNT  
08/19/09 \*\*\*\*\*600.00

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: reim ime travel expense

⑈007714⑈ ⑆321270742⑆673326769⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05		600.00	0.00	600.00

Date  
08/19/09

Check Number  
00007714

Check Amount  
\$ 600.00

NON-NEGOTIABLE

Payee  
Enrique Rodriguez

Motel 6 - Oakland - Embarcadero #1080  
1801 Embarcadero Street  
Oakland, Ca 94606  
USA

*IME  
Charges*

RODRIGUEZ ENRIQUE  
6667 INDIANA AVE APT 247F  
Riverside CALIFORNIA 92506  
USA

Guest Bill # 24553 of the 05/22/2009

Stay of : RODRIGUEZ ENRIQUE

From 05/21/2009 To 05/22/2009

Ref: Folio ID - 25867 : Conf No. - 1080135194 : Guest No. - 19245 : Clerk - MTA (05/21/2009)

Page 1 / 1

Date	Department	Room	QTY	Charges	Total
5/21/09	Cash	0	0	0.00	(84.35)
5/21/09	QQNS (05/21)	145	1	75.99	75.99
5/21/09	City Tax (05/21)	145	1	8.36	8.36
				Net	75.99
				Total tax	8.36
				<b>Total Charges</b>	<b>84.35</b>
				Total Credit	84.35
				Balance	0.00

*Please  
review  
&  
approve  
8/10/9*

Sahara Westwood Hotel - Las Vegas  
 2601 Westwood Drive  
 Las Vegas, NV 89109  
 (702) 733-0001  
 Printed: 5/23/2009 - 11:46am

Page #1

RODRIGUEZ ENRIQUE Guest #21490

RIVERSIDE CA 92506

Room: 3025 DD  
 Check-in: 05/22/09 1:02am Out: 05/23/09 11:46am Nights: 1 Guests: 1/0

Date	CHARGES					PAYMENT				Balance
	Room	Phone	Misc.	Tax	Total	Credit	Cash	Bill	Total	
05/22/09	N/A	0.00	0.00	0.00	0.00	0.00	54.49	N/A	54.49	-54.49
<b>TOTAL</b>	N/A	0.00	0.00	0.00	0.00	0.00	54.49	N/A	54.49	-54.49

AMOUNT TENDERED : \$0.00  
 CHANGE : \$0.00

Check-out time: 11:00am Check-in time: 3:00pm

THANK YOU, COME AGAIN!

Guest Signature: \_\_\_\_\_

DAMAGE/THEFT OF PROPERTY- GUEST WILL BE RESPONSIBLE FOR ANY DAMAGES/THEFT IN THE ROOM. WE RESERVE THE RIGHT TO WITHHOLD ANY DEPOSITS, CASH AND/OR CREDIT CARD PAYMENT FOR DAMAGES/THEFT OF THE HOTEL PROPERTY OR LATE CHECK-OUTS. CHECK-OUT TIME IS 11:00 AM.

THE HOTEL IS NOT RESPONSIBLE FOR LOSS OR DAMAGE TO YOUR VEHICLE OR ITS CONTENTS WHILE PARKED IN OUR LOT. PLEASE DO NOT LEAVE PERSONAL PROPERTY UNATTENDED ANYWHERE IN THE VEHICLE.

PLEASE TAKE A NOTE THAT THE PROPRIETORS OF THIS PROPERTY SHALL NOT BE RESPONSIBLE FOR ACCIDENTS, INJURIES OR ANY LOSS, DAMAGES TO MONEY, JEWELRY OR VALUABLES OF ANY KIND. I ACCEPT FULL RESPONSIBILITY FOR ALL CHARGES AND DAMAGES. I AUTHORIZE HOTEL TO CHARGE MY CREDIT CARD WHICH I SUBMITTED AT CHECK-IN FOR ALL CHARGES INCURRED. SHOULD I NEED ASSISTANCE TO EVACUATE IN AN EMERGENCY I WILL COOPERATE THE THE HOTEL AND THE MANAGEMENT.  
 THANK YOU FOR STAYING HERE WE HOPE YOU HAVE ENJOYED YOUR STAY. PLEASE CALL AGAIN ANY TIME TO MAKE RESERVATIONS HERE.

PRINT NAME: \_\_\_\_\_

Guest Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Arrival Date: 5/24/09 CI Cler MFREUND  
 Departure Date: 5/26/09 CC  
 Group Code: CMAY09A



888-662-5825 | aquariuscasinoresort.com

Name: MARIA PEREZ  
 Address: 6667 Indiana Ave # 247F  
 Riverside CA 92506-4335

1900 S. Casino Dr, Laughlin, Nv. 89029  
 For Reservations call 1-888-662-5825  
 702-298-5111

www.aquariuscasinoresort.com

Room #:	AA 4052	Resv	399553458822	Page	1 of 1
---------	---------	------	--------------	------	--------

Date	Reference	Description	Charges	Credits	Balance
05/24/09	399569001950	ROOM CHARGE CC18079 TAX	23.00 2.07		25.07
05/24/09	399563500982	APPLIED DEPOSIT *****6189		25.07	
05/24/09	399563501003	FD VISA *****6189		25.07	25.07-
05/25/09	399579000059	ROOM CHARGE AA 4052 TAX	23.00 2.07		

Total Due .00

**Best Western Hotel California**  
 580 Geary St  
 San Francisco, CA 94102  
 Ph: 415-441-2700 Fax: 415-441-0124  
 Email: sanfrancisco@hotelca.com  
 Web: www.hotelca.com



Room: 410            A  
 RODRIGUEZ,            ENRIQUE

Payment: CASH  
 2A, 0K, 0B Guest  
 HC  
 May 20, 2009  
 May 21, 2009  
 0905C6

6667 INDIANA AVE APT 247F  
 RIVERSIDE CA  
 92503

<u>Date</u>	<u>Trans</u>	<u>Room</u>	<u>Comment</u>	<u>Debit</u>	<u>Credit</u>	<u>Balance</u>
May20'09	CASH	410			50.00 CR	50.00 CR
May20'09	PARKING	410	225	29.00		21.00 CR
May20'09	PR TAX	410	225	4.06		16.94 CR
May20'09	ROOM	410		0.00		16.94 CR
May21'09	PAID OUT	410		16.94		0.00
Balance due at checkout						0.00

X \_\_\_\_\_

Guest Signature

Regardless of billing instructions, the guest acknowledges all charges as a personal indebtedness.

**Patxi's Chicago Pizza**  
 511 Hayes Street  
 san francisco, ca 94102  
 (415) 558-9991

Server: All Station: 17

Order #: 155919 Take Out  
 Customer Name: gene

>> SETTLED <<

1 Small Caesar Salad 5.95  
 No Anchovies  
 1 sl Chicago o the day v 4.34

SUB TOTAL: 10.29  
 Tax 1: 0.98

AMOUNT DUE: \$11.27

Visa Tendered: 11.27  
 XXXXXXXXXXXX9712 XX/XX  
 TroutID: 144635

CHANGE: 0.00

>> Ticket #: 68 <<

Created: 5/21/2009 2:31:59 PM  
 SETTLED: 5/21/2009 2:32:45 PM

\*\*\*\*\*

'Half-Baked' Pizza?  
 Take one home  
 and impress your  
 family and friends!

\*\*\*\*\*



RIVERSIDE RESORT CASINO  
 LAUGHLIN, NV  
 5/25/2009 14:11

RIVERSIDE BUFFET  
 Check: 509574  
 Server: Helen Guests: 2  
 Terminal: 50

Regular Check  
 2 Lunch Buffet 16.98  
 @ 8.49

Subtotal 16.98  
 Total Tax 1.32  
 Tip Amount 0.00

Total 18.30

CASH 20.00  
 Change 1.70

GRAND TOTAL 18.30

T50 C5094 5/25/2009 14:11

Thank you for Choosing  
 THE RIVERSIDE BUFFET

SPERRY & ROGERS #03462  
PATTERSON CA95363

1 VT 2CHC CHIP CRMF 4.30  
\*\* STARBUCKS COFFEE COMPANY \*\*

SPERRY & ROGERS #03462  
PATTERSON CA95363

1 VT 2CHC CHIP CRMF 4.30  
SUBTOTAL 4.30  
TOTAL 4.30  
CASH 4.30  
CHANGE DUE 0.00

03462 0301 704610 001411555E  
05/22/09 13:29

LIMITED TIME OFFER  
Grande Iced Coffee  
with Milk \$1.95\*  
Made with love for coffee  
\*\* tax if any. Select stores.

\*\* STARBUCKS COFFEE COMPANY \*\*

LAVAL AND I-5 #06689  
LEBEC CA93243

--- DUPLICATE RECEIPT ---

1 VT 2CHC CHIP CRMF 4.30  
SUBTOTAL 4.30  
TOTAL 4.30  
CASH 20.00  
CHANGE DUE 15.70

06689 05A1 098220 001406165E  
05/20/09 12:40

--- DUPLICATE RECEIPT ---

LIMITED TIME OFFER  
Grande Iced Coffee  
with Milk \$1.95\*  
Made with love for coffee  
\*\* tax if any. Select stores.

River Palms Resort Casino  
\*\*\*\*Please Pay Cashier\*\*\*\*  
River Palms Cafe  
140136 Joseph 1  
-----  
55/1 2363 GST 2  
MAY24'09 11:51PM  
-----  
1 Angus Burger LN 5.99  
Food 5.99  
Tax..... 0.46  
Amt Due..... \$ 6.45

**JACK IN THE BOX**

DRIVE THRU # 171

Tel (651) 397-2000

JIB# 3027

1-10-29 PM

Em. 1-10-29 PM

1145 30 30

1145 30 30

Jack In The Box

W13 1145 30 30

YOUR VISIT IS IMPORTANT TO US

Please take a moment to complete our survey

Complete nuestra encuesta

"La Voz del Invitado"

(Tendra una oportunidad

de ganar \$10,000!

Llame al 1-800-728-1593

Su codigo es: 4819 1805 1820 9871

Responda dentro de las proximas

72 horas.

Es necesario comprar.

(Detalles en la tienda)

SubTotal	4.58
Tax	0.38
Total	4.96
CASH	4.96

Thank you for your visit  
189871

5/20/14

**Patxi's Chicago Pizza**  
511 Hayes Street  
San Francisco, CA 94102  
(415) 558-9991

Server: Josh Station: 17

Order #: 155902 Dine In  
Table: 1

>> SETTLED <<

1 Diet Coke	1.75
1 14" Chicago	30.10
Bacon	
Pineapple	
Sausage	

SUB TOTAL: 31.85  
Tax 1: 3.03

AMOUNT DUE: \$34.88

Cash Tendered: 100.00

CHANGE: -65.12

>> Ticket #: 51 <<

Created: 5/21/2009 12:57:59 PM  
SETTLED: 5/21/2009 2:35:43 PM

\*\*\*\*\*  
'Half-Baked' Pizza?  
Take one home  
and impress your  
family and friends!





# Buttercup

Grill & Bar

BUTTERCUP - COTTON STREET  
 1000 COTTON ST  
 OAKLAND, CA 94606  
 Tel: (510) 535-1640  
 www.buttercupgrillandbar.com  
 5/21/2009 9:49:21 PM

CHECK # 472474/1

Qty	Table	Guests	Server
	31	2	26

1	TUNA MELT	8.59
1	MUSHR ONION BURGER	9.98
1	SOFT DRINKS	2.29
1	ORANGE JUICE	2.49

SUB TOTAL 23.35  
 Sales Tax 2.28

TOTAL 25.63

THANK YOU  
 SOFIA

PLEASE PAY CASHIER



# Buttercup

Grill & Bar

BUTTERCUP - COTTON STREET  
 1000 COTTON ST  
 OAKLAND, CA 94606  
 Tel: (510) 535-1640  
 www.buttercupgrillandbar.com  
 5/21/2009 9:59:33 PM

CHECK # 472474/1

Check#	Table	Guests	Server
472474/1	31	2	26

1	MUSHR ONION BURGER	9.98	
1	COCONUT CREME	4.29	
1	SOFT DRINKS	2.29	
1	ORANGE JUICE	2.49	
1	NO BEVERAGE	0.00	
Aaa Discount 10% 472474		1	-1.91
Discounts Sub-Total			-1.91

SUB TOTAL 17.14  
 Sales Tax 1.67

TOTAL 18.81

THANK YOU  
 SOFIA

PLEASE PAY CASHIER



WELCOME TO  
Quik Stop

401 Joseph Ball C CA  
Livingston  
CA

5/20/2009 4:02:14 PM

Register: 2 Tran Seq No: 127112  
Cashier: Thanks, Varinder

Pump 3 Unld Regular	\$2.079
11.700 gal	\$29.00
2 FL CHTDS CRNCHY/40Z	\$2.58
1 M&M PNUT/REG	\$0.99
1 CHICK-D-STICK/20Z	\$0.99
1 32OZ SLUSHY/ICEE/32OZ	\$1.69
1 FL 40Z BAGS 2F 2.00	-\$0.58
Sub. Total:	-\$5.33
Tax:	\$0.14
Total:	-\$5.19
Cash	-\$5.19
Change	\$5.19

THANKS FOR SHOPPING  
AT QUIK STOP

**TOLL RECEIPT**

California Department of Transportation  
SF - Oakland Bay Bridge

Please Don't Drink & Drive!!

05/20/09 17:42:46 LANE: 06 ID: 033  
CLASS: 12 \$ 4.00 CASH



ARCO am/pm 82153  
209 E Flamingo  
Las Vegas  
NV 89115  
Tel : 7027313842  
Site Number 11907822

Qty Name	Price	Total
1 Unleaded Regular		30.50
Pump: 7 12.50 Gallon	\$2.439/Gallon	
SubTotal		30.50
Total		30.50

Cash 100.00  
Prepay Refund Due \$ -69.50

Receipt 6724 ORIGINAL  
1 Rafael 05/20/2009 18:52  
\*PREPAY RECALLED\*  
Thank you for choosing AMPM

**YOUR RECEIPT  
THANK YOU**

05/20/2009 7:47PM 08  
000000#5130 CLERK08

DEPT. 01	T	\$4.60
DEPT. 01	T	\$2.99
DEPT. 01	T	\$2.75
DEPT. 01	T	\$6.99
DEPT. 01	T	\$2.99
DEPT. 01	T	\$3.75
MOSE ST		\$24.07
TAXI	TAX	\$2.29

ITEMS 60  
CASH \$26.36

THANK YOU-COME AGAIN  
 TO VALERO  
 CORNER STORE  
 VALERO.COM

TPO6648891-001 VALERO 3757  
 491 ARMORY  
 BARSTOW CA 92

Descr.	qty	amount
UNLD CA #08	9.769G	25.00
SELF @ 2.559/ G		
Prepaid Fuel		-25.00
Subtotal		0.00
Tax		0.00
<b>TOTAL</b>		<b>0.00</b>
CASH \$		0.00

Store #3757  
 491 Armory Road  
 Barstow, CA  
 ST# 3757 TILL XXXX DR# 1 TRAN# 1019033  
 CSH: 10 05/22/09 19:33:43

ARCO FAC#81115

11:44 Laurel Canyon Blvd.  
 San Fernando, CA 91340  
 Store: 81115

05-20-2009 11:08:25 Register: 2  
 CLERK:1838  
 11:05:44 Sale no:219127

Initial Payment....\$ 40.00  
 PrePay Deposit....\$ 40.00  
 Initial Change.....\$ 0.00

Item	Sz Qt	Total \$
Unlead 87	7 14.005G @ 2.499	35.00
* FUEL SALE-A		
Sub Total.....\$		35.00
Tax.....\$		0.00
Total.....\$		35.00
PrePay Deposit....\$		40.00
Change.....\$		5.00

THANK YOU!

COALIN 123456

COALINGA CIRCLE K

76  
 25203 BORRIS ST  
 COALINGA CA  
 DLR # 68244730

05/22/09 15:15  
 PREPAID RECEIPT

PUMP 6 PUMP  
 GALLONS 13.610  
 @ \$2.939/GAL  
 FUEL \$40.00

COMPLETE A SURVEY  
 WWW.GASVISIT.COM  
 REGISTER TO WIN

JACOB E. TAUBER, M.D.  
A PROFESSIONAL CORPORATION  
9033 WILSHIRE BLVD., SUITE 401  
BEVERLY HILLS, CA 90211  
323-655-2968

---

**WM. JOHATHAN WEBER, ESQ**

Please allow this letter to act as request for case status in reference to the patient indicated below.

Attached is an updated statement of account of your client/our patient. If there are any questions regarding this matter or for further information, please contact our office at

JACOB E TAUBER, M.D.  
A PROFESSIONAL CORPORATION  
9033 WILSHIRE BLVD., SUITE 401  
BEVERLY HILLS, CA 90211  
323-655-2968  
FAX 323-655-2970

Your assistance in this matter is greatly appreciated.

Thank you.

-----  
Our Patient/ Your Client **ENRIQUE RODRIGUEZ # 59650**

- Case in Litigation
  - Case was Settled (Date) \_\_\_\_\_
  - Other \_\_\_\_\_
- 

By: \_\_\_\_\_ Date: \_\_\_\_\_

You May Fax this Information to 323-655-2970

GENASCIS  
PHONE: 310-440-3131 FAX: 310-476-3954

## FAX

DATE: July 15, 2009  
TO: Claudette for Steven Baker, Esq.  
FROM: Sharon Bandler/WilshireSurgicenter  
RE: Enrique Rodriguez  
FAX #: 702-228-2333

TOTAL PAGES 3

Attached is the billing for your client. I will contact you from time to time for status of this case.

Thank you for your help.

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential or exempt from disclosure under applicable federal or state law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via regular US mail. Thank you

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	14.93	0.00	14.93

Date  
08/20/09

Check Number  
00007719

Check Amount  
\$ 14.93

NON-NEGOTIABLE

BENSON, BERTOLODO, BAKER & CARTER, CHTD.  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

WELLS FARGO BANK  
8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

CHECK NO.  
00007719

7719

\*\* FOURTEEN DOLLARS AND 93 CENTS \*\*

DATE AMOUNT  
08/20/09 \*\*\*\*\*14.93

PAY TO THE ORDER OF  
Las Vegas Neurosurgery,  
Orthopaedics & Rehabilitation  
501 S. Rancho Drive, Suite I-67  
Las Vegas NV 89106

~~NON-NEGOTIABLE~~  
VOID AFTER 90 DAYS

MEMO: med records/rodriguez

⑈00??19⑈ ⑆3212707421⑆6733267691⑈

BENSON, BERTOLODO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	14.93	0.00	14.93

Date  
08/20/09

Check Number  
00007719

Check Amount  
\$ 14.93

NON-NEGOTIABLE

Payee  
Las Vegas Neurosurgery,

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	09-5100	10535-05	30.82	0.00	30.82
	09-5099	10676-05	24.74	0.00	24.74
	09-6385	13558-0801	13.79	0.00	13.79
Date	09-6384	13558-0801	6.49	0.00	6.49
09/15/09	09-6015	11338-06	5.39	0.00	5.39
	09-6109	10039-04	53.98	0.00	53.98
Check Number	09-6107	10039-04	21.55	0.00	21.55
00007877	09-6100	12402-07	97.90	0.00	97.90
	09-6108	10039-04	45.36	0.00	45.36
Check Amount	09-6016	10367-05	51.99	0.00	51.99
\$ 627.04	09-6208	13731-09	64.87	0.00	64.87
	09-6181	8642-02	150.42	0.00	150.42
	09-6148	8642-02	8.02	0.00	8.02
	09-6030	10039-04	51.72	0.00	51.72

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**

A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**

8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117

94-7074/3212

7877

CHECK NO.

00007877

\*\* SIX HUNDRED TWENTY SEVEN DOLLARS AND 04 CENTS \*\*

**PAY**  
TO THE  
ORDER  
OF  
The Litigation Document Group, Inc.  
320 South 4th Street  
Las Vegas NV 89101

DATE AMOUNT  
09/15/09 \*\*\*\*\*627.04

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: Copy Jobs

⑈007877⑈ ⑆32127074216733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	09-5100	10535-05	30.82	0.00	30.82
	09-5099	10676-05	24.74	0.00	24.74
	09-6385	13558-0801	13.79	0.00	13.79
Date	09-6384	13558-0801	6.49	0.00	6.49
09/15/09	09-6015	11338-06	5.39	0.00	5.39
	09-6109	10039-04	53.98	0.00	53.98
Check Number	09-6107	10039-04	21.55	0.00	21.55
00007877	09-6100	12402-07	97.90	0.00	97.90
	09-6108	10039-04	45.36	0.00	45.36
Check Amount	09-6016	10367-05	51.99	0.00	51.99
\$ 627.04	09-6208	13731-09	64.87	0.00	64.87
	09-6181	8642-02	150.42	0.00	150.42
	09-6148	8642-02	8.02	0.00	8.02
	09-6030	10039-04	51.72	0.00	51.72

7877  
NET AMT.

NON-NEGOTIABLE

Payee  
The Litigation Document Group, Inc.



The Litigation Document Group

320 S. 4th Street  
Las Vegas, NV 89101  
Phone # (702)380-4283 Fax # (702)380-4286

# Invoice

Date	Invoice #
5/11/2009	09-5099

<b>Ordered By</b>
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

<b>Bill To</b>
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117 702-228-2600

## PAST DUE

Client Matter	Terms	Due Date	Rep	Due Time	Ordered By
10676-05 Rodriguez	Due on receipt	5/11/2009	CW		Susan Anderson

Quantity	Description	Amount
164	Light Litigation - Copying from bound and/or tabbed documents	22.961

Due on Receipt and Thank you for your business. Please see our General Terms and Conditions on back.	<b>Subtotal</b>	\$22.96														
	<b>Sales Tax (7.75%)</b>	\$1.78														
<table border="1"> <tr> <td colspan="2"><b>Please Mail Checks To:</b></td> </tr> <tr> <td colspan="2">The Litigation Document Group, Inc.</td> </tr> <tr> <td colspan="2">320 S. 4th Street</td> </tr> <tr> <td colspan="2">Las Vegas, Nv 89101</td> </tr> <tr> <td>Sign: _____</td> <td></td> </tr> <tr> <td>Print: _____</td> <td></td> </tr> <tr> <td>Date: ___/___/___</td> <td></td> </tr> </table>	<b>Please Mail Checks To:</b>		The Litigation Document Group, Inc.		320 S. 4th Street		Las Vegas, Nv 89101		Sign: _____		Print: _____		Date: ___/___/___		<b>Total</b>	\$24.74
	<b>Please Mail Checks To:</b>															
	The Litigation Document Group, Inc.															
320 S. 4th Street																
Las Vegas, Nv 89101																
Sign: _____																
Print: _____																
Date: ___/___/___																
	<b>Payments/Credits</b>	\$0.00														
	<b>Balance Due</b>	\$24.74														

TAX ID# 88-0504363

We accept all Major Credit Cards!

**ARDELLA W. SHORT**  
4850 Los Amigos Circle  
North Las Vegas, Nevada 89031  
702-646-6254

To: **Benson, Bertoldo, Baker & Carter**  
Steven Baker, Esq.  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117

September 21, 2009

**ENRIQUE RODRIGUEZ - PALMS RESORT INCIDENT**  
**FILE #10676-05**

Date of Accident: November 22, 2004

ARRANGED MEDICAL RECORDS AND BILLINGS;  
IN CHRONOLOGICAL ORDER; REMOVED DUPLICATE  
DOCUMENTS; REVIEWED ALL MEDICAL RECORDS  
AND BILLINGS; PREPARED DETAILED DEMAND  
LETTER, INCLUDING SUMMARIZING MEDICAL  
CARE AND TREATMENT; PREPARED DEMAND  
PACKAGE.

Finalize.....\$4,140.00

  
DELLEA SHORT

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05		550.00	0.00	550.00

Date  
06/23/09

Check Number  
00007168

Check Amount  
\$ 550.00

NON-NEGOTIABLE

V

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

7169

CHECK NO.  
00007168

\*\* FIVE HUNDRED FIFTY DOLLARS AND 00 CENTS \*\*

PAY TO THE ORDER OF  
ENRIQUE RODRIGUEZ

DATE AMOUNT  
06/23/09 \*\*\*\*\*550.00

NON-NEGOTIABLE  
VOID AFTER 90 DAYS

MEMO: Reim Litigation Costs

⑈007169⑈ ⑆321270742⑆673326769⑈

V

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05		550.00	0.00	550.00

7169

Date  
06/23/09

Check Number  
00007168

Check Amount  
\$ 550.00

NON-NEGOTIABLE

Payee  
ENRIQUE RODRIGUEZ

V

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
836849	10676-05	1376.00	0.00	1376.00
838967	12555-07	444.10	0.00	444.10
836718	11398-06	100.00	0.00	100.00
Date 03/12/09	837072	10885-05	774.23	774.23
	836528	11812-07	358.00	358.00

Check Number  
00006231

Check Amount  
\$ 3052.33

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7468 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

CHECK NO.  
00006231

\*\* THREE THOUSAND FIFTY TWO DOLLARS AND 33 CENTS \*\*

**PAY TO THE ORDER OF**  
 Litigation Services & Technologies, LLC  
 1640 West Alta Drive  
 Suite 4  
 Las Vegas NV 89106

DATE: 03/12/09  
 AMOUNT: \*\*\*\*3,052.33

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: Depo Transcripts

⑈006231⑈ ⑆321270742⑆673326769⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
836849	10676-05	1376.00	0.00	1376.00
838967	12555-07	444.10	0.00	444.10
836718	11398-06	100.00	0.00	100.00
Date 03/12/09	837072	10885-05	774.23	774.23
	836528	11812-07	358.00	358.00

Check Number  
00006231

Check Amount  
\$ 3052.33

NON-NEGOTIABLE

Payee  
 Litigation Services & Technologies, LLC

# INVOICE



**LITIGATION SERVICES™**  
 1640 W. Alta Drive, Suite 4  
 Las Vegas, NV 89106  
 Phone: 702-314-7200 Fax: 702-631-7351  
 Website: www.lit-l.com

Steven M. Baker, Esq.  
 Benson, Bertoldo, Baker & Carter, Chtd.  
 7408 West Sahara Avenue  
 Las Vegas, NV 89117

<b>Invoice No.</b>	<b>Invoice Date</b>	<b>Job No.</b>
836849	1/22/2009	100141
<b>Job Date</b>	<b>Case No.</b>	
1/9/2009	A531538	
<b>Case Name</b>		
Rodriguez vs. Fiesta Palms, LLC		
<b>Payment Terms</b>		
Due upon receipt		

ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF: Vikki Kooinga	657.75
ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF: Frank Sciulla	297.50
ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF: Sheri Long	420.75
<b>TOTAL DUE &gt;&gt;&gt;</b>	<b>\$1,376.00</b>
AFTER 2/21/2009 PAY	\$1,513.60

POSTED  
 FEB 11 2009  
 ACCOUNTING DEPT

Thank you for your business!

**Tax ID:** 88-0428399

Phone: 702-228-2600 Fax: 702-228-2333

*Please detach bottom portion and return with payment.*

Steven M. Baker, Esq.  
 Benson, Bertoldo, Baker & Carter, Chtd.  
 7408 West Sahara Avenue  
 Las Vegas, NV 89117

Job No. : 100141 BU ID : LV-CR  
 Case No. : A531538  
 Case Name : Rodriguez vs. Fiesta Palms, LLC

Invoice No. : 836849 Invoice Date : 1/22/2009  
**Total Due : \$ 1,376.00**  
 AFTER 2/21/2009 PAY \$1,513.60

Remit To: **Litig@tion Services & Technologies**  
**1640 W. Alta Drive, Suite 4**  
**Las Vegas, NV 89106**

<b>PAYMENT WITH CREDIT CARD</b>			
Cardholder's Name: _____			
Card Number: _____			
Exp. Date: _____		Phone#: _____	
Billing Address: _____			
Zip: _____		Card Security Code: _____	
Amount to Charge: _____			
Cardholder's Signature: _____		5 App. 1036	

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
730057	11439-06	55.00	0.00	55.00
707367	10676-05	55.00	0.00	55.00

*DUPON A*

Date  
03/12/09

Check Number  
00006259

Check Amount  
\$ 110.00

WELLS FARGO BANK

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

6259

CHECK NO.  
00006259

\*\* ONE HUNDRED TEN DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
 Walgreen Co.  
 1901 E. Voorhees St.  
 P.O. Box 4039 MS #735  
 Danville IL 61834-4039

DATE: 03/12/09  
 AMOUNT: \*\*\*\*\*110.00

WELLS FARGO BANK  
 VOID AFTER 90 DAYS

MEMO: Med Records/Riddle

⑈006259⑈ ⑆321270742⑆673326769⑆⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
730057	11439-06	55.00	0.00	55.00
707367	10676-05	55.00	0.00	55.00

Date  
03/12/09

Check Number  
00006259

Check Amount  
\$ 110.00

Payee  
Walgreen Co.

WELLS FARGO BANK

WALGREEN COMPANY  
CORPORATE AND REGULATORY LAW  
INVOICE FOR RECORD REQUEST SERVICES

**Billed to:**

BENSON BERTOLD BAKER & CARTER  
7408 W SAHARA AVE

LAS VEGAS

NV 89117-

**Make Checks Payable to:**

Walgreen Company  
1901 E. Voorhees St.  
P.O. Box 4039  
MS #735  
Danville, Illinois 61834-4039

**Invoice Number:** 707367

**Amount Due:** \$55.00

**Patient Name:** ENRIQUE RODRIGUEZ

**PatientDOB:** 7/15/1963

File 10676-05

-----  
**INVOICE**

**Re:** ENRIQUE RODRIGUEZ

Dear Sir/Madam

In accordance with your request, pharmacy records for the above referenced patient were forwarded after a complete search was conducted, pursuant to the statutory retention period for pharmacy records. An invoice for our services is attached.

Please remit payment, together with this invoice. If state statute designates a different reimbursement, please enclose a copy of the statute along with a check for that amount.

Sincerely,

Jodi Drews  
Records Custodian

(217) 554-8590 (Phone)  
FEIN 36-192-4025 (Tax ID)

POSTED  
JAN 12 2009  
ACCOUNTING DEPT

10676-05

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
835775	10676-05	100.00	0.00	100.00
834971	8518-02	521.05	0.00	521.05
834969	10525-05	100.00	0.00	100.00
Date 02/05/09	835052	10186-04	273.55	273.55
	835311	10884-05	549.80	549.80

*Deposit*

Check Number  
00005880

Check Amount  
\$ 1544.40

NON-NEGOTIABLE

**BEINSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**  
8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

5880

CHECK NO.  
00005880

\*\* ONE THOUSAND FIVE HUNDRED FORTY FOUR DOLLARS AND 40 CENTS \*\*

**PAY TO THE ORDER OF**  
Litigation Services & Technologies, LLC  
1640 West Alta Drive  
Suite 4  
Las Vegas NV 89106

DATE: 02/05/09  
AMOUNT: \*\*\*\*1,544.40

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: Depo Transcripts

⑈005880⑈ 1232127074216733267691⑈

BEINSON, BERTOLDO, BAKER & CARTER, CHTD

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
835775	10676-05	100.00	0.00	100.00
834971	8518-02	521.05	0.00	521.05
834969	10525-05	100.00	0.00	100.00
Date 02/05/09	835052	10186-04	273.55	273.55
	835311	10884-05	549.80	549.80

5880

Check Number  
00005880

Check Amount  
\$ 1544.40

NON-NEGOTIABLE

Payee  
Litigation Services & Technologies, LLC

# INVOICE



**LITIGATION SERVICES**  
 1640 W. Alta Drive, Suite 4  
 Las Vegas, NV 89106  
 Phone: 702-314-7200 Fax: 702-631-7351  
 Website: www.lit-l.com

Steven M. Baker, Esq.  
 Benson, Bertoldo, Baker & Carter, Chtd.  
 7408 West Sahara Avenue  
 Las Vegas, NV 89117

<b>Invoice No.</b>	<b>Invoice Date</b>	<b>Job No.</b>
835775	12/22/2008	100139
<b>Job Date</b>	<b>Case No.</b>	
12/17/2008	A531538	
<b>Case Name</b>		
Rodriguez vs. Fiesta Palms, LLC		
<b>Payment Terms</b>		
Due upon receipt		

APPEARANCE FEE ONLY FOR THE FOLLOWING SCHEDULED DEPOSITION:

Multiple Witnesses

100.00

**TOTAL DUE >>> POSTED \$100.00**

AFTER 1/21/2009 PAY \$110.00

POSTED  
 ACCOUNTING DEPT.  
 JAN 27 2009

Happy Holidays! We appreciate your business.

Tax ID: 88-0428399

Phone: 702-228-2600 Fax: 702-228-2333

Please detach bottom portion and return with payment.

Steven M. Baker, Esq.  
 Benson, Bertoldo, Baker & Carter, Chtd.  
 7408 West Sahara Avenue  
 Las Vegas, NV 89117

Job No. : 100139 BU ID : LAS-DEP-1

Case No. : A531538

Case Name : Rodriguez vs. Fiesta Palms, LLC

Invoice No. : 835775 Invoice Date : 12/22/2008

**Total Due : \$ 100.00**

AFTER 1/21/2009 PAY \$110.00

**PAYMENT WITH CREDIT CARD**



Cardholder's Name: \_\_\_\_\_

Card Number: \_\_\_\_\_

Exp. Date: \_\_\_\_\_ Phone#: \_\_\_\_\_

Billing Address: \_\_\_\_\_

Zip: \_\_\_\_\_ Card Security Code: \_\_\_\_\_

Amount to Charge: \_\_\_\_\_

Cardholder's Signature: \_\_\_\_\_ 5 App. 1040

Remit To: **Litigation Services & Technologies**  
 1640 W. Alta Drive, Suite 4  
 Las Vegas, NV 89106

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	08-9203	11242-06	64.33	0.00	64.33
	08-9006	11595-06	48.49	0.00	48.49
	08-9008	13176-08	28.45	0.00	28.45
Date	08-9324	11754-07	13.04	0.00	13.04
01/02/09	08-9020	10676-05	23.65	0.00	23.65
	08-9170	8518-02	188.90	0.00	188.90
Check Number	08-9204	10039-01	113.78	0.00	113.78
00005404	08-9076	11403-05	256.12	0.00	256.12
	08-9344	11242-06	114.75	0.00	114.75
Check Amount	08-9053	10197-04	221.57	0.00	221.57
\$ 1940.07	08-9040	10676-05	642.84	0.00	642.84
	08-9232	11242-06	18.79	0.00	18.79
	08-9259	10197-04	194.79	0.00	194.79
	08-9260	10197-04	10.57	0.00	10.57

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

5404

CHECK NO.  
 00005404

\*\* ONE THOUSAND NINE HUNDRED FORTY DOLLARS AND 07 CENTS \*\*

**PAY TO THE ORDER OF**  
 The Litigation Document Group, Inc.  
 320 South 4th Street  
 Las Vegas NV 89101

DATE: 01/02/09  
 AMOUNT: \*\*\*\*1,940.07

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: copy jobs/see attached

⑈005404⑈ ⑆321270742⑆6733267691⑈

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	08-9203	11242-06	64.33	0.00	64.33
	08-9006	11595-06	48.49	0.00	48.49
	08-9008	13176-08	28.45	0.00	28.45
Date	08-9324	11754-07	13.04	0.00	13.04
01/02/09	08-9020	10676-05	23.65	0.00	23.65
	08-9170	8518-02	188.90	0.00	188.90
Check Number	08-9204	10039-01	113.78	0.00	113.78
00005404	08-9076	11403-05	256.12	0.00	256.12
	08-9344	11242-06	114.75	0.00	114.75
Check Amount	08-9053	10197-04	221.57	0.00	221.57
\$ 1940.07	08-9040	10676-05	642.84	0.00	642.84
	08-9232	11242-06	18.79	0.00	18.79
	08-9259	10197-04	194.79	0.00	194.79
	08-9260	10197-04	10.57	0.00	10.57

NON-NEGOTIABLE

Payee  
 The Litigation Document Group, Inc.

Susan A



# The Litigation Document Group

320 S. 4th Street  
 Las Vegas, NV 89101  
 Phone # (702)380-4283 Fax # (702)380-4286

# Invoice

Date	Invoice #
9/3/2008	08-9020

Ordered By
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

Bill To
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117 702-228-2600

Client Matter	Terms	Due Date	Rep	Due Time	Ordered By
10676.05 RODRIGUEZ	Due on receipt	9/3/2008	SA	1000	SUSAN ANDERSON

Quantity	Description	Amount
1	Compact Disc (CD)	21.95T

POSTED  
 SEP 08 2008  
 ACCOUNTING DEPT.

Due on Receipt and Thank you for your business. Please see our General Terms and Conditions on back.

<b>Subtotal</b>	\$21.95
<b>Sales Tax (7.75%)</b>	\$1.70
<b>Total</b>	\$23.65
<b>Payments/Credits</b>	\$0.00
<b>Balance Due</b>	\$23.65

Please Mail Checks To:  
 The Litigation Document Group, Inc.  
 320 S. 4th Street  
 Las Vegas, Nv 89101

Sign: *S. Anderson*

Print: \_\_\_\_\_

Date: \_\_\_/\_\_\_/\_\_\_

**TAX ID# 88-0504363**

We accept all Major Credit Cards!

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	08-9203	11242-06	64.33	0.00	64.33
	08-9006	11595-06	48.49	0.00	48.49
	08-9008	13176-08	28.45	0.00	28.45
Date	08-9324	11754-07	13.04	0.00	13.04
01/02/09	08-9020	10676-05	23.65	0.00	23.65
	08-9170	8518-02	188.90	0.00	188.90
Check Number	08-9204	10039-01	113.78	0.00	113.78
00005404	08-9076	11403-05	256.12	0.00	256.12
	08-9344	11242-06	114.75	0.00	114.75
Check Amount	08-9053	10197-04	221.57	0.00	221.57
\$ 1940.07	08-9040	10676-05	642.84	0.00	642.84
	08-9232	11242-06	18.79	0.00	18.79
	08-9259	10197-04	194.79	0.00	194.79
	08-9260	10197-04	10.57	0.00	10.57

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

5404

CHECK NO.  
 00005404

\*\* ONE THOUSAND NINE HUNDRED FORTY DOLLARS AND 07 CENTS \*\*

DATE: 01/02/09  
 AMOUNT: \*\*\*\*1,940.07

PAY TO THE ORDER OF: The Litigation Document Group, Inc.  
 320 South 4th Street  
 Las Vegas NV 89101

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: copy jobs/see attached

⑈005404⑈ ⑆321270742⑆673326769⑈

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	08-9203	11242-06	64.33	0.00	64.33
	08-9006	11595-06	48.49	0.00	48.49
	08-9008	13176-08	28.45	0.00	28.45
Date	08-9324	11754-07	13.04	0.00	13.04
01/02/09	08-9020	10676-05	23.65	0.00	23.65
	08-9170	8518-02	188.90	0.00	188.90
Check Number	08-9204	10039-01	113.78	0.00	113.78
00005404	08-9076	11403-05	256.12	0.00	256.12
	08-9344	11242-06	114.75	0.00	114.75
Check Amount	08-9053	10197-04	221.57	0.00	221.57
\$ 1940.07	08-9040	10676-05	642.84	0.00	642.84
	08-9232	11242-06	18.79	0.00	18.79
	08-9259	10197-04	194.79	0.00	194.79
	08-9260	10197-04	10.57	0.00	10.57

NON-NEGOTIABLE

Payee  
 The Litigation Document Group, Inc.

Susan A

The Litigation Document Group, Inc.  
320 South Fourth Street  
Las Vegas Nevada 89101

Phone: 702.380.4283  
Fax: 702.380.4283



# Fax

To: BENSON, Bertholdo, Baker & Carter From: Robert

---

Fax: 228-2333 Pages: 2

---

Phone: 228-2600 Date: 9/9/08

---

Re: Billing CC:

- Urgent     For Review     Please Comment     Please Reply     Please Recycle

Attn: SUSAN ANDERSON  
Billing Invoice for SCAN & copy project 08-9040  
Thank you!

The Litigation Document Group, Inc.  
 320 South Fourth Street  
 Las Vegas Nevada 89101  
 Phone: 702.380.4283  
 Fax: 702.380.4283



# The Litigation Document Group

320 S. 4th Street  
 Las Vegas, NV 89101  
 Phone # (702)380-4283 Fax # (702)380-4286

## Invoice

Date	Invoice #
9/4/2008	08-9040

<b>Ordered By</b>
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

<b>Bill To</b>
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117 702-228-2600

Client Matter	Terms	Due Date	Rep	Due Time	Ordered By
10676.05 RODRIQUEZ	Due on receipt	9/4/2008	SA	1000	SUSAN ANDERSON

Quantity	Description	Amount
2	Compact Disc (CD)	43.90T
2,630	Scan to PDF	447.10T
704	Pick and Choose - Copying from stapled, clipped, tabbed and/or tagged documents. Labor Intensive - 30+ Hand Placement	105.60T
704	2- Hole Drill (top)	0.00T

POSTED  
 SEP 10 2008  
 ACCOUNTING DEPT.

Due on Receipt and Thank you for your business. Please see our General Terms and Conditions on back.

<b>Subtotal</b>	\$596.60
<b>Sales Tax (7.75%)</b>	\$46.24
<b>Total</b>	\$642.84
<b>Payments/Credits</b>	\$0.00
<b>Balance Due</b>	\$642.84

Please Mail Checks To:  
 The Litigation Document Group, Inc.  
 320 S. 4th Street  
 Las Vegas, Nv 89101

Sign: \_\_\_\_\_  
 Print: \_\_\_\_\_  
 Date: \_\_\_/\_\_\_/\_\_\_

TAX ID# 88-0504363

We accept all Major Credit Cards!



# The Litigation Document Group

320 S. 4th Street  
 Las Vegas, NV 89101  
 Phone # (702)380-4283 Fax # (702)380-4286

## Invoice

Date	Invoice #
9/4/2008	08-9040

Ordered By
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

Bill To
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117 702-228-2600

Client Matter	Terms	Due Date	Rep	Due Time	Ordered By
10676.05 RODRIQUEZ	Due on receipt	9/4/2008	SA	1000	SUSAN ANDERSON

Quantity	Description	Amount
2	Compact Disc (CD)	43.90T
2,630	Scan to PDF	447.10T
704	Pick and Choose - Copying from stapled, clipped, tabbed and/or tagged documents. Labor Intensive - 30+ Hand Placement	105.60T
704	2-Hole Drill (top)	0.00T

Due on Receipt and Thank you for your business. Please see our General Terms and Conditions on back.

**Subtotal** 5596.60

**Sales Tax (7.75%)** 446.24

**Total** 6042.84

**Payments/Credits** 0.00

**Balance Due** 6042.84

Please Mail Checks To:  
 The Litigation Document Group, Inc.  
 320 S. 4th Street  
 Las Vegas, NV 89101

Sign: \_\_\_\_\_  
 Print: \_\_\_\_\_  
 Date: \_\_\_/\_\_\_/\_\_\_

TAX ID# 88-0504363

We accept all Major Credit Cards!

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	08-9502	9893-04	101.34	0.00	101.34
	08-8023	11700-06	51.72	0.00	51.72
	08-10277	11754-07	13.04	0.00	13.04
Date	08-10260	advertise	671.28	0.00	671.28
01/02/09	08-10190	10039-04	125.84	0.00	125.84
	08-10174	8518-02	130.73	0.00	130.73
Check Number	08-10220	10676-05	17.16	0.00	18.49
00005405	08-10404	10676-05	130.85	0.00	130.85

Check Amount  
\$ 1243.29

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**  
6190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

5405

CHECK NO.  
00005405

\*\* ONE THOUSAND TWO HUNDRED FORTY THREE DOLLARS AND 29 CENTS \*\*

PAY TO THE ORDER OF The Litigation Document Group, Inc.  
320 South 4th Street  
Las Vegas NV 89101

DATE 01/02/09 AMOUNT \*\*\*\*1,243.29

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: copy jobs/see attached

⑈005405⑈ ⑆321270742⑆ ⑆6733267691⑈

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	08-9502	9893-04	101.34	0.00	101.34
	08-8023	11700-06	51.72	0.00	51.72
	08-10277	11754-07	13.04	0.00	13.04
Date	08-10260	advertise	671.28	0.00	671.28
01/02/09	08-10190	10039-04	125.84	0.00	125.84
	08-10174	8518-02	130.73	0.00	130.73
Check Number	08-10220	10676-05	17.16	0.00	18.49
00005405	08-10404	10676-05	130.85	0.00	130.85

Check Amount  
\$ 1243.29

Payee  
The Litigation Document Group, Inc.

NON-NEGOTIABLE

Susan



# The Litigation Document Group

320 S. 4th Street  
Las Vegas, NV 89101  
Phone # (702)380-4283 Fax # (702)380-4286

# Invoice

Date	Invoice #
10/14/2008	08-10220

Ordered By
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

Bill To
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117 702-228-2600

Client Matter	Terms	Due Date	Rep	Due Time	Ordered By
10676-05 Rodriguez	Due on receipt	10/14/2008	SA	1400	Susan Anderson

Quantity	Description	Amount
156	Copying from clean originals	17.16T

POSTED  
OCT 16 2008  
ACCOUNTING DEPT

Due on Receipt and Thank you for your business. Please see our General Terms and Conditions on back.

<b>Subtotal</b>	\$17.16
-----------------	---------

Please Mail Checks To:  
The Litigation Document Group, Inc.  
320 S. 4th Street  
Las Vegas, Nv 89101

Sign: \_\_\_\_\_  
Print: \_\_\_\_\_  
Date: \_\_\_ / \_\_\_ / \_\_\_

TAX ID# 88-0504363

We accept all Major Credit Cards!

<b>Sales Tax (7.75%)</b>	\$1.33
<b>Total</b>	\$18.49
<b>Payments/Credits</b>	\$0.00
<b>Balance Due</b>	\$18.49

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
08-9502	9893-04	101.34	0.00	101.34
08-8023	11700-06	51.72	0.00	51.72
08-10277	11754-07	13.04	0.00	13.04
Date 01/02/09	08-10260	advertise	671.28	671.28
	08-10190	10039-04	125.84	125.84
	08-10174	8518-02	130.73	130.73
Check Number 00005405	08-10220	10676-05	17.16	18.49
	08-10404	10676-05	130.85	130.85

Check Amount \$ 1243.29

Rodriguez

NON-NEGOTIABLE

V

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 6190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

5405

CHECK NO. 00005405

\*\* ONE THOUSAND TWO HUNDRED FORTY THREE DOLLARS AND 29 CENTS \*\*

**PAY TO THE ORDER OF** The Litigation Document Group, Inc.  
 320 South 4th Street  
 Las Vegas NV 89101

DATE 01/02/09 AMOUNT \*\*\*\*1,243.29

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: copy jobs/see attached

⑈005405⑈ ⑆321270742⑆6733267691⑈

V

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
08-9502	9893-04	101.34	0.00	101.34
08-8023	11700-06	51.72	0.00	51.72
08-10277	11754-07	13.04	0.00	13.04
Date 01/02/09	08-10260	advertise	671.28	671.28
	08-10190	10039-04	125.84	125.84
	08-10174	8518-02	130.73	130.73
Check Number 00005405	08-10220	10676-05	17.16	18.49
	08-10404	10676-05	130.85	130.85

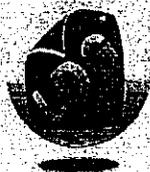
Check Amount \$ 1243.29

Payee  
 The Litigation Document Group, Inc.

NON-NEGOTIABLE

Susan A

V



The Litigation Document Group

320 S. 4th Street  
Las Vegas, NV 89101  
Phone # (702)380-4283 Fax # (702)380-4286

# Invoice

Date	Invoice #
10/28/2008	08-10404

<b>Ordered By</b>
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

<b>Bill To</b>
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117 702-228-2600

**PAST DUE**

Client Matter	Terms	Due Date	Rep	Due Time	Ordered By
10676-05	Due on receipt	10/28/2008	SA	1500	SUSAN ANDERSON

Quantity	Description	Amount
552	Heavy Litigation - Copying from stapled, clipped, tabbed and/or tagged documents. (Labor intensive, up to 30% hand placement)	121.44T

**POSTED**  
OCT 28 2008  
ACCOUNTING DEPT

Due on Receipt and Thank you for your business. Please see our General Terms and Conditions on back.

<b>Subtotal</b>	\$121.44
<b>Sales Tax (7.75%)</b>	\$9.41
<b>Total</b>	\$130.85
<b>Payments/Credits</b>	\$0.00
<b>Balance Due</b>	\$130.85

Please Mail Checks To: The Litigation Document Group, Inc. 320 S. 4th Street Las Vegas, Nv 89101
Sign: _____
Print: _____
Date: ___/___/___

TAX ID# 88-0504363

We accept all Major Credit Cards!

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	5653	11229-06	4020.00	0.00	4020.00
	5675	11242-06	2125.00	0.00	2125.00
	5685	10676-05	875.00	0.00	875.00
Date	5688	10676-05	944.00	0.00	944.00
01/02/09	5680	10567-05	1475.00	0.00	1475.00
	5634	10567-05	216.00	0.00	216.00
Check Number	5629	10048-04	1032.00	0.00	1032.00
00005415	5652	11229-06	1175.00	0.00	1175.00
	5665	11242-06	200.00	0.00	200.00
Check Amount	5711	10638-05	1200.00	0.00	1200.00
\$ 25911.00	5707	10676-05	4369.00	0.00	4639.00
	5693	10676-05	3856.00	0.00	3856.00
	5733	10638-05	3794.00	0.00	3794.00
	5487	8201-02	360.00	0.00	360.00

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

5415

CHECK NO.  
 00005415

\*\* TWENTY FIVE THOUSAND NINE HUNDRED ELEVEN DOLLARS AND 00 CENTS \*\*

PAY TO THE ORDER OF  
 Devinney & Dinneen Career & Vocational Service  
 445 Apple Street, Suite 102  
 Reno NV 89502

DATE: 01/02/09  
 AMOUNT: \*\*\*25,911.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: Professional Services

⑈005415⑈ ⑆321270742⑆6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	5653	11229-06	4020.00	0.00	4020.00
	5675	11242-06	2125.00	0.00	2125.00
	5685	10676-05	875.00	0.00	875.00
Date	5688	10676-05	944.00	0.00	944.00
01/02/09	5680	10567-05	1475.00	0.00	1475.00
	5634	10567-05	216.00	0.00	216.00
Check Number	5629	10048-04	1032.00	0.00	1032.00
00005415	5652	11229-06	1175.00	0.00	1175.00
	5665	11242-06	200.00	0.00	200.00
Check Amount	5711	10638-05	1200.00	0.00	1200.00
\$ 25911.00	5707	10676-05	4369.00	0.00	4639.00
	5693	10676-05	3856.00	0.00	3856.00
	5733	10638-05	3794.00	0.00	3794.00
	5487	8201-02	360.00	0.00	360.00

5415

Payee  
 Devinney & Dinneen Career &

NON-NEGOTIABLE

Susan A



DeVINNEY & DINNEEN CAREER and VOCATIONAL ECONOMIC SERVICES, LTD.

Terrance B Dinneen, M.S., C.R.C., C.R.E.  
Lawrence J. Dinneen, Ph.D., C.R.C.  
Carol A. Dinneen, M.S.

October 8, 2008

Steve Baker, Esq.  
Benson, Bertoldo, Baker & Carter  
7408 W. Sahara Ave.  
Las Vegas, NV 89117-2740

RE: Rodriguez, Enrique  
Our File No: 009 EXW 1492

Dear Steve Baker:

Enclosed are two invoices for my time over the last month on the above referenced case. Please do not hesitate to contact our office if you have any questions or concerns regarding this invoice.

Yours truly,

Terrance Dinneen M.S., C.R.C.  
Certified Earnings Analyst #032  
Certified Rehabilitation Economist #0022  
Certified Rehabilitation Counselor #20325M.S., C.R.C., C.R.E

TBD:st

Enclosure: Invoices

POSTED  
OCT 17 2008  
ACCOUNTING DEPT.



De VINNEY & DINNEEN CAREER and VOCATIONAL ECONOMIC SERVICES, LTD.

Terrance B Dinneen, M.S., C.R.C., C.R.E.  
Lawrence J. Dinneen, Ph.D., C.R.C.  
Carol A. Dinneen, M.S.

Benson, Bertoldo, Baker & Carter  
375 Stephanie St. Bldg 8  
Henderson, NV 89014

**INVOICE FOR PROFESSIONAL SERVICES**  
**FEDERAL ID: 88-0237090**

<b>CASE NAME:</b> Rodriguez, Enrique	<b>INVOICE NO.:</b> 5685
<b>OUR FILE NO.:</b> 009 EXW 1492	<b>INVOICE DATE:</b> 9/30/08

\*\*\*\*\*  
**DESCRIPTION OF SERVICES AND HOURS**  
\*\*\*\*\*

	TOTAL HOURS
Review of file information Contact with Mr. Rodriguez Make travel arrangements	3.5

3.5 hrs. @ \$250/Hr:	\$ 875.00
----------------------	-----------

**BALANCE DUE: \$ 875.00**

DUE UPON RECEIPT

PLEASE REFERENCE INVOICE **5685** ON YOUR DRAFT

*PLEASE DO NOT HESITATE TO CONTACT OUR OFFICE IF YOU HAVE ANY QUESTIONS REGARDING THIS BILLING*

445 Apple Street, Suite 102, Reno, Nevada 89502 • Telephone (775) 825-5558 Toll Free (888) 235-6549 • Facsimile (775) 825-4511  
terry@dinneent.com

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	5653	11229-06	4020.00	0.00	4020.00
	5675	11242-06	2125.00	0.00	2125.00
	5685	10676-05	875.00	0.00	875.00
Date	5688	10676-05	944.00	0.00	944.00
01/02/09	5680	10567-05	1475.00	0.00	1475.00
	5634	10567-05	216.00	0.00	216.00
Check Number	5629	10048-04	1032.00	0.00	1032.00
00005415	5652	11229-06	1175.00	0.00	1175.00
	5665	11242-06	200.00	0.00	200.00
Check Amount	5711	10638-05	1200.00	0.00	1200.00
\$ 25911.00	5707	10676-05	4369.00	0.00	4639.00
	5693	10676-05	3856.00	0.00	3856.00
	5733	10638-05	3794.00	0.00	3794.00
	5487	8201-02	360.00	0.00	360.00

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8180 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

5415

CHECK NO.  
 00005415

\*\* TWENTY FIVE THOUSAND NINE HUNDRED ELEVEN DOLLARS AND 00 CENTS \*\*

DATE: 01/02/09 AMOUNT: \*\*\*25,911.00

**PAY TO THE ORDER OF** Devinney & Dinneen Career & Vocational Service  
 445 Apple Street, Suite 102  
 Reno NV 89502

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: Professional Services

⑈005415⑈ ⑆321270742⑆6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	5653	11229-06	4020.00	0.00	4020.00
	5675	11242-06	2125.00	0.00	2125.00
	5685	10676-05	875.00	0.00	875.00
Date	5688	10676-05	944.00	0.00	944.00
01/02/09	5680	10567-05	1475.00	0.00	1475.00
	5634	10567-05	216.00	0.00	216.00
Check Number	5629	10048-04	1032.00	0.00	1032.00
00005415	5652	11229-06	1175.00	0.00	1175.00
	5665	11242-06	200.00	0.00	200.00
Check Amount	5711	10638-05	1200.00	0.00	1200.00
\$ 25911.00	5707	10676-05	4369.00	0.00	4639.00
	5693	10676-05	3856.00	0.00	3856.00
	5733	10638-05	3794.00	0.00	3794.00
	5487	8201-02	360.00	0.00	360.00

NON-NEGOTIABLE

Payee  
 Devinney & Dinneen Career &

Susan A



De VINNEY & DINNEEN CAREER and VOCATIONAL ECONOMIC SERVICES, LTD.

Terrance B Dinneen, M.S., C.R.C., C.R.E.  
Lawrence J. Dinneen, Ph.D., C.R.C.  
Carol A. Dinneen, M.S.

October 8, 2008

*Stave -  
need your okay.*

Benson, Bertoldo, Baker & Carter  
7408 W. Sahara Ave.  
Las Vegas, NV 89117-2740

RE: Rodriguez, Enrique  
Our File No: 009 EXW 1492

Dear Heidi:

Enclosed please find a revised invoice #5688. The bill rate was incorrect. Disregard the previously sent invoice #5688 with a bill rate of \$250/hr.

Please do not hesitate to contact our office if you have any questions or concerns regarding this invoice.

Respectfully Submitted,

*Terrance Dinneen*  
*st*

Terrance Dinneen M.S., C.R.C.  
Certified Earnings Analyst #032  
Certified Rehabilitation Economist #0022  
Certified Rehabilitation Counselor #20325M.S., C.R.C., C.R.E

TBD:st

Enclosure: Invoice

POSTED

OCT 17 2008

ACCOUNTING DEPT

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	5653	11229-06	4020.00	0.00	4020.00
	5675	11242-06	2125.00	0.00	2125.00
	5685	10676-05	875.00	0.00	875.00
Date	5688	10676-05	944.00	0.00	944.00
01/02/09	5680	10567-05	1475.00	0.00	1475.00
	5634	10567-05	216.00	0.00	216.00
Check Number	5629	10048-04	1032.00	0.00	1032.00
00005415	5652	11229-06	1175.00	0.00	1175.00
	5665	11242-06	200.00	0.00	200.00
Check Amount	5711	10638-05	1200.00	0.00	1200.00
\$ 25911.00	5707	10676-05	4369.00	0.00	4639.00
	5693	10676-05	3856.00	0.00	3856.00
	5733	10638-05	3794.00	0.00	3794.00
	5487	8201-02	360.00	0.00	360.00

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

5415

CHECK NO.  
 00005415

\*\* TWENTY FIVE THOUSAND NINE HUNDRED ELEVEN DOLLARS AND 00 CENTS \*\*

**PAY** Devinney & Dinneen Career &  
 TO THE Vocational Service  
 ORDER OF 445 Apple Street, Suite 102  
 Reno NV 89502

DATE 01/02/09 AMOUNT \*\*\*25,911.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: Professional Services

⑈005415⑈ ⑆321270742⑆6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	5653	11229-06	4020.00	0.00	4020.00
	5675	11242-06	2125.00	0.00	2125.00
	5685	10676-05	875.00	0.00	875.00
Date	5688	10676-05	944.00	0.00	944.00
01/02/09	5680	10567-05	1475.00	0.00	1475.00
	5634	10567-05	216.00	0.00	216.00
Check Number	5629	10048-04	1032.00	0.00	1032.00
00005415	5652	11229-06	1175.00	0.00	1175.00
	5665	11242-06	200.00	0.00	200.00
Check Amount	5711	10638-05	1200.00	0.00	1200.00
\$ 25911.00	5707	10676-05	4369.00	0.00	4639.00
	5693	10676-05	3856.00	0.00	3856.00
	5733	10638-05	3794.00	0.00	3794.00
	5487	8201-02	360.00	0.00	360.00

5415

NON-NEGOTIABLE

Payee  
 Devinney & Dinneen Career &

Susana



**DeVINNEY & DINNEEN CAREER and VOCATIONAL ECONOMIC SERVICES, LTD.**

**Terrance B Dinneen, M.S., C.R.C., C.R.E.**  
**Lawrence J. Dinneen, Ph.D., C.R.C.**  
**Carol A. Dinneen, M.S.**

November 7, 2008

Steve Baker, Esq.  
Benson, Bertoldo, Baker & Carter  
7408 W. Sahara Ave.  
Las Vegas, NV 89117-2740

POSTED  
NOV 24 2008  
RECEIVED DEPT.

RE: Rodriguez, Enrique  
Our File No: 009 EXW 1492

Dear Mr. Steve Baker:

Enclosed is an invoice for my time over the last month on the above referenced case. Please do not hesitate to contact our office if you have any questions or concerns regarding this invoice.

Respectfully Submitted,

Terrance Dinneen M.S., C.R.C.  
Certified Earnings Analyst #032  
Certified Rehabilitation Economist #0022  
Certified Rehabilitation Counselor #20325M.S., C.R.C., C.R.E

Enclosure: Invoice

TD/st



De VINNEY & DINNEEN CAREER and VOCATIONAL ECONOMIC SERVICES, LTD.

Terrance B Dinneen, M.S., C.R.C., C.R.E.  
Lawrence J. Deneen, Ph.D., C.R.C.  
Carol A. Dinneen, M.S.

Steve Baker, Esq.  
Benson, Bertoldo, Baker & Carter  
7408 W. Sahara Ave.  
Las Vegas, NV 89117-2740

**INVOICE FOR PROFESSIONAL SERVICES**

FEDERAL ID: 88-0237090

CASE NAME: Rodriguez, Enrique	INVOICE NO.: 5707
OUR FILE NO.: 009 EXW 1492	INVOICE DATE: 10/31/08

\*\*\*\*\*

**DESCRIPTION OF SERVICES AND TOTAL HOURS**

\*\*\*\*\*

Contact with Mr. Rodriguez Clinical interview with Mr. Rodriguez and travel Preparation of case notes Contacts regarding earnings Review of closing statements Economic analysis of Life Care Plan including present value calculations Contacts regarding Earnings Capacity	16.9
--	------

16.9 hrs. @ \$250/Hr:	\$ 4,225.00
Travel Expense (prorated)	\$ 144.00

**BALANCE (DUE UPON RECEIPT) \$ 4,369.00**

PLEASE REFERENCE INVOICE **5707** ON YOUR DRAFT

*PLEASE DO NOT HESITATE TO CONTACT OUR OFFICE IF YOU HAVE ANY QUESTIONS REGARDING THIS BILLING*

445 Apple Street, Suite 102, Reno, Nevada 89502 • Telephone (775) 825-5558 Toll Free (888) 235-6549 • Facsimile (775) 825-4511  
terry@dinneent.com

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	rodriguez	45.00	0.00	45.00

*Over A*

Date  
02/12/08

Check Number  
00054738

Check Amount  
\$ 45.00

NON-NEGOTIABLE

V

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

54738

94-183/1224

CHECK NO.

00054738

\*\* FORTY FIVE DOLLARS AND 00 CENTS \*\*

DATE	AMOUNT
02/12/08	*****45.00

**PAY TO THE ORDER OF** Wilshire Surgicenter, Inc.  
 8641 Wilshire Blvd., Ste. 201  
 Beverly Hills CA 90211

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: med records/rodriguez

⑈054738⑈ ⑆122401833⑆ 0025017284⑈

V

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	rodriguez	45.00	0.00	45.00

Date  
02/12/08

Check Number  
00054738

Check Amount  
\$ 45.00

NON-NEGOTIABLE

Payee  
Wilshire Surgicenter, Inc.

V

SMB 10676-05

Wilshire Surgicenter Inc.  
8641 Wilshire Blvd., Suite 201, Beverly Hills, CA. 90211  
(310) 289-8600 Fax (310) 289-9930

DATE: 10/18/07

PATIENT NAME: Enrique Rodriguez <sup>NOV 1</sup> SSN: 562-29-4767 ACCT: 562-29-4767

BILL TO: Steven M. Baker, Esq.  
7408 West Sahara Ave.  
Las Vegas, NV 89117

DATE	DESCRIPTION	AMOUNT
	<input checked="" type="checkbox"/> Copy of Medical Records.....	
	<input type="checkbox"/> Disability Forms.....	
	<input type="checkbox"/> Other.....	

TOTAL DUE..... 45.00 \$

PLEASE MAKE CHECK PAYABLE TO:  
WILSHIRE SURGICENTER INC.

Tax ID # 954716116

  
SIGNATURE (Person filling out form)

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
60079	11610-06	35.40	0.00	35.40
57217	10676-05	46.20	0.00	46.20

*DURAN A.*

Date  
02/11/08

Check Number  
00054598

Check Amount  
\$ 81.60

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

94-183/1224

CHECK NO.  
00054598

\*\* EIGHTY ONE DOLLARS AND 60 CENTS \*\*

DATE	AMOUNT
02/11/08	*****81.60

**PAY TO THE ORDER OF**  
 Ctr. for Diseases & Surgery of the Spine  
 600 S. Rancho Dr., #107  
 Las Vegas NV 89106

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: med record/see attached

⑈054598⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
60079	11610-06	35.40	0.00	35.40
57217	10676-05	46.20	0.00	46.20

Date  
02/11/08

Check Number  
00054598

Check Amount  
\$ 81.60

NON-NEGOTIABLE

Payee  
Ctr. for Diseases & Surgery of the Spine

10676-05  
CENTER FOR DISEASES AND SURGERY OF THE SPINE

John S. Thalgot, M.D.



Specializing in Orthopaedic and  
Spine Surgery

# PAYMENT INVOICE

Date: 10/31/07

To: Benson Bertoldo Baker

Your office sent us a request for medical records and/or bills; we require a fee for providing those medical records.

Patient Name: Enrique Rodriguez

Account/Reference Number: 57217

27 copies at \$0.60 per page, equals a prepayment of: \$ 46.20

Please send your payment along with the patient's account/reference number, to:

Medical Records  
Center for Diseases and Surgery of the Spine  
600 South Rancho Drive, Ste. # 107  
Las Vegas, Nevada 89106-4806

Thank you,

Medical Records  
(702) 878-8370 ext.125

Tax Identification Number: 88-0340195

5 App. 1062  
Susan A/c

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
2401	11315-06	6.00	0.00	6.00
10541-05	SIMMONS	44.40	0.00	44.40
11224-06	Hazelton	11.40	0.00	11.40
<u>10676-05</u>	Rodriguez	52.80	0.00	52.80

Date  
02/11/08

Check Number  
00054668

Check Amount  
\$ 114.60

*Duban A.*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**

A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

54668

94-183/1224

CHECK NO.

00054668

\*\* ONE HUNDRED FOURTEEN DOLLARS AND 60 CENTS \*\*

**PAY**  
TO THE ORDER OF  
Medical Associates of Southern Nevada  
9975 South Eastern Ave., #110B  
Las Vegas NV 89123

DATE: 02/11/08  
AMOUNT: \*\*\*\*\*114.60

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: med record/see attached

⑈054668⑈ ⑆1224018331⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
2401	11315-06	6.00	0.00	6.00
10541-05	SIMMONS	44.40	0.00	44.40
11224-06	Hazelton	11.40	0.00	11.40
10676-05	Rodriguez	52.80	0.00	52.80

Date  
02/11/08

Check Number  
00054668

Check Amount  
\$ 114.60

NON-NEGOTIABLE

Payee  
Medical Associates of Southern Nevada

SMB - 10676-09

Govind Koka, D.O.

Nickolas Karajohn, M.D.

Don Gregory, M.D.



NOV 14 2007

Date: 10-23-07

Patient/Client Name: Rodriguez, Enrique Date of Injury: 11-22-04

Dear: Benson Bertoldo Baker & Carter Atten: Steven M. Baker

Enclosed herewith please find the medical records and account balances in connection with your above referenced client for all services rendered by our facilities. The patient treatment totals are as follows:

Medical Associates of S.Nevada

Balance: \$ 2,615.00

Please remit payment payable to: MASN

Please mail payments to: 9775 S. Eastern Ave. #110B Las Vegas, NV 89183

Photocopy Charges

Due upon Receipt: \$ 52.80

Primary Care Consultants-

Balance: \$ 1,461.00

Please remit payment payable to: PCC

Please mail payments to: 9775 S. Eastern Ave. #110B Las Vegas, NV 89183

Photocopy Charges

Due upon Receipt: \$ 10.20

If you have any questions regarding the enclosed medical records and/or billing, please (702) 492-7208.

Thank you and have a wonderful day.

Sandra Jennings

5 App. 1064

Sandra

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
11610-06	Fenix, Amy	9.60	0.00	9.60
11881-07	Springgate	6.60	0.00	6.60
12141-07	Hutchens	5.40	0.00	5.40
Date 10638-05	Webser, J	4.20	0.00	4.20
02/11/08 10787-05	Jenson, J	13.80	0.00	13.80
10676-05	Rodriguez	12.60	0.00	12.60

Date 02/11/08

Check Number 00054686

Check Amount \$ 52.20

*DUPAN A.*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

54686

94-183/1224

CHECK NO.

00054686

\*\* FIFTY TWO DOLLARS AND 20 CENTS \*\*

DATE	AMOUNT
02/11/08	*****52.20

**PAY TO THE ORDER OF** Pain Institute of Nevada  
 600 S. Rancho Dr., #113  
 Las Vegas NV 89106

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: med record/see attached

⑈054686⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
11610-06	Fenix, Amy	9.60	0.00	9.60
11881-07	Springgate	6.60	0.00	6.60
12141-07	Hutchens	5.40	0.00	5.40
Date 10638-05	Webser, J	4.20	0.00	4.20
02/11/08 10787-05	Jenson, J	13.80	0.00	13.80
10676-05	Rodriguez	12.60	0.00	12.60

Date 02/11/08

Check Number 00054686

Check Amount \$ 52.20

NON-NEGOTIABLE

Payee Pain Institute of Nevada

SMB 10676-07



600 S. Rancho Dr., Ste. 113, Las Vegas, Nevada 89106 ■ 878-8252 ■ Fax 878-9096  
P.O. Box 80210, Las Vegas, NV 89180-0210 [www.paininstitute.com](http://www.paininstitute.com)

October 23, 2007

**Benson, Bertoldo, Baker & Carter**  
**Attn: Steven Baker, Esq.**  
7408 W. Sahara Avenue  
Las Vegas, NV 89117  
702-228-2600

**RE: Rodriguez, Enrique**

Whom It May Concern:

Pursuant to your request, attached please find copies of the medical and/or billing records requested for the above named patient. Please be advised that our fee for reproduction of these records is \$ 0.60 per page.

Please remit \$12.60 for 21 pages to **The Pain Institute of Nevada** within fifteen (15) days from the date of this letter. Our group tax identification number is **88-0245302**.

Should you have any further questions, feel free to contact our office. Please dial the main phone number (702-878-8252) and dial my extension at 226 or Geof for Dr. Jarrett's records at ext: 233.

Sincerely,

  
Jacob Kidwell / Geof Wyllie  
Medical Records

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
11338-06	Freese, C	500.00	0.00	500.00
10571-05	Kolbert, L	54.40	0.00	54.40
11958-07	Bowyer, P	33.70	0.00	33.70
Date 02/11/08	10200-04 Gray, A	47.80	0.00	47.80
	10676-05 RODRIGUEZ	33.53	0.00	33.53
	10976-03 Buzzi, D	67.00	0.00	67.00
Check Number 00054669	11265-06 Lee, Young	14.25	0.00	14.25

*Dupon A*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

54669

94-183/1224

CHECK NO.

00054669

\*\* SEVEN HUNDRED FIFTY DOLLARS AND 68 CENTS \*\*

**PAY TO THE ORDER OF**  
 Louis Mortillaro, PhD, LT.  
 501 S. Rancho Dr., Ste. F37  
 Las Vegas NV 89106

DATE: 02/11/08  
 AMOUNT: \*\*\*\*\*750.68

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: med record/depo prep

⑈054669⑈ ⑆122401833⑆ 0025017264⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
11338-06	Freese, C	500.00	0.00	500.00
10571-05	Kolbert, L	54.40	0.00	54.40
11958-07	Bowyer, P	33.70	0.00	33.70
Date 02/11/08	10200-04 Gray, A	47.80	0.00	47.80
	10676-05 RODRIGUEZ	33.53	0.00	33.53
	10976-03 Buzzi, D	67.00	0.00	67.00
Check Number 00054669	11265-06 Lee, Young	14.25	0.00	14.25

54669

Check Amount  
 \$ 750.68

NON-NEGOTIABLE

Payee  
 Louis Mortillaro, PhD, LT.

SMB / 106760-09

LOUIS F. MORTILLARO, PH.D.  
AND  
ASSOCIATES

OCT 25 2007

Louis F. Mortillaro, Ph.D.  
Licensed Psychologist  
Licensed Marriage & Family  
Therapist

Manuel F. Gamazo, Ph.D.  
Licensed Alcohol & Drug  
Counselor

Donald J. Johnson, Ph.D.  
Licensed Marriage & Family  
Therapist

Volmar Franz, Ph.D.  
Licensed Marriage & Family  
Therapist

Date: October 11, 2007

To: Steven M. Baker, Esq.

Patient: Enrique Rodriguez

Patient ID: 502-29-4707

Enclosed you will find the requested psychological information on the above named patient. This office does charge a fee for copying records.

You fees for the request psychological records are:

52 copies @ \$.60 per page \$ 31.20 + postage \$ 2.33

Total charges: \$ 33.53

These charges are not included in any signed liens. Psychological record charges are due and payable within 10 days. Please remit payment promptly.

Please make checks payable to:

L. F. Mortillaro, Ph.D., LTD  
Tax ID #: 88-0513518

For billing inquires related to this bill, call (702) 388-9403

Thank you for you cooperation.

- Psychological, Presurgical & Neuropsychological Evaluations
- Individual, Group, Marriage, Family & Child Counseling/ Psychotherapy
- Biofeedback Therapy & Relaxation Training
- Forensic Evaluations
- Drug & Alcohol Rehabilitation Therapy
- Hypnotherapy
- Pain/Stress Management
- Vocational Rehabilitation Services
- Bilingual Services

501 South Rancho Drive  
Suite F-37  
Las Vegas, Nevada 89106  
702-388-9403 (Office)  
702-388-9643 (FAX)  
mortpsych501@aol.com (e-mail)

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	07-115892	12338-07	1345.10	0.00	1345.10
	07-115825	8324-02	11.35	0.00	11.35
	07-115928	8324-02	33.65	0.00	33.65
Date	07-126064	9393-03	116.07	0.00	116.07
02/08/08	07-115838	11041-06	49.30	0.00	49.30
	07-115747	10235-07	520.22	0.00	520.22
Check Number	07-115794	11604-07	644.28	0.00	644.28
00054560	07-115557	10676-05	331.16	0.00	331.16
Check Amount					
\$ 3051.13					

*PUPARI A.*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

54560

94-183/1224

CHECK NO.

00054560

\*\* THREE THOUSAND FIFTY ONE DOLLARS AND 13 CENTS \*\*

**PAY TO THE ORDER OF**  
 The Litigation Document Group, Inc.  
 320 South 4th Street  
 Las Vegas NV 89101

DATE	AMOUNT
02/08/08	****3,051.13

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: copy jobs/see attached

⑈054560⑈ ⑆122401833⑆ 0025017284⑈

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	07-115892	12338-07	1345.10	0.00	1345.10
	07-115825	8324-02	11.35	0.00	11.35
	07-115928	8324-02	33.65	0.00	33.65
Date	07-126064	9393-03	116.07	0.00	116.07
02/08/08	07-115838	11041-06	49.30	0.00	49.30
	07-115747	10235-07	520.22	0.00	520.22
Check Number	07-115794	11604-07	644.28	0.00	644.28
00054560	07-115557	10676-05	331.16	0.00	331.16
Check Amount					
\$ 3051.13					

NON-NEGOTIABLE

Payee  
 The Litigation Document Group, Inc.



# The Litigation Document Group

320 S. 4th Street  
 Las Vegas, NV 89101  
 Phone # (702)380-4283 Fax # (702)380-4286

# Invoice

Date	Invoice #
11/12/2007	07-115557

Ordered By
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

Bill To
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117 702-228-2600

Client Matter	Terms	Due Date	Rep	Due Time	Ordered By
10675-05 Rodriguez -...	Due on receipt	11/12/2007	SA	am	Susan
<i>10675-05</i>	Quantity				Amount
Description					
Client Matter: 10675-05 Rodriguez v. Enriquez					
1,369	Medium Litigation - Copying from stapled, tabbed and/or tagged documents.				246.42T
1,369	2- Hole Drill (top)				30.12T
3	Acco w/ manilla folder				3.30T
50	Numbered Tabs (supplied and inserted)				27.50T
<i>pls pay 11-13-07</i>					

Please see General Terms and Conditions on back!		Subtotal	\$307.34
Please Mail Checks To: The Litigation Document Group, Inc. 320 S. 4th Street Las Vegas, Nv 89101		Sales Tax (7.75%)	\$23.82
Sign: _____		<b>Total</b>	\$331.16
Print: _____		Payments/Credits	50.00
Date: ___/___/___		<b>Balance Due</b>	\$331.16

**TAX ID# 88-0504363**

Order Forms Online  
[WWW.litigationdocumentgroup.com](http://WWW.litigationdocumentgroup.com)



INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	rodriguez	10.20	0.00	10.20
10541-05	Simmons, J	7.20	0.00	7.20
11983-07	Williams	10.80	0.00	10.80
11939-07	Morton, R	17.40	0.00	17.40
11996-07	Zavala, A	7.20	0.00	7.20

Date  
02/11/08

*DUPONT A*

Check Number  
00054692

NON-NEGOTIABLE

Check Amount  
\$ 52.80

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

54692

94-183/1224

CHECK NO.  
00054692

\*\* FIFTY TWO DOLLARS AND 80 CENTS \*\*

**PAY**  
 TO THE ORDER OF Primary Care Consultants  
 9975 S. Eastern Ave. # 110-B  
 Las Vegas NV 89123

DATE	AMOUNT
02/11/08	*****52.80

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: med record/see attached

⑈054692⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	rodriguez	10.20	0.00	10.20
10541-05	Simmons, J	7.20	0.00	7.20
11983-07	Williams	10.80	0.00	10.80
11939-07	Morton, R	17.40	0.00	17.40
11996-07	Zavala, A	7.20	0.00	7.20

Date  
02/11/08

Check Number  
00054692

NON-NEGOTIABLE

Check Amount  
\$ 52.80

Payee  
Primary Care Consultants

SMB - 10676-09

Govind Koka, D.O.

Nickolas Karajohn, M.D.

Don Gregory, M.D.



NOV 08 2007

Date: 10-23-07

Patient/Client Name: Rodriguez, Enrique Date of Injury: 11-22-04

Dear: Benson Bertoldo Baker & Carter Atten: Steven M. Baker

Enclosed herewith please find the medical records and account balances in connection with your above referenced client for all services rendered by our facilities. The patient treatment totals are as follows:

Medical Associates of S.Nevada Balance: \$ 2,615.00  
Please remit payment payable to: MASN  
Please mail payments to: 9775 S. Eastern Ave. #110B Las Vegas, NV 89183

Photocopy Charges Due upon Receipt: \$ 52.80

Primary Care Consultants- Balance: \$ 1,461.00  
Please remit payment payable to: PCC  
Please mail payments to: 9775 S. Eastern Ave. #110B Las Vegas, NV 89183

Photocopy Charges Due upon Receipt: \$ 10.20

If you have any questions regarding the enclosed medical records and/or billing, please (702) 492-7208.

Thank you and have a wonderful day.

Sandra Jennings

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	2405	11242-06	3075.00	0.00	3075.00
	2393	10814-05	1681.00	0.00	1681.00
	2392	8518-02	451.00	0.00	451.00
Date	2373	11839-07	596.00	0.00	596.00
12/31/07	2390	12432-07	1230.00	0.00	1230.00
	2379	10561-05	820.00	0.00	820.00
Check Number	2389	10676-05	2091.00	0.00	2091.00
00054142	2402	11359-06	820.00	0.00	820.00
	2376	11801-07	2215.50	0.00	2215.50
Check Amount	2370	11926-07	550.00	0.00	550.00
\$ 20130.50	2401	10200-04	6601.00	0.00	6601.00

*Custom A*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
 Las Vegas, NV 89128

54142

94-183/1224

CHECK NO.

00054142

\*\* TWENTY THOUSAND ONE HUNDRED THIRTY DOLLARS AND 50 CENTS \*\*

**PAY**  
 TO THE ORDER OF  
 Salutory Services, Inc.  
 1476 Romanesca Dr.  
 Henderson NV 89052

DATE: 12/31/07  
 AMOUNT: \*\*\*20,130.50

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: expert fee/see attached

⑈054142⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	2405	11242-06	3075.00	0.00	3075.00
	2393	10814-05	1681.00	0.00	1681.00
	2392	8518-02	451.00	0.00	451.00
Date	2373	11839-07	596.00	0.00	596.00
12/31/07	2390	12432-07	1230.00	0.00	1230.00
	2379	10561-05	820.00	0.00	820.00
Check Number	2389	10676-05	2091.00	0.00	2091.00
00054142	2402	11359-06	820.00	0.00	820.00
	2376	11801-07	2215.50	0.00	2215.50
Check Amount	2370	11926-07	550.00	0.00	550.00
\$ 20130.50	2401	10200-04	6601.00	0.00	6601.00

54142

Payee  
 Salutory Services, Inc.

NON-NEGOTIABLE

**Salutory Services, Inc.**

10624 South Eastern Ave.  
Suite # A 284  
Henderson, NV 89052

**Invoice**

Number: 2389

Date: October 31, 2007

**Bill To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

**Ship To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

Description	Amount
<p>Re: Rodriguez, Henry case; Attorney: Jonathan Webber, Esq.</p> <p>- Work done from 12/2006 - 10/30/2007;</p> <p>- 12/20/2006; Meeting with Attorney Weber regarding case update and strategy; meet for spine surgeon and pain management doctor on lien in Los Angeles; (0.4 hr) 82.00</p> <p>- Conference with Dr. Tauber; discussed patient care issues and diagnosis; discussed transfer of pain management care to Dr. Miller in Los Angeles; (0.6 hr) 123.00</p> <p>- 03/09/2007; Meeting with Attorney Weber; discussed current strategy and plan regarding spinal issues; mew pain management doctor in Los Angeles, diagnosis of RSD; medical records and care plan necessary to proceed accordingly; (0.6 hr) 123.00</p> <p>- 05/22/2007; conference with Attorney Weber and Mr. Rodriguez; discussed RSD, Cervical Spine, Toe and Psychological therapy; requested to find Podiatrist and review records in consideration for stimulator; (0.8 hr) 164.00</p> <p>- 10/16/2007; multiple conferences and meeting with Attorney Weber; Attorney Baker and client / wife; teleconference with Dr. Schifini; conference with Dr. Koka and review of current medical care issues; discussed current care plan and records needed; (2.4 hr) 492.00</p> <p>- Reviewed updated medical records and updated Medical Consulting Report; forwarded to Attorneys; moted missing records and updated case To Do List; (3.2 hr) 656.00</p>	

**Salutory Services, Inc.**

10624 South Eastern Ave.  
Suite # A 284  
Henderson, NV 89052

**Invoice**

Number: 2389  
Date: October 31, 2007

**Bill To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

**Ship To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

Description	Amount
- 10/30/2007; After review of updated medical records; reviewed with Dr. Schifini; discussed issues related to diagnoses of CPRS and stimulator placement; (0.8 hr)	164.00
- 10/31/2007; conference with Drs. Tauber and Miller; reviewed diagnostic parameters for SRD / CRPS; current care plan; (0.8 hr)	164.00
- Follow up conference with Attorney Baker and Weber regarding case status, stimulator status, issues related to Dr. Ferrante and Experts; (0.6 hr)	123.00
<b>Total</b>	<b>\$2,091.00</b>

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	00367438	11578-06	26.00	0.00	26.00
	00499070	10725-05	34.00	0.00	34.00
	00367528	11273-06	7.50	0.00	7.50
Date	00367515	11535-06	21.00	0.00	21.00
11/16/07	00367442	11379-06	15.00	0.00	15.00
	35323	12152-07	39.10	0.00	39.10
Check Number	00367516	9737-04	7.50	0.00	7.50
00053753	00367514	10804-05	7.50	0.00	7.50
	00367440	11329-06	30.00	0.00	30.00
Check Amount	00367441	11606-06	26.00	0.00	26.00
\$ 529.48	35489	10676-05	176.88	0.00	176.88
	00367511	admin fee	39.50	0.00	39.50
	00367529	admin	92.00	0.00	92.00
	00367444	12098-07	7.50	0.00	7.50

*AVAM A. Rodriguez*  
**NON-NEGOTIABLE**  
 **SILVER STATE BANK**  
 170 S. Rainbow Blvd.  
 Las Vegas, NV 89128

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

170 S. Rainbow Blvd.  
 Las Vegas, NV 89128

53753

94-183/1224

CHECK NO.

00053753

\*\* FIVE HUNDRED TWENTY NINE DOLLARS AND 48 CENTS \*\*

**PAY TO THE ORDER OF**  
 Legal Wings, Inc.  
 1118 Fremont  
 Las Vegas NV 89101

DATE: 11/16/07  
 AMOUNT: \*\*\*\*\*529.48

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: runner svc/see attached

⑈053753⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	00367438	11578-06	26.00	0.00	26.00
	00499070	10725-05	34.00	0.00	34.00
	00367528	11273-06	7.50	0.00	7.50
Date	00367515	11535-06	21.00	0.00	21.00
11/16/07	00367442	11379-06	15.00	0.00	15.00
	35323	12152-07	39.10	0.00	39.10
Check Number	00367516	9737-04	7.50	0.00	7.50
00053753	00367514	10804-05	7.50	0.00	7.50
	00367440	11329-06	30.00	0.00	30.00
Check Amount	00367441	11606-06	26.00	0.00	26.00
\$ 529.48	35489	10676-05	176.88	0.00	176.88
	00367511	admin fee	39.50	0.00	39.50
	00367529	admin	92.00	0.00	92.00
	00367444	12098-07	7.50	0.00	7.50

53753  
NET AMT.

~~NON-NEGOTIABLE~~

Payee  
 Legal Wings, Inc.

**Document Services**

Printed: 8/2/2007

880223382

Tax ID #

**A Division of Legal Wings, Inc.**

1118 Fremont Street  
Las Vegas, NV 89101  
Office 702.471-0333  
Fax 702.671-0452

35489

Job #

**Eagleye, Nancy**

Quality Control By

**Delivery Ticket**

Order Date 7/31/07 Due Date 8/3/07 Time 11:00 a Rep Mertz, David

Ordering Firm BEND2

BENSON, BERTOLDO, BAKER AND CARTER

Address 7408 W. SAHARA AVE.

City Las Vegas

State NV 89117

Phone 228-2600

Client Matter (Ref: ) 10676-05

Ordered By Cherie Shane

Billed Firm BEND2

BENSON, BERTOLDO, BAKER AND CARTER

Address 7408 W. SAHARA AVE.

City Las Vegas

State NV 89117

Phone 228-2600

Job Description Bates Label 2 Sets of Documents

Work Details

<u>Code</u>	<u>Category</u>	<u>Item</u>	<u>\$\$ Per Item</u>	<u># of Copies</u>	<u>Item Total</u>
604	Miscellaneous	Printed Bates Labels	\$0.08	2052	\$164.16

SubTotal \$164.16

Tax \$12.72 **AUG 09 2007**

Grand Total \$176.88

# 10676-05

Please make check payable to Legal Wings

Originals 0 Originals Returned \_\_\_\_\_

Copies Received By \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
2711591023	11463-06	117.61	0.00	117.61
0304291005	03/11940-0	10.66	0.00	10.66
0305022354	63 estrada	18.34	0.00	18.34
Date 08/29/07	0305022374	26/10676	36.45	0.00
	2711571145	11435-06	0.00	0.00
				11.58

*check*

Check Number  
00053072

Check Amount  
\$ 194.64

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

53072

94-183/1224

CHECK NO.

00053072

\*\* ONE HUNDRED NINETY FOUR DOLLARS AND 64 CENTS \*\*

**PAY TO THE ORDER OF** CHARTONE, Inc.  
 P.O. Box 152471  
 Irving TX 75015-2471

DATE AMOUNT  
 08/29/07 \*\*\*\*\*194.64

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: Med Records/see attache

⑈053072⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
2711591023	11463-06	117.61	0.00	117.61
0304291005	03/11940-0	10.66	0.00	10.66
0305022354	63 estrada	18.34	0.00	18.34
Date 08/29/07	0305022374	26/10676	36.45	0.00
	2711571145	11435-06	0.00	0.00
				11.58

53072  
NET AMT.

Check Number  
00053072

Check Amount  
\$ 194.64

NON-NEGOTIABLE

Payee  
CHARTONE, Inc.

**ChartOne Inc.**  
Invoice Summary

Print Date 08/17/2007  
Invoice No: 030502237426

Invoice Date: 03/14/2007

Tax ID: 94-3360691  
Customer No: BENS3230965

BENSON BERTOLDO BAKER CARTER  
7408 W SAHARA AVE  
ATTN: RECORDS  
LAS VEGAS, NV 89117

10676-05  
1001

POSTED  
AUG 20 2007

Requestor Name: RECORDS  
Patient Name: RODRIGUEZ, ENRIQUE  
Hospital Name: Valley Health Systems NV

Claim No:  
Policy No:  
Patient DOB: 07/15/1963  
Patient SSN: 562-29-4767

Per Page Charge: 0.60  
Total Pages: 52  
Computer Pages: 0  
Fiche Pages: 0  
Pre-Payment: 0.00

Basic Fee:	0.00
Page Fee:	31.20
Clerical Fee:	0.00
Itemized Billing:	0.00
Special Fee:	0.00
Adjustment Amount:	0.00
Ship Amount:	2.55
Hand Amount:	0.00
Tax Amount:	2.70
Invoice Amount:	36.45
Credit Amount:	0.00
Finance Charge:	0.00
Paid Amount:	0.00
<b>Balance Due:</b>	<b>36.45</b>

*Cher*

52594

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
116448751	10838-05	31.35	0.00	31.35
4201	10767-05	500.00	0.00	500.00
305842734	11338-06	58.65	0.00	58.65
Date	564256778	10767-05	81.60	81.60
08/02/07	562294767	10676-05	75.00	75.00

Check Number  
00052594

Check Amount  
\$ 746.60

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

52594

94-183/1224

CHECK NO.

00052594

\*\* SEVEN HUNDRED FORTY SIX DOLLARS AND 60 CENTS \*\*

DATE	AMOUNT
08/02/07	*****746.60

**PAY TO THE ORDER OF:**  
 LOUIS MORTILLARO, PHD, LT  
 501 S RANCHO DRIVE SUITE F37  
 LAS VEGAS NV 89106

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: medical records/see att

⑈052594⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
116448751	10838-05	31.35	0.00	31.35
4201	10767-05	500.00	0.00	500.00
305842734	11338-06	58.65	0.00	58.65
Date	564256778	10767-05	81.60	81.60
08/02/07	562294767	10676-05	75.00	75.00

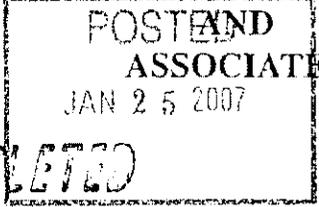
Check Number  
00052594

Check Amount  
\$ 746.60

NON-NEGOTIABLE

Payee  
LOUIS MORTILLARO, PHD, LT

LOUIS F. MORTILLARO, PH.D.



COMPLETED

Ok by [signature]

Louis F. Mortillaro, Ph.D.  
Licensed Psychologist  
Licensed Marriage & Family  
Therapist

Manuel F. Gamazo, Ph.D.  
Licensed Alcohol & Drug  
Counselor

Donald J. Johnson, Ph.D.  
Licensed Marriage & Family  
Therapist

Volmar Franz, Ph.D.  
Licensed Marriage & Family  
Therapist

Date: 1-16-07

To: Jonathon Weber w/ Bob & C

Patient: Enrique Rodriguez

Patient ID: 562-29-4767

Enclosed you will find the requested psychological information on the above named patient. This office does charge a fee for copying records.

Your fees for the requested psychological records are:

118 copies @ \$.60 per page 70.80 + postage 4.20

**Total charge: \$ 75.00**

These charges are not included in any signed liens. Psychological record charges are due and payable within 10 days. Please remit payment promptly.

**Please make checks payable to:**

**L.F. Mortillaro, Ph.D., LTD  
Tax ID #: 88-0513518**

For billing inquires related to this bill, call (702) 388-9403

Thank you for your cooperation.

- Psychological, Presurgical & Neuropsychological Evaluations
- Individual, Group, Marriage, Family & Child Counseling/ Psychotherapy
- Biofeedback Therapy & Relaxation Training
- Forensic Evaluations
- Drug & Alcohol Rehabilitation Therapy
- Hypnotherapy
- Pain/Stress Management
- Vocational Rehabilitation Services
- Bilingual Services

501 South Rancho Drive  
Suite F-37  
Las Vegas, Nevada 89106  
702-388-9403 (Office)  
702-388-9643 (FAX)  
mortpsych501@aol.com (e-mail)



JOSEPH J. BENSON  
 JOHN L. BERTOLDO  
 STEVEN M. BAKER  
 BRETT A. CARTER  
 LAWRENCE J. SMITH  
 BROOK M. HAMMOND  
 E. BREEN ARNTZ  
 W. JONATHAN WEBER  
 JAVIER A. ARGENTI  
Also located in Utah

January 10, 2007

Louis F. Mortillaro, Ph.D.  
 501 S. Rancho Dr., Suite F-37  
 Las Vegas, NV 89106

Re: Our Client/Your Patient : Enrique Rodriguez  
 Date of Birth : 7/15/1963  
 Social Security Number : 562-29-4767  
 Date of Loss : 11/22/2004  
 Our File Number : 10676-05

To Whom It May Concern:

Please be advised that this firm has been retained to represent the interests of Enrique Rodriguez regarding injuries sustained as a direct result of an incident that occurred on 11/22/2004. Our records indicate that you provided our client with medical care, treatment, and/or services for said injuries on or after the above date of loss.

In accordance with the enclosed signed Authorization, please provide this office with a complete copy of all medical records, including, but not limited to, doctor's and nurse's daily chart/soap notes, radiology reports, referral slips, off work notices, all outside referrals, etc., for services rendered to our client on the above referenced date of loss, up to and including the present date. Additionally, please complete the enclosed Certificate of Authenticity of Custodian of Records in the presence of a Notary and/or witness and return with the records/bills requested herein.

If there is a charge for providing these documents, please advise we will forward the appropriate payment. Kindly send the requested documentation at your earliest convenience.

If you have any questions please do not hesitate to contact me at (702) 228-2600. Thank you for your professional cooperation in this matter. It is greatly appreciated.

Very truly yours,

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

*W. Jonathan Weber*  
 WM. JONATHAN WEBER

WJW/uk  
 Enclosure as stated  
 cc:client/file

AUTHORIZATION FOR USE AND DISCLOSURE OF PROTECTED  
HEALTH INFORMATION AND OTHER RECORDS

NAME: ENRIQUE RODRIGUEZ DOB: 7-15-63 SSN: 562-29-4767

I HEREBY GRANT PERMISSION TO AND AUTHORIZE THE USE OR DISCLOSURE OF THE ABOVE NAMED INDIVIDUAL'S RECORDS AS DESCRIBED BELOW TO THESE DESIGNATED ENTITIES:

BENSON, BERTOLDO, BAKER & CARTER, CHTD. and its owners, employees and agents - 7408 West Sahara Avenue, Las Vegas, Nevada 89117 (702) 228-2600

and/or \_\_\_\_\_

THE FOLLOWING INDIVIDUAL(S), MEDICAL PROVIDER(S), AND/OR ORGANIZATION(S) ARE AUTHORIZED TO MAKE THE DISCLOSURE:

- |                                     |   |
|-------------------------------------|---|
| 1. <u>Spring Valley Hospital</u>    | 5. <u>Las Vegas Neurosurgery, Ortho &amp; Rehab</u> |
| 2. <u>Shadow Er Physicians</u>      | 6. <u>VQ Ortho Care</u>                             |
| 3. <u>Professional Billing Svcs</u> | 7. <u>Open MRI of Inland Valley</u>                 |
| 4. <u>Rancho Physical Therapy</u>   | 8. <u>Dr Robert Gutierrez</u>                       |
|                                     | 9. <u>Louis Mortillaro, Ph.D.</u>                   |

Any and all of the following information are to be disclosed:

1. Medical Reports, Records, Charts, Notes, Itemized Billing, Letters, X-Rays, Films, MRI's, CT-Scans and Reports;
2. Personnel, Attendance, Employment, Payroll, Wage Records, School Records and Transcripts;
3. Insurance Records, including all Claims, Itemized Billing, Correspondence, Payments and all documents within the file;
4. \_\_\_\_\_
5. Exclusions: \_\_\_\_\_

**PURPOSE:** The above information is being obtained to assist said authorized entities in evaluation of my claim for benefits or damages. A copy or facsimile of this document shall be considered as effective and valid as the original.

I understand I have the right to revoke this Authorization at any time. I understand if I revoke this Authorization I must do so in writing. I understand that revocation will not apply to my Insurance Company when the law provides my insurer with the right to contest a claim under my policy. Unless otherwise revoked, this Authorization will expire on the following date, event, or condition: 7/13/07. If I fail to specify an expiration date, event or condition, this authorization will expire in one year.

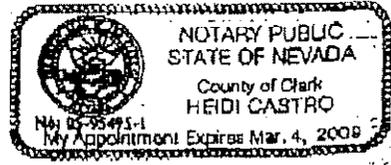
I understand that authorizing the disclosure of this Health Information is voluntary and that I am entitled to a copy of this Authorization and acknowledge receipt of a copy thereof. I can refuse to sign this Authorization. I understand any disclosure of information carries with it the potential for an unauthorized re-disclosure and the information may not be protected by federal confidentiality rules.

I understand that signing this authorization may not condition treatment, payment, enrollment or eligibility for benefits.

Enrique Rodriguez  
Patient/Natural Parent/Guardian/Legal Representative  
of \_\_\_\_\_

Date: 7.13.07

SUBSCRIBED AND SWORN TO before me  
This day 13 of July, 2007  
Heidi Castro





10676-05

Wilshire Surgicenter Inc.  
8641 Wilshire Blvd., Suite 201, Beverly Hills, CA. 90211  
(310) 289-8600 Fax (310) 289-9930

POSTED  
MAR 21 2007

DATE: 03/12/07

PATIENT NAME: Enrique Rodriguez SSN: ACCT: 562-29-4767

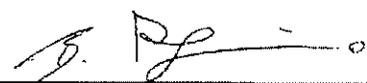
BILL TO: Benson, Bertoldo, Baker & Carter, Attorneys at Law  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117

DATE	DESCRIPTION	AMOUNT
	<input checked="" type="checkbox"/> Copy of Medical Records.....	
	<input type="checkbox"/> Disability Forms.....	
	<input type="checkbox"/> Other.....	

TOTAL DUE..... 45.00 \$

PLEASE MAKE CHECK PAYABLE TO:  
WILSHIRE SURGICENTER INC.

Tax ID # 954716116

  
SIGNATURE (Person filling out form)

CHECK REQUEST

DATE:

3/29/07

CLIENT:

Enrique Rodriguez

FILE #:

10676-05

AMOUNT:

\$ 25.<sup>00</sup>

MAR 29 2007

PAYABLE TO:

Radnet Film Library  
17619 Daphne Ave  
Hawthorne, CA 90250

DATE NEEDED:

3/30/07

PURPOSE:

medical Records

SPECIAL INSTRUCTIONS

THANKS,

STUART

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	RODRIGUEZ	25.00	0.00	25.00

Date  
04/05/07

Check Number  
00051607

Check Amount  
\$ 25.00

NON-NEGOTIABLE

V

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

94-183/1224

CHECK NO.  
00051607

51607

\*\* TWENTY FIVE DOLLARS AND 00 CENTS \*\*

DATE	AMOUNT
04/05/07	*****25.00

**PAY TO THE ORDER OF** Radnet Film Library  
 12619 Daphne Avenue  
 Hawthorne CA 90250

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: med records/10676-05

⑈051607⑈ ⑆122401833⑆ 0025017284⑈

V

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	RODRIGUEZ	25.00	0.00	25.00

Date  
04/05/07

Check Number  
00051607

Check Amount  
\$ 25.00

NON-NEGOTIABLE

Payee  
Radnet Film Library

V



March 15, 2007

Via Fax: 228-2333

Benson Bertoldo Baker & Carter  
7408 W Sahara Ave  
Las Vegas, Nevada 89117

Regarding: Enrique Rodriguez  
DOB 7/15/63  
MR# 106590

The medical records that were requested by your office have been copied and will be mailed upon receipt of payment.

Please remit to my attention at the address below: \$58.80, the copying charge for 98 pages @ \$ .60 per page.

Sincerely,

Mary Vosburg, CCS, CPMSM  
Supervisor, HIM/MSS

Tax ID# 20-1898649

The information contained in this facsimile transmittal is PRIVILEGED and CONFIDENTIAL intended ONLY for the use of the recipient named above. If the reader of this information is not the intended recipient, or employee or agent responsible for the delivery of this information to the intended recipient, you are hereby notified that this is not a waiver of privilege and any dissemination, distribution or copying of this information is strictly PROHIBITED. If you have received the information in error, please immediately notify the sender by telephone and arrange for return or destruction of the document(s).

The document accompanying this transmission contains confidential health information that is legally privileged. This information is intended only for the use of the individual or entity named above. The authorized recipient of this information is prohibited from disclosing this information to any other party unless required to do so by law or regulation and is required to destroy the information after its stated need has been fulfilled.

L:Medical Records/Release of Information/Copy Charge

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
106590	10676-05 <i>Stuart Rodriguez</i>	58.80	0.00	58.80

Date  
04/13/07

Check Number  
00051656

Check Amount  
\$ 58.80

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

94 183/1224

CHECK NO.  
00051656

51656

\*\* FIFTY EIGHT DOLLARS AND 80 CENTS \*\*

**PAY**  
 TO THE  
 ORDER  
 OF  
 Medical District Surgery Center  
 2020 Goldring Avenue, #300  
 Las Vegas NV 89106

DATE	AMOUNT
04/13/07	*****58.80

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: med records/10676-05

⑈051656⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
106590	10676-05	58.80	0.00	58.80

Date  
04/13/07

Check Number  
00051656

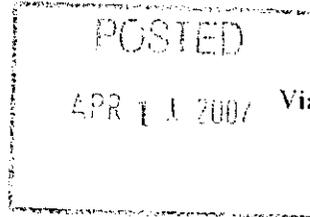
Check Amount  
\$ 58.80

NON-NEGOTIABLE

Payee  
Medical District Surgery Center



March 15, 2007



Via Fax: 228-2333

Benson Bertoldo Baker & Carter  
7408 W Sahara Ave  
Las Vegas, Nevada 89117

*PLEASE PAY*

Regarding: Enrique Rodriguez / 10676.05  
DOB 7/15/63  
MR# 106590

The medical records that were requested by your office have been copied and will be mailed upon receipt of payment.

Please remit to my attention at the address below: \$58.80, the copying charge for 98 pages @ \$ .60 per page.

Sincerely,

Mary Vosburg, CCS, CPMSM  
Supervisor, HIM/MSS

Tax ID# 20-1898649

*3/15/07  
This Gols to  
Heidi?  
10676.05*

The information contained in this facsimile transmittal is PRIVILEGED and CONFIDENTIAL intended ONLY for the use of the recipient named above. If the reader of this information is not the intended recipient, or employee or agent responsible for the delivery of this information to the intended recipient, you are hereby notified that this is not a waiver of privilege and any dissemination, distribution or copying of this information is strictly PROHIBITED. If you have received the information in error, please immediately notify the sender by telephone and arrange for return or destruction of the document(s).

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L:Medical Records/Release of Information/Copy Charge

CHECK REQUEST

DATE: 3/29/07  
CLIENT: Enrique Rodriguez  
FILE #: 10676-05  
AMOUNT: \$ 25.<sup>00</sup>  
PAYABLE TO: Radnet Film Library  
12619 Daphne Ave  
Hawthorne, CA 90250  
DATE NEEDED: 3/30/07  
PURPOSE: medical Records

SPECIAL INSTRUCTIONS

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

THANKS,

STUART

*Handwritten mark*

*2 PAGES*

Radnet Film Library  
12619 Daphne Avenue  
Hawthorne, CA 90250

*Bentson, Benito Do, Baker  
PCARTER*

*323-600-0158*

# Fax

To: *Wm. Jonathan WEBER* From: *Stephanie Beckton*

---

Fax: \_\_\_\_\_ Date: *3-26-2007*

---

Phone: \_\_\_\_\_ *TAXID # 33-070831B*

PLEASE SEND ME THE FOLLOWING JACKETS:

<u>PATIENT NAME</u>	<u>DOB</u>
<i>Enriquez RODRIGUEZ</i>	<i>7-15-63</i>

*NEED \$25.00 check for records*



JOSEPH L. BENSON  
 JOHN L. BERTOLDO  
 STEVEN M. BAKER  
 BRETT A. CARTER  
 LAWRENCE L. SMITH  
 BROOK M. HAMMOND  
 E. GREEN ARNTZ  
 W. JONATHAN WEBER  
 JAVIER A. ARGUELLO

March 2, 2007

Siamak Dardashti, M.D.  
 8750 Wilshire Blvd., Suite 100  
 Beverly Hills, CA 90211

Re: Our Client/Your Patient : Enrique Rodriguez  
 Date of Birth : 7/15/1963  
 Social Security Number : 562-29-4767  
 Date of Loss : 11/22/2004  
 Our File Number : 10676-05

*Medical Records*

To Whom It May Concern:

Please be advised that this firm has been retained to represent the interests of Enrique Rodriguez regarding injuries sustained as a direct result of an incident that occurred on 11/22/2004. Our records indicate that you provided our client with medical care, treatment, and or services for said injuries on or after the above date of loss.

In accordance with the enclosed signed Authorization, please provide this office with a complete copy of all medical records, including, but not limited to, doctor's and nurse's daily chart/soap notes, radiology reports, referral slips, off work notices, all outside referrals, etc., for services rendered to our client on the above referenced date of loss, up to and including, the present date. Additionally, please complete the enclosed Certificate of Authenticity of Custodian of Records in the presence of a Notary and/or witness and return with the records/bills requested herein.

If there is a charge for providing these documents, please advise we will forward the appropriate payment. Kindly send the requested documentation at your earliest convenience.

If you have any questions please do not hesitate to contact me at (702) 228-2600. Thank you for your professional cooperation in this matter. It is greatly appreciated.

Very truly yours,

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

*Wm. Jonathan Weber*

WM. JONATHAN WEBER

WJW/mk  
 Enclosure- as stated  
 cc:client/file

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
06117869T	11537-06	555.88	0.00	555.88
06118135T	10676-05	205.54	0.00	205.54
06117827T	10528-05	84.95	0.00	84.95
Date 02/22/07	06128703T	10677-05	102.25	102.25
	06118264T	8708-03	27.76	27.76
	06128339T	meadows	13.04	13.04
Check Number 00051211	06128814T	10482-05	214.82	214.82
	06128345T	10663-05	471.49	471.49
	06128450T	11353-06	72.27	72.27
Check Amount \$ 3072.04	06128373T	9564-04	340.88	340.88
	06128375T	9847-04	249.03	249.03
	03128374T	9799-04	262.89	262.89
	BROOK	06-128451t	471.24	471.24

Monique Rodriguez

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

94-183/1224

CHECK NO.  
00051211

51211

\*\* THREE THOUSAND SEVENTY TWO DOLLARS AND 04 CENTS \*\*

**PAY TO THE ORDER OF**  
 The Litigation Document Group, Inc.  
 320 South 4th Street  
 Las Vegas NV 89101

DATE: 02/22/07  
 AMOUNT: \*\*\*\*3,072.04

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: copy jobs

⑈051211⑈ ⑆122401833⑆ 0025017284⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
06117869T	11537-06	555.88	0.00	555.88
06118135T	10676-05	205.54	0.00	205.54
06117827T	10528-05	84.95	0.00	84.95
Date 02/22/07	06128703T	10677-05	102.25	102.25
	06118264T	8708-03	27.76	27.76
	06128339T	meadows	13.04	13.04
Check Number 00051211	06128814T	10482-05	214.82	214.82
	06128345T	10663-05	471.49	471.49
	06128450T	11353-06	72.27	72.27
Check Amount \$ 3072.04	06128373T	9564-04	340.88	340.88
	06128375T	9847-04	249.03	249.03
	03128374T	9799-04	262.89	262.89
	BROOK	06-128451t	471.24	471.24

NON-NEGOTIABLE

Payee  
 The Litigation Document Group, Inc.



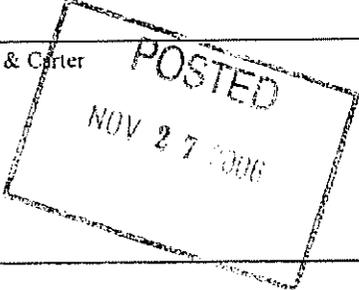
# The Litigation Document Group

320 S. 4th Street  
 Las Vegas, NV 89101  
 Phone # (702)380-4283 Fax # (702)380-4286

# Invoice

Date	Invoice #
11/22/2006	06-118135T

Ordered By
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117



Bill To
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117 702-228-2600

Client Matter	Terms	Due Date	Rep	Due Time	Ordered By
10676-05	Due on receipt	11/22/2006	SA	asap/ am	Tim
Quantity	Description			Rate	Amount
993	Scan to PDF			0.17	168.81T
1	CD (Master w/viewer) (500 page minimum required for free CD)			0.00	0.00T
1	CD (Master w/viewer) (500 page minimum required for free CD)			21.95	21.95T

All invoices which are 30 days past due will incur a 1.5% late fee each month.

<b>Subtotal</b>	\$190.76
<b>Sales Tax (7.75%)</b>	\$14.78
<b>Total</b>	\$205.54
<b>Payments/Credits</b>	50.00
<b>Balance Due</b>	\$205.54

Please Mail Checks To:  
 The Litigation Document Group, Inc.  
 320 S. 4th Street  
 Las Vegas, Nv 89101

Sign: \_\_\_\_\_  
 Print: \_\_\_\_\_  
 Date: \_\_\_/\_\_\_/\_\_\_

**TAX ID# 88-0504363**

Order Forms Online  
[WWW.litigationdocumentgroup.com](http://WWW.litigationdocumentgroup.com)





**CORPORATE**  
**DOWNTOWN**

• 3000 Howard Hughes Pkwy Suite 115, Las Vegas NV 89109 tel. 702.380.4283  
• B of A Plaza 300 S. 4th St. Suite 002, Las Vegas NV 90101 fax 702.380.4286

www.litigationdocumentgroup.com

06-118135T

DATE: 11/21/06

RESET FORM

# IMAGING ORDER FORM

See special instructions on back

PROJECT NAME: \_\_\_\_\_

### CLIENT INFO:

CLIENT NAME: Benson Bertoldo Baker & Carter  
ADDRESS: 7408 W. Sahara Ave.  
PHONE: (702) 228-2600  
ORDERED BY: ~~John~~ TIM  
CLIENT MATTER: 10676-05

DATE/TIME IN: 11/21/06  
DUE BY: 11/22/06 AM ASAP  
DESCRIPTION: \_\_\_\_\_

### PAGE NAME

### TYPE OF MEDIA

- MATCH EXISTING BATES NUMBER
- CREATE BATES NUMBER AT SCAN TIME
- PLACEMENT (PLEASE PROVIDE SAMPLE)
  - PREFIX CHARACTERS: \_\_\_\_\_
  - PAGE NUMBER CHARACTERS: \_\_\_\_\_
  - SUFFIX CHARACTER: \_\_\_\_\_

- |  | # OF ORIGINALS | # OF COPIES |
|--|----------------|-------------|
| <input checked="" type="checkbox"/> CD | _____          | <u>(2)</u>  |
| <input type="checkbox"/> DVD           | _____          | _____       |
| <input type="checkbox"/> FLOPPY        | _____          | _____       |
| <input type="checkbox"/> OTHER         | _____          | _____       |

### ADDITIONAL SCANNING INSTRUCTIONS

#### DO WE SCAN?

- |                   |   |  |                                     |
|-------------------|---|--|-------------------------------------|
| BOX LABEL:        | <input type="checkbox"/> YES                    | <input type="checkbox"/> NO            |                                     |
| BINDER COVERS     | <input type="checkbox"/> YES                    | <input type="checkbox"/> NO            | <input type="checkbox"/> ONLY IF #D |
| FILE FOLDER STABS | <input checked="" type="checkbox"/> YES         | <input type="checkbox"/> NO            | <input type="checkbox"/> ONLY IF #D |
| EXHIBIT TABS      | <input type="checkbox"/> YES                    | <input checked="" type="checkbox"/> NO | <input type="checkbox"/> ONLY IF #D |
| SLIP-SHEETS       | <input type="checkbox"/> YES                    | <input type="checkbox"/> NO            | <input type="checkbox"/> ONLY IF #D |
| POST-IT NOTES     | <input type="checkbox"/> YES                    | <input type="checkbox"/> NO            | <input type="checkbox"/> ONLY IF #D |
| (IF YES)          | <input type="checkbox"/> REMOVE & REPLACE       |  |                                     |
|                   | <input type="checkbox"/> ONE WITH / ONE WITHOUT |  |                                     |
| STANDARD LANGUAGE | <input type="checkbox"/> YES                    | <input type="checkbox"/> NO            | <input type="checkbox"/> ONLY IF #D |

#### COLOR PAGES

- |  |                                       |   |
|--|---------------------------------------|---|
| <input type="checkbox"/> COLOR FOR COLOR | <input type="checkbox"/> LEGEND/BATES | <input type="checkbox"/> SCAN IN PIECES |
| <input type="checkbox"/> B & W FOR COLOR | <input type="checkbox"/> REDUCE       | <input type="checkbox"/> SIZE FOR SIZE  |

#### OVERSIZE PAGES (LARGER THAN 11X17)

### AIT COMPLETE SCANNING SOLUTION

#### INCLUDES:

PREP & REASSEMBLE • RUN-TIME VIEWER • OCR SCAN B&W 8.5 X 11 TO 11X17 AS A GROUP IV TIF IMAGE ELECTRONIC BATES NUMBERING • DETAILED PROJECT INDEX MASTER CD INCLUDED

#### COMPLETE SCANNING PACKAGE

- |                                      |                                      |
|--------------------------------------|--------------------------------------|
| <input type="checkbox"/> BOX         | <input type="checkbox"/> PHYSICAL    |
| <input type="checkbox"/> FILE FOLDER | <input type="checkbox"/> OTHER _____ |
| <input type="checkbox"/> PARENT      |                                      |
| <input type="checkbox"/> CHILD       |                                      |

#### CAPTURE FOLDER DESCRIPTIONS AND PROVIDE AS:

- |  |                                    |
|--|------------------------------------|
| <input type="checkbox"/> ELECTRONIC FORMAT | <input type="checkbox"/> PRINT OUT |
|--|------------------------------------|

#### MEDIA

- |  |                                    |
|--|------------------------------------|
| <input type="checkbox"/> SCAN IN PLACE | <input type="checkbox"/> PRINT OUT |
| <input type="checkbox"/> MAKE A COPY   |                                    |

### CLIENT'S IMAGE VIEWING / TEXT RETRIEVAL SYSTEM(S)

- |                                    |   |  |                                  |
|------------------------------------|---|--|----------------------------------|
| <input type="checkbox"/> SUMMATION | <input type="checkbox"/> CONCORDANCE              | <input checked="" type="checkbox"/> DOCULEX          | <input type="checkbox"/> OPTICON |
| <input type="checkbox"/> IPRO      | <input checked="" type="checkbox"/> ADOBE ACROBAT | <input checked="" type="checkbox"/> OTHER <u>PDF</u> |                                  |

### ADDITIONAL SERVICES

- OCR
  - TEXT ONLY
  - FORMATTED TEXT
    - FORMAT \_\_\_\_\_
    - CLEANUP?  YES  NO (HOURLY CHARGE APPLIES)
- BRANDING
  - PAGE NAME
  - OTHER CAPTION \_\_\_\_\_
  - REDACTIONS
  - PLACEMENT (PLEASE PROVIDE SAMPLE)

- PDF CONVERSION
  - IMAGE ONLY
  - IMAGE HIDDEN WITH TEXT
  - FORMATTED PDF
- BLOWBACKS
  - NUMBER OF SETS: \_\_\_\_\_
  - INCLUDE PAGE NAME
  - INCLUDE OTHER CAPTION: \_\_\_\_\_
  - ASSEMBLY
    - SLIP SHEET
    - BINDING ELEMENT

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
16780	10676-05 <i>Monique Rodriguez</i>	10.20	0.00	10.20

Date  
01/25/07

Check Number  
00050949

Check Amount  
\$ 10.20

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



730 S. Rainbow Blvd.  
Las Vegas, NV 89126

94-183/1224

CHECK NO.  
00050949

50949

\*\* TEN DOLLARS AND 20 CENTS \*\*

DATE	AMOUNT
01/25/07	*****10.20

PAY TO THE ORDER OF  
 Robert C. Gutierrez, M.D.  
 5380 South Rainbow Blvd.  
 Suite 100  
 Las Vegas NV 89118

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: meds/10676-05

⑈050949⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
16780	10676-05	10.20	0.00	10.20

Date  
01/25/07

Check Number  
00050949

Check Amount  
\$ 10.20

Payee  
Robert C. Gutierrez, M.D.

NON-NEGOTIABLE

**Robert Gutierrez, M.D.**  
 3717 Rosecrest Circle So  
 Las Vegas NV 89121

Billing Questions: (702) 940-4263  
 Fax: (702) 940-4265

*Total Balance due by patient: \$1,576.20*

*Patient: Rodriguez, Enrique*  
*Account Number: 16780*

*10/16/06*

**Weber, Jonathan**  
 7408 W Sahara Ave  
 Las Vegas NV 89117

Statement Date: 10/27/2006  
 Home Phone: 228-2600  
 Payment Enclosed: \$  
 Make Check Payable to: Robert Gutierrez, M.D.

  
 Card # \_\_\_\_\_ Exp / \_\_\_\_\_  
 Signature \_\_\_\_\_

..... Cut on this line and fold so that our address shows through return envelope. ....

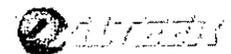
Date	Code	Description	Charges	Pmt/Adj.
10/10/06	Misc. Charge	Robert C Gutierrez MD		
10/10/06	RecCopy	Copy Medical Records	\$10.20	
			<i>Balance due by patient: \$10.20</i>	
08/21/06	Ticket #16903	Robert C Gutierrez MD		
08/21/06	J2001	Office Procedure	\$30.00	
08/21/06	J1030	Office Procedure	\$54.00	
08/21/06	A4550	Office Procedure	\$15.00	
08/21/06	99203	Office Procedure	\$497.00	
08/21/06	20605	Office Procedure	\$300.00	
08/21/06	20526	Office Procedure	\$400.00	
			<i>Balance due by patient: \$1,296.00</i>	
10/02/06	Ticket #17418	Robert C Gutierrez MD		
10/02/06	99213	Office Procedure	\$270.00	
			<i>Balance due by patient: \$270.00</i>	

Account Total	Current	31-60 days	61-90 days	91-120 days	121+ days	Charges	Payments
	\$280.20	\$1,296.00	\$0.00	\$0.00	\$0.00	\$1,576.20	\$0.00

*Total Balance due by patient: \$1,576.20*

**Your account is 30 days past due.**

*Lien Status*



INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
2087	6175-00	1517.00	0.00	1517.00
2099	6175-00	3034.00	0.00	3034.00
2102	6175-00	2972.50	0.00	2972.50
Date 01/18/07	2095	10677-05	1025.00	1025.00
	2086	10676-05	1722.00	1722.00
Check Number 00050755	2092	10482-05	779.00	779.00
	2069	8527-02	492.00	492.00
Check Amount \$ 19782.50	2075	8464-02	1189.00	1189.00
	2073	RAMIREZ	451.00	451.00
	2093	11674-06	410.00	410.00
	2091	9916-04	533.00	533.00
	2082	9928-04	3239.00	3239.00
	2098	9884-04	1107.00	1107.00
	2084	BELLER	1312.00	1312.00

*Miracle*  
*Rodriguez*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

94-163/1224

CHECK NO.  
00050755

\*\* NINETEEN THOUSAND SEVEN HUNDRED EIGHTY TWO DOLLARS AND 50 CENTS \*\*

PAY TO THE ORDER OF  
Salutory Services, Inc.  
1476 Romanesca Dr.  
Henderson NV 89052

DATE: 01/18/07  
AMOUNT: \*\*\*19,782.50

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: prof svcs

⑈050755⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
2087	6175-00	1517.00	0.00	1517.00
2099	6175-00	3034.00	0.00	3034.00
2102	6175-00	2972.50	0.00	2972.50
Date 01/18/07	2095	10677-05	1025.00	1025.00
	2086	10676-05	1722.00	1722.00
Check Number 00050755	2092	10482-05	779.00	779.00
	2069	8527-02	492.00	492.00
Check Amount \$ 19782.50	2075	8464-02	1189.00	1189.00
	2073	RAMIREZ	451.00	451.00
	2093	11674-06	410.00	410.00
	2091	9916-04	533.00	533.00
	2082	9928-04	3239.00	3239.00
	2098	9884-04	1107.00	1107.00
	2084	BELLER	1312.00	1312.00

NON-NEGOTIABLE

Payee  
Salutory Services, Inc.

**Salute / Services, Inc.**

10624 South Eastern Ave.  
 Suite # A 284  
 Henderson, NV 89052

**Invoice**

Number: 2086  
 Date: November 23, 2006

POSTED  
 DEC 7 3 2006

**Bill To:**

Jonathan Webber, Esq.  
 B.B.B. & C.  
 7408 West Sahara Avenue  
 Las Vegas, NV 89117

**Ship To:**

Jonathan Webber, Esq.  
 B.B.B. & C.  
 7408 West Sahara Avenue  
 Las Vegas, NV 89117

Description	Amount
Re: Rodriguez, Enrique Case; Attorney: Jonathan Webber, Esq. - Work done from 09/26/06 - 11/23/06 - Multiple emails and conference calls regarding case strategy and current medical records. - Conferences with Dr. Ferrant regarding review of records and current medical records (3.6 hr) - Teleconference and review of records. - Multiple teleconferences with Dr. Ferrant. - Reviewed new medical records and created Time Line, Records Needed and	Heidi, please pay file # 10076-05 Thanks, C staff regarding 451.00 opinion after t and final report; 738.00 Wang; (0.4 hr) 82.00 ante: (0.8 hr) 164.00 ng Report including 287.00
<b>Total</b>	<b>\$1,722.00</b>

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
23447	9675-04	177.72	0.00	177.72
23577	9850-04	99.13	0.00	99.13
23701	8324-02	121.66	0.00	121.66
Date 01/10/07	23203 10676-05	75.25	0.00	75.25
	23677 8324-02	360.45	0.00	360.45
	23647 10482-05	124.57	0.00	124.57
Check Number 00050687	23654 8324-02	164.17	0.00	164.17

Check Amount \$ 1122.95

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



179 S. Rainbow Blvd.  
Las Vegas, NV 89128

94-183/1224

CHECK NO.  
00050687

50687

\*\* ONE THOUSAND ONE HUNDRED TWENTY TWO DOLLARS AND 95 CENTS \*\*

PAY TO THE ORDER OF  
 Legal Document Solutions  
 710 South 8th Street  
 Las Vegas NV 89101

DATE: 01/10/07  
 AMOUNT: \*\*\*\*1,122.95

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: copy jobs

⑈050687⑈ ⑆122401833⑆ 0025017284⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
23447	9675-04	177.72	0.00	177.72
23577	9850-04	99.13	0.00	99.13
23701	8324-02	121.66	0.00	121.66
Date 01/10/07	23203 10676-05	75.25	0.00	75.25
	23677 8324-02	360.45	0.00	360.45
	23647 10482-05	124.57	0.00	124.57
Check Number 00050687	23654 8324-02	164.17	0.00	164.17

Check Amount \$ 1122.95

NON-NEGOTIABLE

Payee  
Legal Document Solutions

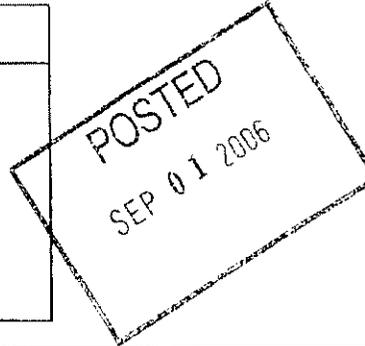
**LEGAL DOCUMENT**Phone: 702-384-3840  
Fax: 702-384-1853

# Invoice

710 South 8th Street  
Las Vegas, NV 89101  
Tax ID #: 56-2317932

Date	Invoice #
8/31/2006	23203

Bill To
Benson Bertoldo Baker & Carter 7408 W. Sahara Avenue Las Vegas, NV 89117
Phone: 702-228-2600 Fax: 702-228-2333



For Legal Document Solutions' Use
Delivered by:
Received by:

P.O. No.	Terms	Rep	Ship Date	Ordered By	LDS Job #	Client Matter #
	Net 30	JJH	8/31/2006	Tim	08064073	10676-05
Qty	Description				Item	Amount
	Clone originals x1, insert tabs and acco clasp					
359	Medium Litigation Copy Services				3	57.44T
33	Tabs				33	9.90T
1	Manila folder				Manila	0.50T
1	Acco binding				Acco	2.00T
	Sales Tax					5.41
Received by:					<b>Total</b>	\$75.25
Signature:		Printed Name:				

We recognize that some of our customers may be billing these expenses to their clients. However, Legal Document Solutions' customers remain ultimately responsible for payment within our terms regardless of their receivables.

50321

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.	
2015	11359-06	369.00	0.00	369.00	
2029	8527-02	779.00	0.00	779.00	
2008	10676-05	779.00	0.00	779.00	
Date	2022	10315-05	287.00	0.00	287.00
11/09/06	2021	10482-05	669.00	0.00	669.00
	2019	10535-05	730.50	0.00	730.50
Check Number	2018	10197-04	225.50	0.00	225.50
00050321	2017	10639-05	956.00	0.00	956.00
	2020	10676-05	587.00	0.00	587.00
Check Amount	2033	10756-05	1086.50	0.00	1086.50
\$ 10602.00	2027	10130-04	246.00	0.00	246.00
	2031	11017-05	2706.00	0.00	2706.00
	2045	7440-01	471.50	0.00	102.50
	2016	9503-03	1079.00	0.00	1079.00

Chasse  
Rodriguez

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
 Las Vegas, NV 89128

50321

94-183/1224

CHECK NO.  
 00050321

\*\* TEN THOUSAND SIX HUNDRED TWO DOLLARS AND 00 CENTS \*\*

DATE 11/09/06 AMOUNT \*\*\*10,602.00

PAY TO THE ORDER OF  
 Salutory Services, Inc.  
 1476 Romanesca Dr.  
 Henderson NV 89052

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: prof scvs/see attached

⑈050321⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.	
2015	11359-06	369.00	0.00	369.00	
2029	8527-02	779.00	0.00	779.00	
2008	10676-05	779.00	0.00	779.00	
Date	2022	10315-05	287.00	0.00	287.00
11/09/06	2021	10482-05	669.00	0.00	669.00
	2019	10535-05	730.50	0.00	730.50
Check Number	2018	10197-04	225.50	0.00	225.50
00050321	2017	10639-05	956.00	0.00	956.00
	2020	10676-05	587.00	0.00	587.00
Check Amount	2033	10756-05	1086.50	0.00	1086.50
\$ 10602.00	2027	10130-04	246.00	0.00	246.00
	2031	11017-05	2706.00	0.00	2706.00
	2045	7440-01	471.50	0.00	102.50
	2016	9503-03	1079.00	0.00	1079.00

50321

NON-NEGOTIABLE

Payee  
 Salutory Services, Inc.

*Jan*

### Salutory Services, Inc.

10624 Sout Eastern Ave.  
Suite # A 284  
Henderson, NV 89052

*10626-09*

### Invoice

Number: 2008

Date: August 15, 2008

**Bill To:**

Jonathan Weber, Esq.  
B.B.B.&C.  
7408 Sahara Avenue  
Las Vegas, NV 89117

**Ship To:**

Jonathan Weber, Esq.  
B.B.B.&C.  
7408 Sahara Avenue  
Las Vegas, NV 89117

Description	Amount
Re: Rodriguez, Enrique Case;	
Attorney: Jonathan Webber, Esq.	
- Work done from 07/25 - 08/15/2006;	
- Email review and reply details of treatment with Attorney Weber; (0.3 hr)	61.50
- Reviewed New Medical Records and updated medical consulting Report; (0.5 hr)	102.50
- Teleconference and emails with Dr. Mortillaro; (0.8 hr)	164.00
- Teleconference with Dr. Kidwell; (0.4 hr)	82.00
- Conferances and emails regarding current medical complaints while meeting with Attorney Weber; meeting with Attorney Weber to evaluate medical management, knee issues and upcoming evaluation by Dr. Thalgott; records to be made available; conference with Dr. Thalgott; (1.8 hr)	369.00
<b>Total</b>	<b>\$779.00</b>

NOV 02 2006  
POSTED

**Salutory Services, Inc.**

10624 Sout Eastern Ave.  
Suite # A 284  
Henderson, NV 89052

*Invoice*

Number: 2020

Date: September 22, 2006

**Bill To:**

Jonathan Weber, Esq.  
B.B.B.&C.  
7408 Sahara Avenue  
Las Vegas, NV 89117

**Ship To:**

Jonathan Weber, Esq.  
B.B.B.&C.  
7408 Sahara Avenue  
Las Vegas, NV 89117



Description	Amount
Re: Rodriguez, Enrique Case; Attorney: Jonathan Webber, Esq. - Work done from 08/16 - 09/22/2006; - Reviewed and replied to a number of emails regarding medical issues and case strategy / follow up teleconference with Dr. Tauber regarding medical condition / meeting on 09/22/06 with Attorney Webber to discuss plan to rule out RSD; evaluation by spine surgeon and pain management doctors at UCLA; (1.4 hr)	287.00
- Referral to Dr. M. Ferrante, Chairman of Anesthesia Pain Management at UCLA; teleconference and email with Dr. Ferrante regarding case overview and referral; (300.00)	300.00
<p style="text-align: center;"> <i>Heidi,              Please pay              10076-05              Thanks,              C</i> </p>	
<b>Total</b>	<b>\$587.00</b>

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	RODRIGUEZ	1500.00	0.00	1500.00

Date  
10/24/06

Check Number  
00050041

Check Amount  
\$ 1500.00

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

94-183/1224

CHECK NO.

00050041

50041

\*\* ONE THOUSAND FIVE HUNDRED DOLLARS AND 00 CENTS \*\*

DATE	AMOUNT
10/24/06	****1,500.00

**PAY** Ferrante & Associates, Inc.  
**TO THE** 528 Pacific Palisades Dr. # 713  
**ORDER** Pacific Palisad CA 90272-1903  
**OF**

~~NON-NEGOTIABLE~~

MEMO: 10676-05/RODRIGUEZ

⑈050041⑈ ⑆122401833⑆ 0025017284⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	RODRIGUEZ	1500.00	0.00	1500.00

Date  
10/24/06

Check Number  
00050041

Check Amount  
\$ 1500.00

NON-NEGOTIABLE

Payee  
Ferrante & Associates, Inc.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
1969	9850-04	164.00	0.00	164.00
1970	10677-05	2009.00	0.00	2009.00
1975	10535-05	656.00	0.00	656.00
Date 09/29/06	1976 10197-04	635.50	0.00	635.50
Check Number 00049832	1977 10676-05	430.50	0.00	430.50
Check Amount \$ 16297.50	1982 10856-05	615.00	0.00	615.00
	1983 8708-03	2091.00	0.00	2091.00
	1984 10098-04	205.00	0.00	205.00
	1991 10097-04	1066.00	0.00	1066.00
	1992 9133-03	2583.00	0.00	2583.00
	1997 9133-03	1230.00	0.00	1230.00
	1999 10683-05	2132.00	0.00	2132.00
	2001 10567-05	1250.50	0.00	1250.50
	2011 9800-04	1230.00	0.00	1230.00

Charisse

Rodriguez

12

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
 Las Vegas, NV 89128

49832

94-183/1224

CHECK NO.

00049832

\*\* SIXTEEN THOUSAND TWO HUNDRED NINETY SEVEN DOLLARS AND 50 CENTS \*\*

PAY TO THE ORDER OF  
 Salutory Services, Inc.  
 1476 Romanesca Dr.  
 Henderson NV 89052

DATE: 09/29/06  
 AMOUNT: \*\*\*16,297.50

NON-NEGOTIABLE

MEMO: prof svcs/see attached

⑈049832⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
1969	9850-04	164.00	0.00	164.00
1970	10677-05	2009.00	0.00	2009.00
1975	10535-05	656.00	0.00	656.00
Date 09/29/06	1976 10197-04	635.50	0.00	635.50
Check Number 00049832	1977 10676-05	430.50	0.00	430.50
Check Amount \$ 16297.50	1982 10856-05	615.00	0.00	615.00
	1983 8708-03	2091.00	0.00	2091.00
	1984 10098-04	205.00	0.00	205.00
	1991 10097-04	1066.00	0.00	1066.00
	1992 9133-03	2583.00	0.00	2583.00
	1997 9133-03	1230.00	0.00	1230.00
	1999 10683-05	2132.00	0.00	2132.00
	2001 10567-05	1250.50	0.00	1250.50
	2011 9800-04	1230.00	0.00	1230.00

49832

NON-NEGOTIABLE

Payee  
 Salutory Services, Inc.

**Salutory Services, Inc.**

10624 Sout Eastern Ave.  
Suite # A 284  
Henderson, NV 89052

*Invoice*

Number: 1977

Date: July 25, 2006

**Bill To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

**Ship To:**

Jonathan Webber, Esq.  
B.B.B. & C  
7408 West Sahara Avenue  
Las Vegas, NV 89117

Description	Amount
Re: Rodriguez, Enrique Case;	
Attorney: Jonathan Webber, Esq.	
- Meeting on 07/21/2006 with Attorney Webber and teleconferance with client regarding current medical issues and plan; reviewed case strategy regarding hand surgeon, knee surgeon and sline surgeon; (1.2 hr)	246.00
- Teleconferance with Dr. Tauber; (0.6 hr)	123.00
- Teleconferance with Attorney Arntz regarding Dr. Oliveri; (0.3 hr)	61.50
<p><i>Heidi, Please pay. File # 10676-05</i></p>	
<b>Total</b>	<b>\$430.50</b>

POSTED  
AUG 01 2006

*Jew*

49232

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10508-05	Gunderson	9.00	0.00	9.00
10536-05	MASTERS	10.60	0.00	10.60
10567-05	VIGGIANI	19.60	0.00	19.60
Date 08/04/06	RODRIGUEZ	43.00	0.00	43.00
	LARDOMITA	28.12	0.00	28.12
	BARTLETT	72.20	0.00	72.20
Check Number 00049232	LEVY	11.00	0.00	11.00
	COOKE	49.80	0.00	16.60
Check Amount \$ 229.71	10849-05	18.00	0.00	19.59

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
 Las Vegas, NV 89128

49232

94-183/1224

CHECK NO.

00049232

\*\* TWO HUNDRED TWENTY NINE DOLLARS AND 71 CENTS \*\*

PAY TO THE ORDER OF  
 LAS VEGAS NEUROSURGERY, ORTHOPAEDICS & R  
 501 S. RANCHO DRIVE, SUITE I-67  
 LAS VEGAS NV 89106

DATE: 08/04/06  
 AMOUNT: \*\*\*\*\*229.71

~~NON-NEGOTIABLE~~

MEMO: MEDS/SEE ATTACHED

VOID AFTER 90 DAYS

⑈049232⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10508-05	Gunderson	9.00	0.00	9.00
10536-05	MASTERS	10.60	0.00	10.60
10567-05	VIGGIANI	19.60	0.00	19.60
Date 08/04/06	RODRIGUEZ	43.00	0.00	43.00
	LARDOMITA	28.12	0.00	28.12
	BARTLETT	72.20	0.00	72.20
Check Number 00049232	LEVY	11.00	0.00	11.00
	COOKE	49.80	0.00	16.60
Check Amount \$ 229.71	10849-05	18.00	0.00	19.59

NON-NEGOTIABLE

Payee  
 LAS VEGAS NEUROSURGERY, ORTHOPAEDICS & R

NON-NEGOTIABLE

Las Vegas Neurosurgery, Orthopaedics & Rehabilitation

10/6/03

Jew

To Whom It May Concern:

This is an invoice of \$43. For copies of medical records we charge \$.60 cents per page (68 pages).

Patient: ENRIQUE RODRIGUEZ

Doctor: MaryAnn Shannon MD

Please remit payment to:

Las Vegas Neurosurgery, Orthopaedics & Rehabilitation  
501 So. Rancho Drive Suite # I-67  
Las Vegas, NV 89106  
Attention: Medical Records

Tax ID: 43-2041736

We appreciate your business and look forward to working with you in the future. If you have questions, contact me at (702) 243-4700  
Thank You.

Sincerely,

POSTED

Gloria Garibaldi  
Medical Records

\*\*\*\*PLEASE INCLUDE THIS INVOICE WITH PAYMENT\*\*\*\*

KING MEDICAL SUPPLY (QRS)  
 20916 HIGGINS COURT  
 TORRANCE CA 90501  
 310-533-8800

Jew

: OICE 0000005376  
 DATE 07/26/2006  
 PO: >>  
 TAX ID: 43-1565704  
 ACCOUNT: 0000000000633

<p>W JONATHAN WEBER ESQ          LAW OFFICE          7408 W SAHARA AVENUE          LAS VEGAS NV 89117</p>	<p style="text-align: right;">AMOUNT ENCLOSED \$ _____</p> <p>ENRIQUE RODRIGUEZ          6667 INDIANA AVE          APT 247F          RIVERSIDE CA 92506</p>
PLEASE DETACH AND RETURN THIS PORTION WITH YOUR PAYMENT	

DATE FROM/THRU	INVOICE #	QTY	CODE	DESCRIPTION	UNIT COST	CHARGE	PAYMENTS
07/20/06 - 07/20/06	0000005376	1	A7034/3235	NASAL MASK COMFORT LITE I	196.46	196.46	
07/20/06 - 07/20/06	0000005376	1	A7035	HEADGEAR FOR CPAP DEVICE	66.38	66.38	
07/20/06 - 07/20/06	0000005376	1	A7033	PILLOWS FOR CPAP	47.44	47.44	

TOTAL CHARGES = 310.28  
 PMTS/CRED/DISC = 124.48  
 BALANCE DUE = 185.80

48675

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	1788	10676-05 WJW	143.50	0.00	143.50
	1812	5228-99	871.25	0.00	871.25
	1855	10130-04	533.25	0.00	533.25
Date	1858	10482-05	1178.75	0.00	1178.75
06/16/06	1861	1861	1148.00	0.00	1148.00
	1863	7440-01	1117.25	0.00	1117.25
Check Number	1866	9853-04	471.50	0.00	471.50
00048675	1868	7440-01	451.00	0.00	451.00
	1869	10676-05	164.00	0.00	164.00
Check Amount	1875	1875	2255.00	0.00	2255.00
\$ 10947.25	1876	10811-05	1271.00	0.00	1271.00
	1878	9340-03	574.00	0.00	574.00
	1881	8609-02	307.50	0.00	307.50
	1882	9061-03	461.25	0.00	461.25

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
 Las Vegas, NV 89128

48675

94-183/1224

CHECK NO.

00048675

\*\* TEN THOUSAND NINE HUNDRED FORTY SEVEN DOLLARS AND 25 CENTS \*\*

PAY TO THE ORDER OF Salutory Services, Inc.  
 1476 Romanesca Dr.  
 Henderson NV 89052

DATE 06/16/06 AMOUNT \*\*\*10,947.25

NON-NEGOTIABLE

MEMO: See breakdown

VOID AFTER 90 DAYS

⑈048675⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	1788	10676-05	143.50	0.00	143.50
	1812	5228-99	871.25	0.00	871.25
	1855	10130-04	533.25	0.00	533.25
Date	1858	10482-05	1178.75	0.00	1178.75
06/16/06	1861	1861	1148.00	0.00	1148.00
	1863	7440-01	1117.25	0.00	1117.25
Check Number	1866	9853-04	471.50	0.00	471.50
00048675	1868	7440-01	451.00	0.00	451.00
	1869	10676-05	164.00	0.00	164.00
Check Amount	1875	1875	2255.00	0.00	2255.00
\$ 10947.25	1876	10811-05	1271.00	0.00	1271.00
	1878	9340-03	574.00	0.00	574.00
	1881	8609-02	307.50	0.00	307.50
	1882	9061-03	461.25	0.00	461.25

48675

NON-NEGOTIABLE

Payee Salutory Services, Inc.

**Salutory Services, Inc.**

10624 Sout Eastern Ave.  
Suite # A 284  
Henderson, NV 89052

10676

*Invoice*

Number: 1788

Date: March 06, 2006

**Bill To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

**Ship To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

Description	Amount
Re: Rodriguez, Enrique Case;	
Attorney: Jonathan Webber, Esq.	
- Meeting with Attorney Webber; Strategy, teleconference with Dr. Koka and Dr. Tauber and Attorney J. Green; (0.7 hr)	143.50
<b>Total</b>	<b>\$143.50</b>

POSTED

48675

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	1788	10676-05	143.50	0.00	143.50
	1812	5228-99	871.25	0.00	871.25
	1855	10130-04	533.25	0.00	533.25
Date	1858	10482-05	1178.75	0.00	1178.75
06/16/06	1861	1861	1148.00	0.00	1148.00
	1863	7440-01	1117.25	0.00	1117.25
Check Number	1866	9853-04	471.50	0.00	471.50
00048675	1868	7440-01	451.00	0.00	451.00
	1869	10676-05	164.00	0.00	164.00
Check Amount	1875	1875	2255.00	0.00	2255.00
\$ 10947.25	1876	10811-05	1271.00	0.00	1271.00
	1878	9340-03	574.00	0.00	574.00
	1881	8609-02	307.50	0.00	307.50
	1882	9061-03	461.25	0.00	461.25

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
 Las Vegas, NV 89128

48675

94-183/1224

CHECK NO.  
 00048675

\*\* TEN THOUSAND NINE HUNDRED FORTY SEVEN DOLLARS AND 25 CENTS \*\*

PAY TO THE ORDER OF  
 Salutory Services, Inc.  
 1476 Romanesca Dr.  
 Henderson NV 89052

DATE: 06/16/06  
 AMOUNT: \*\*\*10,947.25

NON-NEGOTIABLE

MEMO: See breakdown

⑈048675⑈ ⑆122401833⑆ 0025017284⑈

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	1788	10676-05	143.50	0.00	143.50
	1812	5228-99	871.25	0.00	871.25
	1855	10130-04	533.25	0.00	533.25
Date	1858	10482-05	1178.75	0.00	1178.75
06/16/06	1861	1861	1148.00	0.00	1148.00
	1863	7440-01	1117.25	0.00	1117.25
Check Number	1866	9853-04	471.50	0.00	471.50
00048675	1868	7440-01	451.00	0.00	451.00
	1869	10676-05	164.00	0.00	164.00
Check Amount	1875	1875	2255.00	0.00	2255.00
\$ 10947.25	1876	10811-05	1271.00	0.00	1271.00
	1878	9340-03	574.00	0.00	574.00
	1881	8609-02	307.50	0.00	307.50
	1882	9061-03	461.25	0.00	461.25

48675

NON-NEGOTIABLE

Payee  
 Salutory Services, Inc.

**Salutory Services, Inc.**

10624 Sout Eastern Ave.  
Suite # A 284  
Henderson, NV 89052

*Invoice*

Number: 1869

Date: April 25, 2006

**Bill To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

*1067605*

**Ship To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

Description	Amount
Re: Rodriguez, Enrique Case;	
Attorney: Jonathan Webber, Esq.	
- Teleconferance with Dr. Tauber after knee surgery regarding findings and causation; Meeting with Attorney Webber regarding surgery and current case strategy; (0.8 hr)	164.00

**POSTED**

**Total** \$164.00

48152

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
74835	10875-05	1.80	0.00	1.80
16476	10009-04	1.80	0.00	1.80
62941	10446-05	4.80	0.00	4.80
Date 78302	10964-05	1.80	0.00	1.80
05/05/06 56617	9921-04	3.00	0.00	3.00
1450	7269-01	2.40	0.00	2.40
Check Number <del>75358</del>	<del>10303-05</del> <i>Rodriguez</i>	<del>1.20</del>	0.00	<del>1.20</del>
00048152 70039	10482-05	1.80	0.00	1.80

Check Amount \$ 18.60

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

94-183/1224

CHECK NO.  
00048152

48152

\*\* EIGHTEEN DOLLARS AND 60 CENTS \*\*

PAY TO THE ORDER OF  
 Lake Mead Radiologists  
 5495 South Rainbow Blvd.  
 Suite 101  
 Las Vegas NV 89118

DATE 05/05/06 AMOUNT \*\*\*\*\*18.60

NON-NEGOTIABLE

MEMO: MEDS/SEE ATTACHED

VOID AFTER 90 DAYS

⑈048152⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
74835	10875-05	1.80	0.00	1.80
16476	10009-04	1.80	0.00	1.80
62941	10446-05	4.80	0.00	4.80
Date 78302	10964-05	1.80	0.00	1.80
05/05/06 56617	9921-04	3.00	0.00	3.00
1450	7269-01	2.40	0.00	2.40
Check Number 75358	10303-05	1.20	0.00	1.20
00048152 70039	10482-05	1.80	0.00	1.80

Check Amount \$ 18.60

NON-NEGOTIABLE

Payee  
Lake Mead Radiologists

Lake Mead Radiologist  
NEVADA IMAGING CENTERS  
Lien Department  
2835 South Jones Blvd. Suite 3  
Las Vegas, NV 89146

Ph#: (702) 597.1145 Fax#: (702) 942.1157

COPY FEE INVOICE FOR MEDICAL RECORD REPORTS  
(pursuant to the provisions of N.R.S. 629.061)  
(FAX COVER SHEET)

10303-05

POSTED

DATE: 1-12-06

ATTN: Nendi Castro FIRM/COMPANY: Benson Bustardo Baker Carter

FAX#: 028-2333 / PH#: 028-2600

RE: Jose Rodriguez

FROM: LORI (ext 107) PAGES FAXED (including cover sheet): \_\_\_\_\_

OUR ACCT#: 15358 (Our Data Base#): 3  
(PLEASE REFERENCE THIS ACCT.# FOR PROPER APPLICATION/IDENTIFICATION)

Dear Sir/Madam:  
By attached fax, (or enclosed mailing) please find the medical diagnostic reports (MRI/X-ray/CT Scan/Ultrasound) and itemized billing statement in reference to the above named patient (as requested by your patient's authorization to release).

- Facility #1  
N.I.C. - Galleria (Mall Ring Circle) Henderson/East
- Facility #2  
N.I.C. - Open MRI (E Lake Mead Blvd.) North
- Facility #3  
N.I.C. - Peccole Ranch (W. Charleston Blvd.) West
- Facility #4  
N.I.C. - Siena (Coronado Cir. Dr.) Henderson/ South
- Facility #5  
N.I.C. - Spring Valley (Rainbow Blvd.) Southwest
- Facility #6
- OTHER: \_\_\_\_\_

1 REPORT PAGE (S) COPIED x .60 cents per page: \$ 1.60 at facility # 5

1 BILLING PAGE (S) COPIED x .60 cents per page: \$ 1.60 at facility # 5

(when split) REPORT PAGE (S) copied x .60 cents per page: \$ \_\_\_\_\_ at facility # \_\_\_\_\_

(when split) BILLING PAGE (S) copied x .30 cents per page: \$ \_\_\_\_\_ at facility # \_\_\_\_\_

(when split) Billing page copied x .30 cents per page: \$ \_\_\_\_\_ at facility # \_\_\_\_\_

TOTAL AMOUNT DUE: \$ 1.60

PLEASE REMIT ABOVE **TOTAL AMOUNT DUE** TO THE ABOVE NOTED ADDRESS. The itemized "facility" related breakdown amounts is reflected ONLY for our accounting process and has no specific relation to your "total amount due". PLEASE MAKE A COPY OF THIS INVOICE UPON RETURN RECEIPT, OR INDICATE OUR ACCOUNT # ON YOUR ISSUING CHECK.

If you have any questions, please contact us at 702:597.1145.  
The Protected Health Information contained in this fax, or envelope is HIGHLY CONFIDENTIAL. It is intended for the exclusive use of the addressee. It is to be used only in the aid in providing specific healthcare services to this patient. ANY other use is a violation of Federal Law (HIPAA) and will be reported as such. If you receive this in error, please notify sender immediately at number above and destroy the original message. If the reader of this message is not the intended recipient, you are notified that any dissemination, distribution, or copying of this communication is strictly prohibited. Unauthorized re-disclosure or failure to maintain confidentiality could subject you to penalties described in federal and state law.  
(Copy Fee Invoice-12.05.05)

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
1833	10676-05	256.50	0.00	256.50
1836	10992-05	184.50	0.00	184.50
1835	9435-03	328.00	0.00	328.00
Date 1839	10727-06	648.50	0.00	648.50
04/28/06 1840	9436-03	648.50	0.00	648.50
1848	10976-05	410.00	0.00	410.00
Check Number 1844	7440-01	1732.25	0.00	1732.25
00048065 1846	10098-04	123.00	0.00	123.00
1849	10920-05	902.00	0.00	902.00
Check Amount 1854	9884-04	164.00	0.00	164.00
\$ 6073.75 1851	6493-00	328.00	0.00	328.00
1853	11149-06	348.50	0.00	348.50

*Hendi Rodriguez*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
 Las Vegas, NV 89128

48065

04-183/1224

CHECK NO.  
 00048065

\*\* SIX THOUSAND SEVENTY THREE DOLLARS AND 75 CENTS \*\*

DATE 04/28/06 AMOUNT \*\*\*\*6,073.75

PAY TO THE ORDER OF Salutory Services, Inc.  
 1476 Romanesca Dr.  
 Henderson NV 89052

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: Prof Services/see attac

⑈048065⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
1833	10676-05	256.50	0.00	256.50
1836	10992-05	184.50	0.00	184.50
1835	9435-03	328.00	0.00	328.00
Date 1839	10727-06	648.50	0.00	648.50
04/28/06 1840	9436-03	648.50	0.00	648.50
1848	10976-05	410.00	0.00	410.00
Check Number 1844	7440-01	1732.25	0.00	1732.25
00048065 1846	10098-04	123.00	0.00	123.00
1849	10920-05	902.00	0.00	902.00
Check Amount 1854	9884-04	164.00	0.00	164.00
\$ 6073.75 1851	6493-00	328.00	0.00	328.00
1853	11149-06	348.50	0.00	348.50

48065

NON-NEGOTIABLE

Payee  
 Salutory Services, Inc.

**Salutory Services, Inc.**

10624 South Eastern Ave.  
Suite # A 284  
Henderson, NV 89052

10624-03

*[Handwritten mark]*

*Invoice*

Number: 1833

Date: April 03, 2006

**Bill To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

**Ship To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

**Description**

**Amount**

Re: Rodriguez, Enrique Case;

Attorney: Jonathan Webber, Esq.

- Work done from 03/10 - present;

- Multiple teleconferences with Attorney Webber; Meeting with client; Teleconference with Dr. Tauber and teleconference with Dr. Koka; Arrange for surgery/lien; (1.25 hr)

256.50

POSTED

**Total**

**\$256.50**

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
1965	11092-06	1273.75	0.00	1273.75
1971	N. SCHAFFE	1312.00	0.00	1312.00
1931	8630-02	1824.50	0.00	1824.50
Date 1953	8527-02	369.00	0.00	369.00
08/04/06 1946	11359-06	1632.50	0.00	1632.50
1945	8527-02	1506.75	0.00	1506.75
Check Number 1939	10639-05	2706.00	0.00	2706.00
00049196 1938	9108-03	697.00	0.00	697.00
1936	9850-04	779.00	0.00	779.00
Check Amount 1933	9061-03	707.25	0.00	707.25
\$ 15557.50 1932	10676-05 Rodriguez	871.25	0.00	871.25
1930	9436-03	1004.50	0.00	1004.50
1928	9884-04	246.00	0.00	246.00
1927	10326-05	628.00	0.00	628.00

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
 Las Vegas, NV 89128

49196

94-183/1224

CHECK NO.  
 00049196

\*\* FIFTEEN THOUSAND FIVE HUNDRED FIFTY SEVEN DOLLARS AND 50 CENTS \*\*

DATE 08/04/06 AMOUNT \*\*\*15,557.50

PAY TO THE ORDER OF Salutory Services, Inc.  
 1476 Romanesca Dr.  
 Henderson NV 89052

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: june invoices

⑈049196⑈ ⑆122401833⑆ 0025017284⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
1965	11092-06	1273.75	0.00	1273.75
1971	N. SCHAFFE	1312.00	0.00	1312.00
1931	8630-02	1824.50	0.00	1824.50
Date 1953	8527-02	369.00	0.00	369.00
08/04/06 1946	11359-06	1632.50	0.00	1632.50
1945	8527-02	1506.75	0.00	1506.75
Check Number 1939	10639-05	2706.00	0.00	2706.00
00049196 1938	9108-03	697.00	0.00	697.00
1936	9850-04	779.00	0.00	779.00
Check Amount 1933	9061-03	707.25	0.00	707.25
\$ 15557.50 1932	10676-05	871.25	0.00	871.25
1930	9436-03	1004.50	0.00	1004.50
1928	9884-04	246.00	0.00	246.00
1927	10326-05	628.00	0.00	628.00

49196

NON-NEGOTIABLE

Payee  
 Salutory Services, Inc.

# Salutory Services, Inc.

10624 Sout Eastern Ave.  
Suite # A 284  
Henderson, NV 89052

*Invoice*

Number: 1932

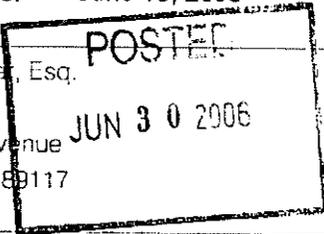
Date: June 18, 2006

**Bill To:**

Jonathan Weber, Esq.  
B.B.B.&C.  
7408 Sahara Avenue  
Las Vegas, NV 89117

**Ship To:**

Jonathan Weber, Esq.  
B.B.B.&C.  
7408 Sahara Avenue  
Las Vegas, NV 89117



Description	Amount
Re: Rodriguez, Enrique Case; Attorney: Jonathan Weber, Esq. - Work done from 04/25 - 06/18/2006; - Multiple teleconferances with Dr. Thalgott regarding his opinion and recommendations; reviewed note; (1.2 hr) - Teleconferance with Dr. Kidwell; (0.5 hr) - Meetoings and strategic discussions with Attorneys Weber and Arntz; (1.8 hr) - Updated Report / Time Line; (0.75 hr)	   246.00 102.50 369.00 153.75
<b>Total</b>	<b>\$871.25</b>

There will be a 3.9% monthly late fee added after 90 days post billing date.

*Heidi please pay  
File # 10076-05*



*cd*

**Salutory Services, Inc.**

10624 Sout Eastern Ave.  
Suite # A 284  
Henderson, NV 89052

*Invoice*

Number: 1788

Date: March 06, 2006

**Bill To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

**Ship To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

Description	Amount
Re: Rodriguez, Enrique Case;	
Attorney: Jonathan Webber, Esq.	
- Meeting with Attorney Webber; Strategy, teleconference with Dr. Koka and Dr. Tauber and Attorney J. Green; (0.7 hr)	143.50

*10676-05*

**POSTED**

**Total** \$143.50

INVOICE

Smart Document Solutions, LLC  
P.O. Box 409740  
Atlanta, Georgia 30384-9740  
Fed Tax ID 58 - 2659941  
(770) 754 - 6000

Invoice #: 0030853116  
Date: 12/19/2005

10676-05  
WJW

Ship to:

JONATHAN WEBER  
BENSON BERTOLDO BAKER CARTER  
7408 W SAHARA AVE  
LAS VEGAS, NV 89117

Bill to:

JONATHAN WEBER  
BENSON BERTOLDO BAKER CARTER  
7408 W SAHARA AVE  
LAS VEGAS, NV 89117

Records from:

INSIGHT MOUNTAIN DIAGNOSTICS  
800 SHADOW LANE  
LAS VEGAS, NV 89106

Requested By: BENSON ET AL  
Patient Name: RODRIGUEZ ENRIQUE

SSN: 562294757  
DOB: 071563

POSTED

Description	Quantity	Unit Price	Amount
Basic Fee			0.00
Retrieval Fee			0.00
Per Page Copy (Paper) 1	19	0.60	11.40
Shipping/Handling			1.06
Subtotal			12.46
Sales Tax			0.97
Invoice Total			13.43
Balance Due			13.43

**PAID**  
*[Signature]*

Pay your invoice online at [www.SDSPayOnline.com](http://www.SDSPayOnline.com)

Terms: Net 30 days      Please remit this amount : \$ 13.43

Smart Document Solutions, LLC  
P.O. Box 409740  
Atlanta, Georgia 30384-9740  
Fed Tax ID 58 - 2659941  
(770) 754 - 6000

Invoice #: 0030853116
Check # _____
Payment Amount \$ _____

**Fast. Secure. Free.**  
SDSPayOnline is a free, online payment processing service that provides you a fast and convenient way to pay your Smart Document Solutions invoice. You can now pay your Smart Document Solutions invoice online by visiting [www.SDSPayOnline.com](http://www.SDSPayOnline.com). Simply have your invoice and major credit card ready to process your payment.

**Please return stub with payment.**

Please include invoice number on check.

To pay invoice online, please go to [www.SDSPayOnline.com](http://www.SDSPayOnline.com) or call (770) 754-5-App. 1124

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
SR1761734	10676-05	0.60	0.00	0.60

*Heidi*  
*E. Rodriguez*

Date  
09/13/05

Check Number  
00045271

Check Amount  
\$ 0.60

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

94-183/1224

CHECK NO.

00045271

45271

\*\* DOLLARS AND 60 CENTS \*\*

**PAY**  
TO THE  
ORDER  
OF  
Professional Billing, LTD.  
3090 S. Durango Drive  
Suite 200  
Las Vegas NV 89117

DATE AMOUNT  
09/13/05 \*\*\*\*\*0.60

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: Med Records/see attache

⑈045271⑈ ⑆122401833⑆ 0025005782⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
SR1761734	10676-05	0.60	0.00	0.60

45271  
NET AMT.

Date  
09/13/05

Check Number  
00045271

Check Amount  
\$ 0.60

NON-NEGOTIABLE

Payee  
Professional Billing, LTD.

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

44957

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
0305021223	9436-03	266.87	0.00	266.87
2799021008	10200-04	49.35	0.00	49.35
2712061000	10477-05	3.23	0.00	3.23
2711571077	10676-05	9.52	0.00	9.52
0305022236	10639-05	73.26	0.00	73.26
0304241775	10535-05	3.89	0.00	3.89

Date  
08/18/05

Check Number  
00044957

Check Amount  
\$ 406.12

Heidi

Rodriguez

ORIGINAL DOCUMENT PRINTED ON CHEMICAL REACTIVE PAPER WITH MICROPRINTED BORDER - SEE REVERSE SIDE FOR COMPLETE SECURITY FEATURES

BENSON, BERTOLDO, BAKER & CARTER, CHTD.  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVE. LAS VEGAS, NV 89117  
(702)228-2800

SILVER STATE BANK  
170 S. RAINBOW BLVD.  
LAS VEGAS, NV 89128

44957

CHECK NO.  
00044957

94-183 / 1224

\*\* FOUR HUNDRED SIX DOLLARS AND 12 CENTS \*\*

DATE

AMOUNT

08/18/05

\*\*\*\*\*406.12

PAY  
TO THE  
ORDER  
OF

CHARTONE, Inc.  
P.O. Box 152471  
Irving TX 75015-2471

AUTHORIZED SIGNATURE

MEMO: Med Records/see attache

THIS DOCUMENT CONTAINS HEAT SENSITIVE INK. TOUCH OR PRESS HERE. RED IMAGE DISAPPEARS WITH HEAT.

⑈044957⑈ ⑆122401833⑆ 0025005782⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
0305021223	9436-03	266.87	0.00	266.87
2799021008	10200-04	49.35	0.00	49.35
2712061000	10477-05	3.23	0.00	3.23
2711571077	10676-05	9.52	0.00	9.52
0305022236	10639-05	73.26	0.00	73.26
0304241775	10535-05	3.89	0.00	3.89

Date  
08/18/05

Check Number  
00044957

Check Amount  
\$ 406.12

Payee  
CHARTONE, Inc.

44957

*jas*

ChartONE, Inc.  
P.O. Box 152472, Irving, TX 75015-2472 (800)299-8694

**INVOICE**

Invoice Number: 271157- -107790  
Medical Record Number: 35026615

*10676-05*

**POSTED**  
Date: 07/19/2005

Dear Jonathan Weber:

Per your request, enclosed are the medical records forwarded from Spring Valley Hospital, Las Vegas, NV.

PAYMENT IS DUE UPON RECEIPT OF THIS INVOICE. A service charge of 1.5% per month (annual rate 18%), except Michigan state, will be charged if not paid within 30 days from the date of this invoice.  
Please detach the bottom portion of this invoice and return with your remittance to ChartONE, Inc. to ensure proper credit.

Comments:

Requested by:

Jonathan Weber:  
BENSON BERTOLDO BAKER  
  
7408 W SAHARA AVE  
  
LAS VEGAS, NV 89117  
(702)228-2600-

Please make check payable to:

ChartONE, Inc.  
P.O. Box 152472  
Irving, TX 75015-2472  
(800)299-8694  
Federal Tax ID# 94-3360691

Patient: ENRIQUE RODRIGUEZ  
Category: Accident  
SSN: XXX-XX-4767  
Birth Date: 07/15/1963  
Admission Date: / /  
Requester ID:  
Other ID:  
TDN/VPN:  
Paper Pages: 13  
Microfiche Pages: 0  
Computer Pages: 0

Base Fee: 0.00  
Page Fee: 7.80  
Shipping: 1.06  
Handling: 0.00  
Itemized: 0.00  
Tax: 0.66  
Adjustment: 0.00  
Pre-Payment: 0.00  

---

Total Due: 9.52

**Please return this portion with your payment payable to:**

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	5653	11229-06	4020.00	0.00	4020.00
	5675	11242-06	2125.00	0.00	2125.00
	5685	10676-05	875.00	0.00	875.00
Date	5688	10676-05	944.00	0.00	944.00
01/02/09	5680	10567-05	1475.00	0.00	1475.00
	5634	10567-05	216.00	0.00	216.00
Check Number	5629	10048-04	1032.00	0.00	1032.00
00005415	5652	11229-06	1175.00	0.00	1175.00
	5665	11242-06	200.00	0.00	200.00
Check Amount	5711	10638-05	1200.00	0.00	1200.00
\$ 25911.00	5707	10676-05	4369.00	0.00	4369.00
	5693	10676-05	3856.00	0.00	3856.00
	5733	10638-05	3794.00	0.00	3794.00
	5487	8201-02	360.00	0.00	360.00

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

5415

CHECK NO.  
 00005415

\*\* TWENTY FIVE THOUSAND NINE HUNDRED ELEVEN DOLLARS AND 00 CENTS \*\*

DATE: 01/02/09  
 AMOUNT: \*\*\*25,911.00

**PAY TO THE ORDER OF**  
 Devinney & Dinneen Career &  
 Vocational Service  
 445 Apple Street, Suite 102  
 Reno NV 89502

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: Professional Services

⑈005415⑈ ⑆321270742⑆6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	5653	11229-06	4020.00	0.00	4020.00
	5675	11242-06	2125.00	0.00	2125.00
	5685	10676-05	875.00	0.00	875.00
Date	5688	10676-05	944.00	0.00	944.00
01/02/09	5680	10567-05	1475.00	0.00	1475.00
	5634	10567-05	216.00	0.00	216.00
Check Number	5629	10048-04	1032.00	0.00	1032.00
00005415	5652	11229-06	1175.00	0.00	1175.00
	5665	11242-06	200.00	0.00	200.00
Check Amount	5711	10638-05	1200.00	0.00	1200.00
\$ 25911.00	5707	10676-05	4369.00	0.00	4369.00
	5693	10676-05	3856.00	0.00	3856.00
	5733	10638-05	3794.00	0.00	3794.00
	5487	8201-02	360.00	0.00	360.00

5415

NON-NEGOTIABLE

Payee  
 Devinney & Dinneen Career &

*Susana*



**De VINNEY & DINNEEN CAREER and VOCATIONAL ECONOMIC SERVICES, LTD.**

10676-05  
by SMB

**Terrance B Dinneen, M.S., C.R.C., C.R.E.**  
**Lawrence J. Dinneen, Ph.D., C.R.C.**  
**Carol A. Dinneen, M.S.**

November 7, 2008

Benson, Bertoldo, Baker & Carter  
7408 West Sahara Ave  
Las Vegas, NV 89117

POSTED  
NOV 13 2008  
ACCOUNTING DEPT

RE: Rodriguez, Enrique  
Our File No: 009 EXW 1492

Dear Mr. Steve Baker:

Enclosed is an invoice for my time over the last month on the above referenced case. Please do not hesitate to contact our office if you have any questions or concerns regarding this invoice.

Respectfully Submitted,

*Terrance Dinneen*  
*(ct)*

Terrance Dinneen M.S., C.R.C.  
Certified Earnings Analyst #032  
Certified Rehabilitation Economist #0022  
Certified Rehabilitation Counselor #20325M.S., C.R.C., C.R.E

TBD:st

Enclosure: Invoice



DeVINNEY & DINNEEN CAREER and VOCATIONAL ECONOMIC SERVICES, LTD.

Terrance B Dinneen, M.S., C.R.C., C.R.E.  
Lawrence J. Deneen, Ph.D., C.R.C.  
Carol A. Dinneen, M.S.

Benson, Bertoldo, Baker & Carter  
7408 West Sahara Ave  
Las Vegas, NV 89117

**KATHLEEN R. HARTMAN, R.N., B.S.N., C.C.M.**

**INVOICE FOR PROFESSIONAL SERVICES  
FEDERAL ID: 88-0237090**

CASE NAME: Rodriguez, Enrique	INVOICE NO.: 5693
OUR FILE NO.: 009 EXW 1492	INVOICE DATE: 10/31/08

\*\*\*\*\*

**DESCRIPTION OF SERVICES AND TOTAL HOURS**

\*\*\*\*\*

Confirm Travel and Review file	
Travel to Las Vegas	
Meeting with Mr. and Mrs. Rodriguez	
Begin Narrative and Tables	
Review medical letters and request	
Research Narrative and Tables	
Complete Narrative	
Tables	
Finalize Narrative and Tables	22.3
Finalize Summary	

22.3 hrs. @ \$160/Hr:	\$ 3,568.00
Travel Expense (prorated)	\$ 288.00

**BALANCE (DUE UPON RECEIPT) \$ 3,856.00**

PLEASE REFERENCE INVOICE **5693** ON YOUR DRAFT

PLEASE DO NOT HESITATE TO CONTACT OUR OFFICE IF YOU HAVE ANY QUESTIONS REGARDING THIS BILLING

445 Apple Street, Suite 102, Reno, Nevada 89502 • Telephone (775) 825-5558 Toll Free (888) 235-6549 • Facsimile (775) 825-4511  
terry@dinneent.com

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	13212-0801	Harris, S	21.00	0.00	22.85
	13184-0801	Giattino,	5.56	0.00	5.56
	11610-06	Amy Fenix	120.60	0.00	120.60
Date	13079-0801	Weber, R	43.80	0.00	43.80
01/02/09	10676-05	Rodriguez,	9.14	0.00	9.14

Check Number  
00005452

Check Amount  
\$ 201.95

NON-NEGOTIABLE

V

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

5452

CHECK NO.  
00005452

\*\* TWO HUNDRED ONE DOLLARS AND 95 CENTS \*\*

**PAY** Centennial Medical Group  
**TO THE** 4454 N. Decatur  
**ORDER** Las Vegas NV 89130  
**OF**

DATE 01/02/09 AMOUNT \*\*\*\*\*201.95

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: Medical Records

⑈005452⑈ ⑆321270742⑆673326769⑈

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	13212-0801	Harris, S	21.00	0.00	22.85
	13184-0801	Giattino,	5.56	0.00	5.56
	11610-06	Amy Fenix	120.60	0.00	120.60
Date	13079-0801	Weber, R	43.80	0.00	43.80
01/02/09	10676-05	Rodriguez,	9.14	0.00	9.14

Check Number  
00005452

Check Amount  
\$ 201.95

Payee  
Centennial Medical Group

NON-NEGOTIABLE

Susan

V

**Centennial**  
MEDICAL GROUP

to getting your pain



**\*RECORDS REQUEST\***

4454 N. Decatur Blvd. Las Vegas, NV 89130  
(702) 839-1203 EXT. 2118 FAX: (702) 932-9341

DATE: 10/13/08

ADDRESS: BBB & C

7408 W. SAHARA AVE

LV, NV 89117

ENCLOSED ARE MEDICAL RECORDS FOR:

Enrique Rodriguez

THAT YOU HAVE REQUESTED.

THE FEE FOR THESE RECORDS IS LISTED BELOW:

13 X \$.60 PER PAGE = \$ 7.80

\$ 1.34 POSTAGE FEE

\$ 9.14 TOTAL RECORDS FEE

POSTED

OCT 28 2008

ACCOUNTING DEPT.

PLEASE MAKE CHECKS PAYABLE TO THE CIRCLED FACILITY:

**CENTENNIAL MEDICAL GROUP**  
TAX ID# 202378045

**CENTENNIAL SURGERY CENTER**  
TAX ID# 880499129

THE FOLLOWING PROVIDERS RECORDS INCLUDED:

\_\_\_\_\_ Dr. David Lanzkowsky      \_\_\_\_\_ Dr. Alain Coppel      \_\_\_\_\_ Dr. Michael Chen

\_\_\_\_\_ Dr. James C. Thomas      \_\_\_\_\_ Dr. Andrew Cash      \_\_\_\_\_ Dr. Donald Fareed

X Centennial Upright MRI

\_\_\_\_\_ Centennial Surgery Center 5 App. 1132

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.	
618173	10676-06	15.31	0.00	15.31	
630860	12750-08	15.44	0.00	15.44	
632086	11618-06	4.20	0.00	4.20	
Date	631015	11958-07	8.78	0.00	8.78
01/02/09	636369	11350-06	57.33	0.00	57.33
	636379	12984-08	11.54	0.00	11.54

Check Number  
00005472

Check Amount  
\$ 112.60

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

5472

CHECK NO.  
00005472

\*\* ONE HUNDRED TWELVE DOLLARS AND 60 CENTS \*\*

**PAY** Discovery Support Services  
 TO THE 12850 Highway 9  
 ORDER #600-379  
 OF Alpharetta GA 30004

DATE 01/02/09 AMOUNT \*\*\*\*\*112.60

~~NON-NEGOTIABLE~~

MEMO: Medical Records

VOID AFTER 90 DAYS

⑈005472⑈ ⑆321270742⑆6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.	
618173	10676-06	15.31	0.00	15.31	
630860	12750-08	15.44	0.00	15.44	
632086	11618-06	4.20	0.00	4.20	
Date	631015	11958-07	8.78	0.00	8.78
01/02/09	636369	11350-06	57.33	0.00	57.33
	636379	12984-08	11.54	0.00	11.54

Check Number  
00005472

Check Amount  
\$ 112.60

5472

Payee  
Discovery Support Services

NON-NEGOTIABLE

Susan X

Discovery Tax ID # 26-1431538

**Bill / Ship to:**

Benson, Bertoldo, Baker, & Carter  
7408 West Sahara Avenue  
Las Vegas NV 89117

Attention: Susan Anderson

Invoice Number 618173  
Invoice Date 10/22/2008  
Work Order # 691360

Total Pages Scanned: 23  
Party Requesting Records: Benson, Bertoldo, Baker  
Reference / Claim #: 10676-06

**Remit Payment to:**

**Discovery**  
Support Services

12850 Highway 9  
# 600 - 379  
Alpharetta, GA 30004  
678.990.5300 / Fax: 678.990.5301

**Records from:**

Bone & Joint Specialists  
2020 Palomino Lane  
Las Vegas NV 89106

**Records of:**

Rodriguez, Enrique  
DOB: 07/15/1963  
AKA:

Item	Quantity	Price	Total
Page 1+	23	0.600	13.80
Shipping and Handling	1	1.510	1.51

Payment terms are net 30, after 30 days a 5% late fee will automatically be applied.

Order Total: 15.31  
Sales Tax:  
Payment Received: 0.00  
Due within 30 days: 15.31  
After 11/21/2008 16.07

Please return a copy of this invoice with payment - Thank you!  
Master Card and American Express Accepted

The medical facility's original records. The confidentiality of these records is maintained, including the Health Insurance Portability and Accountability Act (HIPAA).  
On a copy basis, such charges represent our charges for personal services only, sequential element of our services and no separate charge is made therefore.

10676-06  
Rodriguez

POSTED

OCT 24 2008

ACCOUNTING DEPT

5 App. 1134

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez,	2500.00	0.00	2500.00

Date  
11/12/08

Check Number  
00004964

Check Amount  
\$ 2500.00

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

CHECK NO.  
00004964

\*\* TWO THOUSAND FIVE HUNDRED DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
 The Bone & Joint Institute  
 880 Seven Hills Drive, #140  
 Henderson NV 89052

DATE	AMOUNT
11/12/08	****2,500.00

VOID AFTER 90 DAYS

MEMO: Record Review/Rodriguez

⑈004964⑈ 1:321270742:673326769⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez,	2500.00	0.00	2500.00

Date  
11/12/08

Check Number  
00004964

Check Amount  
\$ 2500.00

Payee  
The Bone & Joint Institute

SUSAN A

# CROVETTI ORTHOPAEDICS & SPORTS MEDICINE

2779 West Horizon Ridge ~ Suite #200' ~ Henderson, Nevada ~ 89052

P - 702-990-2290 F - 702-990-2297

\*\*\*Facsimile Transmittal Cover Sheet\*\*\*

POSTED

JUL 22 2008

ACCOUNTING DEPT

Jason A.

To: John Morris From: CARMEN

Company: Benson, Bertoldo, Baker, Carter Billing Dept.

Fax Number: 228-2333 Direct Line: (702)990-2290 EXT. 226

Phone Number: 228-2600 Date: 6/25/08

RE: Enrique Rodriguez Total Pages Including Cover: 2

URGENT     FOR REVIEW     PLEASE COMMENT     PLEASE REPLY

COMMENTS: Second request for payment.  
Past Due, please remit

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE INDIVIDUAL OR ENTITY NAMED HEREIN. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY UNAUTHORIZED DISSEMINATION IS PROHIBITED. PLEASE NOTIFY THE SENDER IMMEDIATELY AT (702) 990-2290 PHONE, OR (702)990-2297 FAX

10676-06

5/15/08

**The Bone and Joint Institute Of Southern Nevada**

880 Seven Hills Dr Ste 140 Henderson, NV 89052

(702) 990-2290 fax (702) 990-2297

TIN# 88-0454760

Bill To: Benson Bertoldo, Baker & Carter  
7408 W. Sahara Ave  
Las Vegas, NV 89117  
Attn: John Morris

For:

Medical Records reviewed for Enrique J. Rodriguez

By Dr. Michael J. Crovetti Jr. D.O. / Dr. Jason M. Tarno D.O.

Total Charges for Review \$ 2,500.00

Please remit payment upon receipt of this notice to Dr. Michael Crovetti / Dr. Jason M. Tarno at 880 Seven Hills Dr, Ste 140 Henderson, NV 89052. Please include a copy of this letter with your payment. If you have any question please contact Melissa at (702) 990-2290 ext 215 for Dr. Crovetti, Rosie ext 212 for Dr. Tarno, or the Billing Department at (702)990-2290 ext 226

Thank You,  
BJI Billing Department  
C. Martinez

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
2711	10814-05	1485.00	0.00	1485.00
2691	10482-05	3780.00	0.00	3780.00
2694	10676-05	2137.50	0.00	2137.50
Date 11/04/08	2689 11970-07	1935.00	0.00	1935.00
	2702 10567-05	765.00	0.00	765.00
	2712 7109-01	2880.00	0.00	2880.00

*Coupon A*

Check Number  
00004787

Check Amount  
\$ 12982.50

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**  
8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

4787

CHECK NO.  
00004787

\*\* TWELVE THOUSAND NINE HUNDRED EIGHTY TWO DOLLARS AND 50 CENTS \*\*

**PAY TO THE ORDER OF**  
Salutory Services, Inc.  
1476 Romanesca Dr.  
Henderson NV 89052

DATE: 11/04/08  
AMOUNT: \*\*\*12,982.50

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: Expert Fees

⑈004787⑈ ⑈321270742⑈6733267691⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
2711	10814-05	1485.00	0.00	1485.00
2691	10482-05	3780.00	0.00	3780.00
2694	10676-05	2137.50	0.00	2137.50
Date 11/04/08	2689 11970-07	1935.00	0.00	1935.00
	2702 10567-05	765.00	0.00	765.00
	2712 7109-01	2880.00	0.00	2880.00

Check Number  
00004787

Check Amount  
\$ 12982.50

4787

Payee  
Salutory Services, Inc.

NON-NEGOTIABLE

**Salutory Services, Inc.**

10624 South Eastern Ave.  
Suite # A 284  
Henderson, NV 89052

10676-05

# Invoice

Number: 2694

Date: September 25, 2008

**Bill To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

**Ship To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

Description	Amount
Re: Rodriguez, Henry case; Attorney: Jonathan Webber, Esq. - Work done from 06/27/2008 - present; - Conference with Dr. Schifini and Dr. M. Elkanich regarding current medical treatment; (0.6 hr) - Reviewed newly disclosed voluminous medical records and updated Medical Time Line / Consulting Report; (8.5 hr) - Meeting with Attorney Weber to discuss current medical plan; issues related to client; (0.4 hr)	    135.00 1,912.50 90.00
<b>Total</b>	<b>\$2,137.50</b>

POSTED  
OCT 02 2008  
ACCOUNTING DEPT.

- Payment due upon receipt:  
- There will be a 3.9% monthly late fee added after 60 days post billing date.

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	08-8262	9430-03	153.60	0.00	153.60
	08-8104	12480-07	26.72	0.00	26.72
	08-8247	11308-06	73.27	0.00	73.27
Date	08-8166	10315-05	195.39	0.00	195.39
10/24/08	08-8394	8476-02	410.07	0.00	410.07
	08-8408	10315-05	361.60	0.00	361.60
Check Number	08-8417	9921-04	1235.98	0.00	1235.98
00004747	08-8470	11403-06	0.47	0.00	0.47
	08-8477	10676-05	98.43	0.00	98.43
Check Amount	08-8530	8518-02	414.62	0.00	414.62
\$ 3878.94	08-8532	11242-06	753.11	0.00	753.11
	08-8569	11403-06	39.93	0.00	39.93
	08-8079	8476-02	100.82	0.00	100.82
	08-8507	13337-0801	14.93	0.00	14.93

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

4747

CHECK NO.

00004747

\*\* THREE THOUSAND EIGHT HUNDRED SEVENTY EIGHT DOLLARS AND 94 CENTS \*\*

DATE 10/24/08 AMOUNT \*\*\*\*\*3,878.94

**PAY TO THE ORDER OF**  
 The Litigation Document Group, Inc.  
 320 South 4th Street  
 Las Vegas NV 89101

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: copy jobs/aug. 08

⑈004747⑈ ⑆321270742⑆673326769⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	08-8262	9430-03	153.60	0.00	153.60
	08-8104	12480-07	26.72	0.00	26.72
	08-8247	11308-06	73.27	0.00	73.27
Date	08-8166	10315-05	195.39	0.00	195.39
10/24/08	08-8394	8476-02	410.07	0.00	410.07
	08-8408	10315-05	361.60	0.00	361.60
Check Number	08-8417	9921-04	1235.98	0.00	1235.98
00004747	08-8470	11403-06	0.47	0.00	0.47
	08-8477	10676-05	98.43	0.00	98.43
Check Amount	08-8530	8518-02	414.62	0.00	414.62
\$ 3878.94	08-8532	11242-06	753.11	0.00	753.11
	08-8569	11403-06	39.93	0.00	39.93
	08-8079	8476-02	100.82	0.00	100.82
	08-8507	13337-0801	14.93	0.00	14.93

4747 NET AMT.

NON-NEGOTIABLE

Payee  
 The Litigation Document Group, Inc.



# The Litigation Document Group

320 S. 4th Street  
Las Vegas, NV 89101  
Phone # (702)380-4283 Fax # (702)380-4286

# Invoice

Date	Invoice #
8/25/2008	08-8477

Ordered By
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

Bill To
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117 702-228-2600

Client Matter	Terms	Due Date	Rep	Due Time	Ordered By
10676-05 Rodriguez	Due on receipt	8/25/2008	SA	am	Susan Anderson

Quantity	Description	Amount
1,015	Blowbacks (B/W)	91.35T

POSTED  
AUG 25 2008  
ACCOUNTING DEPT.

*8.25-08  
pls pay*

Due on Receipt and Thank you for your business. Please see our General Terms and Conditions on back.

Please Mail Checks To:  
The Litigation Document Group, Inc.  
320 S. 4th Street  
Las Vegas, Nv 89101

Sign: \_\_\_\_\_  
Print: \_\_\_\_\_  
Date: \_\_\_/\_\_\_/\_\_\_

**TAX ID# 88-0504363**

**We accept all Major Credit Cards!**

<b>Subtotal</b>	\$91.35
<b>Sales Tax (7.75%)</b>	\$7.08
<b>Total</b>	\$98.43
<b>Payments/Credits</b>	\$0.00
<b>Balance Due</b>	\$98.43

*Rodriguez*

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
2577	10769-05	585.00	0.00	585.00
2578	10367-05	945.00	0.00	945.00
2580	10675-05	2835.00	0.00	2835.00
Date 2583	10868-05	1745.00	0.00	1745.00
08/04/08 2584	10571-05	2565.00	0.00	2565.00
2586	10684-05	1980.00	0.00	1980.00
Check Number 2592	10676-05	675.00	0.00	675.00
00004004 2593	10567-05	1575.00	0.00	1575.00
2601	11470-06	990.00	0.00	990.00
Check Amount 2614	12035-07	472.50	0.00	472.50
\$ 23142.50 2612	Ladormita,	1845.00	0.00	1845.00
2606		2880.00	0.00	2880.00
2613	9694-04	2655.00	0.00	2655.00
2615	10197-04	1395.00	0.00	1395.00

**NON-NEGOTIABLE**

*Benson A*

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

4004

CHECK NO.  
 00004004

\*\* TWENTY THREE THOUSAND ONE HUNDRED FORTY TWO DOLLARS AND 50 CENTS \*\*

DATE AMOUNT  
 08/04/08 \*\*\*23,142.50

**PAY TO THE ORDER OF** Salutory Services, Inc.  
 1476 Romanesca Dr.  
 Henderson NV 89052

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: Expert Witness Fees

⑈004004⑈ ⑆321270742⑆6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
2577	10769-05	585.00	0.00	585.00
2578	10367-05	945.00	0.00	945.00
2580	10675-05	2835.00	0.00	2835.00
Date 2583	10868-05	1745.00	0.00	1745.00
08/04/08 2584	10571-05	2565.00	0.00	2565.00
2586	10684-05	1980.00	0.00	1980.00
Check Number 2592	10676-05	675.00	0.00	675.00
00004004 2593	10567-05	1575.00	0.00	1575.00
2601	11470-06	990.00	0.00	990.00
Check Amount 2614	12035-07	472.50	0.00	472.50
\$ 23142.50 2612	Ladormita,	1845.00	0.00	1845.00
2606		2880.00	0.00	2880.00
2613	9694-04	2655.00	0.00	2655.00
2615	10197-04	1395.00	0.00	1395.00

**NON-NEGOTIABLE**

Payee  
 Salutory Services, Inc.

**Salutory Services, Inc.**

10324 South Eastern Ave.

Suite # A 284

Henderson, NV 89052

**Invoice**

Number: 2592

Date: June 27, 2008

**Bill To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

**Ship To:**

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

Description	Amount
Re: Rodriguez, Henry case; Attorney: Jonathan Webber, Esq.	
- Reviewed and discussed case and report with Dr. Crovetti; follow up with Dr. Schifini; (1.4 hr)	315.00
- 06/25/2008; Reviewed newly disclosed medical records; updated medical consulting report; (1.4 hr)	315.00
- 06/27/2008; Conference with Dr. Schifini regarding current status for stimulatory; (0.2 hr)	45.00
<b>Total</b>	<b>\$675.00</b>

- Payment due upon receipt;

-There will be a 3.9% monthly late fee added after 60 days post billing date.

POSTED

JUL 17 2008

ACCOUNTING DEPT.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
08-7468	10039-04	130.61	0.00	130.61
08-6600	10676-05	55.71	0.00	55.71
08-6599	11754-07	17.54	0.00	17.54
Date 08/15/08	08-6598	183.48	0.00	183.48
	08-7286	43.14	0.00	43.14

*Rob:ney*

*Page A*

Check Number  
00004180

Check Amount  
\$ 430.48

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**  
8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

CHECK NO.  
00004180

\*\* FOUR HUNDRED THIRTY DOLLARS AND 48 CENTS \*\*

**PAY TO THE ORDER OF**  
The Litigation Document Group, Inc.  
320 South 4th Street  
Las Vegas NV 89101

DATE: 08/15/08  
AMOUNT: \*\*\*\*\*430.48

~~NON-NEGOTIABLE~~  
VOID AFTER 90 DAYS

MEMO: copy jobs/see attached

⑈004180⑈ ⑆321270742⑆673326769⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
08-7468	10039-04	130.61	0.00	130.61
08-6600	10676-05	55.71	0.00	55.71
08-6599	11754-07	17.54	0.00	17.54
Date 08/15/08	08-6598	183.48	0.00	183.48
	08-7286	43.14	0.00	43.14

Check Number  
00004180

Check Amount  
\$ 430.48

NON-NEGOTIABLE

Payee  
The Litigation Document Group, Inc.



# The Litigation Document Group

320 S. 4th Street  
Las Vegas, NV 89101  
Phone # (702)380-4283 Fax # (702)380-4286

## Invoice

Date	Invoice #
7/1/2008	08-6600

<b>Ordered By</b>
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

<b>Bill To</b>
Benson, Bertoldo, Baker, & Carter 7408 W. Sahara Ave Las Vegas, NV 89117 702-228-2600

Client Matter	Terms	Due Date	Rep	Due Time	Ordered By
10676.05 RODRIGUEZ	Due on receipt	7/1/2008	SA	0130	SUSAN ANDERSON

Quantity	Description	Amount
464	Copying from clean originals	\$1.04T
20	Slip Sheets	0.66T

*pls pay 7-1-08*

**POSTED**  
**JUL 02 2008**  
**ACCOUNTING DEPT**

Due on Receipt and Thank you for your business. Please see our General Terms and Conditions on back.

<b>Subtotal</b>	\$51.70
<b>Sales Tax (7.75%)</b>	\$4.01
<b>Total</b>	\$55.71
<b>Payments/Credits</b>	\$0.00
<b>Balance Due</b>	\$55.71

Please Mail Checks To:  
The Litigation Document Group, Inc.  
320 S. 4th Street  
Las Vegas, Nv 89101

Sign: \_\_\_\_\_  
Print: \_\_\_\_\_  
Date: \_\_\_/\_\_\_/\_\_\_

**TAX ID# 88-0504363**

**We accept all Major Credit Cards!**

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10482-05	Loeffler-O	7.20	0.00	7.20
12112-07	Kell, B	29.75	0.00	29.75
10676-05	Rodriguez	48.60	0.00	48.60

Date  
05/24/08

Check Number  
00001229

Check Amount  
\$ 85.55

*DUPON A.*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



170 S. Rainbow Blvd.  
Las Vegas, NV 89128

1229

94-183/1224

CHECK NO.  
00001229

\*\* EIGHTY FIVE DOLLARS AND 55 CENTS \*\*

**PAY**  
 TO THE  
 ORDER  
 OF  
 Russell J. Shah MD  
 10624 S. Eastern Ave. # A425  
 Henderson NV 89052

DATE	AMOUNT
06/24/08	*****85.55

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: Medical Records

⑈001229⑈ ⑆122406833⑆ 0025020544⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10482-05	Loeffler-O	7.20	0.00	7.20
12112-07	Kell, B	29.75	0.00	29.75
10676-05	Rodriguez	48.60	0.00	48.60

Date  
06/24/08

Check Number  
00001229

Check Amount  
\$ 85.55

Payee  
Russell J. Shah MD

NON-NEGOTIABLE

**Russell J. Shah, MD, Ltd.**

10624 S. Eastern Avenue, #A-425  
Henderson, NV 89052  
702-644-0500

Invoice for Medical Records

Patient Name Rodriguez, Enrique  
SS# \_\_\_\_\_

Medical Records	<u>81</u> pages @ \$0.60 per page	\$ <u>48.60</u>
Postage		\$ <u>Ø</u>
Notary Fee		\$ <u>Ø</u>
Total Due		\$ <u>48.60</u> ✓

Please remit payment to the above address.

Thank you!

*faxed out*

Records sent on 11/20/07 by Ulucir

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	2507	10489-05	855.00	0.00	855.00
	2508	10197-04	2555.00	0.00	2555.00
	2501	10936-05	495.00	0.00	495.00
Date	2512	10676-05	2070.00	0.00	2070.00
05/30/08	2534	11811-07	500.00	0.00	500.00
	2513	10769-05	2340.00	0.00	2340.00
Check Number	2515	10561-05	1305.00	0.00	1305.00
00055606	2529	12552-07	2375.00	0.00	2375.00
	2514	11772-07	3465.00	0.00	3465.00
Check Amount	2541	12555-07	135.00	0.00	135.00
\$ 17180.00	2542	11963-07	500.00	0.00	500.00
	2521	10161-04	585.00	0.00	585.00

*Pyrona*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600



**SILVER STATE BANK**

170 S. Rainbow Blvd.  
 Las Vegas, NV 89128

55606

94-183/1224

CHECK NO.  
 00055606

\*\* SEVENTEEN THOUSAND ONE HUNDRED EIGHTY DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF** Salutory Services, Inc.  
 1476 Romanesca Dr.  
 Henderson NV 89052

DATE: 05/30/08  
 AMOUNT: \*\*\*17,180.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: expert fees

⑈055606⑈ ⑆122401833⑆ 0025017284⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	2507	10489-05	855.00	0.00	855.00
	2508	10197-04	2555.00	0.00	2555.00
	2501	10936-05	495.00	0.00	495.00
Date	2512	10676-05	2070.00	0.00	2070.00
05/30/08	2534	11811-07	500.00	0.00	500.00
	2513	10769-05	2340.00	0.00	2340.00
Check Number	2515	10561-05	1305.00	0.00	1305.00
00055606	2529	12552-07	2375.00	0.00	2375.00
	2514	11772-07	3465.00	0.00	3465.00
Check Amount	2541	12555-07	135.00	0.00	135.00
\$ 17180.00	2542	11963-07	500.00	0.00	500.00
	2521	10161-04	585.00	0.00	585.00

55606  
 NET AMT.

Payee  
 Salutory Services, Inc.

NON-NEGOTIABLE

# Salutory Services, Inc.

10624 South Eastern Ave.

Suite # A 284

Henderson, NV 89052

# Invoice

Number: 2512

Date: April 07, 2008

### Bill To:

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

### Ship To:

Jonathan Webber, Esq.  
B.B.B. & C.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

Description	Amount
Re: Rodriguez, Henry case; Attorney: Jonathan Webber, Esq. - Work done from 10/2007 - present; - 12/11/2007; Conference with Dr. Schifini regarding results of injection and bone scan; possible referral to Dr. Croveti and stimulator; follow up conference with Mr. Rodriguez and Attorney Weber; conference with Dr. Koka; conference with Dr. Croveti; (1.4 hr)	315.00
- Reviewed Extensive Medical Records, entire file and updated Medical Consulting Report, in addition, redacted Time Line for Dr. Croveti; (7.8 hr)	1,755.00
<b>Total</b>	<b>\$2,070.00</b>

- Payment due upon receipt:

- There will be a 3.9% monthly late fee added after 60 days post billing date.

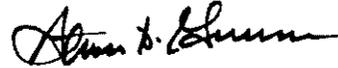


1 **OPPS**

2 Marsha L. Stephenson, Esq. (NV Bar No. 6130)  
3 STEPHENSON & DICKINSON, P.C.  
4 2820 West Charleston Blvd., Suite 19  
5 Las Vegas, NV 89102-1942  
6 Telephone: (702) 474-7229  
7 Facsimile: (702) 474-7237

Electronically Filed  
10/14/2011 02:51:39 PM

8 Kenneth C. Ward (Bar No. 6530)  
9 Keith R. Gillette (Bar No. 11140)  
10 Jason A. Rose (Bar No. 9671)  
11 ARCHER NORRIS  
12 A Professional Law Corporation  
13 2033 North Main Street, Suite 800  
14 PO Box 8035  
15 Walnut Creek, California 94596-3728  
16 Telephone: 925.930.6600  
17 Facsimile: 925.930.6620



CLERK OF THE COURT

18 Attorneys for Defendant FIESTA PALMS, LLC, a  
19 Nevada Limited Liability Company, d/b/a/ THE  
20 PALMS CASINO RESORT

21 DISTRICT COURT  
22 CLARK COUNTY, NEVADA

23 ENRIQUE RODRIGUEZ,  
24  
25 Plaintiffs,  
26  
27 v.  
28 FIESTA PALMS, LLC, a Nevada Limited  
Liability Company, d/b/a/ The Palms  
Casino Resort, et al.,  
Defendants.

Case No. A531538

Dept: 10

**DEFENDANT FIESTA PALMS, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY, d/b/a/ THE PALMS CASINO  
RESORTS' OPPOSITION TO PLAINTIFF'S  
MOTION FOR RECONSIDERATION OF  
ORDER TO RETAX COSTS**

**OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER  
TO RETAX COSTS**

Defendant FIESTA PALMS, LLC d/b/a THE PALMS CASINO RESORT ("The Palms"),  
by and through its attorney of record Kenneth C. Ward, Keith R. Gillette, and ARCHER NORRIS,  
oppose Plaintiff's Motion for Reconsideration of Order to Tax Costs. This opposition is made by  
virtue of Clark County District Court Rule 2.24, District Court Rule 13(7), Nevada Revised Statute,

ZA126/1236839-1

1 sections 18.020 and 18.110 and on the grounds that Plaintiff has not set forth any basis in fact or law  
2 that demonstrates this issue is one of those very rare instances that requires this Court to reconsider  
3 its September 16, 2011 Order granting the Palms' Motion to Tax Costs ("Order").

4 This opposition is further based upon the papers and pleading on file herein, the below  
5 Points and Authorities, and oral argument.

## 6 MEMORANDUM OF POINTS AND AUTHORITIES

### 7 I.

#### 8 Introduction

9 At the outset it is important to note that Plaintiff has not raised any new legal or factual issues  
10 for this Court to consider. Rather, Plaintiff attempts to dress up its previously filed opposition to  
11 the motion to tax in another set of clothes and simply rehash the same arguments that have already  
12 been carefully reviewed and decided by this Court. Plaintiff's memorandum of costs, opposition to  
13 the motion to tax, and motion for reconsideration all fail to sufficiently document, itemize, and  
14 justify that its costs were reasonable and necessary. This Court carefully considered and correctly  
15 granted the motion to tax costs and, as a result, Plaintiff's motion for reconsideration should be  
16 denied.

### 17 II.

#### 18 Statement of Facts

19 Plaintiff filed and served its Memorandum of Costs on March 15, 2011. The memorandum is  
20 a generic diagram that contains virtually no detail. Plaintiff did not provide a single document or any  
21 explanation concerning the costs set forth in its memorandum.<sup>1</sup>

22 Attached to the memorandum of costs is a three paragraph affidavit from Plaintiffs counsel.<sup>2</sup>  
23 The first two paragraphs of the affidavit simply say that Plaintiff's counsel is a licensed attorney and  
24 he's employed by the firm representing the Plaintiff. The affidavit contains one sentence concerning  
25 the costs. While this sentence states the costs are "correct" and "have been necessarily incurred," it  
26

27 \_\_\_\_\_  
<sup>1</sup> A copy of the memorandum of costs is attached to the motion for reconsideration as Exhibit 1.

28 <sup>2</sup> A copy of the Affidavit is attached to the motion for reconsideration as Exhibit 1.

1 is void of any reference as to whether the costs are reasonable and necessary.

2 Based on the Plaintiff's failure to comply with established Nevada law and demonstrate that  
3 the claimed costs were reasonable and necessary, the Palms filed a Motion to Tax Costs.<sup>3</sup> More  
4 specific, the Palms moved to tax Plaintiff's costs on the grounds such costs are not recoverable  
5 because there's no showing that the costs were reasonable and necessary or recoverable by statute.  
6 The motion also explicitly provided that Plaintiff failed to provide any itemization, invoices, or other  
7 evidentiary support justifying an award of its costs.

8 Plaintiff opposed the motion to tax, but ignored the glaring deficiencies the Palms highlighted  
9 in its memorandum of costs. In fact, Plaintiff had several opportunities to demonstrate that its costs  
10 were reasonable by documentation, itemization, or other evidence. Plaintiff could have made such a  
11 showing when it filed its memorandum of costs, its opposition to the motion to tax, or at the hearing  
12 on the motion to tax. Plaintiff, however, chose not to take advantage of those opportunities and did  
13 not provide any documentation or other evidence in support of its memorandum of costs.

14 The issue was fully briefed by the Plaintiff and the Palms and came before the Court on July  
15 5, 2011. Following the hearing, the court took the matter under advisement for further  
16 consideration. On September 19, 2011, the Court granted the Palms' Motion to Tax Costs. More  
17 specific, the Court found that Plaintiff "had every opportunity to produce documents or evidence  
18 substantiating its claimed costs but failed to do so" and "seeks recovery of other costs that either  
19 exceed certain statutory limits or are not recoverable under Nevada." (A true and correct copy of the  
20 Order is attached hereto as Exhibit 1.)

21 Now Plaintiff wants to reargue the same legal and factual analysis. Plaintiff filed its motion  
22 for reconsideration. But leave to file such a motion has not been requested or granted. Attached to  
23 the motion for reconsideration is a stack of disorganized papers or invoices.<sup>4</sup> These invoices are not  
24 authenticated and there is no supporting affidavit or other document that points out any information  
25 concerning the nature of the costs. The invoices—attached for the first time to the motion for  
26 reconsideration—show that Plaintiff cannot support his claim that the costs are necessary,

27 \_\_\_\_\_  
28 <sup>3</sup> A copy of the motion to tax costs is attached to the motion for reconsideration as Exhibit 2.

<sup>4</sup> A copy of the "invoices" is attached to the motion for reconsideration as Exhibit 3.

1 reasonable, and actually incurred. For instance, one document shows over 50 cost entries billed in  
2 the years 2014 and 2015. (A true and correct copy of selected invoices from Plaintiff's motion for  
3 reconsideration is attached hereto as Exhibit 2.) Another set of documents labeled as invoices show  
4 real estate commissions that were paid to the Plaintiff, which are not recoverable costs of litigation.  
5 (A true and correct copy of selected invoices from Plaintiff's motion for reconsideration is attached  
6 hereto as Exhibit 3.).

7 This Court correctly granted the motion to tax costs.

### 8 III.

#### 9 Legal Argument

10  
11 **A. Reconsideration of the Order denying Plaintiff's memorandum of costs is not**  
12 **appropriate because leave has not been granted by the court, the Plaintiff has**  
13 **not presented any new issues of law and simply rehashes his old arguments**  
14 **that have already been briefed, argued, and considered by this Court.**

15 Plaintiff continues to disregard the requirement that the prevailing party must show how the  
16 costs were necessary to and incurred in the action and provide sufficient justifying documentation  
17 and specific itemization to demonstrate the reasonableness and the accuracy of the claimed costs.  
18 (*Waddell v. L.V.R.V., Inc.*, 122 Nev. 15 (Nev. 2006); *Bobby Berosini, Ltd. v. People for the Ethical Treatment*  
19 *of Animals*, 114 Nev. 1348 (Nev. 1998).) This Court enforced NRS 18.020(3) when it granted the  
20 Palms' motion to tax costs and confirmed settled Nevada law that simply filing a generic  
21 memorandum and affidavit is not sufficient verification of the incurred costs. (*Vill. Builders 96 v. U.S.*  
22 *Labs.*, 121 Nev. 261, 277-78 (Nev. 2005)(requiring justifying documentation for each individual item  
23 of costs and substantiating the reason for such costs rather than merely providing documentation to  
24 support that amount of the total costs is reasonable.)

25 The rehearing of any motion must be done in conformity with the local and District Court  
26 Rules. Clark County District Court Rule 2.24 and D.C.R. 13(7) state that "no motion once heard  
27 and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be  
28 reheard, unless by leave of the court granted upon motion therefore, after notice of such motion to  
the adverse parties." Leave to reconsider a previously decided issue may only be granted if

1 substantially different evidence is introduced or the decision is clearly erroneous. (*Masonry & Tile*  
2 *Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741 (Nev. 1997).) Absent new  
3 issues of material fact or law, “points or contentions not raised in the original hearing cannot be  
4 maintained or considered on rehearing.” (*Achrem v. Expressway Plaza Ltd. Partnership*, 112 Nev. 737  
5 (Nev. 1996).) Only “in very rare instances in which new issues of fact or law are raised supporting a  
6 ruling contrary to the ruling already reached should a motion for rehearing be granted.” (*Moore v. City*  
7 *of Las Vegas*, 92 Nev. 402, 405 (Nev. 1976).)

8 Here, Plaintiff did not seek leave of the court. Leave, however, is required under the District  
9 Court Rules. The motion for reconsideration is not properly before this Court and, as a result,  
10 should be denied on this basis alone.

11 Even if the leave requirement is somehow waived or ignored, Plaintiff’s motion for  
12 reconsideration does not raise a *new* issue of law or fact for this Court to consider. Instead, Plaintiff  
13 rehashes its argument that its three paragraph affidavit and generic memorandum of cost is sufficient.  
14 More important, Plaintiff had a full and complete opportunity to submit evidence such as affidavits  
15 or invoices and demonstrate that its costs were necessary, actually incurred, and reasonable the first  
16 time the parties briefed and argued this issue before the Court. Instead, Plaintiff uses the same  
17 arguments as he did before without presenting any new legal issues to this Court.

18 Dressing up the same old arguments in a new set of clothes does not constitute one of those  
19 “very rare” instances that justifies rehearing a motion that has already been decided. In short, the  
20 motion for reconsideration is improper because leave was not granted and the Plaintiff does not raise  
21 any new legal issues upon which this Court may reconsider its previous order.

22  
23 **B. Plaintiff’s untimely invoices, voluminous as they are, illuminate, rather than**  
24 **eliminate, why settled Nevada law requires a party to show how its costs were**  
**necessary, actually incurred, and reasonable.**

25 NRS 18.110 provides that a memorandum of costs must be filed with 5 days after notice of  
26 entry of judgment. Plaintiff—for the first time—attaches a stack of papers to its motion for  
27 reconsideration seven months after it filed a memorandum of costs. The invoices attached to the  
28

1 motion for reconsideration were not raised in the original hearing and, therefore, cannot be  
2 considered on rehearing. In addition, the Plaintiff did not offer any explanation as to why it did not  
3 submit these invoices when this matter was briefed and argued before the Court. There is none.  
4 Simply put, the plaintiff was dilatory and such behavior should not be condoned by the court.<sup>5</sup>

5 The stack of invoices attached to the motion for reconsideration actually highlights why  
6 Nevada law requires a party seeking its costs to show how these costs were necessary, actually  
7 incurred, and reasonable. The first several pages contain over 50 cost entries with invoice dates in  
8 the future—2014 and 2015. (See Exhibit 2.) The accuracy of these unverified invoices is therefore  
9 suspect at best. Even more confusing is the 30 plus pages of documents attached to the motion for  
10 reconsideration that show real estate commissions paid to the Plaintiff. (See Exhibit 3.) Real estate  
11 commissions paid to Plaintiff as part of his job are not recoverable costs. More important, this  
12 demonstrates that Plaintiff simply plucked and pulled any random document that happens contain a  
13 dollar figure and attached it to the motion for reconsideration. But neither a perfunctory survey of  
14 these “invoices”, nor a careful resolute stare, would lead an average reader to an appreciable  
15 understanding of how the claimed costs were reasonable, necessary, and actually incurred. In short,  
16 even these untimely and improperly attached invoices aren’t helpful to the determination of whether  
17 Plaintiff’s costs are necessary and reasonable.

18 There is not a single declaration from any vendor, expert, Plaintiff, or Plaintiff’s counsel  
19 authenticating the stack of disorganized papers attached to the motion for reconsideration. And  
20 Plaintiff’s offer no explanation to the Court or the Palms as to how Plaintiff is entitled for costs  
21 billed in the years 2014 and 2015 or how Plaintiff’s real estate commissions demonstrate his costs in  
22 this matter were reasonable, actually incurred, and necessary. “[J]udges need not paw over the files  
23 without assistance from the parties.” (*Huey v. United Parcel Service, Inc.* 165 F.3d 1084, 1085 (7<sup>th</sup> Cir.  
24 1999).) But that is precisely what Plaintiff is demanding that this Court do by attaching nearly 200  
25 pages of documents without any index, affidavit, itemization, or explanation. Therefore, these  
26 invoices are untimely, unsupported, and not reliable.

27  
28 <sup>5</sup> It is one of the principal maxims of equity jurisprudence that equity aids the vigilant and not those that slumber on their rights. (*Baber v. Caples*, 71 OR 212 (Ore. 1914).

1 C. Plaintiff's attempt to distinguish this case from controlling case law is  
2 erroneous.

3 While the Plaintiff's costs were denied on several grounds, Plaintiff's sole contention for  
4 reconsideration is that an Affidavit from its counsel is sufficient for an award of costs under NRS  
5 18.020. Plaintiff erroneously relies on *Canepa v. Durham*, 62 Nev. 417 (1945) and contends that an  
6 "Affidavit in support of the Memorandum of Costs was sufficient." (Motion for Reconsideration, p.  
7 4 and 7.) The court in *Canepa*, however, determined the sufficiency of awarding costs under Section  
8 8928 N.C.L.—not NRS 18.020. Section 8928 N.C.L. pertains to costs following the modification of  
9 a judgment: "Section 8928 N. C. L. provides that where a judgment is modified, or where a new trial  
10 is ordered, and no order is made relative to costs, as in this case, the party obtaining any relief shall  
11 have his costs." (*Lee Tire & Rubber Co. v. McCarran*, 57 Nev. 123 (1936).) (emphasis added.) Contrary  
12 to Plaintiff's contention, the *Canepa* opinion does not hold that costs under NRS 18.020 are  
13 recoverable upon the filing of a three paragraph affidavit.

14 Unpublished orders are not regarded as precedent and can not be cited as legal authority.  
15 (Nevada Supreme Court Rule 123.) Despite this established rule, Plaintiff relies upon *Southern Nevada*  
16 *Chinese Weekly v. Chinese American Chamber of Commerce* (Motion for reconsideration, p. 7) to contend  
17 that a court's failure consider the adequacy of the memorandum is an abuse of discretion. This  
18 unpublished opinion, however, does not support Plaintiff's argument. Actually, this opinion states  
19 that the costs must be actual and reasonable and that the party seeking costs must provide sufficient  
20 documentation: "Under Nevada law, the prevailing party is entitled to recover costs incurred in  
21 litigation... Those costs *must* be actual and reasonable." (*S. Nevada Chinese Weekly*, at 3)(emphasis  
22 added) The court continues to explain that "The prevailing party **must provide sufficient**  
23 **documentation that the costs were reasonable.**" (*Ibid.*)(emphasis added). The court in *S. Nevada*  
24 *Chinese Weekly* reversed the denial of costs because the lower court summarily denied the  
25 memorandum of costs without any analysis. (*Ibid.*)

26 Unlike the situation in *S. Nevada Chinese Weekly*, this Court performed an extensive analysis of  
27 the Plaintiff's memorandum of costs. The matter was extensively briefed by the parties, argued  
28

1 before the Court, and the matter was then taken under advisement for further consideration.  
2 Following this activity, the Court made very specific and detailed findings of fact and conclusions of  
3 law. For instance, this Court found that “The prevailing party must...provide sufficient justifying  
4 documentation...to demonstrate the reasonableness and accuracy of the costs.” (Order, p. 2) In  
5 addition, this Court found that the “Plaintiff’s cost memorandum provided a generic breakdown of  
6 claimed costs...The court is unable to determine what method of calculation, if any, was used by  
7 Plaintiff.” (*Ibid.*) Therefore, Plaintiff’s characterization that the order simply denied its memorandum  
8 of costs without any consideration or analysis is inaccurate.

9 Even if the Court considers Plaintiff’s motion for reconsideration, the subject Order also  
10 held that several cost items are not recoverable under Nevada law or exceed certain statutory limits.  
11 These finding were not challenged by Plaintiff. The portions of the Order contested by Plaintiff are  
12 not supported by the *Canepa* or the *S. Nevada Chinese Weekly* opinions.

#### 13 IV.

#### 14 Conclusion

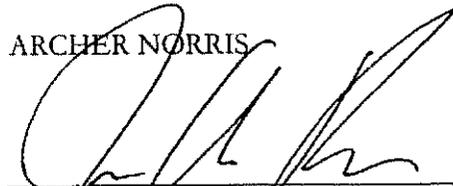
15 The rule regarding recovery of costs is well settled in Nevada. The Plaintiff must show that  
16 the claimed costs are reasonable, necessary, and actually incurred. This showing is made by providing  
17 sufficient documentation or evidence—not a stack of haphazardly assembled papers. While this is a  
18 minimal burden, Plaintiff failed to demonstrate that his costs were reasonable the first time this  
19 matter was briefed, argued, and submitted to the Court. Now Plaintiff attempts to rehash the same  
20 arguments without first seeking leave of court. This attempt, however, is made without any reference  
21 to any new facts or law that demonstrates this issue is one of those very rare instances when this  
22 Court should reconsider a matter that has been fully briefed, argued, and decided. Therefore,  
23 Plaintiff’s motion for reconsideration should be denied.

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**AFFIRMATION**  
**(NRS 239B.030)**

The undersigned does hereby affirm that the above NRCP 16.1 Disclosure does not contain the social security number of any person.

Dated: October 14, 2011

ARCHER NORRIS  


---

Kenneth C. Ward (Bar No. 6530)  
Keith R. Gillette (Bar No. 11140)  
Jason A. Rose (Bar No. 9671)  
A Professional Law Corporation  
2033 North Main Street, Suite 800  
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Walnut Creek, California 94596-3728

Attorneys for Defendant FIESTA PALMS,  
LLC, a Nevada Limited Liability Company,  
d/b/a/ THE PALMS CASINO RESORT

EXHIBIT INDEX

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EXHIBIT	DESCRIPTION
1	September 19, 2011, Court Order Granting The Palms' Motion to Tax Costs
2	Selected invoices from Plaintiff's Motion for Reconsideration
3	Additional Selected invoices from Plaintiff's Motion for Reconsideration

CERTIFICATE OF MAILING

**Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC**  
**Court and Action No: District Court, Clark County, Nevada Action No. A531538**

I, Cindy A. Inghland, declare that I am over the age of eighteen years and not a party to this action or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035, Walnut Creek, California 94596-3728. On October 14, 2011, I caused the following document(s) to be served:

**DEFENDANT FIESTA PALMS, LLC, A NEVADA LIMITED LIABILITY COMPANY, d/b/a/ THE PALMS CASINO RESORTS' OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER TO RETAX COSTS**

by placing a true copy of the document(s) listed above, enclosed in a sealed envelope, addressed as set forth below, for collection and mailing on the date and at the business address shown above following our ordinary business practices. I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that a sealed envelope is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

by having a true copy of the document(s) listed above transmitted by facsimile to the person(s) at the facsimile number(s) set forth below before 5:00 p.m. The transmission was reported as complete without error by a report issued by the transmitting facsimile machine.

by placing a true copy of the document(s) listed above, in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by the express service carrier to receive documents, in an envelope designated by the express service carrier, with delivery fees paid or provided for, addressed as set forth below.

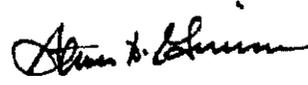
Steven M. Baker, Esq.  
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7408 W. Sahara Avenue  
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Phone: 702.228.2600  
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Enrique Rodriguez

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Las Vegas, NV 89101  
Phone: 702.384.8424  
Fax: 702.384.6568  
Co-Counsel for Defendant  
Fiesta Palms, LLC a Nevada Limited  
Liability Company, d/b/a The Palms  
Casino Resort

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 14, 2011, at Walnut Creek, California.

Cindy A. Inghland

**EXHIBIT "1"**



CLERK OF THE COURT

1 **FFCL**  
Marsha L. Stephenson, Esq. (NV Bar No. 6530)  
2 **STEPHENSON & DICKINSON, P.C.**  
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3 Las Vegas, NV 89102-1942  
4 Telephone: (702) 474-7229  
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5 Keith R. Gillette (Bar No. 11140)  
6 **ARCHER NORRIS**  
A Professional Law Corporation  
7 2033 North Main Street, Suite 800  
PO Box 8035  
8 Walnut Creek, California 94596-3728  
Telephone: 925.930.6600  
9 Facsimile: 925.930.6620

10 Attorneys for Defendant FIESTA PALMS, LLC, a  
Nevada Limited Liability Company, d/b/a/ THE  
11 PALMS CASINO RESORT

12 **DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**

15 **ENRIQUE RODRIGUEZ,**  
16 **Plaintiffs,**

17 **v.**

18 **FIESTA PALMS, LLC, a Nevada Limited**  
19 **Liability Company, d/b/a/ The Palms**  
**Casino Resort, et al.,**  
20 **Defendants.**

CASE NO.: A531538

DEPT NO: 10

BENCH TRIAL DATE: 10/25/10

HEARING DATE: 7/5/11

21  
22 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

23 THIS MATTER having come on for hearing on July 5, 2011, with respect to Defendant's  
24 Motion to Tax Costs, before the Honorable Jessie Walsh, presiding, and the Court having  
25 considered the evidence and the arguments of counsel and taken the matter under advisement for  
26 further consideration, this Court finds and concludes as follows:

27 ///

28 ///

1 **FINDINGS OF FACT**

2 The Court finds that Plaintiff's Memorandum of Costs fails to document, itemize, and justify  
3 its costs. In Plaintiff's Opposition to Defendant's Motion to Tax Costs, Plaintiff had the  
4 opportunity to produce documents or evidence substantiating its claimed costs but failed to do so.

5 In addition, Plaintiff's memorandum of costs seeks recovery of other costs that either exceed  
6 certain statutory limits or are not recoverable under Nevada law.

7 **CONCLUSIONS OF LAW**

8 Notwithstanding the language of Nev.Rev.Stat. § 18.020, the district court still retains  
9 discretion in determining the reasonableness of the amounts and the items of costs to be awarded.  
10 Decisional law holds that discretion should be sparingly exercised. Further, the trial court should  
11 exercise restraint as statutes permitting recovery of costs, being in derogation of the common law,  
12 must be strictly construed.

13 The prevailing party must also show how the costs were necessary to and incurred in the  
14 action and provide sufficient justifying documentation and specific itemization to demonstrate the  
15 reasonableness and the accuracy of the costs claimed. The filing a memorandum is not sufficient  
16 verification of the incurred costs.

17 Plaintiff's costs memorandum provided a generic breakdown of claimed costs, and did not  
18 contain the required itemization or documentation for each individual item. The court is unable to  
19 determine what method of calculation, if any, was used by the Plaintiff to confirm that these costs  
20 were actually incurred for this matter, necessary, and reasonable. The itemized materials are  
21 necessary to make such a determination and any award of costs without this information is improper.

22 The Plaintiff must itemize and provide supporting documentation for each cost he seeks to  
23 recover. No such showing has been made, and Plaintiff's costs in the sum of \$149,146.18 must be  
24 disallowed.

25 Nevada Revised Statute, section 18.005 specifically provides what costs are recoverable.  
26 Litigation cost and attorney fee statutes are exceptions to the common law American Rule that every  
27 litigant pays his or her own fees. Restraint therefore must be exercised when awarding costs that are  
28 not allowed by statute or case law. Even if Plaintiff properly itemizes and documents various costs,

1 these costs are still not recoverable under any statute or judicial opinion. Such costs include costs  
2 categories within Plaintiff's Memorandum of Costs including: e-filing retainer; trial transcript costs;  
3 and, Telecopies, Photocopies, Long Distance Telephone Calls, and Postage. As for witness fees,  
4 plaintiff has failed to substantiate the amounts sought in recovery as costs, and seeks amounts far in  
5 excess of that allowed by statute. Further, the Court determines that Plaintiff's Memorandum of  
6 Costs fails to allocate costs between the various defendants.

7 Accordingly, Plaintiff's costs in the sum of \$149, 146.18 must be disallowed.

8  
9 Dated: July 26, 2011

ARCHER NORRIS



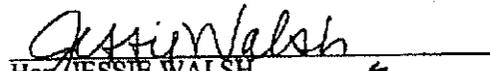
Keith R. Gillette (Bar No. 11140)  
ARCHER NORRIS  
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Attorneys for Defendant FIESTA PALMS,  
LLC, a Nevada Limited Liability Company,  
d/b/a/ THE PALMS CASINO RESORT

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ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to  
Tax Costs is GRANTED.

Dated: 10 Sept 2011

  
Hon. JESSIE WALSH  
DISTRICT COURT JUDGE ↗

1 CERTIFICATE OF SERVICE

2 **Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC**  
3 **Court and Action No: District Court, Clark County, Nevada Action No. A531538**

4 I, Tracy Pico, certify that I am over the age of eighteen years and not a party to this action  
5 or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035, Walnut  
6 Creek, California 94596-3728. On September 22, 2011, I caused the following document(s) to  
7 be served: **NOTICE OF ENTRY OF ORDER ~ DEFENDANT'S MOTION TO TAX  
8 COSTS**

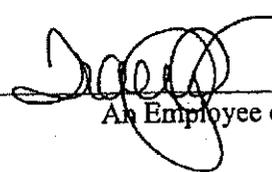
9  by placing a true copy of the document(s) listed above, enclosed in a sealed envelope,  
10 addressed as set forth below, for collection and mailing on the date and at the business  
11 address shown above following our ordinary business practices. I am readily familiar  
12 with this business' practice for collection and processing of correspondence for  
13 mailing with the United States Postal Service. On the same day that a sealed envelope  
14 is placed for collection and mailing, it is deposited in the ordinary course of business  
15 with the United States Postal Service with postage fully prepaid.

11 Steven M. Baker, Esq.  
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17 Co-Counsel for Defendant  
18 Fiesta Palms, LLC a Nevada Limited  
19 Liability Company, d/b/a The Palms  
20 Casino Resort

17 John Naylor  
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20 Las Vegas NV 89101  
21 Phone: 702.383.8888  
22 Fax: 702.277.9568  
23 *Co-Counsel for Defendant*  
24 Fiesta Palms, LLC dba The Palms  
25 Casino Resort

23 I declare under penalty of perjury that the foregoing is true and correct. Executed on  
24 September 22, 2011, at Walnut Creek, California.

25   
26 \_\_\_\_\_  
27 An Employee of Archer Norris

**EXHIBIT "2"**

Case 10676

Schedule of client costs

Date	Invoice #	Amount	Description	Vendor Name	
10/13/08	3700492	31.36	Runner Service	??????	
02/12/08	39834	28.05	runner svc	??????	
07/13/09	1045311	638.00	Depo Transcript --	All-American Court Reporters	
12/1/2014	2010004767	75.00	Process Service	AM:PM Legal Solutions	
12/15/05	3010261011	1.80	MEDICAL RECORDS	American Medical Response	
06/22/10	10676-05	4140.00	demand ltr/package	Ardella W. Short	
11/07/06	10676-05	9.14	Medical Records	Centennial Medical Group	
11/08/07	57217	46.20	medical records	Center for Diseases & Surgery	
07/25/05	2711571077	9.52	medical records	ChartOne, Inc.	
08/20/07	0305022374	36.45	medical records	ChartOne, Inc.	
12/15/05	227550	39.82	MEDICAL RECORDS	ChartOne, Inc.	85.79
09/29/09	10676-05	148.00	FILING FEE	Clark County District Court	
12/10/2014	A531538	630.00	transcriber blilling	Clark County Treasurer	
8/18/2014	6347	442.00	Professional Fees	Devinney & Dinneen Career &	
12/1/2014	6426	2716.00	Professional Fees	Devinney & Dinneen Career &	
12/1/2014	6420	1278.00	Professional Fees	Devinney & Dinneen Career &	
12/1/2014	6453	2040.00	Professional Fees	Devinney & Dinneen Career &	
12/1/2014	6469	6367.00	Professional Fees	Devinney & Dinneen Career &	
07/16/10	6309	754.00	professional fees	Devinney & Dinneen Career &	
04/21/10	6207	234.00	File Review	Devinney & Dinneen Career &	
12/22/09	6101	428.00	prof svcs	Devinney & Dinneen Career &	
11/24/08	5707	4369.00	prof svcs	Devinney & Dinneen Career &	
11/13/08	5693	3856.00	prof svcs	Devinney & Dinneen Career &	
10/17/08	5688	944.00	Expert Fees	Devinney & Dinneen Career &	
10/17/08	5685	875.00	Expert Fees	Devinney & Dinneen Career &	
10/24/08	618173	15.31	Medical Records	Discovery Support Services, LLC	
01/14/10	10676-05	600.00	reim ime charges per smb	ENRIQUE RODRIGUEZ	
12/08/09	10676-05	550.00	REIM LIT COSTS	ENRIQUE RODRIGUEZ	
10/13/2014	722819984	25.47	overnight postage	Federal Express	
10/15/2014	725180291	36.49	overnight postage	Federal Express	
11/5/2014	727578318	12.10	overnight postage	Federal Express	
10/28/08	296516852	23.30	overnight mail	Federal Express	
10/28/08	296516852	23.30	overnight mail	Federal Express	
10/28/08	296516852	33.15	overnight mail	Federal Express	
04/06/10	10676-05	1500.00	PATIENT INTERVIEW	Ferrante & Associates, Inc. - ? Docst?	
8/5/2014	101759	213.25	depo transcript ✓	First-Choice Reporting Services, Inc.	
07/08/10	98253	262.81	depo transcript ✓	First-Choice Reporting Services, Inc.	
10/23/2014	10676-05	3200.00	expert trial fee	Jack Tauber, M.D.	
11/9/2014	10676-05	10000.00	expert trial fee	Jacob E. Tauber, M.D.	
10/23/2014	10676-05	4000.00	expert trial fee	Joseph Schifini, MD	
12/1/2014	767	4000.00	trial expert fee	Joseph Schifini, MD	
12/1/2014	765	7450.00	record review/trial prep	Joseph Schifini, MD	
10/25/07	10676-05	15.19	medical records	Joseph Schifini, MD	
10/22/2014	10676-05	500.00	expert fees	Kathleen Hartman	
11/08/07	10676-05	18.00	medical records	Kelly G. Hawkins & Associates	
11/12/09	10676-05	500.00	depo prep fee	L.F. Mortillaro, Ph.D., LTD	
08/18/09	10676-05	56.05	MED RECORDS	L.F. Mortillaro, Ph.D., LTD	
02/11/08	10676-05	33.53	medical records	L.F. Mortillaro, Ph.D., LTD	
01/25/07	562294767	75.00	MEDICAL RECORDS	L.F. Mortillaro, Ph.D., LTD	
12/1/2014	10676-05	5000.00	record review&teleconf	Las Vegas Neurosurgery,	
02/11/08	10676-05	43.00	MEDICAL RECORDS	Las Vegas Neurosurgery,	
03/21/07	10676-05	14.93	medical records	Las Vegas Neurosurgery,	

11/4/2014	2010002649	85.00	Process Service	Legal Express, Inc.
11/4/2014	2010002649	95.00	Process Service	Legal Express, Inc.
11/4/2014	2010002649	95.00	Process Service	Legal Express, Inc.
11/4/2014	2010002649	95.00	Process Service	Legal Express, Inc.
01/28/10	71428	112.50	process svc	Legal Express, Inc.
11/28/07	56906	10.50	runner service	Legal Express, Inc.
12/12/06	50312	36.35	RUNNER	Legal Express, Inc.
08/09/07	35489	176.88	copy job	Legal Wings, Inc.
10/13/2014	867260	295.50	depo transcript	Litigation Services & Technologies, LLC
10/13/2014	867264	194.00	depo transcript	Litigation Services & Technologies, LLC
10/13/2014	867626	223.05	depo transcript	Litigation Services & Technologies, LLC
11/9/2014	868117	354.50	depo transcript	Litigation Services & Technologies, LLC
09/15/09	847865	401.55	depo transcript	Litigation Services & Technologies, LLC
02/10/09	836849	1376.00	depo transcript	Litigation Services & Technologies, LLC
01/22/09	835775	100.00	appearance fee	Litigation Services & Technologies, LLC
10/22/2014	10676-05	5000.00	trial fees	Louis Mortillaro, Ph.D.
10/22/2014	10676-05	5000.00	trial fees	Mary Ann Shannon, M.D.
11/16/09	RP18843	34.20	medical records	Matt Smith Physical Therapy
06/23/09	10676-05	52.80	medical records	Medical Associates of
04/12/07	106590	58.80	MEDICAL RECORDS	Medical District Surgery Center
03/31/10	10-1526	6.49	medical records	Med-R Medical Retrieval
12/01/09	09-4176	117.86	medical records	Med-R Medical Retrieval
01/20/10	09-4054	14.73	medical records	Med-R Medical Retrieval
11/20/2014	10676-05	48.11	reim parking/meal	Monique Krystek
10/22/2014	10676-05	26.00	trial subpoena	Nathan Heaps, M.D.
11/4/2014	10676-05	-26.00	void ck 11306	Nathan Heaps, M.D.
09/28/09	10676-05	100.00	amen summons publication	nevada legal news
11/08/07	10676-05	26.00	subpoena fee	NV Private Investigators Licensing Board → 1053505
11/07/06	10676-05	12.60	medical records	Pain Institute of Nevada, Inc.
10/22/2014	10676-05	2500.00	trial fees	Primary Care Consultants
08/19/09	10676-05	63.00	medical records	Primary Care Consultants
01/19/06	10676-05	-52.80	credit	Primary Care Consultants
07/28/05	SR1761734	0.60	medical records	Professional Billing, LTD.
12/1/2014	72534	4434.05	copy job	QUIVX
09/01/06	23203	75.25	COPIES	QUIVX
11/08/07	10676-05	25.00	MEDICAL RECORDS	Radnet Film Library
10/15/09	900343948	20.00	medical records	Reimbursement Technologies, Inc.
11/27/06	16780	10.20	MEDICAL RECORDS	Robert C. Gutierrez, M.D.
10/23/2014	10676-05	5600.00	expert trial fee	Russell J. Shah MD
10/28/2014	10676-05	1200.00	expert trial fee	Russell J. Shah MD
11/3/2014	10676-05	5600.00	Russell J. Sh-10676-05	Russell J. Shah MD
12/1/2014	5037	1200.00	trial prep fee	Russell J. Shah MD
12/1/2014	5037	2400.00	trial prep&record review	Russell J. Shah MD
10/28/08	10676-05	48.60	medical records	Russell J. Shah MD
10/02/08	2694	2137.50	Expert Fees	Salutory Services, Inc.
07/17/08	2592	675.00	Expert Fees	Salutory Services, Inc.
04/15/08	2512	2070.00	expert fees	Salutory Services, Inc.
11/19/07	2389	2091.00	prof svcs	Salutory Services, Inc.
12/13/06	2086	1722.00	PROF SVCS	Salutory Services, Inc.
10/04/06	2020	587.00	PROF. SERV.	Salutory Services, Inc.
11/02/06	2008	779.00	RECORDS REVIEW	Salutory Services, Inc.
08/01/06	1977	430.50	PROF. SERV.	Salutory Services, Inc.
06/30/06	1932	871.25	PROF. SERV.	Salutory Services, Inc.
04/28/06	1869	164.00	PROF. SERV.	Salutory Services, Inc.
04/10/06	1833	256.50	PROF SERV.	Salutory Services, Inc.
03/16/06	1797	830.25	PROF SERV.	Salutory Services, Inc.
05/30/06	1788	143.50	LEGAL SVCS	Salutory Services, Inc.

03/10/06	1788	143.50	PROF. SERV.	Salutory Services, Inc.
02/27/06	1729	328.00	PROF. SERV.	Salutory Services, Inc.
10/22/2014	10676-05	26.00	trial subpoena	Sheri Long
9/10/2014	SEP10034	121.41	Sierra Legal -SEP10034	Sierra Legal Duplicating, Inc.
8/26/2014	10676-05	26.00	witness fee	Steve Ferraro
11/18/2014	10676-05	14586.30	transcript/hotel/meals	Steven M. Baker
10/22/2014	10676-05	900.00	trial fees	Steven T. Baker
05/12/10	10676-05	2500.00	record review/crovetti	The Bone & Joint Institute
12/03/08	08-10404	130.85	copy job	The Litigation Document Group, Inc.
10/16/08	08-10220	17.16	Copy Job	The Litigation Document Group, Inc.
11/13/07	07-115557	331.16	copy job	The Litigation Document Group, Inc.
11/27/06	06118135T	205.54	SCANNING TO CD	The Litigation Document Group, Inc.
09/10/08	08-9040	642.84	Copy Job	The Litigation Document Group, Inc.
09/08/08	08-9020	23.65	Copy Job	The Litigation Document Group, Inc.
08/25/08	08-8477	98.43	copy job	The Litigation Document Group, Inc.
07/02/08	08-6600	55.71	copy job	The Litigation Document Group, Inc.
07/09/09	09-5099	24.74	Copy Job	The Litigation Document Group, Inc.
04/30/09	09-4409	12.07	copy job	The Litigation Document Group, Inc.
8/28/2014	3706630	27.50	E-Filing retainer	US Legal Management Services, Inc.
9/17/2014	3706793	32.77	Runner Service	US Legal Management Services, Inc.
9/17/2014	3706793	61.77	Runner Service	US Legal Management Services, Inc.
9/17/2014	3706793	32.77	Runner Service	US Legal Management Services, Inc.
9/17/2014	3706793	32.77	Runner Service	US Legal Management Services, Inc.
10/19/2014	3707082	61.77	Runner Service	US Legal Management Services, Inc.
10/19/2014	3707082	61.77	Runner Service	US Legal Management Services, Inc.
11/20/2014	3707330	31.36	Runner Service	US Legal Management Services, Inc.
11/20/2014	3707330	32.77	Runner Service	US Legal Management Services, Inc.
1/15/2015	3707711	84.82	Runner Service	US Legal Management Services, Inc.
06/04/10	3705605	32.77	runner svc	US Legal Management Services, Inc.
12/30/09	3704049	32.77	runner svc	US Legal Management Services, Inc.
12/30/09	3704049	25.99	runner svc	US Legal Management Services, Inc.
08/28/09	3703042	54.24	process svc	US Legal Management Services, Inc.
08/28/09	3703042	641.00	process svc	US Legal Management Services, Inc.
03/24/09	3701606	40.68	Runner Service	US Legal Management Services, Inc.
10/19/06	10676-05	5.40	medical records	VaterSpine, Ltd.
10/22/2014	10676-05	26.00	trial subpoena	Vicki Kooinga
9/21/2014	09-182	200.00	locate witness	VTI Associates
05/12/10	09-187	2500.00	expert retainer	vii associates
01/12/09	707367	55.00	Medical Records	Walgreen Company, Inc.
10/23/2014	10676-05	5000.00	expert trial fee	Walter Kildwell, M.D.
07/22/08	10676-05	45.00	medical records	Wilshire Surgicenter, Inc.
04/28/08	10676-05	45.00	MEDICAL RECORDS	Wilshire Surgicenter, Inc.
grand total		147678.32		
		0.00		

+ Wiznet fees

**EXHIBIT "3"**

Seller/Buyer: Rodriguez/Cassady  
Property Address: 996 Dahlia Court Hemet, CA  
Tax Parcel Id:

Memo:

Escrow No. 14007015 - 303 HL

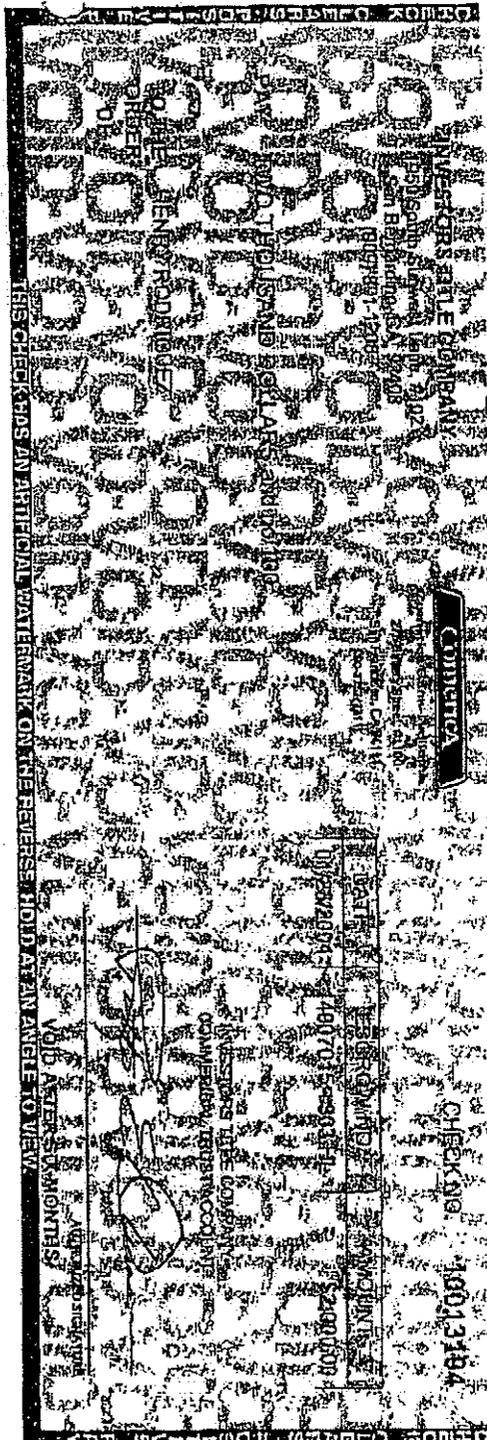
Check Date: 01/23/2004

Check No. 10013194

⑆ 10013194⑆ ⑆ 121139522⑆ 1892372333⑆

Check Total \$2,000.00

DESCRIPTION	CODE	AMOUNT
		\$2,000.00
		\$2,000.00



Dahlia  
2004

# PRELIMINARY CHANGE OF OWNERSHIP REPORT

FOR RECORDER'S USE ONLY

To be completed by transferee (buyer) prior to transfer of subject property in accordance with Section 480.03 of the Revenue and Taxation Code. A Preliminary Change of Ownership Report must be filed with each conveyance in the County Recorder's office for the county where the property is located; this particular form may be used in all 58 counties of California.  
**THIS REPORT IS NOT A PUBLIC DOCUMENT**

SELLER/TRANSFEROR: ROY LUNA, JR.  
BUYER/TRANSFeree: HENRY JAVIER RODRIGUEZ  
ASSESSOR'S PARCEL NUMBER(S) 456-283-009-2  
PROPERTY ADDRESS OR LOCATION:  
996 DAHLIA  
HEMET, CA  
MAIL TAX INFORMATION TO: HENRY RODRIGUEZ  
Name  
Address 6667 INDIANA AVENUE #247F  
RIVERSIDE, CA 92506

**NOTICE:** A lien for property taxes applies to your property on March 1 of each year for the taxes owing in the following fiscal year, July 1 through June 30. One-half of these taxes is due November 1, and one-half is due February 1. The first installment becomes delinquent on December 10, and the second installment becomes delinquent on April 10. One tax bill is mailed before November 1 to the owner of record. **IF THIS TRANSFER OCCURS AFTER MARCH 1 AND ON OR BEFORE DECEMBER 31, YOU MAY BE RESPONSIBLE FOR THE SECOND INSTALLMENT OF TAXES DUE FEBRUARY 1.**  
The property which you acquired may be subject to a supplemental assessment in an amount to be determined by the San Bernardino County Assessor. For further information on your supplemental roll obligation, please call the San Bernardino County Assessor.

## PART I: TRANSFER INFORMATION

Please answer all questions.

- |                          |                                     |  |
|--------------------------|-------------------------------------|--|
| YES                      | NO                                  |  |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | A. Is this transfer solely between husband and wife (Addition of a spouse, death of a spouse, divorce settlement, etc.)?                           |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | B. Is this transaction only a correction of the name(s) of the person(s) holding title to the property (For example, a name change upon marriage)? |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | C. Is this document recorded to create, terminate, or reconvey a lender's interest in the property?  |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | D. Is this transaction recorded only to create, terminate, or reconvey a security interest (e.g. co-signer)?                                       |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | E. Is this document recorded to substitute a trustee under a deed of trust, mortgage, or other similar document?                                   |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | F. Did this transfer result in the creation of a joint tenancy in which the seller (transferor) remains as one of the joint tenants?               |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | G. Does this transfer return property to the person who created the joint tenancy (original transferor)?   |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | H. Is this transfer of property:   |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 1. to a trust for the benefit of the grantor, or grantor's spouse?   |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 2. to a trust revocable by the transferor?   |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 3. to a trust from which the property reverts to the grantor within 12 years?  |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | I. If this property is subject to a lease, is the remaining lease term 35 years or more (including written options)?                               |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | J. Is this a transfer from parents to children or from children to parents?  |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | K. Is this transaction to replace a principal residence by a person 55 years of age or older?  |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | L. Is this transaction to replace a principal residence by a person who is severely disabled as defined by Revenue and Code Section 69.57?         |

If you checked yes to J, K, or L, an applicable claim form must be filed with the County Assessor.  
Please provide any other information that would help the Assessors to understand the nature of the transfer.

**IF YOU HAVE ANSWERED "YES" TO ANY OF THE ABOVE QUESTIONS EXCEPT J, K, OR L, PLEASE SIGN AND DATE, OTHERWISE COMPLETE BALANCE OF THE FORM.**

## PART II: OTHER TRANSFER INFORMATION

- A. Date of transfer if other than recording date \_\_\_\_\_
- B. Type of transfer. Please check appropriate box.  
 Purchase     Foreclosure     Gift     Trade or Exchange     Merger, Stock, or Partnership Acquisition  
 Contract of Sale - Date of Contract \_\_\_\_\_  
 Inheritance - Date of Death \_\_\_\_\_     Other: Please explain: \_\_\_\_\_  
 Creation of Lease     Assignment of a Lease     Termination of a Lease  
 Date lease began \_\_\_\_\_  
 Original term in years (including written options) \_\_\_\_\_  
 Remaining term in years (including written options) \_\_\_\_\_
- C. Was only a partial interest in the property transferred?  Yes     No    If yes, indicate the percentage transferred \_\_\_\_\_ %

Search Results

RECEIVED  
OCT 22 2008

Page 1 of 1

Dean Heller  
Nevada Secretary of State  
Corporate Information



Name: MARY STAR ENTERPRISES, INC.

Type: Corporation	File Number: C7622-2004	State: NEVADA	Incorporated On: March 25, 2004
Status: Initial list of officers filed	Corp Type: Regular		
Resident Agent:	TERRANCE LEE DZVONICK (Accepted)		
Address:	4612 N KENNY WAY		
	NORTH LAS VEGAS	NV	89031-
President:	ENRIQUE JAVIER RODRIGUEZ		
Address:	6667 INDIANA AVE APT 247F		
	RIVERSIDE	CA	92506-
Secretary:	ENRIQUE JAVIER RODRIGUEZ		
Address:	6667 INDIANA AVE APT 247F		
	RIVERSIDE	CA	92506-
Treasurer:	MARIA ESTRELLA PEREZ		
Address:	6667 INDIANA AVE APT 247F		
	RIVERSIDE	CA	92506-

Return to search menu	Search for another Resident Agent
Search for another Officer	Search for another Corporation

STETSON  
Property  
Mary Star  
2004

OPL  
C1776491  
EXT-15-02

LEONARD TAVAGLIONE  
780-0745 687-9770  
2485 MARY  
RIVERSIDE, CA 92506

4758

16-1008/1220

DATE 5-10-99

PAY TO THE ORDER OF

*Honny Rodriguez*

\$ 900.00

*Nine hundred and no/100*

DOLLARS

**CITY NATIONAL BANK**  
THE INLAND EMPIRE  
3484 Central Avenue (213) 937-9050  
Riverside, California 92506

*[Signature]*

⑈004758⑈ ⑆122026088⑆ 075⑈04054⑈

4762

14-1037-220

LEONARD TAVAGLIONE  
780-0745 282-5770  
2465 MARY  
PRINCESSIDE GA 31324

DATE: 05/22/09

PAY TO THE ORDER OF: *Alvin... ..* \$ 1000<sup>00</sup>

*Leonard Tavaglione*

CITY NATIONAL BANK  
THE INLAND EMPIRE  
3484 Central Avenue • (714) 472-5050  
Brea, CA 92606

110047820112201606610750010494

1999

LEONARD TAVAGLIONE

780-0745 887-8770  
2485 MARY  
RIVERSIDE, CA 92506

4772

16-1606/1220

PAY  
TO THE  
ORDER OF

DATE 6-9-99

Harry Passiguer

\$ 600.00

Six hundred and no/100

DOLLARS

**CITY NATIONAL BANK**  
THE INLAND EMPIRE  
3184 Central Avenue, (313) 427-3950  
Riverside, California 92506

*[Signature]*

⑈004772⑈ ⑆1220⑆6066⑆ 075⑈0⑆0694⑈

10267 Via Pavon  
Moreno Valley, CA

MARCUS Mc LAUGHLIN  
ATTORNEY AT LAW  
ESCROW TRUST ACCOUNT  
6800 INDIANA AVE  
RIVERSIDE, CA 92506  
(951) 504-7791



617 S. GOTHRIE BLVD.  
SANTA ANA, CA 92705  
R-122

DATE March 26, 1999

15449

PAY FIFTY SEVEN THOUSAND AND TWENTY SEVEN AND 29/100 DOLLARS \$ 18,077.29  
TO THE ORDER OF

PAY COMPANY

*Marcus McLaughlin*  
*Marcus McLaughlin*

⑆015449⑆ ⑆12261831⑆003 ⑆00990⑆

MARCUS Mc LAUGHLIN

DATE	DESCRIPTION	AMOUNT
03/26/99	10267 Via Pavon, Moreno Valley, CA	18,077.29
		15449

15449



NICK E. TAVAGLIONE  
2485 MARY ST. PH. 909-788-2904  
RIVERSIDE, CA 92508

89-4075/1222  
002116790

2335

DATE 10-2-02

PAY TO THE ORDER OF Hermy Rodriguez \$ 5,265.00  
Five Thousand Two Hundred Sixty Five DOLLARS

INLAND EMPIRE NATIONAL BANK

SENIOR ADVANTAGE

*[Signature]*

MEMO  
⑆ 22240751⑆ 2335⑆002⑆ 16790⑆

FAIR FAX 2001

**INVESTORS TITLE COMPANY**  
 1950 South Sunwest Lane, #102, San Bernardino, CA 92408  
 (909) 891-1208  
**SELLERS CLOSING STATEMENT**  
 Estimated

**RECEIVED**  
 OCT 20 2008

Escrow No: 14007015-303 HL  
 Close Date:  
 Proration Date:  
 Date Prepared: 02/17/2004

Seller: Henry Rodriguez

*2004*

Property: 996 Dahlin Court  
 Hemet, CA

Description	Debit	Credit
<b>TOTAL CONSIDERATION:</b>		209,000.00
Total Consideration		
<b>ADDITIONAL CHARGES:</b>		
Property Taxes Due to RIVERSIDE COUNTY TAX COLL	940.87	
Home Warranty #	350.00	
Natural Hazard Disclosure to LGS	49.95	
<b>COMMISSIONS:</b>		
Commission	12,540.00	
\$6,270.00 to Brubaker-Culton		
\$6,270.00 to Century 21 Wright		
<b>PRORATIONS AND ADJUSTMENTS:</b>		491.76
County Taxes		
Based on the Semi - Annual amount of \$627.78		
<b>PAYOFFS:</b>	114,354.85	
Payoff to CHASE MANHATTAN MORTGAGE CORP.		
\$100,002.90 Principal Balance		
\$8,750.25 Interest From 12/01/2003 to 03/01/2004		
\$80.98 PHA PREMIUM		
\$2,391.94 ESCROW IMPOUND BALANCE		
\$303.76 LATE CHARGES		
(\$1,500.00) CREDIT		
\$3,930.02 FORECLOSURE FEES		
\$395.00 FEES DUE		
<b>RECORDING FEES:</b>		20.00
Recording Fees to Investors Title Company		
<b>ESCROW AND TITLE CHARGES:</b>		772.50
Escrow Fee to Investors Title Company		50.00
Document Preparation to Investors Title Company		10.00
Notary Fee to Jefferson Mobile Notary		
Title Insurance to Investors Title Company		914.00
Wire Transfer Fee to Investors Title Company		25.00
Demand Fee to Investors Title Company		25.00
Funds held for final audit to Investors Title Company		300.00
Disbursed to Investors Title Company		5,000.00
<b>Sub Totals</b>	135,352.17	209,491.76
<b>Proceeds Due Seller</b>	74,139.59	
<b>Totals</b>	\$209,491.76	\$209,491.76

CHECK NO. 10045267

INVESTORS TITLE COMPANY  
1950 South Sunwell Blvd #102  
San Bernardino, CA 92408  
(909) 891-1208

**VOID**

624720044 24007018 - 303HL \$83,227.69

PAY SIXTY THREE THOUSAND TWO HUNDRED TWENTY SEVEN DOLLARS AND 69/100

INVESTORS TITLE COMPANY  
COMMERCIAL TRUST ACCOUNT

TO THE ORDER OF ENRIQUE JAVIER RODRIGUEZ  
6867 INDIAN AVE #227F  
RIVERSIDE, CA 92508



THIS CHECK HAS AN ARTIFICIAL WATERMARK ON THE REVERSE. HOLD AT AN ANGLE TO REVEAL.

⑆10045267⑆ ⑆121137522⑆ 1892372333⑆

CENTRICA

1950s Old Bay Street, Suite 402  
San Bernardino, CA 92410  
(909) 891-1228

2121 Broadway, Suite 1100  
San Francisco, CA 94115  
www.centrica.com

CHECK NO. 10045553

DATE 02/19/2004

ESGROW NO. 14007015-309 HL

AMOUNT \$3485.46

PAY THREE THOUSAND FOUR HUNDRED SIXTY FIVE DOLLARS and 46/100

INVESTORS TITLE COMPANY  
COMMERCIAL TRUST ACCOUNT

FOR THE HENRY RODRIGUEZ  
ORDER OF 905 DAVILA COURT  
HEMET, CA

HENRY RODRIGUEZ  
905 DAVILA COURT  
HEMET, CA

THIS CHECK HAS AN AFTERSHIP WATERMARK ON THE REVERSE. HOLD AT ALL TIMES. YOUR ATTENTION

1001555301 12111395221 189239233301

RECEIVED  
OCT 20 2008

STATEWIDE GROUP, INC.  
DBA STATEWIDE FORECLOSURE SERVICES

9-7-04

MARY STAR ENTERPRISES  
6677 INDIANA AVE #247-F  
RIVERSIDE, CA 92506

OUR TS#6672

ON 5/27/04, WE HELD TRUSTEE SALE #6672 THERE WERE SURPLUS FUNDS FROM OUR SALE. BASED UPON OUR REVIEW OF THIS ABOVE FILE IT APPEARS YOU ARE ONE OF THE PROPER PARTIES TO RECEIVE THESE FUNDS. IN ORDER TO AVOID COSTLY AND TIME CONSUMING COURT ACTION TO DISBURSE THE ABOVE FUNDS, WE ARE ASKING THAT YOU SIGN A COPY OF THIS LETTER INDICATING YOUR AGREEMENT WITH THE FOLLOWING TERMS AND CONDITIONS:

1. IF A CLAIM IS MADE AGAINST THESE FUNDS AT A LATER DATE BY ANOTHER PARTY ASSERTING THEIR RIGHT TO THESE FUNDS, YOU WILL RETURN THEM TO US ON SEVEN (7) DAYS NOTICE
2. IF THE FUNDS ARE NOT RETURNED TO US BY YOU AND LEGAL ACTION ENSUES YOU AGREE TO PAY OUR ATTORNEY FEES TO DEFEND US IN THIS ACTION.
3. IF A COURT ULTIMATELY DETERMINES YOU WERE NOT THE CORRECT PARTY TO RECEIVE THESE FUNDS YOU WILL THEN RETURN THE FUNDS TO US, IF YOU HAVE NOT PREVIOUSLY DONE SO, WITHIN 3 DAYS OF THIS DETERMINATION.
4. YOU HAVE COMPLIED WITH ALL FEDERAL & CALIFORNIA LAWS WITH RESPECT TO YOUR RECEIVING TITLE TO THIS PROPERTY.

THE SURPLUS FUNDS TO BE DISBURSED TO YOU ARE:

SURPLUS FUNDS	\$ 58,977.14
LESS: DEDUCTIONS	
TRUSTEE ADMIN FEE	( 750.00)
HOUSEHOLD FINANCE	* (40,000.00)
<b>NET SURPLUS FUNDS</b>	<b>\$ 18,227.14</b>

+ \$ 5,000.00 =

\* ESTIMATED AMOUNT DUE. BALANCE WILL BE ADJUSTED WHEN ACTUAL AMOUNT IS RECEIVED FROM HFC.

\$23,227

THANK YOU FOR YOUR COOPERATION IN THIS MATTER.

SINCERELY,

ROBERT M. DODSON, PRESIDENT  
STATEWIDE FORECLOSURE SERVICES

*2004*

BY SIGNING BELOW I INDICATE MY AGREEMENT WITH THE ABOVE TERMS

MARY STAR ENTERPRISES, INC.  
A NEVADA CORP.

9/7/04  
DATE

3990 OLD TOWN AVENUE #A201 SAN DIEGO, CA 92110  
619-291-7877 FAX 619-291-7876

STATEWIDE GROUP, INC  
BA STATEWIDE FORECLOSURE SERVICES

1993 OLD TOWN AVENUE, SUITE 2014  
SAN DIEGO, CA 92110-2991  
619-291-7877

PAY Five thousand

DATE	INVOICE	AMOUNT
	Invoice	
	Payment	

9D 3582/1222  
8032

DATE	AMOUNT	DESCRIPTION	DOLLARS	CHECK AMOUNT
8/18/09	8032	STATEWIDE FORECLOSURE SERVICES	8032	

6667 Indian Ave, #177-F  
Riverside Ca 92506

**USbank** 24 HOUR BANKING  
1-800-872-3333

⑆00803⑆ ⑆122235821⑆ ⑆1813260718⑆

SECURITY FEATURES: MICRO PRINT, WATERMARK, VOID COPY PROTECTION, COLOR COPY PROTECTION, SECURITY PAPER, SECURITY INK, SECURITY FIBER, SECURITY THREAD, SECURITY GLASS, SECURITY FILM, SECURITY COATING, SECURITY LAMINATION, SECURITY SEALING, SECURITY MARKING, SECURITY IDENTIFICATION, SECURITY TRACKING, SECURITY MONITORING, SECURITY ALERTING, SECURITY REPORTING, SECURITY ANALYSIS, SECURITY EVALUATION, SECURITY IMPROVEMENT, SECURITY INNOVATION, SECURITY RESEARCH, SECURITY DEVELOPMENT, SECURITY TESTING, SECURITY CERTIFICATION, SECURITY COMPLIANCE, SECURITY AUDITING, SECURITY CONSULTING, SECURITY TRAINING, SECURITY SUPPORT, SECURITY SERVICES, SECURITY SOLUTIONS, SECURITY PARTNERSHIPS, SECURITY COLLABORATION, SECURITY INNOVATION, SECURITY RESEARCH, SECURITY DEVELOPMENT, SECURITY TESTING, SECURITY CERTIFICATION, SECURITY COMPLIANCE, SECURITY AUDITING, SECURITY CONSULTING, SECURITY TRAINING, SECURITY SUPPORT, SECURITY SERVICES, SECURITY SOLUTIONS, SECURITY PARTNERSHIPS, SECURITY COLLABORATION.

*[Handwritten Signature]*

2001



**Inlandcross Escrow, Inc.**

1011 Magnolia Avenue, Suite A - Riverside, CA 92506  
 951 984-3600 • FAX (951) 984-1348

**RECEIVED**  
 OCT 20 2001

DATE: September 18, 2001  
 ESCROW NO: 04822MA  
 ESCROW OFFICER: Zina M. Anderson

TIME: 15:29:36

CLOSING DATE: September 17, 2001

**SELLER FINAL CLOSING STATEMENT**

SELLER(S): Henry Rodriguez  
 BUYER(S): Paul R. Chevior and Ana Maria T. Chevior  
 PROPERTY: 3404 N. Falfax Drive, San Bernardino, CA 92404

	↓ DEBITS	↓ CREDITS
<b>FINANCIAL:</b>		
Total Consideration		144,400.00
<b>PRORATIONS/ADJUSTMENTS:</b>		
Unpaid County Taxes in 0810, 03 Semi-Annual from 07/01/01 to 09/17/01	287.82,	
Seller credit Buyer for closing costs	3,400.00	
Lien amt trans to Tax Ref plus Release	80.22	
<b>TITLE CHARGES:</b>		
CLTA Standard Policy for 144,400.00	654.00	
Documentary Transfer Tax	158.95	
Sub Escrow Fee	100.00	
Nonconveyance Fee	65.00	
Reconveyance Fee	38.00	
Water Company Fee	127.50	
Release of Lien	28.00	
<b>ESCROW CHARGES</b>		
Escrow Fee	518.00	
Draw Deed	25.00	
Escrow Trust	18.00	
Notary	10.00	
<b>PAYOFFS - First Nationwide Mortgage</b>		
Total Payoff \$27,208.31		
Principal Balance	<del>89,058.18</del>	
Interest to 09/10/01	4,420.80	
Forwarding/Demand Fee	80.00	
Late Charge	212.46	
Impound Account	2,853.04	
Legal Fees	91.50	
O/S FC thru 9/15	1,821.88	
Unpaid Fees	35.00	
Other Late Fee	38.00	
UPS	15.00	
<b>PAYOFFS - Nicholas R. Tavaglione INVESTMENT PROPERTY</b>		
Total Payoff \$26,682.43		
Principal Balance	<del>18,200.00</del>	
Additional	<del>8,482.43</del>	
Water Bill	100.00	
<b>COMMISSIONS:</b>		
Listing Brokers Commission to Armstrong Realty, Inc. 0.00%	3,720.00	
Selling Brokers Commission to Coldwell banker Foothill Properties 3.00%	4,338.00	
<b>MISCELLANEOUS CHARGES:</b>		
Old Republic Home Warranty for Home Protection Policy	445.00	
Maria Booth Reimburse for payment of termite	135.00	

Hazard Disclosure	49.95
Comp Mill of California Inc. repair garage door	125.00

---

NET PROCEEDS DUE SELLER	\$ 6,157.82	+ \$ 26,682.43	= \$ 32,840.25
TOTALS	\$ 144,400.00	\$ 144,400.00	

SAVE THIS STATEMENT FOR INCOME TAX PURPOSES

RAIN CROSS ESCROW, INC.

51374

TRUST ACCOUNT

*[Handwritten Signature]*

STATE OF TEXAS

COUNTY OF DALLAS

DATE: 08/18/2009

AMOUNT: \$100,000.00

DESCRIPTION: PAYROLL

RAIN CROSS ESCROW, INC.

DETACH AND RETAIN THIS STATEMENT  
THE ATTACHED CHECK IS IN PAYMENT OF ITEMS DESCRIBED BELOW.  
IF NOT CORRECT PLEASE NOTIFY US PROMPTLY, NO RECEIPT DESIRED.

51374

DATE	DESCRIPTION	AMOUNT
08/18/2009	PAYROLL	\$100,000.00

First Monday  
Form 201 to 002

PURCHASE AGREEMENT DEPOSIT RECEIPT

(Real Estate - Short Term)

DATE: May 16 2008 at 23374 Via Arden, California  
The sum of \$ 200,000 authorized by CI CASEY payable to Henry Rodriguez  
to be held subject to the receipt of the sum of \$ 200,000 from Henry Rodriguez  
City of San Jose County of San Jose State of California  
The purchase price of \$ 200,000 to be paid in full below and by the following subdivision:  
Address: \_\_\_\_\_

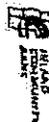
1999

RECEIVED  
OCT 20 2008

- The attached contains \_\_\_\_\_ items.
- AND IF IS FURTHER AGREED (Check all that are applicable, but applicable):
1. This agreement is subject to the terms and conditions set forth in the attached \_\_\_\_\_ days after this receipt and acceptance is mutually delivered to Buyer or Buyer's Agent within the period.
  2. This agreement is subject to the terms and conditions set forth in the attached \_\_\_\_\_ days after this receipt and acceptance.
  3. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  4. Buyer to pay the \_\_\_\_\_ days after acceptance, the Seller to deliver the necessary all instruments necessary to close the transaction to the Seller to pay the \_\_\_\_\_ days after acceptance. Seller's Agent shall deliver the title documents to the Seller to be held by the Seller for the \_\_\_\_\_ days after acceptance.
  5. This to be subject to the terms and conditions set forth in the attached \_\_\_\_\_ days after acceptance.
  6. If no other agreement is made, Buyer and Seller agree to the terms and conditions set forth in the attached \_\_\_\_\_ days after acceptance.
  7. Buyer will furnish \_\_\_\_\_ days after acceptance, the Seller to deliver the necessary all instruments necessary to close the transaction to the Seller to pay the \_\_\_\_\_ days after acceptance.
  8. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  9. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  10. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  11. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  12. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  13. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  14. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  15. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  16. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  17. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  18. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  19. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  20. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  21. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.
  22. Buyer to deliver the title documents to Seller as soon as reasonably practicable after acceptance.

Buyer's Agent: By: _____ Is the agent of: <input type="checkbox"/> Seller exclusively; <input type="checkbox"/> Buyer exclusively; or <input type="checkbox"/> both Seller and Buyer. <input type="checkbox"/> Not attached Agency Disclosure Agreement.	Seller's Agent: By: _____ Is the agent of: <input type="checkbox"/> Seller exclusively; or <input type="checkbox"/> both Seller and Buyer. <input type="checkbox"/> Not attached Agency Disclosure Agreement.
I agree to the terms stated above. Date: <u>5-16-08</u> to <u>99</u> Buyer: <u>Henry Rodriguez</u> Address: <u>23374 Via Arden, San Jose, CA 95131</u> Buyer's Agent: _____	I agree to the terms stated above. Date: <u>5-16</u> to <u>99</u> Seller: <u>Henry Rodriguez</u> Address: <u>23374 Via Arden, San Jose, CA 95131</u> Seller's Agent: _____

MARCUS McLAUGHLIN  
ATTORNEY AT LAW  
ESCROW TRUST ACCOUNT  
6820 INDIANA #150  
RIVERSIDE, CA 92506  
(951) 684-7794



511 W. FOOTHILL BLVD.  
FULLERTON, CA 92715  
951-722-1222

15814

DATE June 9, 1999

DOLLARS \$ 39,594.26

TO THE ORDER OF

HENRY RODRIGUEZ

*Henry Rodriguez*

⑆015814⑆ ⑆12224⑆ ⑆1003 ⑆00490⑆

MARCUS McLAUGHLIN

DATE	DESCRIPTION	AMOUNT
June 9, 1999	Escrow # 6672 23379 Via Amador, Moreno Valley, CA	39,594.26
		15814

DATE June 9, 1999

Escrow # 6672 23379 Via Amador, Moreno Valley, CA

39,594.26

15814

Escrow No. 14007015 - 303 HL

Check Date: 01/23/2004

Check No. 10013194

DESCRIPTION	CODE	AMOUNT
		\$2,000.00
		\$2,000.00

Check Total \$2,000.00

Seller/Buyer: Rodriguez/Cassady  
 Property Address: 996 Dahlia Court Hemet, CA  
 Tax Parcel Id:

Memo:

INVESTORS TITLE COMPANY  
 350 South St. West Bldg. #102  
 San Bernardino, CA 92408  
 (909) 891-1208

**COMERICA**

CHECK NO. 10013194

DATE	ESGROW NO	AMOUNT
07/28/2009	1007016-303	\$2,000.00

PAY TWO THOUSAND DOLLARS and no/100

TO THE ORDER OF HENRY RODRIGUEZ

INVESTORS TITLE COMPANY  
 COMMERCIAL TRUST ACCOUNT

VOID AFTER SIX MONTHS

THIS CHECK HAS AN ARTIFICIAL WATERMARK ON THE REVERSE HOLD AT AN ANGLE TO VIEW.

⑈10013194⑈ ⑆121137522⑆ 1892372333⑈

INVESTORS TITLE COMPANY  
 350 South St. West Bldg. #102  
 San Bernardino, CA 92408  
 (909) 891-1208

**COMERICA**

CHECK NO. 10013211

DATE	ESGROW NO	AMOUNT
07/28/2009	1007016-303	\$2,000.00

PAY TWO THOUSAND DOLLARS and no/100

TO THE ORDER OF ENRIQUETA RODRIGUEZ

INVESTORS TITLE COMPANY  
 COMMERCIAL TRUST ACCOUNT

VOID AFTER SIX MONTHS

THIS CHECK HAS AN ARTIFICIAL WATERMARK ON THE REVERSE HOLD AT AN ANGLE TO VIEW.

⑈10013211⑈ ⑆121137522⑆ 1892372333⑈

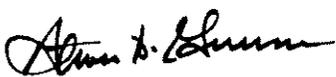




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STEVEN M. BAKER  
Nevada Bar No. 4522  
BENSON, BERTOLDO, BAKER & CARTER  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
Attorneys for Plaintiff

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CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
  
Plaintiff,  
  
vs.  
  
FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/baa/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS, individually,  
DOES 1 through X, inclusive, and ROE  
BUSINESS ENTITIES I through X, inclusive,  
  
Defendants.

CASE NO: A531538  
  
DEPT NO: 10  
  
PLAINTIFF'S REPLY TO DEFENDANT'S  
OPPOSITION TO MOTION FOR  
RECONSIDERATION OF ORDER GRANTING  
DEFENDANT'S MOTION TO RETAX COSTS;  
  
HEARING DATE: 10/20/11  
HEARING TIME: *chambers*

**I. Introduction**

Plaintiff is seeking an Order of Reconsideration of this Court's granting of Defendant's Motion to Tax.

**II. Basis of This Court's Decision to Grant Defendant's Motion**

Defendant moved this Court for an Order to Tax on the "grounds that Plaintiff failed to document, itemize, and justify its costs."<sup>1</sup>

<sup>1</sup> See Motion to Tax Costs, 2: 8-9.



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On July 5, 2011, at the time of Defendant's Motion to Tax, Defense counsel argued that although he was not contesting the veracity of Plaintiff's counsel's affidavit, no invoices or documentation were provided to allow a determination as to whether the costs were reasonable or necessary.<sup>2</sup>

The basis of this Court's decision to grant Defendant's Motion was that Plaintiff did not attach any invoices to his Memorandum of Costs or Opposition to the Motion to Retax.

Plaintiff re-iterates that Invoices were/are not required, and that the Affidavit of Plaintiff's counsel was, in fact, sufficient.

**III. Argument**

Plaintiff, in total compliance with relevant statutes and Nevada law, provided a Memorandum of Costs, setting forth an itemization of said costs, and supported the same with an Affidavit, attesting that the costs set forth therein were correct and necessarily incurred.<sup>3</sup>

Plaintiff submits, and Nevada law supports, that the Affidavit submitted in support of the Memorandum of Costs was sufficient. *Canepa v. Durham*, 1945, 155 P.2d 788, 62 Nev. 417.<sup>4</sup>

Under NRS 18.110(1), a prevailing party must submit:

a memorandum of the items of his costs in the action or proceeding, which memorandum **must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding.**

---

<sup>2</sup> As argued at the time of the hearing of this matter, this was a 2 ½ week bench trial involving a case of disputed liability and causation. Certainly, there can be no argument, and there was no argument, that the costs asserted were unreasonable.

<sup>3</sup> See Motion for Reconsideration, **Exhibit "1,"** Memorandum of Costs, including Affidavit of Steven M. Baker, Esq.

<sup>4</sup> In an effort to further support the reasonableness of the costs, however, Plaintiff has submitted invoices for each of the asserted costs.



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The subject statute does not specify that invoices or receipts are required; rather, the statute simply calls for an affidavit of the party or his counsel, which is what was accomplished in this case.

Plaintiff's Memorandum, as argued in his Opposition, set forth actual, rather than estimated costs.

As pointed out in Plaintiff's Opposition to Motion to Retax and supported by the undersigned counsel's affidavit in support of Plaintiff's Memorandum, rather than a reasonable estimate or calculation, Plaintiff's costs were actual and necessarily incurred.

This Court certainly has the ability and discretion to determine the reasonableness of the asserted costs.

**IV. Conclusion**

Plaintiff submits that the Memorandum of Costs, supporting Affidavit, arguments set forth in the Opposition to Defendant's Motion to Retax, and most importantly, this Court's understanding and appreciation of the complexities of the 2 ½ week bench trial provided ample and sufficient support of the actual, reasonable and necessary nature of the costs asserted.

Plaintiff respectfully submits that an Order for Reconsideration of this Court's granting of Defendant's Motion to Retax is warranted.

Date: 10/19/11

BENSON, BERTOLDO, BAKER & CARTER

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Nevada Bar No. 4522  
7408 W. Sahara Avenue  
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Telephone : (702) 228-2600  
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Attorneys for Plaintiff



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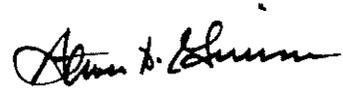
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 18<sup>th</sup> day of Oct, 2011, I served a true and correct copy of PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S MOTION TO RETAX COSTS; EX PARTE APPLICATION FOR ORDER SHORTENING TIME; ORDER was served as indicated below to the following interested parties:

<p><b>VIA HAND-DELIVERY/RECEIPT OF COPY</b></p> <p><u>REFUSED</u></p> <p>Jeffery A. Bendavid, Esq. Adam S. Davis, Esq. Moran Law Firm 630 South Fourth Street Las Vegas, Nevada 89101 Co-Counsel for Defendant Fiesta Palms, LLC</p>	<p><b><u>VIA WIZNET NOTIFICATION</u></b></p> <p>Keith Gillette, Esq. Archer, Norris 2033 North Main Street, Suite 800 P.O. Box 8035 Walnut Creek, California 94596-3728 925-930-6600 Telephone 925-930-6620 Facsimile Attorneys for Defendant</p>
<p><b><u>VIA WIZNET NOTIFICATION</u></b></p> <p>Marsha L. Stephenson, Esq. Stephenson &amp; Dickinson 2820 West Charleston Blvd., Suite 19 Las Vegas, Nevada 89102-1942 Co-counsel for Defendant</p>	

  
An Employee of Benson, Bertoldo, Baker & Carter



  
CLERK OF THE COURT

1 NOTM  
2 Marsha L. Stephenson, (Bar No. 6150)  
3 STEPHENSON & DICKINSON, P.C.  
4 2820 West Charleston Blvd., Suite 19  
5 Las Vegas, NV 89102-1942  
6 Telephone: 702.474.7229  
7 Facsimile: 702.474.7237

8 Kenneth C. Ward (Bar No. 6530)  
9 kcward@archernorris.com  
10 Keith R. Gillette (Bar No. 11140)  
11 kgillette@archernorris.com  
12 ARCHER NORRIS  
13 A Professional Law Corporation  
14 2033 North Main Street, Suite 800  
15 Walnut Creek, California 94596-3759  
16 Telephone: 925.930.6600  
17 Facsimile: 925.930.6620

18 Attorneys for Defendant  
19 FIESTA PALMS, LLC, a Nevada Limited Liability  
20 Company, d/b/a THE PALMS CASINO RESORT

21 DISTRICT COURT  
22 CLARK COUNTY, NEVADA

23 ENRIQUE RODRIGUEZ,  
24 Plaintiff,

25 v.

26 FIESTA PALMS, LLC, a Nevada Limited  
27 Liability Company, d/b/a THE PALMS  
28 CASINO RESORT, et al.,  
Defendants.

Case No. A531538

**NOTICE OF MOTION AND MOTION TO  
AMEND THE ORDER DENYING  
DEFENDANT'S MOTION FOR A NEW  
TRIAL**

Hearing Date:  
Hearing Time:  
Hearing Dept: X

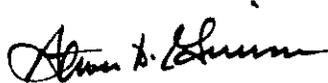
29 COMES NOW Defendant FIESTA PALMS, LLC, a Nevada Limited Liability Company,  
30 d/b/a/ THE PALMS CASINO RESORT ("THE PALMS" or "Defendant") by and through its  
31 counsel of record, Marsha L. Stephenson, Esq., of the law firm of STEPHENSON &  
32 DICKINSON, P.C., and Kenneth C. Ward, Esq., of the law firm of ARCHER NORRIS, and  
33 hereby file the following Defendant's Notice of Motion and Motion to Amend the Order Denying  
34 Defendant's Motion for New Trial filed by this Court on September 29, 2011.

ZA126/1237197-1

NOTM AND MOTION TO AMEND THE ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL







CLERK OF THE COURT

1 MPA  
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2 STEPHENSON & DICKINSON, P.C.  
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10 Attorneys for Defendant  
11 FIESTA PALMS, LLC, a Nevada Limited Liability  
Company, d/b/a THE PALMS CASINO RESORT  
12

13 DISTRICT COURT  
14 CLARK COUNTY, NEVADA  
15

16 ENRIQUE RODRIGUEZ,  
17 Plaintiff,  
18 v.  
19 FIESTA PALMS, LLC, a Nevada Limited  
Liability Company, d/b/a THE PALMS  
20 CASINO RESORT, et al. ,  
21 Defendants.  
22

Case No. A531538

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO AMEND THE ORDER  
DENYING DEFENDANT'S MOTION FOR  
NEW TRIAL**

Dept: X  
Judge: Hon. Jessie Walsh

23  
24 **I. INTRODUCTION**

25 Defendant FIESTA PALMS, LLC dba THE PALMS CASINO RESORT ("THE  
26 PALMS") respectfully asserts that the Court's Order Denying Defendant's Motion for New Trial  
27 ("Order") filed on September 29, 2011, should be altered or amended by virtue of NRCP 52(b) or  
28

ZA126/1238196-1.

1 NRCP 59(e) because of obvious errors of law and fact set forth in the Order:

2 (1) Dr. Schifini did not produce all of the records that he was obligated to under the  
3 document subpoena submitted upon him. The facts in the Order pertaining to the documents  
4 withheld and/or reviewed by Dr. Schifini must contain such a significant fact to be accurate.  
5

6 (2) Defendant's counsel deposed not one but two of plaintiff's treating medical providers,  
7 Dr. Nathan Heaps and Dr. Louis Mortillaro. The facts and conclusions regarding defense  
8 counsel's depositions and diligence should be removed.

9 THE PALMS requests that the Court grant this motion to correct a clear error of law and  
10 prevent manifest injustice.

## 11 **II. FACTUAL BACKGROUND**

12  
13 After the hearing on THE PALM's Motion for New Trial on July 5, 2011, this Court  
14 instructed plaintiff's counsel to prepare the proposed order deciding the motion. During the  
15 ensuing two months, in conversations with plaintiff's counsel, counsel for THE PALMS  
16 repeatedly inquired as to the status of the proposed order, reiterating their request that they be  
17 given an opportunity to review the document in advance of its submittal. Based upon these  
18 conversations, it was defendant's counsel's understanding that they would have the opportunity to  
19 review the proposed order in advance of its submittal to this Court. On September 6, 2011, at the  
20 conclusion of the hearing on plaintiff's motion to require posting of supersedeas bond,  
21 defendant's counsel again raised the issue with plaintiff's counsel, Steve Baker. During this  
22 conversation, attorney Baker reiterated that he would be providing this proposed order for  
23 defendant's review in the near future.

24 On Friday, September 9, 2011, plaintiff's counsel's paralegal, Monique Krystek, emailed  
25 counsel for THE PALMS, indicating that the Order After Hearing on defendant's Motion for New  
26 Trial was being submitted to this court for signature. (See Exhibit A to the Affidavit of Keith R.  
27 Gillette ("Gillette Aff't.") in support of instant motion.) Upon receiving this email, defendant's  
28 counsel wrote to plaintiff's paralegal Monique Krystek, as well as plaintiff's counsel Robert

1 Cardenas, objecting to the Court's endorsement of the proposed order without defendant's  
2 review. (Exhibit B to Gillette Aff't.) Shortly thereafter that same afternoon, attorney Steve  
3 Baker spoke with defendant's counsel Keith Gillette. In that conversation, attorney Baker  
4 acknowledged that he would allow defendants the opportunity to review and comment on the  
5 proposed order. Attorney Baker also informed attorney Gillette that the order had not been  
6 submitted, notwithstanding comments from his paralegal stating otherwise. This was confirmed  
7 in an email sent immediately after the conversation. (Exhibit C to Gillette Aff't.)

8 On Tuesday, September 13, 2011, this proposed order was re-sent to defendant's counsel  
9 Gillette. (Exhibit D to Gillette Aff't.) Defendant's counsel wrote to plaintiff's counsel Baker and  
10 Cardenas on the same day, providing comments and requested revisions to the proposed order.  
11 (Exhibit E to Gillette Aff't.) In separate correspondence that same day, defendant's counsel  
12 wrote again attorneys Baker and Cardenas, indicating that the proposed order had apparently not  
13 been withdrawn, reiterating defendant's request that it be revised and resubmitted, and enclosing  
14 a copy of the letter written to this Court on the issue. (Exhibits F and G to Gillette Aff't.)

15 This and subsequent attempts to contact plaintiff's counsel were ignored, with no  
16 communication between the parties prior to the defendant's receipt of the Court's Notice of Entry  
17 of Order. Consequently, the Order contains a number of factual inaccuracies in its Findings of  
18 Fact, leading to Conclusions of Law premised upon those faulty facts.

### 19 III. LEGAL ARGUMENT

#### 20 A. The Court Should Amend a Judgment that is Based on Errors of Law or Fact

21 Nevada trial courts have power to "alter or amend" a judgment following a motion made  
22 under NRCF Rule 59(e) or 52(b). While neither rule sets forth any specific grounds for relief,  
23 under the Federal rules containing similar language, courts have found such motions proper when  
24 the district court committed clear error of law or fact. See *Turner v. Burlington Northern Santa*  
25 *Fe R.R. Co.*, 338 F.3d 1058, 1063 (9<sup>th</sup> Cir. 2003). "A [FRCP] Rule 59(e) motion should be  
26 granted if there exists a manifest error of law or fact, so as to enable the court to correct its own  
27 errors and thus avoid unnecessary appellate procedures." *Divane v. Krull Elec. Co., Inc.*, 194 F.3d  
28 845, 848 (7<sup>th</sup> Cir. 1999)(Internal citations omitted). See e.g. *Deutsch v. Burlington Northern R.R.*

1 Co., 983 F2d 741, 744 (7<sup>th</sup> Cir. 1992) re Rule 52(b). These cases are noteworthy, as cases  
2 interpreting the Federal Rules of Civil Procedure are persuasive authority in interpreting the  
3 Nevada Rules of Civil Procedure. *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev.  
4 46, 53 (2002).

5 B. The Facts Pertaining to Records Produced and Reviewed by Dr. Schifini and the Deposition  
6 History of Plaintiff's Treating Physicians are Erroneous Because they are Factually Inaccurate  
7 and Unsupported by the Record

8 Findings of fact shall not be set aside by the trial court unless clearly erroneous. NRC  
9 52(a); *Kockos v. Bank of Nevada*, 90 Nev. 140 (1974). The United States Supreme Court has  
10 defined the clearly erroneous standard under FRCP 52(a) and the Nevada Supreme Court has  
11 adopted the same standard to interpret NRC 52(a): "A finding is 'clearly erroneous' when  
12 although there is evidence to support it, the reviewing court on the entire evidence is left with the  
13 definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*,  
14 333 U.S. 364, 395 (1948), cited in *Unionamerica Mortgage & Equity Trust v. McDonald*, 97 Nev.  
15 210, 211-12 (1981).

16 The weight of the evidence in this case indicates certain statements of fact and  
17 conclusions of law are so inaccurate or incomplete that they are erroneous. The following  
18 Findings of Fact in the Order are in error:

19 1. Page 4, line 7: "Defense counsel argued that Plaintiff's counsel withheld 100+  
20 documents that Dr. Schifini relied upon in providing expert opinions at trial." This statement is  
21 misleading and incomplete. The Order fails to mention that the basis for Defense counsel's  
22 claim: the 100+ documents were subject to a subpoena previously issued on Dr. Schifini but were  
23 not produced pursuant to that subpoena. This critical fact should be added to made the Statement  
24 of Fact accurate.

25 2. Page 4, line 9: "Secondly, Dr. Schifini reviewed *all* the medical records in this  
26 case" (emphasis in original). This statement is similarly incomplete and misleading. The records  
27 produced by Dr. Schifini pursuant to the document subpoena issued on him did not reflect that he  
28 had been provided all of the medical records in this case. This additional fact should be added to

1 make the Statement of Fact accurate

2 3. Page 5, lines 1-2: "The Court finds that defense decided not to depose a single  
3 treating physician in a case where the Plaintiff was alleging a constellation of profound injuries."  
4 This sentence is factually incorrect. Defense counsel deposed Dr. Nathan Heaps on June 4, 2010  
5 and Dr. Louis Mortillaro on May 24, 2010. This Statement of Fact should be removed from the  
6 Order.

7 Based on the aforementioned incorrect or incomplete facts, the following Conclusions of  
8 Law are in error and should be removed:

9 4. Page 8, lines 10-13: "Defense counsel did not exercise reasonable diligence and  
10 cannot argue surprise since they chose not to depose a single treating provider. As a result of this  
11 failure, defendant did not discover the entirety of the materials contained in Dr. Schifini's files."  
12 These two sentences are both factually incorrect and misleading. First, as stated above, counsel  
13 did depose Dr. Nathan Heaps and Dr. Louis Mortillaro, both plaintiff's treating physicians.  
14 Further, the entirety of the materials in Dr. Schifini's files were under a document subpoena  
15 issued upon him. The fact that Dr. Schifini, plaintiff's retained physician, failed to provide such  
16 documents should not prejudice defense counsel. Defense counsel sought all documents in Dr.  
17 Schifini's files and relied on the documents that were produced in order to outline the nature and  
18 scope of his expected testimony. Accordingly, the conclusion that Defense counsel did not  
19 exercise reasonable diligence and cannot argue surprise is factually unsupported and should be  
20 removed.

21 5. Page 8, lines 15-17: "Each and every one of these documents had been previously  
22 disclosed to the Defendant and were no more than the records of other treating physicians  
23 contained in Dr. Schifini's file." Again, this conclusion is irrelevant and misleading. It does not  
24 account for Dr. Schifini's failure to produce documents under subpoena. These documents may  
25 have been disclosed by plaintiff's counsel, but defense counsel never contended that this was not  
26 the case. Instead, defense counsel argued that the documents were not disclosed by Dr. Schifini,  
27 as he was required to do pursuant to the subpoena. This Conclusion of Law is therefore  
28 inaccurate because mischaracterized defendant's argument and is supported by an irrelevant fact.

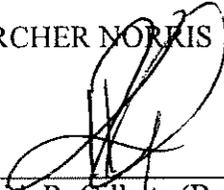
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IV. CONCLUSION

The Order, as it stands currently, creates an incomplete and prejudicial picture of the facts in this case. These inaccuracies would not exist had plaintiff's counsel submitted the proposed order to defense counsel for review and comments, as it promised to do on several occasions. Under NCRP rules 52(b) and 59(e), this court can amend its judgment without retrying or upsetting its overall conclusion. Doing so would create complete and accurate picture of the facts as they in fact occurred. Therefore, this Motion should be granted and the Order amended to reflect the changes discussed herein.

Dated: October 18, 2011

ARCHER NORRIS

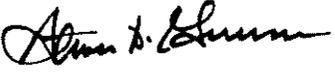


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Keith R. Gillette (Bar No. 11140)  
ARCHER NORRIS  
2033 North Main Street, Suite 800  
Walnut Creek CA 94596  
*Attorneys for Defendant FIESTA PALMS,  
LLC, a Nevada Limited Liability Company,  
d/b/a THE PALMS CASINO RESORT*



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7 Facsimile: (702) 474-7237

  
CLERK OF THE COURT

5 Keith R. Gillette (Bar No. 11140)  
6 ARCHER NORRIS  
7 A Professional Law Corporation  
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9 PO Box 8035  
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10 Attorneys for Defendant FIESTA PALMS, LLC, a  
11 Nevada Limited Liability Company, d/b/a/ THE  
12 PALMS CASINO RESORT

12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

15 ENRIQUE RODRIGUEZ,  
16  
17 Plaintiffs,  
18  
19 v.  
20 FIESTA PALMS, LLC, a Nevada Limited  
21 Liability Company, d/b/a/ The Palms  
22 Casino Resort, et al.,  
23  
24 Defendants.

Case No. A531538

**AFFIDAVIT OF KEITH R. GILLETTE IN  
SUPPORT OF MOTION TO AMEND  
ORDER DENYING DEFENDANT'S  
MOTION FOR NEW TRIAL**

Dept. No. X  
Judge: Hon. Jessie Walsh

22 KEITH R. GILLETTE, being first duly sworn, deposes and says:

23 1. I am a resident of the State of California. I am an adult over the age of 18, and in  
24 all respects competent to make this Affidavit. This Affidavit is based upon my personal  
25 knowledge, and if called upon to testify thereto, I could and would testify as set forth in this  
26 Affidavit.

27 ///

28 ///

ZA126/1237750-1

1           2.     I am an attorney licensed in the state of Nevada and am a partner in the law firm of  
2 Archer Norris. I am counsel for Defendant FIESTA PALMS, LLC, a Nevada Limited Liability  
3 Company, d/b/a/ THE PALMS CASINO RESORT, in the above captioned case.

4           3.     I have reviewed the Memorandum of Points and Authorities in Support of this  
5 motion, and incorporate by reference the facts alleged therein.

6           4.     A true and correct copy of correspondence from plaintiff's paralegal Monique  
7 Krystek to Keith Gillette, dated September 9, 2011, at 3:15 p.m., is enclosed hereto as Exhibit A.

8           5.     A true and correct copy of correspondence from Keith Gillette to Monique Krystek  
9 and Robert Cardenas, dated September 9, 2011, at 3:25 p.m., is enclosed hereto as Exhibit B.

10          6.     A true and correct copy of correspondence from Keith Gillette to Monique  
11 Krystek, dated September 9, 2011, at 3:45 p.m., is enclosed hereto as Exhibit C.

12          7.     A true and correct copy of correspondence from plaintiff's paralegal Monique  
13 Krystek to Keith Gillette, dated September 13, 2011, at 12:57 p.m., is enclosed hereto as Exhibit  
14 D.

15          8.     A true and correct copy of correspondence from Keith Gillette to Steve Baker and  
16 Robert Cardenas, dated September 13, 2011 is attached hereto as Exhibit E.

17          9.     A true and correct copy of correspondence from Keith Gillette to Steve Baker and  
18 Robert Cardenas, dated September 13, 2011 is attached hereto as Exhibit F.

19          10.    A true and correct copy of correspondence from Keith Gillette to Honorable Jessie  
20 Walsh, dated September 13, 2011 is attached hereto as Exhibit G.

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26    ///  
27    ///  
28    ///



# EXHIBIT A

5 App. 1207

**Gillette, Keith R.**

---

**From:** Monique Krystek [monique@bensonlawyers.com]  
**Sent:** Friday, September 09, 2011 3:15 PM  
**To:** Gillette, Keith R.  
**Subject:** Rodriguez v. Fiesta Palms

Dear Keith,

Attached for your review, please find a copy of the Order After Hearing on Defendant's Motion for Mistrial. The Order has been submitted for signature.

Thank you,

Monique



Monique Krystek, Litigation Paralegal  
Benson, Bertoldo, Baker & Carter  
7408 West Sahara Avenue  
Las Vegas, NV 89117  
(702)228-2600 (Office)  
(702) 228-2333 (Fax)

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10/14/2011

5 App. 1208

## EXHIBIT B

**Gillette, Keith R.**

---

**From:** Gillette, Keith R.  
**Sent:** Friday, September 09, 2011 3:25 PM  
**To:** 'Monique Krystek'; 'Robert Cardenas'  
**Subject:** RE: Rodriguez v. Fiesta Palms  
There is no attachment.

MORE IMPORTANTLY: Steve told me on Tuesday, consistent with the court's instructions back in July , that I would see this before it was submitted. PLease take whatever steps you need to take to allow me a chance to review this before it gets signed.

I tried to call you but you weren't answering your phone. Calls to Steve's cell also went to voicemail.

This is important, I appreciate your courtesies.

Thank you.

Regards,

**Keith R. Gillette**

**Partner**

Admitted to practice in California and Nevada

**ARCHERNORRIS**

2033 N. Main Street, Ste. 800

Walnut Creek, CA 94596

**direct** (925) 952-5440 | **main** (925) 930-6600

**email** kgillette@archernorris.com

www.ARCHERNORRIS.com

---

**From:** Monique Krystek [mailto:monique@bensonslawyers.com]

**Sent:** Friday, September 09, 2011 3:15 PM

**To:** Gillette, Keith R.

**Subject:** Rodriguez v. Fiesta Palms

Dear Keith,

Attached for your review, please find a copy of the Order After Hearing on Defendant's Motion for Mistrial. The Order has been submitted for signature.

Thank you,

10/14/2011

5 App. 1210

Monique



Monique Krystek, Litigation Paralegal  
Benson, Bertoldo, Baker & Carter  
7408 West Sahara Avenue  
Las Vegas, NV 89117  
(702)228-2600 (Office)  
(702) 228-2333 (Fax)

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10/14/2011

5 App. 1211

# EXHIBIT C

5 App. 1212

**Gillette, Keith R.**

---

**From:** Gillette, Keith R.  
**Sent:** Friday, September 09, 2011 3:45 PM  
**To:** 'Monique Krystek'  
**Subject:** RE: Rodriguez v. Fiesta Palms

Steve just called to tell me that this hasn't been submitted yet for signature. I will review this and provide responses shortly, but in the interim please don't submit this until I have a chance to comment.

Regards,

**Keith R. Gillette**

**Partner**

Admitted to practice in California and Nevada

**ARCHERNORRIS**

2033 N. Main Street, Ste. 800

Walnut Creek, CA 94596

**direct** (925) 952-5440 | **main** (925) 930-6600

**email** kgillette@archernorris.com

www.ARCHERNORRIS.com

---

**From:** Monique Krystek [mailto:monique@bensonlawyers.com]  
**Sent:** Friday, September 09, 2011 3:28 PM  
**To:** Gillette, Keith R.  
**Subject:** RE: Rodriguez v. Fiesta Palms

Sorry. My computer is trippin. Trying to attach, again...

---

**From:** Gillette, Keith R. [mailto:kgillette@archernorris.com]  
**Sent:** Friday, September 09, 2011 3:25 PM  
**To:** Monique Krystek; Robert Cardenas  
**Subject:** RE: Rodriguez v. Fiesta Palms

There is no attachment.

**MORE IMPORTANTLY:** Steve told me on Tuesday, consistent with the court's instructions back in July , that I would see this before it was submitted. PLease take whatever steps you need to take to allow me a chance to review this before it gets signed.

10/14/2011

5 App. 1213

I tried to call you but you weren't answering your phone. Calls to Steve's cell also went to voicemail.

This is important, I appreciate your courtesies.

Thank you.

Regards,

**Keith R. Gillette**

**Partner**

Admitted to practice in California and Nevada

**ARCHERNORRIS**

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Walnut Creek, CA 94596

**direct** (925) 952-5440 | **main** (925) 930-6600

**email** kgillette@archernorris.com

www.ARCHERNORRIS.com

---

**From:** Monique Krystek [mailto:monique@bensonlawyers.com]

**Sent:** Friday, September 09, 2011 3:15 PM

**To:** Gillette, Keith R.

**Subject:** Rodriguez v. Fiesta Palms

Dear Keith,

Attached for your review, please find a copy of the Order After Hearing on Defendant's Motion for Mistrial. The Order has been submitted for signature.

Thank you,

Monique



Monique Krystek, Litigation Paralegal  
Benson, Bertoldo, Baker & Carter  
7408 West Sahara Avenue

10/14/2011

5 App. 1214

## EXHIBIT D

**Gillette, Keith R.**

---

**From:** Monique Krystek [monique@bensonlawyers.com]

**Sent:** Tuesday, September 13, 2011 12:57 PM

**To:** Gillette, Keith R.

**Subject:** FW: Rodriguez v. Fiesta Palms

**Attachments:** Order and FFCL Denying Mtn for Mistrial.pdf

Per Steve's request, I am sending this to you again. It shows as having been sent on Friday, September 9, 2011 at 3:28 p.m.

If you cannot open the attachment, let me know and I'll fax it to you.

Thanks,

Monique

---

**From:** Monique Krystek

**Sent:** Friday, September 09, 2011 3:28 PM

**To:** 'Gillette, Keith R.'

**Subject:** RE: Rodriguez v. Fiesta Palms

Sorry. My computer is trippin. Trying to attach, again...

---

**From:** Gillette, Keith R. [mailto:kgillette@archernorris.com]

**Sent:** Friday, September 09, 2011 3:25 PM

**To:** Monique Krystek; Robert Cardenas

**Subject:** RE: Rodriguez v. Fiesta Palms

There is no attachment.

**MORE IMPORTANTLY:** Steve told me on Tuesday, consistent with the court's instructions back in July, that I would see this before it was submitted. Please take whatever steps you need to take to allow me a chance to review this before it gets signed.

I tried to call you but you weren't answering your phone. Calls to Steve's cell also went to voicemail.

This is important, I appreciate your courtesies.

Thank you.

Regards,

10/14/2011

5 App. 1216

# EXHIBIT E



**ARCHERNORRIS**  
A PROFESSIONAL LAW CORPORATION

2033 North Main Street, Suite 800  
Walnut Creek, CA 94596-3769  
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www.archernorris.com

KEITH R. GILLETTE  
kgillette@archernorris.com  
925.952.5440  
Admitted to Practice in California, Nevada

September 13, 2011

**VIA FAX & EMAIL C/O MONIQUE KRISTEK (MONIQUE@BENSONLAWYERS.COM)**

Steven M. Baker, Esq.  
Robert Cardenas, Esq.  
Benson, Bertoldo, Baker & Carter  
7408 W. Sahara Avenue  
Las Vegas, NV 89117

Re: *Rodriguez v. Fiesta Palms, LLC., et al., Action No. A531538*

Gentlemen:

Please allow this to serve as our comments and requested revisions to plaintiff's proposed order on defendant's motion for new trial.

1. Page 4, line 7: At the end of this sentence, please add the following language: These documents were subject to a subpoena previously issued on this individual, but not produced pursuant to that subpoena.
2. Page 5, line 9: At the end of this sentence, please add the following language: The records produced by Dr. Schifini pursuant to the document subpoena issued on this individual did not reflect that this healthcare provider had been provided all the medical records in this case.
3. Page 5, lines 1-2: This sentence is factually incorrect. Please remove this letter.
4. Page 8, lines 10-13: These two paragraphs are factually incorrect and misleading. Please remove the two sentences.
5. Page 8, lines 15-17: The paragraph that begins with "Each and every one of these documents [ ]" is irrelevant and misleading. We ask that it be removed.

We reiterate our request that the proposed order, submitted to the Court on September 9, 2011 without our review or comment, be withdrawn. We similarly request that an amended proposed order be submitted for our review and comment in advance of its submittal to the Court, with an adequate amount of time within which to respond.

Steven M. Baker, Esq.  
September 13, 2011  
Page 2

Your anticipated courtesies are appreciated.

Very truly yours,  
ARCHER NORRIS



Keith R. Gillette

KRG/tp  
ZA126/1221299-1

# EXHIBIT F



**ARCHERNORRIS**  
A PROFESSIONAL LAW CORPORATION

2033 North Main Street, Suite 800  
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925.930.6620 (Fax)  
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**KEITH R. GILLETTE**  
kgillette@archernorris.com  
925.952.6440  
Admitted to Practice in California, Nevada

September 13, 2011

**VIA FAX & EMAIL C/O MONIQUE KRISTEK (MONIQUE@BENSONLAWYERS.COM)**

Steven M. Baker, Esq.  
Robert Cardenas, Esq.  
Benson, Bertoldo, Baker & Carter  
7408 W. Sahara Avenue  
Las Vegas, NV 89117

Re: *Rodriguez v. Fiesta Palms, LLC., et al., Action No. A531538*

Gentlemen:

I write further to the previous conversations, emails and texts between us relating to the proposed order on defendant's motion for new trial.

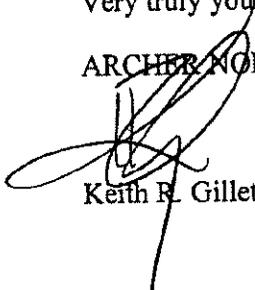
To recap, this office has requested repeatedly the opportunity to review this proposed form of order prior to its submission to the Court. Late in the day on Friday, I received notice from your paralegal Monique Krystek that this proposed order had been submitted for signature. Despite my request for its withdrawal to allow for review and comment, this document has not been withdrawn, nor have I received any notice from you advising of developments.

Enclosed please find a copy of the letter I wrote to Judge Walsh on this issue. I would appreciate your effort in whatever steps are necessary to have this current form of order withdrawn and to be provided an opportunity to meet and confer with your office regarding the language contained within this document.

Your anticipated courtesies are appreciated.

Very truly yours,

ARCHER NORRIS

  
Keith R. Gillette

KRG/tp  
Enclosure  
ZA126/1221289-1

WALNUT CREEK

SACRAMENTO

NEWPORT BEACH

LOS ANGELES

# EXHIBIT G

5 App. 1222



**ARCHERNORRIS**  
A PROFESSIONAL LAW CORPORATION

2033 North Main Street, Suite 800  
Walnut Creek, CA 94596-3759  
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www.archernorris.com

**KEITH R. GILLETTE**  
kgillette@archernorris.com  
925.952.5440  
Admitted to Practice in California, Nevada

September 13, 2011

Honorable Jessie Walsh  
c/o Jeri Winter, Judicial Assistant  
Department 10  
Clark County District Court  
200 Lewis Ave.  
Las Vegas, NV 89101

Re: Enrique Rodriguez v. Fiesta Palms, LLC, et al.  
Clark County District Court Case No. A531538  
Our File No.: ZA-126

Judge Walsh:

We write regarding the Proposed Order on Defendant's Motion for New Trial.

Late in the afternoon of Friday, September 9, 2011, I received an email from plaintiff's office indicated that a proposed order on this Motion had been submitted for your signature. This proposed order was not submitted for Defendant's comment prior to its submittal to your chambers. Since receiving the proposed order after its submittal the Court, we have identified language which, in its opinion, is both incorrect and incomplete.

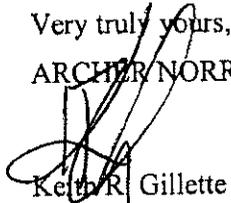
By way of background, this office has repeatedly requested on numerous occasions prior to last week that plaintiff provide a copy of the proposed order for review and comment. This request was reiterated in open court after the hearing on plaintiff's Motion to Require Posting of Supersedeas Bond heard September 5, 2011. Plaintiff's counsel at that time reiterated previous representations, in that this office would be afforded an opportunity to review the proposed order. For whatever reason, this has not occurred.

Accordingly, we respectfully request that this Court not endorse the Order previously submitted by plaintiff's counsel on September 9, 2011.

Honorable Jessie Walsh  
September 13, 2011  
Page 2

Respectfully submitted.

Very truly yours,  
ARCHER NORRIS

A handwritten signature in black ink, appearing to read "Keith R. Gillette", is written over the typed name "ARCHER NORRIS". The signature is stylized and somewhat illegible.

Keith R. Gillette

KRG:tp  
cc: Steve Baker, Esq.  
ZA126/1221310-1

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

\_\_\_\_\_ /

**APPELLANT'S APPENDIX**  
**VOLUME 4**

**ROBERT L. EISENBERG (Bar # 0950)**  
**Lemons, Grundy & Eisenberg**  
**6005 Plumas Street, Third Floor**  
**Reno, Nevada 89519**  
**775-786-6868**  
**Email: [rle@lge.net](mailto:rle@lge.net)**

**ATTORNEYS FOR APPELLANT**

**CHRONO INDEX**

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
1.	Complaint	11/15/06	1	1 - 10
2.	Defendant Fiesta Palm's LLC dba Casino Resorts Answer to Plaintiff's Complaint	04/23/07	1	11 - 19
3.	Plaintiff's 16.1 List of Documents and Witnesses	09/24/11	1	20 - 30
4.	Plaintiff's Fifth Supplemental Early Case Conference List of Documents and Witnesses	01/14/08	1	31 - 35
5.	Plaintiff's Sixth Supplemental Early Case Conference List of Documents and Witnesses	01/25/08	1	36 - 39
6.	Plaintiff's Seventh Supplemental Early Case Conference List of Documents and Witnesses	07/01/08	1	40 - 45
7.	Plaintiff's Eight Supplemental Early Case Conference List of Documents and Witnesses	07/25/08	1	46 - 50
8.	Plaintiff's Ninth Supplemental Early Case Conference List of Documents and Witnesses	10/13/08	1	51 - 55
9.	Plaintiff's Tenth Supplemental Early Case Conference List of Documents and Witnesses	10/30/08	1	56 - 60
10.	Demand for Jury Trial	4/14/09		61 - 63
11.	Plaintiff's Thirteenth Supplemental Early Case Conference List of Documents and Witnesses	5/01/09	1	64 - 68
12.	Plaintiff's Fourteenth Supplemental Early Case Conference List of Documents and Witnesses	5/01/09	1	69 - 72
13.	Amended Complaint	07/08/09	1	73 - 82
14.	Amended Order Setting Bench Trial	05/11/10	1	83 - 84
15.	Rebuttal Expert Disclosure [NRCP 16.1 (a)(2)]	07/14/10	1	85 - 125

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

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16.	Motion to Compel Responses to Request for Production of Documents, to Compel Further Responses to Interrogatories; Request for Sanctions; and Motion to Compel Independent Medical Examinations of Plaintiff	07/28/10	1	126 - 134
17.	Plaintiff's Opposition to Defendant's Motion to Compel Responses to Request for Production of Documents, to Compel Further Responses to Interrogatories; Request for Sanctions; and Motion to Compel Independent Medical Examination of Plaintiff	08/09/10	1	135 - 137
18.	Plaintiff's Pre-Trial Memorandum	09/27/10	1	138 - 145
19.	Plaintiff's Motion to Strike	11/10/10	1	146 - 150
20.	Defendant The Palms' Opposition to Plaintiff's Motion to Strike	11/23/10	1	151 - 157
21.	Defendant Fiesta Palms, LLC Post-Trial Brief	11/24/10	1	158 - 187
22.	Plaintiff's Confidential Trial Brief	01/13/11	1	188 - 206
23.	Plaintiff's Opposition to Defendants' Motion for Mistrial	01/14/11	1	207 - 239
24.	Defendant Fiesta Palms, LLC's Motion for Mistrial, or, Alternatively, Motion to Strike Plaintiff's Confidential Pretrial and Trial Briefs on Ex Parte Application for Order Shortening Time; Order	01/20/11	1	240 - 248
25.	Reply in Support of the Palms' Motion for Mistrial, or, Alternatively, Motion to Strike Plaintiff's Confidential Pretrial and Trial Briefs	01/26/11	2	249 - 257
26.	Findings of Fact, Conclusions of Law, and Order [re: Motion for Mistrial]	03/10/11	2	258 - 261
27.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Strike Defendant's Post-Trial Brief]	03/10/11	2	262 - 264

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<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
28.	Findings of Fact, Conclusions of Law, and Order [re: Plaintiff's Rule 52 Motion on the Issue of Liability]	03/10/11	2	265 - 268a
29.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Strike Defendant's Experts]	03/10/11	2	269 - 272
30.	Verdict	03/14/11	2	273 - 274
31.	Plaintiff's Memorandum of Costs and Disbursements Pursuant to NRS 18.020	03/15/11	2	275 - 279
32.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, d/b/a The Palms Casino Resorts' Notice of Motion and Motion to Tax Costs	03/21/11	2	280 - 287
33.	Memorandum Re: Pre-Judgment Interest	03/22/11	2	288 - 292
34.	Defendant Fiesta Palms, LLC DBA The Palms Casino Resort's Memorandum of Points and Authorities in Support of its Motion for New Trial	03/25/11	2	293 - 324
35.	Declaration of Kenneth C. Ward in Support of Defendant Fiesta Palms, LLC's Motion for New Trial	03/25/11	2	325 - 411
36.	Declaration of Kenneth C. Ward (2nd) in Support of Defendant Fiesta Palms, LLC's Motion for New Trial	03/25/11	2	412 - 491
37.	Defendant Fiesta Palms, LLC DBA The Palms Casino Resort's Memorandum of Points and Authorities in Support of its Motion for New Trial	03/28/11	3	492 - 523
38.	Declaration of Kenneth C. Ward in Support of Defendant Fiesta Palms, LLC Motion for New Trial	03/28/11	3	524 - 686
39.	Defendant Fiesta Palms, LLC's Notice of Motion and Motion for New Trial	03/28/11	3	687 - 688

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**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

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40.	Defendant Fiesta Palms, LLC's Reply Memorandum/Opposition to Plaintiff's Memorandum re: Pre-Judgment Interest	04/01/11	3	689 - 692
41.	Amended Memorandum re: Pre-Judgment Interest	04/05/11	3	693 - 696
42.	Opposition to Defendant Fiesta Palms, LLC., D/B/A The Palms Casino's Motion to Tax [sic] Costs	04/05/11	3	697 - 705
43.	Judgment on the Verdict	04/12/11	3	706 - 708
44.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, d/b/a/ The Palms Casino Resort's Reply to Plaintiff's Opposition to the Motion to Tax Costs	04/13/11	3	709 - 715
45.	Notice of Entry of Judgment	04/15/11	3	716 - 721
46.	Findings of Facts and Conclusions of Law in Support of Verdict	04/21/11	3	722 - 726
47.	Plaintiff's Opposition to Defendants' Motion for New Trial	04/22/11	4	727 - 820
48.	Notice of Motion and Motion to Amend Judgment on the Verdict	05/02/11	4	821 - 824
49.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, D/B/A The Palms Casino Resort's Reply to Plaintiff's Opposition to the Motion for New Trial	05/02/11	4	825 - 834
50.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Amend Judgment on Verdict]	09/19/11	4	835 - 837
51.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Tax Costs]	09/19/11	4	838 - 840
52.	Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion for New Trial	09/29/11	4	841 - 854

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**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

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53.	Plaintiff's Motion for Reconsideration of Order Granting Defendant's Motion to Retax Costs; Ex Parte Application for Order Shortening Time; Order	10/5/11	4 5	855 - 976 977- 1149
54.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, D/B/A The Palms Casino Resort's Opposition to Plaintiff's Motion for Reconsideration of Order to Retax Costs	10/14/11	5	1150 - 1191
55.	Plaintiff's Reply to Defendant's Opposition to Motion for Reconsideration of Order Granting Defendant's Motion to Retax Costs	10/18/11	5	1192 - 1195
56.	Notice of Motion and Motion to Amend the Order Denying Defendant's Motion for a New Trial	10/18/11	5	1196 - 1197
57.	Memorandum of Points and Authorities in Support of Motion to Amend the Order Denying Defendant's Motion for New Trial	10/18/11	5	1198 - 1203
58.	Affidavit of Keith R. Gillette in Support of Motion to Amend Order Denying Defendant's Motion for New Trial	10/18/11	5	1204 - 1224
59.	Notice of Appeal	11/04/11	6	1225 - 1257
60.	Opposition to Motion to Amend the Order Denying Defendant's Motion for New Trial	11/04/11	6	1258 - 1270
61.	Order	11/17/11	6	1271 - 1272
62.	Amended or Supplemental Notice of Appeal	12/13/11	6	1273 - 1278
63.	Amended Judgment on the Verdict	02/15/12	6	1279 - 1281
64.	Second Amended or Supplemental Notice of Appeal	03/13/12	6	1282 - 1314

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

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66.	Partial Transcript- Bench Trial (Sheri Long)	10/25/10	8	1405 - 1431
67.	Partial Transcript- Bench Trial (Vikki Kooinga)	10/25/10	8	1432 - 1444
68.	Partial Transcript- Bench Trial Vol. 1 (Enrique Rodriguez)	10/26/10	8	1445 - 1579
69.	Partial Transcript- Bench Trial (Dr. Maryanne Shannon)	10/27/10	9	1580 - 1777
70.	Partial Transcript- Bench Trial Vol. 2 (Enrique Rodriguez)	10/27/10	9	1778 - 1810
71.	Partial Transcript- Bench Trial (Dr. Joseph Schifini)	10/28/10	10	1811 - 1892
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73.	Partial Transcript- Bench Trial Vol. 1(Dr. Russell Shah)	11/1/10	11	2038 - 2191
74.	Partial Transcript- Bench Trial Vol. 3 (Enrique Rodriguez)	11/2/10	11	2192 - 2220
75.	Partial Transcript- Bench Trial Vol. 2 (Dr. Russell Shah)	11/2/10	12	2221 - 2339
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CLERK OF THE COURT

1 **OPPS**  
STEVEN M. BAKER  
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5 Attorneys for Plaintiff

6  
7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 \* \* \*

10 ENRIQUE RODRIGUEZ, an individual,  
11 Plaintiff,

CASE NO: A531538

DEPT NO: 10

12 vs.

**BENCH TRIAL DATE: 10/4/10**

13 FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
14 RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
15 and ROE BUSINESS ENTITIES I through X,  
inclusive,

**HEARING DATE:**

**HEARING TIME:**

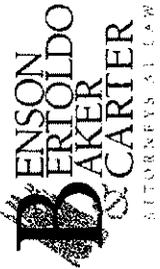
16 Defendants.  
17

18 **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR NEW TRIAL**

19 COMES NOW the Plaintiff, ENRIQUE RODRIGUEZ, by and through his  
20 undersigned attorney of record, STEVEN M. BAKER, ESQ., of the law firm of BENSON,  
21 BERTOLDO, BAKER & CARTER, CHTD., and hereby files his Opposition to Defendants'  
22 Motion for New Trial.  
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7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333





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This Opposition is made and based on the pleadings and papers on file herein, the following Points and Authorities, Affidavits of Counsel, and any oral argument that may be presented at the time set for hearing of this matter.

DATED this 22 day of April, 2011.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff

**I. Introduction**

In seeking a new trial, Defendant has offered the following four (4) arguments:

1. Plaintiff's counsel engaged in misconduct<sup>1</sup>;
2. The Court erred in allowing testimony of certain providers<sup>2</sup>;
3. The evidence was insufficient to justify the verdict<sup>3</sup>; and
4. The Court erred in striking defense experts<sup>4</sup>.

Each of the arguments is either factually and/or legally flawed. The issues were sufficiently addressed by this Court during trial and the defense has offered nothing by way of factual or legal argument to support and/or justify a Rule 59 order for new trial.

**II. Statement of Facts**

**A. Case Overview and Verdict**

This is a premises liability matter that occurred November 22, 2004 at the Palms Sports Bar/Sports Book. Plaintiff ENRIQUE RODRIGUEZ was an invited guest to watch a football

<sup>1</sup> Motion, B, page 5.

<sup>2</sup> *Id.*, C, page 6.

<sup>3</sup> *Id.*, D, page 19.

<sup>4</sup> *Id.*, E, page 24.



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game. During half-time, agents, employees and/or assigns of the Palms (hereinafter known as the "PALMS GIRLS") were participating in a promotion wherein they were throwing souvenirs to Sports Bar/Sports Book patrons while blindfolded.

In response to the Palms Girl, Brandy Beavers, throwing souvenirs in the Sports Bar/Sports Book while blind-folded, a customer within the Sports Bar/Sports Book dove for a thrown souvenir and hit Mr. Rodriguez's extended and stationary left knee. Mr. Rodriguez then struck the person next to him, hitting the left side of his head, then falling down, thereby sustaining extensive injuries and damages.

A bench trial commenced in this matter on October 25, 2010 and this Honorable Court issued a verdict on March 9, 2011 for the Plaintiff and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS in the amount of \$6,051,589.38.<sup>5</sup>

**B. Qualification of Treating Providers as Experts During Trial**

Plaintiff treated with approximately 25 medical providers over the course of several years. Defense counsel did not depose a single provider.

As the Court will recall, this was a very complicated medical claim. Understanding that the case was being tried as a bench trial, and in an effort to potentially expedite the trial, Plaintiff's counsel opted not to call every provider to testify.

It is important to note that none of the providers were "unavailable," as suggested by defense counsel<sup>6</sup>; rather, in the interest of judicial economy, and as supported by Nevada law, as cited at the time of trial, and herein below, Plaintiff's counsel had each testifying provider qualified and admitted as both a treating physician and non-retained expert in their respective field.

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<sup>5</sup> See Exhibit "1," Verdict.  
<sup>6</sup> See Motion, 6: 12-13.



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This Court expressed a familiarity with the issue, case authority and distinction and admitted Plaintiff's treating physicians as qualified experts, permitting them to testify as to Plaintiff's treatment, diagnoses, prognoses, causation and need for treatment.

The rulings of this Court were consistent throughout the trial.

Candidly, had this Court refused to qualify any of the providers as experts, or limited their testimony in any fashion, Plaintiff's counsel would have simply called each of the treating providers to testify. However, clearly this could have resulted in a four (4) month long trial. Under the Nevada Code of Judicial Conduct Canon 3(8): "a judge shall dispose of all judicial matters promptly, efficiently and fairly." Clearly calling approximately 25 medical providers to testify would not have disposed of this matter, promptly, efficiently or fairly as required by the rules.

1. Court's Qualification of Dr. Shannon

The qualification of treating providers as experts occurred at the outset of the medical testimony, beginning with Dr. Shannon. Plaintiff's counsel provided this Court with the necessary legal authority to permit the qualification and admission. Defense counsel, at no point in the trial, offered any legal support in opposition, and even expressed a lack of familiarity with the governing law and rules.

MR. BAKER: Your Honor, I move to have her admitted as a treating physician and qualified as an expert in the field of orthopedic surgery and the related matters to which she'll testify.

THE COURT: Any objection?

MR. WARD: I have no objection to her qualifications. The only objection I have is that she has not be disclosed as anything other than a treating physician, so I would object to any claims of questions in terms of what would normally be submitted to an expert –

MR. BAKER: Can I have –

MR. WARD: -- aside from her treating.



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MR. BAKER: Your Honor –

THE COURT: Mr. Baker?

MR. BAKER: Yes, Your Honor.

I'd like to show you both the *Fernandez v. Admirand* [phonetic] case that speaks to the fact that once a physician is qualified to be expert, they can speak in any area of their expertise.

But more importantly, Your Honor, *Prabhu v. Levine*, which is 112 Nev. 1538 and speaks about the fact specifically that in the Prabhu case, a treating physician was allowed to testify to standard of care. It basically says that the treating physician or a doctor is an expert for any purpose.

THE COURT: Mr. Ward?

MR. WARD: **I am not familiar with that specific case.**

The -- but I am familiar with Nevada Revised Statute 15.285 and 51.065, that I believe that it would limit her from anything that she's been -- other than what she's been disclosed as, and she has only been disclosed as a treater.

If there are -- certainly she would be qualified.

I'm not saying she wouldn't be qualified if she had been properly disclosed. She's not given a report. She's not been disclosed as anything other than a treater. So to ask her - - I understand she can offer opinions about her own treatment. But to try to use her to - - as an expert to testify as to other doctors, I think would be inappropriate.

MR. BAKER: And Your Honor, particularly I intend to use her to speak about other doctors. She's testified that she uses other doctors' treatment in the course of her diagnoses, prognoses and treatment of patients. As an expert this Court certainly recognizes there's a difference between a retained expert and a not retained expert. She has not been retained as an expert in this case. She is a treating physician who has reviewed the course of the medical treatment, has commented on the course of the medical treatment and should rightly be allowed to testify to that. And I'd like to add as well that N.R.S. 50.275 allows her, in her capacity as expert as set out in the *Prabhu v. Levine* case, to speak to matters that would be otherwise inadmissible including hearsay.

And so Your Honor, by Nevada case law and Nevada statute she's an expert. She's not been disclosed as a retained expert but she is a physician and an expert.

THE COURT: I understand the distinction, and **I am familiar both of these cases.** Frankly I'm familiar with Dr. Shannon. She's testified in this Court before. So I think the motion should be granted in it's entirety.

MR. BAKER: Which motion is that?



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THE COURT: Motion to qualify her as an expert.<sup>7</sup>

**2. Court's Qualification of Dr. Schifini**

Dr. Schifini, one of Plaintiff's anesthesiologists, had an opportunity to review the entirety of Plaintiff's medical records and was also qualified and admitted as an expert.

MR. BAKER: I'm going to have him accepted by this Court as a treating physician, qualified as an expert in the areas of pain management, including neurologically mediated disease and the modalities of which are used to treat those diseases.

THE COURT: Any objection?

MR. WARD: No, Your Honor.

THE COURT: So ordered.<sup>8</sup>

\*\*\*

Q And as Chairman of the Department of Pain Management at UCLA, to your knowledge he studied RSD causal to a complex regional pain syndrome and a variety of neurologically mediated pathologies?

A Yes, that -

MR. WARD: Object; hearsay.

THE WITNESS: Dr. -

MR. BAKER: It's not a statement, Your Honor.

THE COURT: Mr. Ward, what was that?

MR. WARD: Hearsay. This witness is going to testify as to qualifications. And presumably he's going to testify as to qualifications and presumably he's going to testify as to findings, and I think it's all hearsay.

MR. BAKER: Your Honor, we dealt with that issue yesterday when I gave you the problem case and the remainder of the cases in yesterday, your ruling was that the doctors were allowed to refer to information that they had reviewed. He's been qualified as an expert, under the *Omastat* [phonetic] case that I handed you yesterday. Not *Omastat*, that was -- but you know the one I'm talking about. But yesterday you've already ruled on the same issue.

<sup>7</sup> See Exhibit "2," Shannon Trial Transcript, 7:14-9:24

<sup>8</sup> See Exhibit "3," Schifini Trial Transcript, 6: 4-10.



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MR. WARD: And I don't believe the case says that, but I will -- I'm not going to argue it anymore, and I'll simply note my objection.

MR. BAKER: A continuing objection is stipulated to, Your Honor.

THE COURT: Very well, noted for the record. Please proceed.<sup>9</sup>

3. Court's Qualification of Dr. Shah

Dr. Shah was the next provider to be qualified and admitted as an expert.

Q. And you've reviewed other doctor's medical records in terms of your care and treatment of Enrique Rodriguez, is that correct?

A. I have, yes.

MR. BAKER: At this time, Your Honor, I'd like to admit him as a treating physician but also qualify him as an expert in neurology, neurologically mediated diseases, those diagnostic tests to determine neurologic injury and related matters.

THE COURT: Any objection, Mr. Ward?

MR. WARD: Your Honor, I don't have any objection to his expertise, his qualifications. I don't have any objection to admitting him as an expert as a treating physician. He was not disclosed as an expert in this case. I object to anything that falls under the routine expert disclosure.

MR. BAKER: Your Honor, that's the argument that we've been making throughout trial.

THE COURT: Right. But, Mr. Ward, your objection is noted for the record.

MR. BAKER: And do you want a standing objection or are you more comfortable objecting each time? I mean I'm very happy to stipulate to a standing objection.

MR. WARD: I don't care. I just want to make sure I put it on the record.

THE COURT: I understand. The objection is noted for the record. **The motion is granted.**<sup>10</sup>

4. Court's Qualification of Dr. Kidwell

Dr. Kidwell was qualified and admitted *without* objection.

<sup>9</sup> *Id.*, at 10:6-11:8

<sup>10</sup> See **Exhibit "4,"** Shah Trial Transcript, 8:13-9:13.



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MR. BAKER: Move to admit the doctor as a treating physician of Enrique Rodriguez and is an expert in the field of pain management and anesthesiology.

THE COURT: Any objection, Mr. Ward?

MR. WARD: No, Your Honor.

THE COURT: Very well.<sup>11</sup>

**5. Court's Qualification of Dr. Mortillaro**

Lastly, Dr. Mortillaro was also qualified and admitted.

MR. BAKER: Your Honor, I move to qualify Dr. Mortillaro again as a neuropsychologist and related issues.

THE COURT: Uh-huh. Any objection?

MR. WARD: I do not object to him being accepted as an expert as a treater.

MR. BAKER: And I'll also offer him as a treating physician.

MR. WARD: I object to him being anything other than a treater, because I object to his qualifications. I think he's very well qualified, but he's not disclosed as an expert in this case.

MR. BAKER: And, Your Honor, that's the same conversation that we've had.

THE COURT: That's the same objection, noted for the record. **The motion is granted.** So ordered.<sup>12</sup>

**III. Legal Argument**

**A. Standard for New Trial**

Rule 59 governs motions for new trial.

- (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable

<sup>11</sup> See Exhibit "5," Kidwell Trial Transcript, 5: 15-20.

<sup>12</sup> See Exhibit "6," Mortillaro Trial Transcript, 8:19-9:8.



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diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Plaintiff submits that defense counsel is unable to establish any of the foregoing elements necessary for a new trial under Rule 59.

When there is substantial evidence to sustain the judgment, it will not be disturbed. *Brechan v. Scott*, 92 Nev. 633, 555 P.2d 1230 (1976).

The decision to grant or deny a motion for new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse. *Southern Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 577 P.2d 1234 (1978).

Standard of review for granting or denying motion for new trial is abuse of discretion. Rules Civ.Proc., Rule 59(a). *Dow Chemical Co. v. Mahlum*, 1998, 970 P.2d 98, 114 Nev. 1468, rehearing denied 973 P.2d 842, 115 Nev. 13.

An order granting a new trial for insufficiency of conflicting evidence will not be disturbed in the absence of a clear abuse of discretion. *Goldfield Mohawk Mining Co. v. Frances-Mohawk Mining & Leasing Co.*, 1913, 129 P. 315, 35 Nev. 423.

Plaintiff submits that there is *substantial* evidence to sustain the verdict and there is an absence of a clear abuse of discretion. Accordingly, defendant's motion should be denied in its entirety.

**B. Plaintiff's Counsel Did Not Engage in Misconduct**

As the Court will recall, Defense counsel, during Opening Argument, the evidentiary phase of the trial, and Closing Argument, accused Plaintiff's counsel of engaging in a systematic "medical build-up," and manipulation of the medical records.



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Post-trial, in a desperate and ill-founded manner, Defense counsel, in moving for a mistrial, then accused Plaintiff's counsel *and* Your Honor of engaging in a systematic *ex parte* conspiracy, rendering the trial unfair and impartial.

Now, Defense counsel is arguing that Plaintiff's counsel engaged in blatant premeditated and reprehensible misconduct.

Defendant argues that Plaintiff's counsel's alleged misconduct constitutes an *irregularity in the proceedings*. Counsel then argues that it is well settled under Nevada law that attorney misconduct constitutes an irregularity in the proceedings<sup>13</sup>.

Interestingly, however, they cite no Nevada law, *or any authority*, for that matter, in support of this position.

Defendant's real argument is that they were *surprised* and *unprepared* for the evidence presented at trial by Plaintiff's Economist, Mr. Dineen, and Dr. Schifini.

Defense counsel points to two (2) *examples* (arguments) of misconduct:

1. Plaintiff's counsel withheld evidence in regards to Plaintiff's tax returns; and
2. Plaintiff's counsel withheld evidence relied upon by Dr. Schifini.

Both arguments are factually flawed, and offer nothing new for this Court to consider. Candidly, they are baseless.

To once again accuse the undersigned of misconduct is simply disingenuous. Regardless, to the extent the admission of evidence during trial can somehow be interpreted as *misconduct* on the part of Plaintiff's counsel, the conduct itself was never objected to.

Moreover, defense counsel chose not to depose Dr. Schifini, and regardless, the 100+ documents that counsel argues Dr. Schifini relied upon, and Plaintiff's counsel *withheld*, were

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<sup>13</sup> Motion, 5: 16-17.



1 medical records of other providers which were, in fact disclosed, and ultimately, stipulated to  
2 by defense counsel as being part of Dr. Schifini's file. As this Court will recall, they were  
3 made part of the trial exhibits *via* stipulation prior to Dr. Schifini's testimony.

4  
5 In civil cases, the Supreme Court will consider arguments of egregious but  
6 unobjected-to misconduct at trial by counsel only in those rare circumstances where the  
7 counsel's comments are of such sinister influence as to constitute "irreparable and  
8 fundamental error," which is error that, if not corrected, would result in a substantial  
9 miscarriage of justice or denial of fundamental rights and which is present only when it is  
10 plain and clear that no other reasonable explanation for the verdict exists. *Ringle v. Bruton*,  
11 2004, 86 P.3d 1032, 120 Nev. 82. It is significant to note, in this context, and as the court will  
12 recall, that the Life Care Plan, which was provided, but not entered into evidence, provided  
13 greater damages than those that were testified to by Dr. Schifini.

14  
15 The admission of evidence in this case, relative to Dr. Schifini and Mr. Dineen,  
16 certainly cannot be deemed misconduct on the part of Plaintiff's counsel. Even assuming the  
17 admissions were interpreted as misconduct, it certainly was not on the level of constituting  
18 *irreparable and fundamental error*.

19  
20 To warrant reversal and a new trial on grounds of attorney misconduct of the  
21 prevailing party's attorney, the flavor of misconduct must sufficiently permeate an entire  
22 proceeding to provide conviction that the jury was influenced by passion and prejudice in  
23 reaching its verdict. *DeJesus v. Flick*, 2000, 7 P.3d 459, 116 Nev. 812.

24  
25 Obviously, this was not a jury trial, so in order to prevail under this standard, the  
26 defense would have to establish that Plaintiff's alleged misconduct permeated the entire trial  
27 such that *Your Honor* was influenced by passion and prejudice in reaching the verdict.

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1. Plaintiff's Counsel Did Not Withhold Evidence in re: Plaintiff's Tax Returns

Mr. Dineen was qualified in the areas of vocational rehabilitation and forensic economics at trial.

MR. BAKER: And Your Honor, at this time, I would ask that he be qualified in the area of vocational rehabilitation and forensic economics.

THE COURT: Any objection, Mr. Ward?

MR. WARD: No, Your Honor.

MR. BAKER: Okay. Just to let the Court know --

THE COURT: So ordered.<sup>14</sup>

Mr. Dineen was asked to look at the vocational issues, the types of work that Plaintiff was able to do prior to his accident, to look at what vocational options he may have in the future and then calculate that loss. He was also asked to look at the costs of future medical care and calculate those values, as well.<sup>15</sup>

Mr. Dineen met with the Plaintiff, reviewed his medical records, three (3) years of tax returns<sup>16</sup>, and social security materials in forming an opinion that Plaintiff was disabled.<sup>17</sup> Importantly, Mr. Dineen testified that Plaintiff was qualified by the Federal Government as being disabled.<sup>18</sup>

Mr. Dineen testified to a reasonable degree of economic and professional certainty that Plaintiff's income was *reported*.

Defense counsel is critical of the fact that Mr. Dineen, during his testimony at trial, and in response to defense counsel's inquiry as to whether Mr. Dineen knew if any of

<sup>14</sup> See Exhibit "7," Dineen Trial Transcript, 5:25; 6:1-6.

<sup>15</sup> *Id.*, at 7: 21-25; 8: 1-2.

<sup>16</sup> 1999, 2001 and 2004, which Mr. Dineen acknowledged were filed in 2009. *Id.*, at 18: 18-22.

<sup>17</sup> *Id.*, at 8: 9-25; 9-12: 22.

<sup>18</sup> *Id.*, at 12: 23- 18:12



1 Plaintiff's income was reported, indicated that he had received a letter from Plaintiff's tax  
2 preparer advising that the subject returns had, in fact been filed.

3 Q. Business income? Okay. So let's deal with the business income. Is it your opinion  
4 to a reasonable degree of professional probability that his business income, in the year  
5 2004, was \$208,000?

6 A. If that's what's reported on the return, yes.

7 Q. That's not my question. My question is, is it your opinion that that's what his  
8 income is, to a reasonable degree of professional responsibility?

9 A. Sure. That's what the business income is.

10 Q. Okay. When you say that's what the business income is, you used, in your direct  
11 examination, you used the term reported income?

12 A. Yes.

13 Q. Isn't it true that you don't know if any of this income was reported?

14 A. **I do know that it was reported.**

15 Q. Have you received additional information since I took your deposition –

16 A. Yes.

17 Q. -- that you haven't told me about?

18 A. **I just received this. It's a letter dated October 20th from the tax preparer,  
19 indicating that the returns were filed.**

20 MR. WARD: Okay. I'd like to make that part of the record.<sup>19</sup>

21 \*\*\*

22 Mr. Dineen's trial testimony occurred on November 2, 2010. The letter was dated  
23 October 20, 2010. Importantly, defense counsel did not mark the letter as an exhibit or move  
24 to admit the letter.

25 MR. WARD: I'm sorry. But I'm not going to mark it?

26 THE COURT: Not?

28 <sup>19</sup> Id., at 71: 7-25; 72: 1-6.



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MR. WARD: Not. Now –

THE COURT: I guess he's not going to move to admit it after all.

MR. WARD: I'm not going to move.

MR. BAKER: Okay.<sup>20</sup>

Defense counsel's argument that this letter was somehow intentionally withheld is unsupported. It was not the subject of direct examination, and the information relative to the same was brought out through cross-examination in response to counsel contentious inquiry as to whether Mr. Dineen knew if any of Plaintiff's income was in fact reported. Mr. Dineen was provided the letter from the tax preparer subsequent to his deposition, but merely days before his testimony. Defense counsel never moved to admit the document, but did question Mr. Dineen as to the authenticity of the letter.

Most importantly, defense counsel's argument that the letter was withheld deliberately by Plaintiff's counsel is not only factually in error, it avoids a well understood legal principal: Experts are permitted to rely on facts or data that is otherwise inadmissible. NRS 50.285.

NRS 50.285, governing the opinions of experts, states as follows:

1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by **or made known** to the expert at **or before the hearing**.
2. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data **need not be admissible in evidence**.

Again, the subject letter was "made known" to Mr. Dineen days before trial, and was never admitted as evidence in the case. Mr. Dineen, did, however, rely on the evidence in formulating an opinion that Plaintiff's income was reported.

Nevada case law makes it clear that experts may rely on evidence that is otherwise

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<sup>20</sup> *Id.*, at 72: 12-18.



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inadmissible at trial even when testifying before jury as to ultimate issues. NRS 50.285, 50.295. *Barrett v. Baird*, 1995, 908 P.2d 689, 111 Nev. 1496.

Plaintiff's counsel did not withhold any evidence regarding Plaintiff's tax returns, and the accusations of defense counsel are baseless and ill-founded.

Defense counsel, during cross-examination, accused Mr. Dineen of not being aware if any of Plaintiff's income was reported. Mr. Dineen responded that he did know that the income was reported, and referenced an October 20, 2010 letter from Plaintiff's tax preparer.

Defense counsel questioned Mr. Dineen as to the basis of his opinions, challenged his methodology and reliance on information and/or lack thereof, yet never moved to admit the subject letter.

There was certainly no misconduct on the part of Plaintiff's counsel.

**2. Plaintiff's Counsel Did Not Withhold Evidence Relied Upon by Dr. Schifini**

Laughably, defense counsel has argued that Plaintiff's counsel withheld 100+ documents that Dr. Schifini relied upon in providing expert opinions at trial.

First, defense counsel opted **not** to depose Dr. Schifini.

Secondly, Dr. Schifini reviewed *all* the medical records in the case.<sup>21</sup>

Third, defense counsel's only objections relative to Dr. Schifini's testimony were foundation and hearsay. Counsel, whose mistakes pre-trial, during trial and now post-trial, are numerous, did not object to the records relied upon, or the introduction of the documents other than on a *foundation* and *hearsay basis*, which related to Dr. Schifini's ability to provide expert testimony, and not his reliance on the documents.

Fourth, as this Court will recall, the records that counsel refers to were introduced and

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<sup>21</sup> See Exhibit "3," Oct. 28, 2010, Trial Testimony, 6: 12-14.



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admitted into evidence, with the only objections being *foundation* and *hearsay*.

Dr. Joseph Schifini was qualified as an expert in the areas of pain management, including neurologically mediated disease and modalities of which are used to treat those diseases.

MR. BAKER: I'm going to have him accepted by this Court as a treating physician, qualified as an expert in the areas of pain management, including neurologically mediated disease and the modalities of which are used to treat those diseases.

THE COURT: Any objection?

MR. WARD: No, Your Honor.

THE COURT: So ordered.<sup>22</sup>

As set forth above, an expert is permitted to rely upon inadmissible evidence. NRS 50.285, 50.295. *Barrett v. Baird*, 1995, 908 P.2d 689, 111 Nev. 1496.

In this case, however, the documents were introduced and admitted.

Separately, while counsel has argued that 100+ documents were presented, he does not identify the documents, and his position that he had never seen them before is illogical, as they were not new to the case, and were in fact stipulated into evidence.

C. The Court's Order Permitting the Introduction of Testimony of Providers Was Appropriate and Within the Sound Discretion of the Court

Defense counsel is critical of the fact that this Court qualified and admitted certain treating providers during trial. Defense counsel's position is that none of the providers were designated as witnesses or provided expert reports. Defense counsel's argument is that they never had notice of the testifying providers' opinions until trial and that they were *prejudiced* as a result.

First of all, during the discovery phase, Plaintiff, in his 9<sup>th</sup> Supplement to ECC

<sup>22</sup> *Id.*, 6: 4-10.



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Disclosures, advised the defense as follows:

Plaintiff reserves the right to call any and all experts designated by other parties in this case to render expert testimony. **This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.**<sup>23</sup>

Secondly, each of the testifying providers were qualified and admitted as experts.

Third, and as a point of reiteration, defense counsel **did not** depose one of Plaintiff's providers.

As will be demonstrated herein, the scope of a witness' testimony and whether that witness will be permitted to testify as an expert are within the discretion of trial court. Importantly, the trial court's ruling **will not** be disturbed unless there is an abuse of discretion.

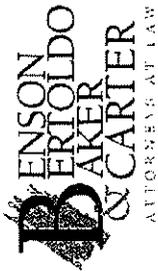
Secondly, once the district court certifies an expert as qualified, the expert may testify to all matters within the expert's experience or training, and the expert is generally given reasonably wide latitude in the opinions and conclusions he or she can state.

Third, Nevada Federal law establishes that treating physicians can appropriately have opinions as to the cause of an injury, based upon their examination of the patient, or to the degree of injury, or the extent of disability, in the future. The prognosis of the patient and what tasks a patient will be able to perform are legitimate opinions which come within the parameters of opinions required to be made by treating physicians, without subjecting them to the expert designation or report requirements.

Most importantly, under Nevada law, treating physicians are not considered retained experts. They should be allowed to testify as to treatment, diagnosis (including causation), and prognosis based upon their treatment of the patient and their medical training.

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<sup>23</sup> See Exhibit "8," 9<sup>th</sup> Supplement.



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1. Scope and Admission of Expert Testimony are Within Discretion of Trial Court

The threshold test for admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine fact in issue; the goal is to provide the trier of fact resource for ascertaining truth in relevant areas outside ken of ordinary laity. N.R.S. 50.275. *Prabhu v. Levine*, 1996, 930 P.2d 103, 112 Nev. 1538, rehearing denied.

The scope of a witness' testimony and whether a witness will be permitted to testify as an expert witness are within the discretion of the trial court, and the trial court's ruling will not be disturbed unless there is an abuse of discretion. *See Murphy v. F.D.I.C.*, 106 Nev. 26, 787 P.2d 370 (1990); *Provence v. Cunningham*, 95 Nev. 4, 588 P.2d 1020 (1979); *Emmons v. State*, 1991, 807 P.2d 718, 107 Nev. 53; *see also, Childers v. State*, 1984, 680 P.2d 598, 100 Nev. 280; *Watson v. State*, 1978, 578 P.2d 753, 94 Nev. 261; *Porter v. State*, 1978, 576 P.2d 275, 94 Nev. 142; *Singleton v. State*, 1974, 522 P.2d 1221, 90 Nev. 216.

The Nevada Supreme Court will not disturb a lower court's determination that expert testimony is admissible unless it is clear that the trial judge abused the discretion vested in him in allowing such testimony. *Provence v. Cunningham*, 95 Nev. 4, 588 P.2d 1020 (1979).

Furthermore, the question of whether expert testimony is appropriate under the particular circumstances of the case is for the trial court in the exercise of a sound discretion. *Duff v. Page*, 1957, 249 F.2d 137.

Additionally, the fact that any of the providers had not performed certain procedures, or had never performed such procedures goes to the *weight*, not the admissibility, of the evidence. *Brown v. Capanna*, 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989).

Lastly, even if the Court were to determine that Plaintiff's counsel failed to comply with the disclosure requirements, the decision whether to permit expert witness to testify



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where there has been failure to comply with disclosure requirements is committed to trial court's discretion. Rules Civ.Proc., Rule 26(b)(4). *Murphy v. Federal Deposit Ins. Corp.*, 1990, 787 P.2d 370, 106 Nev. 26.

2. **Defense Counsel Did Not Depose Any of Plaintiff's Providers, and Therefore, Cannot Argue "Surprise"**

Defense counsel cannot argue *surprise* since they opted not to depose a single treating provider.

Nevada law makes it clear that a new trial is not warranted on grounds of *surprise* based on testimony which, *with reasonable diligence*, could have been anticipated. Rules Civ.Proc., Rule 59. *DeLee v. Roggen*, 1995, 907 P.2d 168, 111 Nev. 1453.

Furthermore, the "surprise" contemplated by Rule 59 (a) must result from some fact, circumstance, or situation in which a party is placed unexpectedly, to his injury, without any default or negligence of his own, and which ordinary prudence could not have guarded against. *Havas v. Haupt*, 94 Nev. 591, 583 P.2d 1094 (1978).

Lastly, the grant of denial of a new trial based upon a claim of "surprise" lies within the sound discretion of the trial court. *Id.*

Plaintiff submits that under the undisputed facts of this case, *surprise* cannot be argued or supported.

3. **Once Qualified as an Expert, Expert May Testify as to All Matters Within Expert's Experience or Training**

Importantly, once the district court certifies an expert as qualified, the expert may testify to all matters within the expert's experience or training, and the expert is generally given reasonably wide latitude in the opinions and conclusions he or she can state, being subject only to the general exercise of discretion by the district court concerning whether the



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expert is truly qualified to render such testimony. See NRS 50.275<sup>24</sup>; *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992); *Brown v. Capanna*, 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989) (a proposed medical expert should not be scrutinized by an excessively strict test of qualifications); *Freeman v. Davidson*, 105 Nev. 13, 15, 768 P.2d 885, 886 (1989) (“[a]n expert witness need not be licensed to testify as an expert, as long as he or she possesses special knowledge, training and education, or in this case, knowledge of the standard of care”); *Wright v. Las Vegas Hacienda*, 102 Nev. 261, 263, 720 P.2d 696, 697 (1986) (“[a] witness need not be licensed to practice in a given field ... to be qualified to testify as an expert”).

**4. Under Nevada Law, Treating Providers are Allowed to Testify as to Treatment, Diagnosis, Causation and Prognosis**

*Tracey v. American Family Mut. Ins. Co.*, 2010 WL 3808694 (D.Nev. Sep 21, 2010), specifically held that under Nevada law, treating physicians are not considered retained experts and they should be allowed to testify as to treatment, diagnosis, including causation, and prognosis based upon their treatment of the patient and their medical training. In *Tracy*, the court further held that the Plaintiff was allowed to question his treating physicians in regards to how they determined the precise location of Plaintiff's back pain, including any diagnostic tests they conducted.

Nevada federal courts have consistently held that “[s]ince a treating physician's opinion on matters such as ‘causation, future treatment, extent of disability and the like’ are part of the ordinary care of a patient, a treating physician may testify to such opinion.” *Elgas*

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<sup>24</sup> NRS 50.275 provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.



1 v. *Colorado Belle Corp.*, 179 F.R.D. 296 (D.Nev.1998) (quoting *Piper v. Harnischfeger*  
2 *Corp.*, 170 F.R.D. 173, 174-75 (D .Nev.1997)).

3 In this case, Plaintiff was permitted to ask his treating physicians questions regarding  
4 the examinations they performed, diagnostic tests they performed, the cause of Plaintiff's pain  
5 and treatment, etc., as appropriate under Nevada law. See *Piper* 170 F.R.D. 173. They were  
6 witnesses testifying as to the facts of their examination, diagnosis and treatment and their  
7 opinions about the cause of an injury or the extent of any remaining disability in this regard  
8 were a necessary part of the treatment of the Plaintiff. *Kirkland v. Union Pacific Railroad*,  
9 189 F.R.D. 604 (D.Nev.1999).

11 Plaintiff asked his treating physicians to give their opinions, as treating physicians, as  
12 to whether the kind of injuries complained of were caused by the subject incident. Defense  
13 counsel had an opportunity to question the *weight* to be given their treatment.

15 Of course, of particular importance are the two (2) cases provided in support of the  
16 qualification and admission of treating providers as experts during trial: *Prabhu v. Levine*,  
17 112 Nev. 1538, 930 P.2d 103 (Nev. Dec 31, 1996) (NO. 21270), rehearing denied (Jul 03,  
18 1997) and *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992).

19 In *Prabhu*, Dr. Prabhu contended that the district court erred in admitting Dr. Levine's  
20 deposition testimony because his deposition was taken only twelve days before trial and  
21 because prior to the deposition, Ms. Franco had designated him only as a treating physician.  
22 In addition, Dr. Prabhu pointed out that Ms. Franco never supplemented her interrogatory  
23 responses to identify Dr. Levine as an expert witness. According to Dr. Prabhu, his counsel  
24 was forced to cross-examine Dr. Levine without prior knowledge that Dr. Levine would  
25 answer questions regarding the standard of care and causation. Dr. Prabhu asserted that Ms.  
26 Franco's failure to identify Dr. Levine at an earlier time violated NRCP 26 and that Dr.  
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1 Levine's testimony should have been excluded.<sup>25</sup>

2 This is essentially the same argument that defense counsel in this case is making. In  
3 determining that the district court did not abuse its discretion by admitting Dr. Levine's  
4 testimony, the Nevada Supreme Court noted as follows:

5 NRS 50.275 provides that "[i]f scientific, technical or other specialized knowledge  
6 will assist the trier of fact to understand the evidence or to determine a fact in issue, a  
7 witness qualified as an expert by special knowledge, skill, experience, training or  
8 education may testify to matters within the scope of such knowledge." This court has  
previously determined that:

9 [t]he threshold test for the admissibility of testimony by a qualified expert is  
10 whether the expert's specialized knowledge will assist the trier of fact to  
11 understand the evidence or determine a fact in issue. The goal of course, is to  
12 provide the trier of fact a resource for ascertaining truth in relevant areas  
outside the ken of ordinary laity.

13 *Townsend v. State*, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987).

14 In addition, we have recognized that "[a] decision concerning the competency of a  
15 witness to offer an opinion as an expert is within the sound discretion of the trial  
16 court[,] and the ruling will not be disturbed unless a clear abuse of the court's  
17 discretion is shown." *Cheyenne Construction v. Hozz*, 102 Nev. 308, 311, 720 P.2d  
18 1224, 1226 (1986). Here, Dr. Levine was not designated as an expert witness. He was,  
19 however, designated as a witness, albeit as a treating physician. In addition, Dr.  
Prabhu's counsel attended the deposition and cross-examined Dr. Levine regarding the  
pertinent standard of care and causation. The district court determined that Dr.  
Levine's testimony should be admitted, and we conclude that the district court did not  
abuse its discretion in so ruling.

20 The basis of defense counsel's argument that *Prabhu* is inapposite is that: a) *Prabhu*

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22 <sup>25</sup> NRCPC 26(b)(4)(A)(i) provides as follows:

23 A party may through interrogatories require any other party to identify each person whom the other  
24 party expects to call as an expert witness at trial, to state the subject matter on which the expert is  
expected to testify, and to state the substance of the facts and opinions to which the expert is expected  
25 to testify and a summary of the grounds for each opinion.

26 Additionally, NRCPC 26(b)(5)(G) states as follows:

27 Except as provided herein, upon objection of a party who has served his list of witnesses in compliance  
28 with the provisions hereof, no party required to serve a list of expert witnesses on the objecting party  
may call an expert witness to testify except for purposes of impeachment unless the requirements of  
26(b)(5) for that witness have been met.



1 was a medical malpractice case; and b) the foundation of the decision was the lack of  
2 prejudice demonstrated.

3 The holding, however, as clearly enunciated by the Nevada Supreme Court, is that: a)  
4 decisions concerning the competency of a witness to offer an opinion as an expert is within  
5 the sound discretion of the trial court; b) the ruling will not be disturbed unless a clear abuse  
6 of discretion is shown.

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8 *Fernandez, supra*, was a medical malpractice claim that resulted from the death of  
9 Mr. Fernandez. At trial, Dr. Queniahah, a surgeon, and Dr. Tripoli, a pathologist, testified for  
10 Fernandez in his case-in-chief. Neither doctor practiced as specialists in internal medicine.  
11 The defendants asserted that neither of these doctors could testify to the standard of care for  
12 their specialty, internal medicine.

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14 In dismissing this argument, the court in *Fernandez* held as follows:

15 Once a physician is qualified as an expert, he or she may testify to all matters within  
16 his or her experience or training, and the expert is generally given reasonably wide  
17 latitude in the opinions and conclusions he or she can state, being subject only to the  
18 general exercise of discretion by the district court concerning whether the expert is  
19 truly qualified to render such testimony. See NRS 50.275; *Brown v. Capanna*, 105  
20 Nev. 665, 671, 782 P.2d 1299, 1303 (1989) (a proposed medical expert should not be  
21 scrutinized by an excessively strict test of qualifications); *Freeman v. Davidson*, 105  
22 Nev. 13, 15, 768 P.2d 885, 886 (1989) (“[a]n expert witness need not be licensed to  
23 testify as an expert, as long as he or she possesses special knowledge, training and  
24 education, or in this case, knowledge of the standard of care”); *Wright v. Las Vegas  
25 Hacienda*, 102 Nev. 261, 263, 720 P.2d 696, 697 (1986) (“[a] witness need not be  
26 licensed to practice in a given field ... to be qualified to testify as an expert”).

27 Within the field of medicine, many matters are common knowledge to all physicians  
28 and recognized as truisms by the medical profession.

29 Again, in accordance with *Prabhu* and NRS 50.275, as set forth by Plaintiff’s counsel  
30 at trial, it was in the Court’s sound discretion to qualify Plaintiff’s treating providers as  
31 experts. Once qualified, consistent with the holding in *Fernandez*, the treating providers were  
32 permitted to testify to all matters within his or her experience and/or training.



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Defense counsel's arguments at trial, and set forth in the subject motion, merely go to the *weight* of the evidence, and not the admissibility.

**a. As Non-Retained Experts, No Reports or Designation Were Required**

Plaintiff's treating providers were not required to produce expert reports.

The initial-disclosure provisions in Rule 26(a) of the federal rules, as amended in 2000, are adopted as modified in Rule 16.1(a) of the Nevada rules.

FRCP 26(a) clearly contemplates two types of experts: those who may qualify as experts, but are not retained or specially employed, and those who are retained or specially employed to provide testimony in the case. Written reports are required only for experts in the latter category. As explained in the Advisory Committee notes, a treating physician may testify without any requirement for a written report. Fed.R.Civ.P. 26(a)(2), Advisory Committee's Notes, 1993 amendment.

Treating physicians commonly consider the cause of any medical condition presented in a patient, the diagnosis, the prognosis and the extent of disability, if any, caused by the condition or injury. Opinions as to these matters are encompassed in the ordinary care of a patient and do not subject the treating physician to the report requirement of Rule 26(a)(2)(B). Numerous other courts who have considered this issue have reached similar conclusions. *Piper v. Harnischfeger Corp.*, 170 F.R.D. 173, 175 (D.Nev.1997) (no written report required if treating physician's testimony as to "causation, future treatment, extent of disability and the like" is based on knowledge acquired in the course of treatment); *Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 349 (D.Colo.1995) (opinions of treating physicians as to the cause of an injury or degree of future injury based on an examination of the patient "are a necessary part of the treatment of the patient."); *Wreath v. U.S.*, 161 F.R.D. 448, 449 (D.Kan.1995) ("The determining issue is the scope of the proposed testimony"); *Mangla v. University of*



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*Rochester*, 168 F.R.D. 137, 139 (W.D.N.Y.1996) (“A treating physician's testimony ... is based on the physician's personal knowledge of the examination, diagnosis, and treatment of a patient and not from information acquired from outside sources[,]” thus no report is required).

In *Salas v. U.S.*, 165 F.R.D. 31, 33 (W.D.N.Y.1995), the court explained:

The relevant question is whether these treating physicians acquired their opinions as to the cause of the plaintiff's injuries directly through their treatment of the plaintiff. If so, then they must be treated as treating physicians, who can be deposed under the amendments to Rule 26 but who cannot be forced to file the written report required by Rule 26(a)(2)(B).

As a general rule, a treating physician considers not just the plaintiff's diagnosis and prognosis, but also the cause of the plaintiff's injuries.

The exclusion of treating physicians from the disclosure requirements of Rule 26(a)(2)(B) has been consistently honored by Nevada Federal Courts. *Kirkland v. Union Pacific Railroad*, 189 F.R.D. 604 (D.Nev.1999); *Piper v. Harnischfeger Corp.*, 170 F.R.D. 173, 174-175 (D.Nev.1997); *Elgas v. Colorado Belle Corp.*, 179 F.R.D. 296, 299 (D.Nev.1998)), and elsewhere ( Cf. *Hall v. Sykes*, 164 F.R.D. 46, 48 (E.D.Va.1995); *Shapardon v. West Beach Estates*, 172 F.R.D. 415, 417 (D.Haw.1997)).

As stated in *Kirkland*, supra:

Furthermore, treating physicians can appropriately have opinions as to the cause of an injury, based upon their examination of the patient, or to the degree of injury, or the extent of disability, in the future. The prognosis of the patient and what tasks a patient will be able to perform are legitimate opinions which come within the parameters of opinions required to be made by treating physicians, without subjecting them to the requirements of Rule 26(a)(2)(B). *Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 349 (D.Colo.1995).

*Piper v. Harnischfeger Corporation*, 170 F.R.D. 173, 174 (D.Nev.1997), is particularly instructive as in that case, the court was faced with a similar *restrictive* argument:

Defendant argues that treating physicians are exempt from the report requirement if they are only going to testify as to their “factual percipient observations”, but are subject to the requirements of subdivision (a)(2)(B) if they go beyond factual observations and give opinions. Presumably, Defendant is referring to opinions on



1 such matters as causation, future treatment, extent of disability and the like. The court  
 2 believes that Defendant's view is too narrow and that the rule is not that restrictive.

3 It is common place for a treating physician during, and as part of, the course of  
 4 treatment of a patient to consider things such as the cause of the medical condition, the  
 5 diagnosis, the prognosis and the extent of disability caused by the condition, if any.  
 6 Opinions such as these are a part of the ordinary care of the patient and do not subject  
 7 the treating physician to the extensive reporting requirements of Fed.R.Civ.P.  
 8 26(a)(2)(B).

9 Other courts that have considered this issue have reached a similar conclusion. *Baker*  
 10 *v. Taco Bell Corp.*, 163 F.R.D. 348, 349 (D.Colo.1995); *Wreath v. United States*, 161 F.R.D.  
 11 448, 449 (D.Kan.1995); *Bucher v. Gainey Transportation Service of Indiana, Inc.*, 167 F.R.D.  
 12 387, 390 (M.D.Penn.1996); *Salas v. United States*, 165 F.R.D. 31, 33 (W.D.N.Y.1995);  
 13 *Mangla v. University of Rochester*, 168 F.R.D. 137, 139 (W.D.N.Y.1996).

14 Plaintiff's treating providers were not subject to the strict disclosure requirements.  
 15 Defense counsel was fully aware of the nature and substance of the claimed injuries and had  
 16 also been given the medical records generated by these physicians. Defense counsel was free  
 17 to depose the treating physicians. They chose not to do so.

18 **b. Plaintiff's Treating Providers Were Permitted to Rely on the**  
 19 **Opinions of Non-Testifying Experts as Foundation for Their**  
 20 **Opinions**

21 Nevada law makes it equally clear that Plaintiff's treating providers were permitted to  
 22 rely on the opinions of non-testifying experts as a foundation for their opinions given at trial.  
 23 *Villagomes v. Laboratory Corp. of America*, 2010 WL 4628085 (D.Nev. Nov 08, 2010).

24 As stated in *Villagomes*:

25 Rule 703 of the Federal Rules of Evidence states that a qualified expert may base his  
 26 opinions on facts or data made known to him if it is of a type reasonably relied upon  
 27 by experts in the particular field in forming opinions or inferences on the subject. The  
 28 facts and data relied on by the expert need not be admissible in order for the opinion or  
 inference to be admitted. A testifying expert may rely on the opinions of non-  
testifying experts as a foundation for the opinions within the testifying expert's field of  
expertise. Rule 703, however, is not a license for an expert witness to simply parrot  
 the opinions of non-testifying experts. *United States Gypsum v. LaFarge North*



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*American, Inc.*, 670 F.Supp.2d 748, 758 (N.D.Ill.2009); *Stephenson v. Honeywell Intern., Inc.*, 703 F.Supp.2d 1250, 1255 (D.Kan.2010); *Deutz Corp. v. City Light & Power, Inc.*, 2009 WL 2986515 (N.D.Ga.2009)

*United States Gypsum, supra*, states in this regard:

“[i]t is common in technical fields for an expert to base an opinion in part on what a different expert believes on the basis of expert knowledge not possessed by the expert; and it is apparent from the wording of Rule 703 that there is no general requirement that the other expert testify as well.” *Dura Automotive Systems of Indiana, Inc. v. CTS Corporation*, 285 F.3d 609, 613 (7th Cir.2002). Such testimony need only be excluded when an expert is “just parroting the opinion” of another expert. *Id.* Otherwise, an expert may rely on information provided by non-testifying experts, so long as he does not merely serve as a spokesman for the absent expert, vouching for the truth of his statements. *In re James Wilson Associates*, 956 F.2d 160, 172-73 (7th Cir.1992).

670 F.Supp.2d at 758.

**D. The Evidence was Sufficient to Justify the Verdict**

Defense counsel has argued that the body of evidence presented “conclusively demonstrates the evidence was insufficient to justify the verdict.”<sup>26</sup> This Court’s Findings of Fact and Conclusions of Law refute this laughable position.

To remind defense counsel, on the issue of Liability, this Court found as follows:

**FINDINGS OF FACT**

During the course of this trial, Plaintiff established that, prior to the subject incident, Defendant was aware that promotional items were being thrown into crowds at events on the premises; that Defendant knew this behavior was inappropriate because it was a safety issue and could foreseeably cause injury to an individual; that prior to the incident at bar, Defendant conducted a staff meeting where staff was instructed not to cause promotional items to be thrown into crowds because of said safety concerns; and that Defendant, despite this knowledge and awareness, constructed a “field goal” within the sports book for purposes of throwing promotional items at sporting events.

Sheri Long, the Director of Marketing at The Palms, testified that she was aware that promotional items were thrown into crowds before the subject incident; this witness acknowledged this behavior was inappropriate because it constituted a safety issue which could foreseeably cause injury to an individual.

In her testimony, Ms. Long specifically recalled holding a meeting, before the subject incident, and instructing her staff that items should not be thrown into crowds during

<sup>26</sup> See Motion, 19: 7-8.



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promotional events.

Ms. Long acknowledged that the injuries suffered by Plaintiff were exactly of the type she was concerned would occur if promotional items were thrown into crowds at promotional events.

Ms. Long further testified that what occurred in this case is what she was trying to prevent when she conveyed to her staff that promotional items were not to be thrown into a crowd at an event.

Vikki Kooinga, Risk Manager at The Palms, also testified that throwing items into a crowd could foreseeably cause injury to someone in the audience.

Ms. Kooinga acknowledged that throwing promotional items into the crowd was inappropriate, wrong and beneath the standard of care for the hotel in protecting the safety of their patrons upon the premises.

Lastly, Ms. Kooinga testified that she would have expected hotel Security to stop anyone from throwing items into the crowd.

Plaintiff was then injured when promotion items were thrown into the crowd at a promotional event.

**CONCLUSIONS OF LAW**

NRCF 52(c) states in pertinent part as follows:

If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence.

Liability has been conclusively established by the Plaintiff in this matter. The unequivocal testimony and undisputed facts establish liability and are as follows:

1. Defendant was aware promotional items were being thrown into crowds at events before the incident at bar;
2. Defendant conducted a staff meeting prior to the incident at bar where staff was instructed not to cause or permit promotional items to be thrown into crowds at events;
3. Defendant acknowledged that throwing promotional items into crowds was inappropriate;



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4. Defendant acknowledged that throwing promotional items into crowds was a safety concern as it could foreseeably cause injury to an individual;
5. Defendant acknowledged that said foreseeable risk of injury was known by them prior to the incident at bar;
6. Despite this awareness, after said staff meeting, and with knowledge of said foreseeable risk of harm, Defendant constructed a goal post in the sports book for purposes of promotional items to be thrown;
7. Plaintiff was then injured as a direct and proximate result of throwing promotional items at an event upon Defendant's premises.

Additionally, Defendant has conceded that there was a known safety procedure prohibiting promotional items from being thrown into the crowds.

Defendant's conceded that they violated this known safety procedure as related to the case at bar.

The known safety procedure was admissible as relevant to the issue of liability.

Defendant's policy and the breach thereof both aided this Court, as the finder of fact, in determining the issue of liability. No comparative liability was found on the part of the Plaintiff.

Therefore, this Honorable Court finds and adjudges liability against Defendant PALMS CASINO RESORT and in favor of the Plaintiff ENRIQUE RODRIGUEZ herein. These findings and conclusions are made and based upon the weight of the testimony and evidence aforesaid, and is reached independently of any other finding, ruling, or conclusion of the Court.<sup>27</sup>

As to the Verdict, this Court specifically found as follows:

1) Liability in favor of the Plaintiff in this matter was determined as consistent with the Findings of Fact and Conclusions of law granting Directed Verdict pursuant to NRCF 52 entered in this matter on March 10, 2011.

2) The Court finds the testimony of Plaintiff's treating physicians, including, but not limited to Dr. Shifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shaw, Dr. Shannon, and Dr. Tauber to be persuasive on the issue of the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial and, accordingly, and in this Court's discretion, awards as past medical expenses the amount of \$376,773.38 and future medical expenses in the amount of \$1,854,738.00.

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<sup>27</sup> See Exhibit "9," Findings of Facts and Conclusions of Law in re: Rule 52



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2 3) Based upon the testimony of said treating physicians, the Plaintiff Enrique Rodriguez,  
3 and “before and after” lay witnesses who testified at the time of trial, the Court finds that  
4 Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of  
5 the subject incident which have detrimentally impacted his daily living and functioning and,  
6 consistent with that finding, and in this Courts discretion, awards as past pain and suffering  
7 the amount of \$1,243,350.00 and future pain and suffering in the amount of \$1,865,025.00.

8 4) The Court finds the testimony of Plaintiff’s economist, Terrence Dineen, persuasive  
9 on the issue of Plaintiff’s loss of economic opportunity, vocational disability, and loss of past  
10 and future earnings, finds and concludes the Plaintiff suffered significant detrimental impact  
11 to his ability to transact in the field of real-estate purchases, refurbishment, and sales due to  
12 his physical limitations resultant of the subject injury, finds that sufficient opportunity existed  
13 and exists in the repressed real estate market for Plaintiff to continue to profitably purchase,  
14 refurbish and sell real-estate absent said physical limitations, and is persuaded by and accepts  
15 the calculations of Mr. Dineen with respect to the same and, in this Court’s discretion, awards  
16 past lost income in the amount of \$289,111.00 and future lost income in the amount of  
17 \$422,593.00.

18 5) As to the allocation of liability the Court finds liability against Defendant Fiesta  
19 Palms, LLC, as set forth in Finding and Conclusion #1, above, but finds that Defendant  
20 Beavers also failed to act in the manner of the average reasonable person under similar  
21 circumstances in a manner creating a foreseeable harm to patrons of the Palms by throwing  
22 promotional items into a crowded environment and in other and further manners as elucidated  
23 at the time of trial. The Court, in its discretion, therefore apportions liability at 60% to the  
24 Palms and 40% to Beavers, with no finding of comparative fault on the part of the Plaintiff.

25 WHEREFORE, this Court finds and concludes that a verdict be entered in said amounts as  
26 set forth on the stipulated Verdict form attached hereto as Exhibit #1.<sup>28</sup>

27 The foregoing can hardly be interpreted as insufficient; rather, the evidence was  
28 substantial, and clearly supportive of the verdict.

The Nevada Supreme Court has held repeatedly that where a question of fact has been  
determined by the trial court, the court will not reverse unless the judgment is clearly  
erroneous or not based on substantial evidence. *NRCP 52(a)*. *Kockos v. Bank of Nevada*, 90  
Nev. 140, 520 P.2d 1359 (1974); *Fletcher v. Fletcher*, 89 Nev. 540, 516 P.2d 103 (1973); *B &*  
*C Enterprises v. Utter*, 88 Nev. 433, 498 P.2d 1327 (1972); *Savini Constr. Co. v. A. & K.*  
*Earthmovers, Inc.*, 88 Nev. 5, 492 P.2d 125 (1972); *Brandon v. Travitsky*, 86 Nev. 613, 472

<sup>28</sup> See Exhibit “10,” Findings of Fact and Conclusions of Law in Support of Verdict.



1 P.2d 353 (1970); *Richfield Oil Corp. v. Harbor Ins. Co.*, 85 Nev. 185, 452 P.2d 462 (1969).

2 Plaintiff submits, and the foregoing demonstrates, that Plaintiff established the amount  
3 of damages by substantial evidence, with reasonable certainty; proved the amount of damages  
4 with reasonable certainty; proved the incident caused specified losses; provided substantial  
5 evidence of revenues and expenses to prove lost profits; and provided evidence of lost  
6 earnings to support an award of damages for lost earning capacity.

8 **E. The Court's Order Striking Defendants' Experts was Appropriate**

9 Defendant has not, and cannot, establish the existence of any of the reasons set forth in  
10 NRCP 59 to justify a new trial relative to this issue. Rather, they have simply re-iterated the  
11 arguments they offered in opposition to Plaintiff's Motion to Strike.

12 None of the authority or argument constitutes *newly-discovered evidence*, and  
13 therefore, it would not serve as a ground for relief under Rule 59.

14 Defendant presented two (2) experts in this trial<sup>29</sup>, neither of whom opined that their  
15 opinions were given to a reasonable degree of professional probability as required under  
16 Nevada law.<sup>30</sup>

17 Accordingly, Plaintiff sought and obtained an Order to Strike Dr. Cargill's testimony  
18 in its entirety, as well as an Order to Strike Mr. Franklin's opinions relative to standard of care  
19 and dangerous activity. This Court entered specific Findings of Fact and Conclusions of Law  
20 in support of the Order to Strike.<sup>31</sup>

21 Specifically, this Court found as follows:

22 **FINDINGS OF FACT**

23 Defendant presented two (2) experts in this trial, Dr. Thomas Cargill (Economist) and  
24 Forrest Franklin (Liability), neither of whom opined that their opinions were given to

25 <sup>29</sup> Dr. Thomas Cargill (Economist) and Forrest Franklin (Liability).  
26 <sup>30</sup> NRS 50.275; *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. Jul 24, 2008) (NO. 46722)  
27 <sup>31</sup> See **Exhibit "11,"** Findings of Fact and Conclusions of Law in Support of Order to Strike.  
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a reasonable degree of professional probability as required under Nevada law.

Forrest Franklin, Defendant's liability expert, was retained to develop and render an opinion with respect to the standard of care as it relates to throwing objects, memorabilia, and promotional articles into crowds.

Mr. Franklin offered the following opinions:

1. Throwing memorabilia as a promotional effort into crowds is not a substandard protocol;
2. It is not unsafe to throw things into crowds; and
3. It is not below the standard of care to throw items into a crowd.

None of these opinions, however, were given to a reasonable degree of professional probability.

Dr. Cargill offered the following two (2) opinions at trial:

1. Plaintiff could not have made as much in the current financial market as he could have back in 2004 because the bubble burst in the housing market; and
2. Mr. Dineen's discount rates were inappropriate.

Neither of these opinions was given to a reasonable degree of professional probability.

#### CONCLUSIONS OF LAW

To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Dr. Cargill and Mr. Franklin's testimony failed to satisfy the "assistance" requirement of NRS 50.275, in that neither expert provided opinions to a reasonable degree of professional probability.

Accordingly, their opinions did not rise to the level of "scientific knowledge" within the meaning of NRS 50.275.

The opinions of Dr. Cargill and Mr. Franklin offered insufficient foundation for this court to take judicial notice of the scientific basis of those conclusions.

While counsel for the Defendant may have properly qualified said individuals as experts, the opinions rendered by the respective experts were speculative, as the court was not advised and the record does not reflect whether such opinions were made on



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the basis of "possibility" or some other standard lower than "a reasonable degree of professional probability."

Accordingly, the testimony of Cargil and Franklin did not satisfy the "assistance" requirement of NRS 50.275.<sup>32</sup>

Importantly, and as established above, the determination of liability and supportive findings and conclusions was made and based upon the weight of the testimony and evidence, and was reached independently of any other finding, ruling, or conclusion of the Court.<sup>33</sup>

**IV. Conclusion**

Based on the foregoing, Plaintiff respectfully requests that Defendant's motion be denied in its entirety.

Plaintiff submits that defense counsel is unable to establish any of the foregoing elements necessary for a new trial under Rule 59.

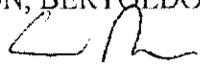
Plaintiff submits that the scope of a witness' testimony and whether a witness will be permitted to testify as an expert witness are within the discretion of the trial court, and the trial court's ruling will not be disturbed unless there is an abuse of discretion.

Plaintiff submits that there is *substantial* evidence to sustain the verdict and there is an absence of a clear abuse of discretion.

Accordingly, defendant's motion should be denied in its entirety.

DATED this 22 day of April, 2011.

BENSON, BERTOLDO, BAKER & CARTER

BY: 

STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiffs

<sup>32</sup> *Id.*

<sup>33</sup> See Exhibit "9," Findings of Facts and Conclusions of Law in re: Rule 52.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22 day of April 2011, a true and correct copy of the foregoing document was served via 1<sup>st</sup> Class, U.S. Mail, postage thereon fully prepaid as follows:

Keith Gillette, Esq. Archer Norris 2033 North Main Street, Suite 800 P.O. Box 8035 Walnut Creek, California 94596 Co-counsel for Fiesta Palms	925-930-6600 Telephone 925-930-6620 Facsimile
Jeffery A. Bendavid, Esq. Moran & Associates 630 S. Fourth St. Las Vegas, NV 89101 Attorneys for Defendant Fiesta Palms	384-8424 Telephone 384-6568 Facsimile
Marsha L. Stephenson, Esq. Stephenson & Dickinson 2820 West Charleston Blvd., Suite 19 Las Vegas, Nevada 89102 Co-counsel for Fiesta Palms	474-7229 Telephone 474-7237 Facsimile

  
An Employee of Benson, Bertoldo, Baker & Carter

# **EXHIBIT 1**

C. AL

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*Alfonso D. Blum*  
CLERK OF THE COURT

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

**ENSON  
FRIOLDO  
BAKER  
& CARTER**  
ATTORNEYS AT LAW

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DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

vs.

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT; BRANDY BEAVERS; DOES 1  
through X, inclusive, and ROE BUSINESS  
ENTITIES 1 through X, inclusive,

Defendants

CASE NO: A531538

DEPT NO: 10

TRIAL DATE: 10/25/10

VERDICT

The Honorable Jessie Walsh, presiding judge in the above-entitled action, hereby finds for  
Plaintiff ENRIQUE RODRIGUEZ as follows:

1. The Court finds against Defendant FIESTA PALMS, L.L.C.
2. The Court finds against Defendant BRANDY BEAVERS.

Yes / No

///

///

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**ENSON**  
**ERDOLDO**  
**AKER**  
**ST. CARTER**  
ATTORNEYS AT LAW

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3. The Court finds the percentage of fault between Defendants as follows

Defendant FIESTA PALMS, L.L.C.	<u>60</u> %
Defendant BRANDY BEAVERS	<u>40</u> %

4. The total amount of the plaintiff's damages is divided as follows:

Past Medical Expenses	<u>\$376,773.38</u>
Future Medical Expenses	<u>\$1,854,738.</u>
Past Pain and Suffering	<u>\$1,243,350.</u>
Future Pain and Suffering	<u>\$1,965,025.</u>
Past Lost Income	<u>\$289,111.</u>
Future Lost Income	<u>\$422,592.</u>

5. Further, the Court finds that Defendant Fiesta Palms, L.L.C. acted with conscious disregard of the rights or safety of others when it was aware of the probable dangerous consequences of its conduct and willfully and deliberately failed to avoid those consequences.

Yes / No

DATED this 7<sup>th</sup> day of Mar February, 2011.

Jessie Walsh  
HON. JESSIE WALSH, District Court Judge

## **EXHIBIT 2**

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TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ,	)	
	)	
Plaintiff,	)	CASE NO. A-531538
	)	
v.	)	DEPT. X
	)	
FIESTA PALMS LLC,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

WEDNESDAY, OCTOBER 27, 2010

**REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. MARYANNE SHANNON**

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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Denver (303) 634-2295

1 practice?

2 A Yes. Depending on the source of the patient, yes.

3 Q And you've testified for your patients in court  
4 before?

5 A Yes, I have.

6 Q On approximately how many occasions?

7 A Well since I've been -- we've been legislated to  
8 keep records in 2005 this would be the 22nd time I've appeared  
9 in court here.

10 Q I remember the legislation, Doctor. And have you  
11 been qualified both as a treating physician and as an expert  
12 in courts in the State of Nevada?

13 A I've never been denied, so --

14 MR. BAKER: Your Honor, I move to have her admitted as a  
15 treating physician and qualified as an expert in the field of  
16 orthopedic surgery and the related matters to which she'll  
17 testify.

18 THE COURT: Any objection?

19 MR. WARD: I have no objection to her qualifications.

20 The only objection I have is that she has not be  
21 disclosed as anything other than a treating physician, so I  
22 would object to any claims of questions in terms of what would  
23 normally be submitted to an expert --

24 MR. BAKER: Can I have --

25 MR. WARD: -- aside from her treating.

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1 MR. BAKER: Your Honor --

2 THE COURT: Mr. Baker?

3 MR. BAKER: Yes, Your Honor.

4 I'd like to show you both the Fernandez v. Admirand  
5 [phonetic] case that speaks to the fact that once a physician  
6 is qualified to be expert, they can speak in any area of their  
7 expertise.

8 But more importantly, Your Honor, Prabhu v. Levine,  
9 which is 112 Nev. 1538 and speaks about the fact specifically  
10 that in the Prabhu case, a treating physician was allowed to  
11 testify to standard of care. It basically says that the  
12 treating physician or a doctor is an expert for any purpose.

13 THE COURT: Mr. Ward?

14 MR. WARD: I am not familiar with that specific case.  
15 The -- but I am familiar with Nevada Revised Statute 15.285  
16 and 51.065, that I believe that it would limit her from  
17 anything that she's been -- other than what she's been  
18 disclosed as, and she has only been disclosed as a treater.

19 If there are -- certainly she would be qualified.  
20 I'm not saying she wouldn't be qualified if she had been  
21 properly disclosed. She's not given a report. She's not been  
22 disclosed as anything other than a treater. So to ask her --  
23 I understand she can offer opinions about her own treatment.  
24 But to try to use her to -- as an expert to testify as to  
25 other doctors, I think would be inappropriate.

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1 MR. BAKER: And Your Honor, particularly I intend to use  
2 her to speak about other doctors. She's testified that she  
3 uses other doctors' treatment in the course of her diagnoses,  
4 prognoses and treatment of patients.

5 As an expert this Court certainly recognizes there's  
6 a difference between a retained expert and a not retained  
7 expert. She has not been retained as an expert in this case.  
8 She is a treating physician who has reviewed the course of the  
9 medical treatment, has commented on the course of the medical  
10 treatment and should rightly be allowed to testify to that.

11 And I'd like to add as well that N.R.S. 50.275  
12 allows her, in her capacity as expert as set out in the Prabhu  
13 v. Levine case, to speak to matters that would be otherwise  
14 inadmissible including hearsay.

15 And so Your Honor, by Nevada case law and Nevada  
16 statute she's an expert. She's not been disclosed as a  
17 retained expert but she is a physician and an expert.

18 THE COURT: I understand the distinction, and I am  
19 familiar both of these cases. Frankly I'm familiar with  
20 Dr. Shannon. She's testified in this Court before.

21 So I think the motion should be granted in it's  
22 entirety.

23 MR. BAKER: Which motion is that?

24 THE COURT: Motion to qualify her as an expert.

25 MR. BAKER: Thank you, Your Honor. And --

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## **EXHIBIT 3**

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TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ,	)	
	)	
Plaintiff,	)	CASE NO. A-531538
	)	
v.	)	DEPT. X
	)	
FIESTA PALMS LLC,	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 28, 2010

**REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. JOSEPH SCHIFINI**

APPEARANCES:

For the Plaintiff:	STEVEN M. BAKER, ESQ. ROBERT S. CARDENAS, ESQ. Benson, Bertoldo & Baker
--------------------	---

For the Defendant:	KENNETH C. WARD, ESQ. Archer * Norris
--------------------	--

RECORDED BY: VICTORIA BOYD, COURT RECORDER

1 explain to the Court, as I've tried to say?

2 A They're similar, but there's major differences  
3 between them.

4 MR. BAKER: I'm going to have him accepted by this Court  
5 as a treating physician, qualified as an expert in the areas  
6 of pain management, including neurologically mediated disease  
7 and the modalities of which are used to treat those diseases.

8 THE COURT: Any objection?

9 MR. WARD: No, Your Honor.

10 THE COURT: So ordered.

11 BY MR. BAKER:

12 Q Now, you've reviewed all the medical records in this  
13 case. Is that fair to say?

14 A I have. Yes.

15 Q And you're aware of the manner in which Mr.  
16 Rodriguez was injured?

17 A Yes.

18 Q Would you explain to the Court, please, your  
19 understanding of this injury?

20 A My understanding of it is that Mr. Rodriguez was at  
21 the Palms Casino, watching or observing -- I believe it was a  
22 football game, some sort of sporting event on one of the big  
23 screen TVs. During the course of these events -- he was more  
24 kind of interested in the sporting event -- but during the  
25 course of the events, there was a promotional sort of giveaway

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1 A Yes. Oh, Exhibit 20 -- all right. I thought you  
2 meant 25 of what we have. Okay. I'm there.

3 Q Did Dr. Ferrente do an examination of Mr. Rodriguez?

4 A Yes. It appears he did an examination on November  
5 14th, 2006.

6 Q And as Chairman of the Department of Pain Management  
7 at UCLA, to your knowledge he studied RSD causal to a complex  
8 regional pain syndrome and a variety of neurologically  
9 mediated pathologies?

10 A Yes, that --

11 MR. WARD: Object; hearsay.

12 THE WITNESS: Dr. --

13 MR. BAKER: It's not a statement, Your Honor.

14 THE COURT: Mr. Ward, what was that?

15 MR. WARD: Hearsay. This witness is going to testify as  
16 to qualifications. And presumably he's going to testify as to  
17 qualifications and presumably he's going to testify as to  
18 findings, and I think it's all hearsay.

19 MR. BAKER: Your Honor, we dealt with that issue  
20 yesterday when I gave you the problem case and the remainder  
21 of the cases in yesterday, your ruling was that the doctors  
22 were allowed to refer to information that they had reviewed.

23 He's been qualified as an expert, under the Omastat  
24 [phonetic] case that I handed you yesterday. Not Omastat,  
25 that was -- but you know the one I'm talking about. But

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1 yesterday you've already ruled on the same issue.

2 MR. WARD: And I don't believe the case says that, but I  
3 will -- I'm not going to argue it anymore, and I'll simply  
4 note my objection.

5 MR. BAKER: A continuing objection is stipulated to, Your  
6 Honor.

7 THE COURT: Very well, noted for the record. Please  
8 proceed.

9 BY MR. BAKER:

10 Q If you go to page five of Exhibit 25, would you  
11 discuss with the Court what Dr. Ferrente's [phonetic] was of  
12 Enrique Rodriguez?

13 A Dr. Ferrente, during that visit, said it is possible  
14 that the patient has complex regional pain syndrome, or  
15 regional sympathetic dystrophy. However, his physical  
16 examination is more consistent with a chronic knee pain of a  
17 mechanical nature. Furthermore, we don't have sufficient  
18 objective information for which to make a definitive  
19 diagnosis.

20 He goes onto say that if the pain continues or  
21 worsens, he suggests that the patient undergoes bone scans,  
22 lumbar sympathetic blocks, trial of clonidine patches and  
23 neurontin, all of which are geared towards dealing with nerve-  
24 type pain or neurogenic pain of a nature consistent with  
25 complex regional pain syndrome.

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# **EXHIBIT 4**

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TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ,	)	
	)	
Plaintiff,	)	CASE NO. A-531538
	)	
v.	)	DEPT. X
	)	
FIESTA PALMS LLC,	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MONDAY, NOVEMBER 1, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. RUSSELL SHAH  
VOLUME I

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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1 with the care and treatment of RSD, Complex Regional Pain  
2 Syndrome, Causalgia, and other neurologically mediated  
3 pathologies?

4 A That's correct. Yeah, that's part of the training.  
5 Yes, absolutely.

6 Q And you're a treating physician for Enrique  
7 Rodriguez?

8 A I have been for quite some time now, since 2006.

9 Q Many years now.

10 A More than four years. That's right.

11 Q And you know Enrique.

12 A I know him very well, yes.

13 Q And you've reviewed other doctor's medical records  
14 in terms of your care and treatment of Enrique Rodriguez, is  
15 that correct?

16 A I have, yes.

17 MR. BAKER: At this time, Your Honor, I'd like to admit  
18 him as a treating physician but also qualify him as an expert  
19 in neurology, neurologically mediated diseases, those  
20 diagnostic tests to determine neurologic injury and related  
21 matters.

22 THE COURT: Any objection, Mr. Ward?

23 MR. WARD: Your Honor, I don't have any objection to his  
24 expertise, his qualifications. I don't have any objection to  
25 admitting him as an expert as a treating physician. He was

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1 not disclosed as an expert in this case. I object to anything  
2 that falls under the routine expert disclosure.

3 MR. BAKER: Your Honor, that's the argument that we've  
4 been making throughout trial.

5 THE COURT: Right. But, Mr. Ward, your objection is  
6 noted for the record.

7 MR. BAKER: And do you want a standing objection or are  
8 you more comfortable objecting each time? I mean I'm very  
9 happy to stipulate to a standing objection.

10 MR. WARD: I don't care. I just want to make sure I put  
11 it on the record.

12 THE COURT: I understand. The objection is noted for the  
13 record. The motion is granted.

14 MR. BAKER: Thank you, Your Honor.

15 BY MR. BAKER:

16 Q Now you've been treating Enrique, as you said, for  
17 the last several years, is that right?

18 A Yes, since about -- more than four years now.

19 Q And you're aware that before he saw you, he went to  
20 see a doctor named Dr. Ferrante in Los Angeles?

21 A Yes, he did.

22 Q And Dr. Ferrante came up with a differential  
23 diagnosis of complex regional pain syndrome? Or actually, at  
24 that time --

25 MR. WARD: Objection, leading.

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# **EXHIBIT 5**

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TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ,	)	
	)	
Plaintiff,	)	CASE NO. A-531538
	)	
v.	)	
	)	DEPT. X
FIESTA PALMS LLC,	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MONDAY, NOVEMBER 8, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. WALTER KIDWELL

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

1 in California, been here for a long time.

2 Q Where'd you go to undergraduate?

3 A I did my undergraduate at UNLV and UNR. Went to  
4 medical school at Uniform Services University of Health  
5 Sciences in Bethesda, Maryland, Military Medical School. Did  
6 my internship, residency, and fellowship training in the  
7 United States Navy.

8 Q And what -- in what area do you practice in Las  
9 Vegas?

10 A Pain management.

11 Q And you're licensed in Las Vegas?

12 A In Nevada, yes.

13 Q And you're board certified in pain management?

14 A Yes.

15 MR. BAKER: Move to admit the doctor as a treating  
16 physician of Enrique Rodriguez and is an expert in the field  
17 of pain management and anesthesiology.

18 THE COURT: Any objection, Mr. Ward?

19 MR. WARD: No, Your Honor.

20 THE COURT: Very well.

21 BY MR. BAKER:

22 Q Doctor, I told you --

23 THE COURT: So ordered.

24 MR. BAKER: Thank you, Your Honor.

25 THE COURT: You always forget that part, Mr. Baker.

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# **EXHIBIT 6**

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TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ,	)	
	)	
Plaintiff,	)	CASE NO. A-531536
	)	
v.	)	DEPT. X
	)	
FIESTA PALMS LLC,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 9, 2010

**REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. LOUIS MORTILLARO**

APPEARANCES:

For the Plaintiff:	STEVEN M. BAKER, ESQ. ROBERT S. CARDENAS, ESQ.
For the Defendant:	KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

1           So my practice, as it is now, is I still see  
2 worker's comp patients. I see personal injury cases, usually  
3 doctor referrals. I work probably mostly for the Plaintiff,  
4 but also I'm getting a lot more defense cases and referrals  
5 from defense lawyers.

6           And like I said, the murder cases, the psychosexual  
7 dangerous cases, working there, family court. That's  
8 basically it.

9           Q     Yeah. Is it fair to say that you've been to be the  
10 partial advisor to the Court, the District Court of Clark  
11 County on just numerous, numerous, numerous occasions?

12          A     Yes. I forget about that. When Stew Bell was the  
13 District Attorney and Judge Thompson was his assistant, I used  
14 to work a lot with them as an AMICAS [phonetic] advisor  
15 relative to women's issues, domestic violence against women,  
16 and also some of the murder cases that the DA has at the time.

17                I used to work with Stew, and Bill Koot, and Chuck  
18 on those cases. So yeah, I've done a lot of --

19          MR. BAKER: Your Honor, I move to qualify Dr. Mortillaro  
20 again as a neuropsychologist and related issues.

21          THE COURT: Uh-huh. Any objection?

22          MR. WARD: I do not object to him being accepted as an  
23 expert as a treater.

24          MR. BAKER: And I'll also offer him as a treating  
25 physician.

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1 MR. WARD: I object to him being anything other than a  
2 treater, because I object to his qualifications. I think he's  
3 very well qualified, but he's not disclosed as an expert in  
4 this case.

5 MR. BAKER: And, Your Honor, that's the same conversation  
6 that we've had.

7 THE COURT: That's the same objection, noted for the  
8 record. The motion is granted. So ordered.

9 Mr. Baker.

10 BY MR. BAKER:

11 Q How many people in your practice?

12 A About five or six of us, yes.

13 Q And do you work conjunctively with another Ph.D. to  
14 provide mental health services to people on the premises?

15 A Yes.

16 Q And who is that?

17 A Dr. Gamazzo [phonetic], Dr. Johnson, Dr. Craft  
18 [phonetic], who is my psychological assistant.

19 Q Is it true that both you and Dr. Gamazzo provided  
20 services to Enrique Rodriguez?

21 A Yes.

22 Q And is that your file sitting in front of you with  
23 respect to Enrique Rodriguez?

24 A Yes.

25 Q And can you please tell us the first time you saw

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# **EXHIBIT 7**

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TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ,	)	
	)	
Plaintiff,	)	CASE NO. A-531538
	)	
v.	)	DEPT. X
	)	
FIESTA PALMS LLC,	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE  
THURSDAY, NOVEMBER 4, 2010  
**REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF TERRANCE DINNEEN**

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

1 THE COURT: Yeah. I think so.

2 BY MR. BAKER:

3 Q Are there times you've told me -- have you agreed to  
4 participate in every case I've asked you to render an economic  
5 decision -- opinion?

6 A Probably more accurate way is, I've agreed to see  
7 your clients and evaluate whether or not I think there is an  
8 economic loss, and chances of vocational rehabilitation.

9 Q And have there been sometimes you told me that that  
10 answer was no?

11 A There's been some times, yes, that I've told you no,  
12 that I don't believe there is a vocational or economic loss  
13 that we can calculate.

14 Q I have tried to start every examination with a  
15 triple negative, so I think I got it done through today. When  
16 were you first contacted in this case?

17 A In 2008.

18 Q Was that by my office?

19 A It was.

20 Q And what was your assignment?

21 A I was asked to look at the vocational issues, the  
22 types of work that Mr. Rodriguez was able to do prior to his  
23 accident, to look at what vocational options he may have in  
24 the future and then, if there was going to be a loss, that he  
25 wasn't going to be able to make as much money, to calculate

1 that loss. I was also asked to look at the costs of future  
2 medical care and calculate those values as well.

3 Q As in dollar value?

4 A Yes.

5 Q Okay. Did you do an evaluation of Enrique Rodriguez  
6 with respect to rehabilitation issues?

7 A I did.

8 Q What was that evaluation of?

9 A I met with Mr. Rodriguez, went through the types of  
10 work that he's done in his past, the amount of education that  
11 he has, you know, physically how he was doing, how he self  
12 assessed the limitations that he has, what had happened  
13 between the injury and when I saw him, which was about two and  
14 a half, three years ago when he was injured. And I think that  
15 encompasses most of what I did in the initial evaluation.

16 Q Did you also conjunctively review materials?

17 A I did.

18 Q Could you explain to the judge what you looked at?

19 A I looked at the medical records that I was provided  
20 with, that summarized the medical treatment that he had. I  
21 looked at three years of tax returns that I was provided with,  
22 as I developed my opinions to write my report.

23 Q Did you review any materials on social security?

24 A I did.

25 Q What materials did you review?

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1           A     I have a letter from Social Security that's in my  
2 file, that I reviewed. And I think that, maybe, without going  
3 through everything, that's the only one that's directly from  
4 Social Security.

5           Q     Is there a time --

6           MR. WARD: I would object and move to strike any response  
7 about Social Security. Social Security is not relevant to  
8 these findings. And I think it is prejudicial, and --

9           MR. BAKER: Your Honor, social security

10          MR. WARD: it's hearsay.

11          MR. BAKER: Social security is absolutely relevant to  
12 these findings. 214405 return to work at There is no argument  
13 being made that Mr. Rodriguez is not disabled, and there was a  
14 Social Security determination that he was disabled. You have  
15 previously ruled on an issue that it wasn't relevant when  
16 Enrique was speaking about it because of causation. He is  
17 specifically not, and has said at these depositions, speaking  
18 about causation, just his disability status, whether or not he  
19 is disabled, and a determination by the federal government  
20 that he is disabled is certainly not.

21          MR. WARD: Counsel for plaintiff is now putting forth to  
22 the Court exactly what I was objecting to by saying it, that  
23 it found to be disabled. What he was before the Social  
24 Security commission, what was said, what was actually found,  
25 what was testified to -- that's all hearsay. We don't have it

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1 do, plus what they might earn as well. So you see people that  
2 are high wage earners, that can work ten hours a month and  
3 make over \$900 in that ten hours. And even though they may  
4 have a severe impairment, they would be determined not to meet  
5 that definition of disability because they can earn over \$950  
6 a month. And those standards are applied to every Social  
7 Security case, particularly with individuals under 50, as to  
8 whether or not the person meets that definition of disability.  
9 So it's a fairly complex definition of disability, and a  
10 fairly stringent one. But it is one that's commonly used  
11 by --

12 THE COURT: -- objection as to --

13 MR. WARD: Your Honor, may I ask for an ongoing  
14 objection? I don't want to keep interrupting. Obviously this  
15 is before the Court at this point, so I think the prejudice is  
16 already there. So I don't want to be rude and keep  
17 interrupting, but I do want to protect the --

18 THE COURT: Noted for the record.

19 MR. WARD: Thank you, Your Honor.

20 BY MR. BAKER:

21 Q And was that definition actually codified?

22 A Yes.

23 Q Can you explain that to the Judge?

24 A In the Ticket to Work Act -- passed under the first  
25 motion of George -- elder -- Bush administration in 1999.

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1 Congress took notice of that definition of disability. It's  
2 probably one of the most studied definitions of disability  
3 because of the impact of the number of people who meet that  
4 definition of disability -- have on the Social Security  
5 system. And the general accounting office had done a study  
6 that was actually written into the act, the Ticket to Work  
7 Act, that found a .5 percent return to work rate of people who  
8 meet that definition of disability, meaning 99.5 percent of  
9 the people who were found to meet that definition of  
10 disability do not return to work.

11 Q And with respect to that definition, are the .5  
12 percent who return to work -- are they just not lazy, and the  
13 other 99.5 percent lazy?

14 A There -- well, there's been subsequent studies to  
15 try and determine what are the characteristics that fit into  
16 that .5 percent. The only correlation that they've been able  
17 to find is higher levels of education, individuals that have  
18 education beyond high school into the college level and into  
19 the graduate school level. The number of people who returned  
20 to work was a severe impairment -- tend to have higher levels  
21 of education. But that's the only correlation they could  
22 find. They couldn't find any correlation with specific types  
23 of impairment, whether it was a congenital impairment or a  
24 disease impairment or an impairment generated out of an  
25 accident. You know, and they attempted to look at all those

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1 different variables, trying to figure out what was the  
2 characteristics, and how can we get more people back to work.  
3 And that's the only correlation so far. Some of those studies  
4 do have a bit higher return to work rate. Highest one I've  
5 seen is about 10 or 11 percent, still meaning more people  
6 don't return to work than do. But the one that Congress took  
7 notice of was the .05 percent.

8 Q And did Enrique meet the definition of disability,  
9 according to your evaluation of his medical records and your  
10 experience as a vocational rehabilitation expert?

11 A Well, when I saw him and interviewed him, he had  
12 told me that he had met that definition of disability, so I  
13 knew that. In terms of my work with the Social Security  
14 Administration, because he was under 50, it wouldn't surprise  
15 me if they went through a fair amount of steps when they  
16 evaluated whether or not he would meet that level of  
17 disability.

18 Q Is it a difficult definition to meet?

19 MR. WARD: Object. Move to strike on the basis of  
20 speculation.

21 THE COURT: Overruled. Let's have some foundation,  
22 Mr. Baker.

23 BY MR. WARD:

24 Q How many Social Security disability cases do you  
25 work here?

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1           A     When I went off that panel, I had testified in a  
2 little over 4,500 cases.

3           Q     And in each of those 4,500 cases was a certain  
4 process used by the administration?

5           A     Yes.

6           Q     And was the process consistent?

7           A     Yes.

8           Q     And was there a specific process utilized for  
9 individuals under 50?

10          A     Yes.

11          Q     And was that consistent?

12          A     Yes.

13          Q     And does Enrique Rodriguez qualify as an individual  
14 under 50 with respect to that consistent process?

15          A     It does.

16          MR. BAKER: I would ask, then, Your Honor, that I be  
17 allowed to have an explanation for most of this.

18          THE COURT: Very well.

19          BY MR. BAKER:

20          Q     Please explain the process.

21          A     Anybody under the age of 50 is considered a younger  
22 individual. Starting at age 50, you're considered approaching  
23 advanced age. And from age 55 to 60, you're considered of  
24 advanced age. And of age 60, you're considered of retirement  
25 age. I hate those titles and those age groups, but --

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1 THE COURT: Me, too. I object.

2 MR. BAKER: Sustained, Your Honor.

3 THE WITNESS: You know, so different standards begin to  
4 apply because age becomes a factor in disability, starting at  
5 age 50. If you're 49 and three-quarters, if you're under the  
6 age of 50 at any of those levels, you have to meet a different  
7 criteria, a criteria that's harder to meet, in relation to  
8 whether or not you're disabled. So when a person is under 50,  
9 the case is looked at with a much greater scrutiny than, say,  
10 a person who's over 60. And you can have two people with  
11 identical backgrounds, but the age difference of, say, 49 and  
12 61, there's a much higher probability that the person at age  
13 61 would be found disabled, and the person who's under the age  
14 of 50, because of the consideration of age as a factor of  
15 disability --

16 BY MR. BAKER:

17 Q Is it a difficult definition to meet?

18 A It is. It's a very difficult definition of  
19 disability to meet because you have, not only a physical  
20 component that you have to meet, there's an earning component  
21 that you also have to meet, based on your ability to perform  
22 job skills.

23 Q And did Enrique Rodriguez meet that criteria?

24 A Yes.

25 Q And was he rendered totally disabled by the federal

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1 government?

2 A He was.

3 Q After going through that process that you've  
4 described?

5 A Yes.

6 Q And is it an intensive process?

7 A Yes.

8 Q And was that the entirety of your basis for  
9 determining that Enrique Rodriguez was totally disabled?

10 A No. It was one of the pieces of the --

11 Q Tell the judge what pieces.

12 A Well, I've reviewed the medical records, noted the  
13 diagnosis, complex regional pain syndrome. You know, that's a  
14 very nasty little condition to try and rehabilitate somebody  
15 from, you know, due to the impact of pain on daily functioning  
16 and the inability of us to get a person to the point where  
17 they can function at some consistent level. That's sort of, I  
18 guess, a roundabout way of saying if we can get somebody who  
19 can function four hours a day, five days a week, consistently,  
20 then we've got a good chance of starting them back on  
21 employment, you know. But if that four hours comes every  
22 third day or second day or fifth day, or three times a month  
23 that they can work, and it's not predictable, unless they have  
24 some highly unusual job skills, their chances of getting them  
25 back to employment are not good. In Enrique's case, the

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1 impact of the complex regional pain syndrome, I felt, was a  
2 significant factor in terms of creating impairment, you know,  
3 functionally as well as a disability reason and function,  
4 interact, you know, replace. Certainly, significant amounts  
5 of various types of medication, you know, that he was and has  
6 been -- you know, I felt that are more probable on that basis.  
7 There was not a reasonable probability that we could  
8 successfully rehabilitate him.

9 Q And is it your opinion to a reasonable degree of  
10 professional probability that indicates Enrique Rodriguez was  
11 totally disabled?

12 A Yes.

13 Q Now, once you determined that he was disabled, did  
14 he set about to calculate lost handling?

15 A I did.

16 Q What materials were you provided to calculate the  
17 lost handling?

18 A I was provided the tax returns, three of them, from  
19 1999, 2001 and 2004.

20 Q Are you familiar with the fact that those tax  
21 returns were filed in April -- filed in 2009 or 2010?

22 A Yes.

23 Q What impact would that have on your calculation, if  
24 anything?

25 A I took the tax returns to be reflective of his

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1           A     Sure. First, from the period of 1999 to 2004, I  
2     only had three tax returns. For 2003, 2002 and 2000, I didn't  
3     have any tax returns or reported income in those years. The  
4     reported business income in 2004, where he had the 400 in  
5     gross sales, the reported income was 208,000. Then, where he  
6     had the 144,000 in 2001, the reported income was 1,748. And  
7     where he had the 286, 286,000 in gross sales in '99, the  
8     reported income was 76,513. So quite a bit of variance in  
9     those numbers -- you know, I looked at the income as percent  
10    in different ways to try and analyze that income, to determine  
11    an annual earning capacity and what his skill set were.  
12    Earning capacity is, essentially, what a person's ability to  
13    generate income is in the labor market.

14                There are a couple of authors that say earning  
15    capacity is the highest earnings that anybody is capable of  
16    earning. Yes. Roger Weddington Field [phonetic], in their  
17    writing -- and they're pretty prolific in their field --  
18    defined earning capacity as the highest ability that  
19    somebody's demonstrated. Other authors indicate that you've  
20    got to look at the skills, the labor market and what those  
21    skills are worth in determining earning capacity. And I did  
22    both. I looked at what Enrique had done. He did some of the  
23    repairing on these properties on his own. I would classify it  
24    as some of the easier repairing, you know, not major. And he  
25    was selective in picking properties that didn't need major

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1 Q 192?

2 A The 192 is the taxable income.

3 Q Okay.

4 A Okay.

5 Q And this first one, the gross income was income?

6 A That's business income.

7 Q Business income? Okay. So let's deal with the  
8 business income. Is it your opinion to a reasonable degree of  
9 professional probability that his business income, in the year  
10 2004, was \$208,000?

11 A If that's what's reported on the return, yes.

12 Q That's not my question. My question is, is it your  
13 opinion that that's what his income is, to a reasonable degree  
14 of professional responsibility?

15 A Sure. That's what the business income is.

16 Q Okay. When you say that's what the business income  
17 is, you used, in your direct examination, you used the term  
18 reported income?

19 A Yes.

20 Q Isn't it true that you don't know if any of this  
21 income was reported?

22 A I do know that it was reported.

23 Q Have you received additional information since I  
24 took your deposition --

25 A Yes.

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1 Q -- that you haven't told me about?

2 A I just received this. It's a letter dated October  
3 20th from the tax preparer, indicating that the returns were  
4 filed.

5 MR. WARD: Okay. I'd like to make that part of the  
6 record.

7 THE COURT: Do we need a copy of that, Mr. Dinneen?

8 THE WITNESS: I don't think we need to, Your Honor. You  
9 know, counsel provided it to me, so presumably, he has another  
10 copy. I can replace that in my file, just for expediency.

11 THE COURT: Very well.

12 MR. WARD: I'm sorry. But I'm not going to mark it?

13 THE COURT: Not?

14 MR. WARD: Not. Now --

15 THE COURT: I guess he's not going to move to admit it  
16 after all.

17 MR. WARD: I'm not going to move.

18 MR. BAKER: Okay.

19 BY MR. WARD:

20 Q Now, when your deposition was taken -- by the way,  
21 when does that say they were found?

22 A It doesn't. It just says -- it's short. I can read  
23 it.

24 Q No. That's okay.

25 A Okay.

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# **EXHIBIT 8**





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2. Louis Mortillaro, Ph.D.  
Person Most Knowledgeable and/or Custodian of Records  
501 South Rancho Drive, Suite F37  
Las Vegas, Nevada 89106  
256-1330 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

3. G. Michael Elkanich, MD  
Person Most Knowledgeable and/or Custodian of Records  
2680 Crimson Canyon Drive  
Las Vegas, Nevada 89128-9995

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided

4. Joseph J. Schifini, MD  
Person Most Knowledgeable and/or Custodian of Records  
526 South Tonopah Drive, Suite 160  
Las Vegas, Nevada 89106  
870-0011 Telephone

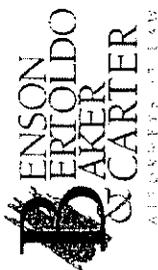
This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

5. Centennial Upright MRI / Centennial Medical Group  
Person Most Knowledgeable and/or Custodian of Records  
4640 West Craig Road  
North Las Vegas, Nevada 89032

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

6. Russell J. Shah, MD  
Person Most Knowledgeable and/or Custodian of Records  
2628 West Charleston Blvd.  
Las Vegas, Nevada 89102

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and



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treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

Plaintiff reserves the right to call any and all witnesses identified by any other party.

Plaintiff reserves the right to call any and all experts designated by other parties in this case to render expert testimony. This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.

Plaintiff reserves the right to call any and all witnesses necessary for impeachment or rebuttal purposes.

Plaintiff reserves the right to supplement this list of witnesses as discovery continues and as new information becomes available.

#### DOCUMENTS

1. Billing records from Louis Mortillaro, Ph.D., in the amount of \$20,027.00, consisting of 4 pages.
2. Medical record from Joseph J. Schifini, MD, consisting of one page.
3. Medical records and billing records from Matt Smith Physical Therapy, in the amount of \$3,368.00, consisting of 21 pages.
4. Billing records from G. Michael Elkanich, MD, in the amount of \$ 785.00, consisting of one pages.
5. Billing records from Centennial Upright MRI / Centennial Medical Group, in the amount of \$7,500.00, consisting of one page
6. Medical records and billing records from Russell J. Shah, MD, in the amount of \$400.00, consisting of four pages.

Plaintiff reserves the right to amend the above list of documents and the right to submit additional documents, if any exists, as such documents may become available to plaintiff



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throughout the course of discovery.

Plaintiff reserves the right to submit any and/or all of the above documents and any documents produced throughout the course of discovery as evidence at the time of trial.

Plaintiff reserves the right to introduce any and all evidence and other tangible things identified by other parties.

Plaintiff reserves the right to supplement this list of documents as discovery continues and additional information becomes available.

DATED this 7 day of October, 2008.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10<sup>th</sup> day of October, 2008, a true and correct copy of the foregoing PLAINTIFF'S NINTH SUPPLEMENTAL EARLY CASE CONFERENCE LIST OF WITNESSES AND DOCUMENTS was mailed in a sealed envelope by U.S. Mail, postage prepaid to the following addressees:

10676-05  
Jeffery A. Bendavid, Esq.  
Moran & Associates  
630 S. Fourth St.  
Las Vegas, NV 89101  
Attorneys for Defendant Fiesta Palms, LLC  
384-8424 Telephone  
384-6568 Facsimile

10676-05  
Kenneth C. Ward, Esq.  
Archer Norris  
2033 North Main Street, Suite 800  
P.O. Box 8035  
Walnut Creek, CA 94596  
Co-Counsel for Fiesta Palms  
925-930-6600 Telephone  
925-930-6620 Facsimile

*S. Anderson*

\_\_\_\_\_  
An Employee of Benson, Bertoldo, Baker & Carter

# **EXHIBIT 9**

*Alan L. Blum*  
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**FFCL**  
STEVEN M. BAKER  
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Las Vegas, Nevada 89117  
Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
Attorneys for Plaintiff

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

vs.

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES 1 through X,  
inclusive,  
Defendants.

CASE NO: A531538

DEPT NO: 10

**BENCH TRIAL DATE: 10/25/10**

**HEARING DATE: 1/31/11**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

THIS MATTER having come on for hearing on January 31, 2011 with respect to Plaintiff's Rule 52 (erroneously designated "Rule 50") Motion on the Issue of Liability before the Honorable Jessie Walsh, presiding, and the Court having considered the evidence and the arguments of counsel and taken the matter under advisement for further consideration, it is hereby found and concluded as follows:

**FINDINGS OF FACT**

During the course of this trial, Plaintiff established that, prior to the subject incident, Defendant was aware that promotional items were being thrown into crowds at events on the



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premises; that Defendant knew this behavior was inappropriate because it was a safety issue and could foreseeably cause injury to an individual; that prior to the incident at bar, Defendant conducted a staff meeting where staff was instructed not to cause promotional items to be thrown into crowds because of said safety concerns; and that Defendant, despite this knowledge and awareness, constructed a "field goal" within the sports book for purposes of throwing promotional items at sporting events.

Sheri Long, the Director of Marketing at The Palms, testified that she was aware that promotional items were thrown into crowds before the subject incident; this witness acknowledged this behavior was inappropriate because it constituted a safety issue which could foreseeably cause injury to an individual.

In her testimony, Ms. Long specifically recalled holding a meeting, before the subject incident, and instructing her staff that items should not be thrown into crowds during promotional events.

Ms. Long acknowledged that the injuries suffered by Plaintiff were exactly of the type she was concerned would occur if promotional items were thrown into crowds at promotional events.

Ms. Long further testified that what occurred in this case is what she was trying to prevent when she conveyed to her staff that promotional items were not to be thrown into a crowd at an event.

Vikki Kooinga, Risk Manager at The Palms, also testified that throwing items into a crowd could foreseeably cause injury to someone in the audience.

Ms. Kooinga acknowledged that throwing promotional items into the crowd was inappropriate, wrong and beneath the standard of care for the hotel in protecting the safety of their patrons upon the premises.



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Lastly, Ms. Kooinga testified that she would have expected hotel Security to stop anyone from throwing items into the crowd.

Plaintiff was then injured when promotional items were thrown into the crowd at a promotional event.

CONCLUSIONS OF LAW

NRCP 52(c) states in pertinent part as follows:

If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence.

Liability has been conclusively established by the Plaintiff in this matter. The unequivocal testimony and undisputed facts establish liability and are as follows:

1. Defendant was aware promotional items were being thrown into crowds at events before the incident at bar;
2. Defendant conducted a staff meeting prior to the incident at bar where staff was instructed not to cause or permit promotional items to be thrown into crowds at events;
3. Defendant acknowledged that throwing promotional items into crowds was inappropriate;
4. Defendant acknowledged that throwing promotional items into crowds was a safety concern as it could foreseeably cause injury to an individual;
5. Defendant acknowledged that said foreseeable risk of injury was known by them prior to the incident at bar;
6. Despite this awareness, after said staff meeting, and with knowledge of said foreseeable risk of harm. Defendant constructed a goal post in the sports book for purposes of promotional items to be thrown;
7. Plaintiff was then injured as a direct and proximate result of throwing promotional items at an event upon Defendant's premises.



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Additionally, Defendant has conceded that there was a known safety procedure prohibiting promotional items from being thrown into the crowds.

Defendant's conceded that they violated this known safety procedure as related to the case at bar.

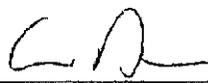
The known safety procedure was admissible as relevant to the issue of liability.

Defendant's policy and the breach thereof both aided this Court, as the finder of fact, in determining the issue of liability. No comparative liability was found on the part of the Plaintiff.

Therefore, this Honorable Court finds and adjudges liability against Defendant PALMS CASINO RESORT and in favor of the Plaintiff ENRIQUE RODRIGUEZ herein. These findings and conclusions are made and based upon the weight of the testimony and evidence aforesaid, and is reached independently of any other finding, ruling, or conclusion of the Court.

DATED this 7<sup>th</sup> day of February, 2011.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
702-228-2600  
Attorneys for Plaintiff



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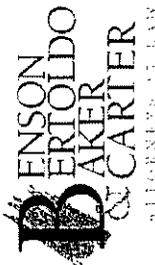
ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Rule 52 (erroneously designated "Rule 50") Motion on the Issue of Liability is granted.

Date: 3/2/11

Jason Welsh  
DISTRICT COURT JUDGE

## **EXHIBIT 10**



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FFCL  
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Attorneys for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

ENRIQUE RODRIGUEZ, an individual,	CASE NO: A531538
Plaintiff,	DEPT NO: 10
vs.	
FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/baa/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES 1 through X, inclusive,	
Defendants.	

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
IN SUPPORT OF VERDICT

THIS MATTER HAVING COME ON FOR TRIAL before the bench, commencing on October 25, 2011, and a verdict being entered on March 14, 2011, this Honorable Court Finds and Concludes as follows:

1) Liability in favor of the Plaintiff in this matter was determined as consistent with the Findings of Fact and Conclusions of law granting Directed Verdict pursuant to NRC P 52 entered in this matter on March 10, 2011.



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2) The Court finds the testimony of Plaintiff's treating physicians, including, but not limited to Dr. Shifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shaw, Dr. Shannon, and Dr. Tauber to be persuasive on the issue of the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial and, accordingly, and in this Court's discretion, awards as past medical expenses the amount of \$376,773.38 and future medical expenses in the amount of \$1,854,738.00.

3) Based upon the testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and "before and after" lay witnesses who testified at the time of trial, the Court finds that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that finding, and in this Courts discretion, awards as past pain and suffering the amount of \$1,243,350.00 and future pain and suffering in the amount of \$1,865,025.00.

4) The Court finds the testimony of Plaintiff's economist, Terrence Dineen, persuasive on the issue of Plaintiff's loss of economic opportunity, vocational disability, and loss of past and future earnings, finds and concludes the Plaintiff suffered significant detrimental impact to his ability to transact in the field of real-estate purchases, refurbishment, and sales due to his physical limitations resultant of the subject injury, finds that sufficient opportunity existed and exists in the repressed real estate market for Plaintiff to continue to profitably purchase, refurbish and sell real-estate absent said physical limitations, and is persuaded by and accepts the calculations of Mr. Dineen with respect to the same and, in this Court's discretion, awards



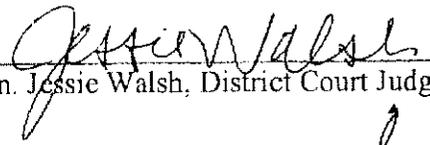
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past lost income in the amount of \$289,111.00 and future lost income in the amount of \$422,593.00.

5) As to the allocation of liability the Court finds liability against Defendant Fiesta Palms, LLC, as set forth in Finding and Conclusion #1, above, but finds that Defendant Beavers also failed to act in the manner of the average reasonable person under similar circumstances in a manner creating a foreseeable harm to patrons of the Palms by throwing promotional items into a crowded environment and in other and further manners as elucidated at the time of trial. The Court, in its discretion, therefore apportions liability at 60% to the Palms and 40% to Beavers, with no finding of comparative fault on the part of the Plaintiff.

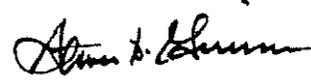
WHEREFORE, this Court finds and concludes that a verdict be entered in said amounts as set forth on the stipulated Verdict form attached hereto as Exhibit #1.

Date: 19 Apr 2011

  
Hon. Jessie Walsh, District Court Judge

# **EXHIBIT 11**

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**B**ENSON  
**B**ERTOLDO  
**B**AKER  
**&** CARTER  
ATTORNEYS AT LAW

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Attorneys for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

ENRIQUE RODRIGUEZ, an individual,      CASE NO: A531538  
Plaintiff,      DEPT NO: 10

vs.

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,  
Defendants.

BENCH TRIAL DATE: 10/25/10  
HEARING DATE: 1/31/11

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS MATTER having come on for hearing on January 31, 2011 with respect to Plaintiff's Motion to Strike Defendant's Experts before the Honorable Jessie Walsh, presiding, and the Court having considered the evidence and the arguments of counsel and taken the matter under advisement for further consideration, this Honorable Court finds and concludes as follows:

FINDINGS OF FACT

Defendant presented two (2) experts in this trial, Dr. Thomas Cargill (Economist) and Forrest Franklin (Liability), neither of whom opined that their opinions were given to a

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reasonable degree of professional probability as required under Nevada law.

Forrest Franklin, Defendant's liability expert, was retained to develop and render an opinion with respect to the standard of care as it relates to throwing objects, memorabilia, and promotional articles into crowds.

Mr. Franklin offered the following opinions:

1. Throwing memorabilia as a promotional effort into crowds is not a substandard protocol;
2. It is not unsafe to throw things into crowds; and
3. It is not below the standard of care to throw items into a crowd.

None of these opinions, however, were given to a reasonable degree of professional probability.

Dr. Cargill offered the following two (2) opinions at trial:

1. Plaintiff could not have made as much in the current financial market as he could have back in 2004 because the bubble burst in the housing market; and
2. Mr. Dineen's discount rates were inappropriate.

Neither of these opinions was given to a reasonable degree of professional probability.

CONCLUSIONS OF LAW

To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

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Dr. Cargill and Mr. Franklin's testimony failed to satisfy the "assistance" requirement of NRS 50.275, in that neither expert provided opinions to a reasonable degree of professional probability.

Accordingly, their opinions did not rise to the level of "scientific knowledge" within the meaning of NRS 50.275.

The opinions of Dr. Cargill and Mr. Franklin offered insufficient foundation for this court to take judicial notice of the scientific basis of those conclusions.

While counsel for the Defendant may have properly qualified said individuals as experts, the opinions rendered by the respective experts were speculative, as the court was not advised and the record does not reflect whether such opinions were made on the basis of "possibility" or some other standard lower than "a reasonable degree of professional probability."

Accordingly, the testimony of Cargil and Franklin did not satisfy the "assistance" requirement of NRS 50.275.

DATED this 7<sup>th</sup> day of ~~January~~ <sup>February</sup>, 2011.

BENSON, BERTOLDO, BAKER & CARTER

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ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Strike Defendant's Experts Cargill and Franklin is granted.

Date: 5/2/11

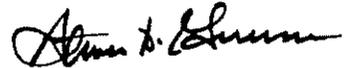
*Jessie Valdez*  
DISTRICT COURT JUDGE



1 **NOTM**

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CLERK OF THE COURT

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17 Attorneys for Defendant FIESTA PALMS, LLC, a  
18 Nevada Limited Liability Company, d/b/a/ THE  
19 PALMS CASINO RESORT

20 DISTRICT COURT  
21 CLARK COUNTY, NEVADA

22 ENRIQUE RODRIGUEZ,  
23  
24 Plaintiffs,  
25  
26 v.  
27 FIESTA PALMS, LLC, et al.,  
28  
29 Defendants.

Case No. A531538

**NOTICE OF MOTION AND MOTION TO  
AMEND JUDGMENT ON THE VERDICT**

Date:  
Time:  
Dept: X

30 PLEASE TAKE NOTICE that Defendant FIESTA PALMS, LLC dba THE PALMS  
31 CASINO RESORT, by and through its attorneys of record Kenneth C. Ward, Keith R. Gillette,  
32 and ARCHER NORRIS, moves to amend the Judgment on the Verdict filed by this Court on  
33 April 12, 2011. This Motion is made pursuant to NRS 17.130 and on the grounds that the  
34 Judgment on the Verdict does not accurately calculate the post-judgment interest rate as a  
35 variable interest rate to be readjusted every six months.

36 ///  
37 ZA126/1130697-1

1 This Motion is further based upon the papers and pleading filed herein, the below  
2 Memorandum of Points and Authorities, and oral argument.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I.**  
5 **INTRODUCTION**

6 Defendant FIESTA PALMS, LLC dba THE PALMS CASINO RESORT (“THE  
7 PALMS”) moves to amend the Court’s Judgment on the Verdict (“Judgment”) filed on April 12,  
8 2010. The Judgment holds THE PALMS and Co-Defendant BRANDY BEAVERS joint and  
9 severally liable to the Plaintiff for \$6,051,589.38. The Judgment sets the interest rates as follows:

10 “Pre-judgment interest shall accrue on past damages at the legal rate of 5.25%  
11 (3.25 prime + 2) on the amount of \$1,909,234.38 pursuant to NRS 17.130, from  
12 the date of service of the Summons and Complaint (12/11/2006) until fully  
13 satisfied, such interest in the amount of FOUR HUNDRED TWENTY SEVEN  
THOUSAND TWENTY SEVEN AND 71/100 DOLLARS (\$427,027.00 [sic])  
as of April 4, 2011 and accruing at a rate of TWO HUNDRED SEVENTY  
FOUR AND 62/100 DOLLARS (\$274.62) per diem thereafter.

14 Post-Judgment Interest shall accrue at the legal rate on future damages in the  
15 amount of \$4,142,355.00, until fully satisfied.”

16 The Court’s calculation of **post-judgment** interest on Plaintiff’s **past damages** has been  
17 erroneously set at the interest rate of 5.25%, as opposed to adjustable amount mandated by NRS  
18 17.130(2). The Judgment erroneously calculates the amount of post-judgment interest and must  
19 therefore be amended.

20 **II.**  
21 **LEGAL ARGUMENT**

22 **A. Legal Standard for Post-Judgment Interest**

23 *Nevda Revised Statute 17.130(2)* governs the calculation of interest on a judgment:

24 “When no rate of interest is provided by contract or otherwise by law, or  
25 specified in the judgment, the judgment draws interest from the time of service of  
26 the summons and complaint until satisfied, except for any amount representing  
27 future damages, which draws interest only from the time of entry of the judgment  
28 until satisfied, at a rate equal to the prime rate at the largest bank in Nevada as  
ascertained by the commissioner of financial institutions on January 1 or July 1,  
as the case may be, immediately preceding the date of judgment, plus 2 percent.  
**The rate must be adjusted accordingly on each January 1 and July 1  
thereafter until judgment is satisfied.**” (Emphasis added.)

1 The Nevada Supreme Court has plainly stated that **pre-judgment** interest must be  
2 calculated using a single rate in effect on the date of judgment, not a periodic biannual rate. *Lee*  
3 *v. Ball*, 121 Nev. 391, 396 (2005). However, this fixed rate only applies until the date of  
4 judgment. The fixed rate does not apply to post-judgment interest. Instead, the rate must be  
5 adjusted every six months until satisfied. NRS 17.130(2). As explained in *Kerala Props., Inc. v.*  
6 *Familian*, “the biannual rate adjustment applies postjudgment, *i.e.*, **when the judgment is**  
7 **entered until it is satisfied, and not prejudgment.**” 122 Nev. 601, 606 (2006) (emphasis  
8 added).

9 Therefore, pursuant to NRS 17.130(2), “the prime rate at the time of judgment plus 2%”  
10 calculation applies to **past** damages from the date of service of the complaint until the date of  
11 judgment. The adjustable post-judgment rate that must be reevaluated on every January 1 and  
12 July 1 until judgment is satisfied applies to both Plaintiff’s past and future damages.

13 **B. The Judgment Should Be Amended to Reflect the Appropriate Adjustable Post-**  
14 **Judgment Interest Rate**

15 The Judgment issued by this Court correctly determines the pre-judgment interest rate on  
16 Plaintiff’s past damages at a rate of 5.25% (3.25% prime rate plus an additional 2%), as required  
17 by NRS 17.130(2). However, the Judgment then calculates a *per diem* rate of interest after  
18 judgment until fully satisfied at an amount of \$274.62. This is incorrect. The post-judgment  
19 interest rate must be adjusted every January 1 and July 1 until the judgment is satisfied. *Keralas*  
20 *Props., Inc. v. Familian*, 122 Nev. 601, 606 (2006). This Court cannot set a fixed rate of post-  
21 judgment *per diem* interest when NRS 17.130(2) and the Nevada Supreme Court are clear that  
22 **post-judgment interest is variable**. Just as the post-damages interest rate for Plaintiff’s future  
23 damages will be periodically calculated until satisfied, the interest on Plaintiff’s **post-judgment**  
24 **past damages must be calculated in the same manner**.

25 As such, the Judgment should be amended to adequately reflect the law on calculation of  
26 post-judgment interest. Rather than setting a fixed *per diem* amount of post-judgment interest,  
27 the Court should amend the Judgment to state that any and all interest accruing after the entry of  
28 judgment will be calculated using a rate adjusted on each January 1 and July 1 until the judgment

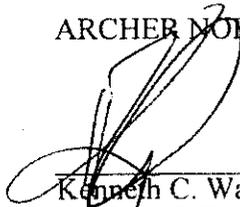
1 is fully satisfied, as required by NRS 17.130(2).

2 **III.**  
3 **CONCLUSION**

4 The Judgment filed by this Court does not appropriately set the rate for post-judgment  
5 interest in this matter. As explained above, instead of using a fixed interest rate resulting in the  
6 \$274.62 *per diem* amount, the appropriate interest rate for both Plaintiff's past and future  
7 damages must be readjusted on each January 1 and July 1 from the date of judgment until  
8 judgment is satisfied. Therefore, Defendant THE PALMS respectfully requests that the Court  
9 GRANT its Motion to Amend the Judgment on the Verdict to reflect the proper adjustable interest  
10 rate for post-judgment interest as required by NRS 17.130(2).

11  
12 Dated: May 2, 2011

ARCHER MORRIS

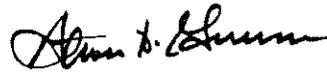


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12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

15 ENRIQUE RODRIGUEZ,

16 Plaintiff,

17 v.

18 FIESTA PALMS, LLC, a Nevada Limited  
19 Liability Company, d/b/a THE PALMS  
CASINO RESORT, et al. ,

20 Defendants.

Case No. A531538

**DEFENDANT FIESTA PALMS, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY, D/B/A THE PALMS CASINO  
RESORT'S REPLY TO PLAINTIFF'S  
OPPOSITION TO THE MOTION FOR  
NEW TRIAL**

Hearing Dept: X (in Chambers)  
Hearing Date: May 5, 2011

22 Defendant FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a THE  
23 PALMS CASINO RESORT ("the Palms"), by and through its counsel of record, hereby files its  
24 Reply to Plaintiff's Opposition to Defendant's Motion for New Trial.

25 **I.**  
26 **INTRODUCTION**

27 Despite plaintiff Enrique Rodriguez's ("Plaintiff") paltry arguments, the Palms is clearly  
28 entitled to a new trial in this case based on the facts that 1) the Court committed error in

1 permitting the Plaintiff to have four medical treaters testify on behalf of 25 treaters, and in subject  
2 areas in which they are not qualified, 2) Plaintiff and his counsel purposefully withheld  
3 documents from the Palms; 3) the body of evidence the Palms produced at trial demonstrated that  
4 Plaintiff's evidence was insufficient to justify the verdict; and 4) the Court was in error when it  
5 granted Plaintiff's motion to strike the Palms' experts' opinions. Only a new trial can remedy  
6 these defects, which greatly prejudiced the Palms and prevented it from having a fair trial in this  
7 case.

## 8 II. 9 LEGAL ANALYSIS

### 10 A. Plaintiff should not have been permitted to only have a selected few treaters' testify 11 regarding an aggregation of nontestifying providers' opinions and records, which 12 constitute inadmissible hearsay.

13 Plaintiff still attempts to rely on the case *Prabhu v. Levine*, 112 Nev. 1538, 1541 (1996),  
14 although that case is clearly distinguishable. As discussed in the Palms' moving papers, unlike  
15 the doctor's testimony in *Prabhu*, wherein the doctor offered expert opinions on issues learned  
16 within the scope of his own specific and detailed treatment of the plaintiff, Mr. Rodriguez's  
17 testifying treating doctors offered opinions on ultimate issues such as causation based not on their  
18 own treating opinions, but on the opinions and records of other doctors, unrelated to their  
19 treatment of Plaintiff.

20 As pointed out in the Palms' moving papers, testimony of one treating physician as to the  
21 collective opinion of a group of other physicians of different opinions and specialties who do not  
22 testify is inadmissible hearsay under NRS 50.285. *Estes v. State*, 122 Nev. 1123, 1140-41 (2006).  
23 With regard to Plaintiff's medical case, his counsel elicited testimony from only four treating  
24 healthcare providers, not from all of Plaintiff's treaters. Plaintiff attempted to have these four  
25 treaters to aggregate the opinions and conclusions of the other 25+ treaters even though such  
26 opinions and conclusions were complete outside the scope of the testifying treaters' scope of  
27 expertise and treatment of Plaintiff. *Prabhu* certainly did not stand for such a change in the law.

28 Rather, *Prabha* stood for the appellate court not finding the required prejudice because the  
opposing counsel attended the deposition of the treating physician and cross-examined him on the

1 very subjects that he testified about. In this case, for example, Dr. Schifini only submitted 30+  
2 documents in response to a subpoena, without revealing that he, in actuality, had reviewed  
3 hundreds of reports of other physicians. His original subpoena response indicated he would be a  
4 relatively unimportant witness, and thus he was not deposed. Thus, any error in this case was  
5 compounded by the fact that Dr. Schifini was not deposed. Therefore the error of permitting  
6 opinion testimony regarding causation and the standard of care could not be ameliorated through  
7 the Palms' opportunity to cross-examine on those issues at a deposition.

8 This case did not involve one physician being permitted to provide opinion testimony  
9 through a deposition, but rather 20+ treatment providers' reports being aggregated by four  
10 treating providers who were never deposed. The Palms was never put on notice that those four  
11 treaters would deny the Palms' the ability to cross-examine all of the treating providers on the  
12 stand at trial. To be denied such an opportunity is a travesty of justice that denied the Palms a fair  
13 trial.

14 Plaintiff had 30+ treating healthcare providers in this case. It is patently unfair and  
15 prejudicial to either require the Palms to have deposed every single one of them on the off chance  
16 that one might offer expert testimony, or for the Palms to have to wait until trial to find out which  
17 providers are going to offer expert testimony. Here, Plaintiff was required by NRCP Rules 16.1  
18 and 26 to have timely designated as experts the four treaters who testified at trial. Because he did  
19 not, the Palms was severely prejudiced in preparing its defense.

20 **B. Several of Plaintiff's treatment providers testified outside the scope of their**  
21 **expertise.**

22 Plaintiff attempts to obfuscate the issues regarding the five testifying treatment providers  
23 by claiming they were all qualified as experts. Assuming *arguendo* that Plaintiff's treating  
24 providers were properly disclosed, they still must be qualified to offer the opinions they seek to  
25 offer. Plaintiff attempts to argue that simply because an expert has been "qualified" to testify on  
26 a certain matter, that expert is qualified to opine on all matters, including those outside the  
27 expert's scope of expertise. Clearly, this is not the law in Nevada. See N.R.S. 50.275.

1           1.       *Dr. Schifini testified outside the scope of his expertise.*

2           For example, as Plaintiff points out, Dr. Schifini was only admitted to testify as a treating  
3 physician qualified as an anesthesiologist and “as an expert in the areas of pain management.” He  
4 was never admitted as an expert regarding spinal surgery. Yet, he proceeded to testify as to the  
5 specific costs of the proposed spinal cord stimulator that he opined Dr. Ferrante would believe  
6 was necessary, had Dr. Ferrante actually treated plaintiff within the past several years. This  
7 opinion was clearly far outside the scope of Dr. Schifini’s expertise.

8           He also even testified about life care planning, and produced a new life care plan at trial,  
9 although Plaintiff had disclosed an expert in that very area who had even produced an expert  
10 report. Clearly, those areas are well outside of the range in which Dr. Schifini’s expertise.

11           2.       *Dr. Kidwell also testified outside the scope of his expertise.*

12           Another example is Dr. Kidwell. As Plaintiff points out in his Opposition, Dr. Kidwell  
13 was qualified and admitted as “an expert in the field of pain management and anesthesiology.”  
14 However, his qualification regarding anesthesiology and pain management clearly does not  
15 qualify him to opine regarding orthopedic spine surgeries. He was not qualified to offer credible  
16 expert testimony as to what treatment Dr. Thalgott, an orthopedic spine surgeon who had not seen  
17 Plaintiff since 2008, would currently prescribe if he were to examine Plaintiff. In 2007 Dr.  
18 Thalgott wrote in his treatment record that Plaintiff was not a candidate for back surgery.  
19 However, at trial, Dr. Kidwell testified that, had Dr. Thalgott followed Plaintiff’s treatment since  
20 2007, he would now recommend back surgery. There is simply no foundation for this “opinion”  
21 from Dr. Thalgott via his purported psychic connection with Dr. Kidwell.

22           These and the other “opinions” elicited by Plaintiff’s counsel are improper and should not  
23 have been admitted as evidence.

24       **C.    Plaintiff’s counsel’s gamesmanship prevented the Palms from being able to properly**  
25       **respond to the “new” critical evidence.**

26           Plaintiff’s counsel attempts to downplay the importance of the newly found evidence from  
27 Plaintiff’s economist expert, Mr. Dineen, and Plaintiff’s treater, Dr. Schifini, however such  
28 evidence was critical to Plaintiff’s damages calculations.

1           1.       *The tax preparer's letter was critical evidence.*

2           Mr. Dineen, as pointed out by Plaintiff in his Opposition, specifically stated that it was his  
3 opinion to a reasonable degree of professional responsibility that in 2004, Plaintiff's business  
4 income was \$208,000 based on what was reported on Plaintiff's return. Thus, the "reported" tax  
5 returns were critical to Mr. Dineen's entire wage loss claim analysis. Yet, the letter regarding the  
6 reported income was not created until October 20, 2010, a long time after the Palms' deposition  
7 of Mr. Dineen, and yet the Palms was never alerted the Palms to the fact that such evidence  
8 existed until the Palms' counsel was surprised by it while Mr. Dineen was on the stand.

9           As pointed out in the Palms' moving papers, Plaintiff's counsel had possession of the  
10 letter and provided it to Mr. Dineen. (Deposition Testimony of Terrence Dineen, Ex. K to the  
11 Declaration of Kenneth C. Ward, 71: 20-72: 10, filed in conjunction with the Palms' motion for  
12 new trial.) Plaintiff's counsel was under a duty to provide that evidence to the Palms, and yet he  
13 chose not to. Contrary to Plaintiff's assertion, he clearly did withhold the evidence. Such  
14 sandbagging of the Palms at the last minute should not have been permitted, and Plaintiff's  
15 gamesmanship should have resulted in the evidence of the reported income not being introduced  
16 into evidence, whether through Mr. Dineen or any other witness.

17           2.       *Dr. Schifini's "lost" records were crucial pieces of evidence.*

18           The Palms proceeded with typical discovery in a case with medical damages and  
19 subpoenaed Plaintiff's treater, Dr. Schifini's records. The Palms received back approximately  
20 21+ documents. (The entire extent of the documents produced by Dr. Schifini were attached as  
21 Exhibit F to the Affidavit of Kenneth C. Ward, filed in conjunction with the Palms' moving  
22 papers.) However, at trial, Dr. Schifini indicated he had approximately 117 documents that had  
23 not been previously produced that he had reviewed in preparation for trial. In addition, Plaintiff  
24 never disclosed any of Dr. Schifini's 100+ additional documents that Dr. Schifini testified to at  
25 trial.

26           At trial, Dr. Schifini revealed that he had reviewed all of the medical records in the case.  
27 (See Exhibit 3, Oct. 28, 2010, Trial Testimony, 6:12-14, to Plaintiff's Opposition.) This was  
28 never previously disclosed to the Palms. This fact is extremely prejudicial to the Palms, because

1 had the Palms known Dr. Schifini had considered every single medical record in forming his  
2 opinions, the Palms would have likely deposed him.

3 A mere 30+ pages from a pain management specialist indicates that he was likely not  
4 actively involved in the plaintiff's treatment. However, if that same physician is reviewing every  
5 single record to form his opinions, that transforms the specialist into a potentially critical witness  
6 in the case. Dr. Schifini's significance as a witness was not apparent until trial had commenced  
7 and his entire file was produced, and he admitted to having reviewed all of Plaintiff's medical  
8 records. This clearly prejudiced the Palms because Plaintiff downplayed Dr. Schifini's  
9 importance and the expansive scope of his testimony until trial, leaving the Palms at a clear  
10 disadvantage. Dr. Schifini ended up being one of Plaintiff's primary medical damages witnesses,  
11 which there would be no way to tell from Dr. Schifini's produced documents.

12 **D. Plaintiff's treating providers were permitted to testify far beyond the scope of their**  
13 **treatment.**

14 Plaintiff spends approximately 11 pages discussing the treatment providers' expert  
15 testimony in his Opposition. However, he misses the point that the Palms agrees that a treatment  
16 provider can testify as to a diagnosis based upon that treatment provider's own treatment of the  
17 Plaintiff. First, although the court does have discretion as to the scope of a witness's testimony  
18 and whether a witness may testify as an expert, such discretion can only be exercised within the  
19 strict parameters of Nevada case and statutory law governing expert testimony. Anything that  
20 exceeds those parameters is an abuse of discretion.

21 Second, although the Palms did not depose Plaintiff's treatment providers, it had its own  
22 medical experts reviewing Plaintiff's treatment providers' files, and the Palms believed it would  
23 have the opportunity to cross-examine any necessary medical providers. The Palms did not know  
24 that it would be deprived of such an opportunity for the convenience of Plaintiff. Even if the  
25 Palms had selected 2-3 primary treating providers to depose, Plaintiff would still have been able  
26 to "surprise" the Palms, by not selecting those 2-3 treating providers to testify about all of the  
27 medical providers' records.

28 Third, a treatment provider, even if qualified as an expert, can only testify within subject

1 areas within the expert's experience or training. As previously discussed, that does not mean that  
2 a treatment provider qualified regarding pain management is then qualified to discuss every single  
3 treatment area within the medical field. Rather, the expert must have experience and training in  
4 the matter sufficient to qualify him or her as an expert. In this case, several of Plaintiff's  
5 testifying treaters testified beyond any possible scope of their expertise.

6 Fourth, as previously discussed, *Prabhu* is inapposite because the Court specifically relied  
7 on the fact that the treating physician had been cross-examined. In addition, *Fernandez v.*  
8 *Admirand*, 108 Nev. 963 (1992) does not stand for the broad proposition suggested by Plaintiff.  
9 Rather in *Fernandez*, the court specifically addressed the fact that certain matters are common  
10 knowledge to all physicians, and it limited its finding in that case to "[t]he recognition of red  
11 blood bleeding from the rectum as an indication of potential colon cancer is something within the  
12 ken of all physicians." *Id.* at 970. However, the *Fernandez* court was quick to point out that  
13 "[a]dmittedly, some diagnoses or operational procedures are unique to a medical specialty, and  
14 only a specialist in that medical area would be able to testify to the standard of care to be met,"  
15 but this was not the case specifically "with the diagnosis for bright red blood bleeding from the  
16 rectum."

17 As Plaintiff himself points out, this case involved complicated medical claims requiring  
18 more than the typical run-of-the mill medical diagnoses. Instead, they involved issues regarding  
19 whether orthopedic surgery would be appropriate and the like. Clearly, such diagnoses require a  
20 specialist.

21 Fifth, Plaintiff attempts to argue that no report was required of the testifying treaters as  
22 they were non-retained experts. However, the cases that Plaintiff cites to support this assertion  
23 actually disprove his theory. For example, *Piper v. Harnischfeger Corp.*, 170 F.R.D. 173, 175  
24 (D.Nev. 1997) is cited only to state that no written report is required if the testimony based on  
25 knowledge acquired in the course of treatment (not on the bases of the findings of other treaters.)  
26 *Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 349 (D.Colo.1995) also limits its holding to opinions  
27 "based on an examination of the patient," and thus not on other treaters' examination of the  
28 patient. Perhaps the most striking example cited by Plaintiff is *Mangla v. University of*

1 *Rochester*, 168 F.R.D. 137, 139 (W.D.N.Y. 1996) providing that a treating physician's testimony  
2 is based on the physician's personal knowledge of the examination, diagnosis and treatment, and  
3 not from information acquired from outside sources.

4 These cases all limit the treating physicians' opinions to their personal knowledge of a  
5 patient's treatment, and specifically excludes opinions derived from outside sources. Here, the  
6 treating providers were permitted to testify based on outside sources (other treating providers'  
7 records), with no personal knowledge regarding that treatment. This clearly exceeds the scope of  
8 what a treating provider should be allowed to testify to. Thus, Plaintiff's testifying treaters should  
9 have been disclosed and required to issue a report regarding their opinions.

10 Finally, Plaintiff asserts that Plaintiff's treating providers were permitted to rely on the  
11 opinions of non-testifying experts, and cites to several cases in support of this theory. However,  
12 it is clear from the cited cases that those cases are inapposite because they deal with disclosed  
13 experts, rather than non-experts, such as the treating providers in this case. In fact, the cases  
14 specifically state that an expert may not parrot the opinion of another expert, and may not serve as  
15 a spokesman for the absent expert, vouching for the truth of his statements. *In re James Wilson*  
16 *Associates*, 956 F.2d 160, 172-173 (7th Cir. 1992.) This is exactly what was permitted to occur in  
17 this case, and those opinions should have been stricken from the record.

18 **E. The evidence remains insufficient to support a verdict and the motion to strike was**  
19 **erroneously granted.**

20 The Palms' produced two experts who provided a sufficient foundation for their opinions,  
21 and yet the Court granted a motion to strike their testimony, basically rendering the Palms'  
22 defense with a virtually insurmountable blow. Both experts clearly testified to a reasonable  
23 degree of professional probability. As discussed in the moving papers, Plaintiff's motion was  
24 erroneously granted. In addition, a review of the evidence demonstrates that there existed  
25 insufficient evidence for a Plaintiff verdict, and certainly for such an exorbitant verdict.

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**III.  
CONCLUSION**

Based on the foregoing and the Palms' moving papers, the Palms request the Court grant its Motion for a New Trial.

Dated: May 2, 2011

ARCHER NORRIS



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LLC, a Nevada Limited Liability Company,  
d/b/a/ THE PALMS CASINO RESORT

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CERTIFICATE OF SERVICE

Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC  
Court and Action No: District Court, Clark County, Nevada Action No. A531538

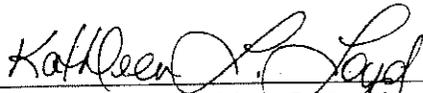
I, Kathleen L. Loyd, certify that I am over the age of eighteen years and not a party to this action or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035, Walnut Creek, California 94596-3728. On May 2, 2011, I caused the following document(s) to be served: **DEFENDANT FIESTA PALMS, LLC A NEVADA LIMITED LIABILITY COMPANY, D/B/A THE PALMS CASINO RESORT'S REPLY TO PLAINTIFF'S OPPOSITION TO THE MOTION FOR NEW TRIAL**

by having a true copy of the document(s) listed above transmitted by facsimile to the person(s) at the facsimile number(s) set forth below before 5:00 p.m. The transmission was reported as complete without error by a report issued by the transmitting facsimile machine.

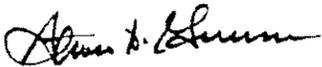
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Fiesta Palms, LLC a Nevada Limited  
Liability Company, d/b/a The Palms  
Casino Resort

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 2, 2011, at Walnut Creek, California.

  
\_\_\_\_\_  
Kathleen L. Loyd



  
CLERK OF THE COURT

1 FFCL  
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10 Attorneys for Defendant FIESTA PALMS, LLC, a  
Nevada Limited Liability Company, d/b/a/ THE  
11 PALMS CASINO RESORT

12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

15 ENRIQUE RODRIGUEZ,  
16 Plaintiffs,

17 v.

18 FIESTA PALMS, LLC, a Nevada Limited  
Liability Company, d/b/a/ The Palms  
19 Casino Resort, et al.,  
20 Defendants.

CASE NO.: A531538

DEPT NO: 10

BENCH TRIAL DATE: 10/25/10

HEARING DATE: 7/5/11

22 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

23 THIS MATTER having come on for hearing on July 5, 2011, with respect to Defendant's  
24 Motion to Amend Judgment on the Verdict, before the Honorable Jessie Walsh, presiding, and the  
25 Court having considered the evidence and the arguments of counsel and taken the matter under  
26 advisement for further consideration, this Court finds and concludes as follows:  
27

1 FINDINGS OF FACT

2 Within the Judgment on the Verdict filed April 12, 2011, the reference to interest accrual  
3 on the Judgment is articulated as follows:

4 Pre-judgment interest shall accrue on past damages at the legal rate of 5.25%  
5 (3.25 prime + 2) on the amount of \$1,909,234.38 pursuant to NRS 17.130, from  
6 the date of service of the Summons and Complaint (12/11/2006) until fully  
7 satisfied, such interest in the amount of FOUR HUNDRED TWENTY SEVEN  
THOUSAND TWENTY SEVEN AND 71/100 DOLLARS (\$427,027.00 [sic])  
as of April 4, 2011 and accruing at a rate of TWO HUNDRED SEVENTY  
FOUR AND 62/100 DOLLARS (\$274.62) per diem thereafter.

8 Post-Judgment Interest shall accrue at the legal rate on future damages in the  
9 amount of \$4,142,355.00, until fully satisfied.

10 Defendant Fiesta Palms LLC (hereinafter, Defendant or "Palms") objected to this  
11 articulation of interest to be awarded as to post-judgment interest on past damages, as developed  
12 within its Motion to Amend Judgment. Plaintiff filed no opposition to said Motion, and concurred  
13 that the interest rate was improperly articulated.

14 CONCLUSIONS OF LAW

15 NRS 17.130 mandates that determination of post-judgment interest on past damages. The  
16 Judgment on the Verdict filed April 12, 2011 erroneously articulates the interest rate as "5.25%  
17 (3.25 prime + 2)."  
18

19  
20  
21 Dated: July 26, 2011

ARCHER NORRIS

22  
23   
24 Keith R. Gillette (Bar No. 11140)  
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Attorneys for Defendant FIESTA PALMS,  
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d/b/a/ THE PALMS CASINO RESORT

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ORDER

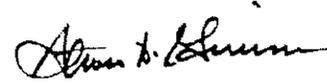
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Amend Judgment on the Verdict is granted.

Dated: 14 Sept 2011

  
\_\_\_\_\_  
Hon. JESSIE WALSH  
DISTRICT COURT JUDGE 

ZA1267187167-1



  
CLERK OF THE COURT

1 **FFCL**  
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10 Attorneys for Defendant FIESTA PALMS, LLC, a  
Nevada Limited Liability Company, d/b/a/ THE  
11 PALMS CASINO RESORT

12 **DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**

15 **ENRIQUE RODRIGUEZ,**  
16 **Plaintiffs,**

17 **v.**

18 **FIESTA PALMS, LLC, a Nevada Limited**  
19 **Liability Company, d/b/a/ The Palms**  
20 **Casino Resort, et al.,**  
21 **Defendants.**

CASE NO.: A531538

DEPT NO: 10

BENCH TRIAL DATE: 10/25/10

HEARING DATE: 7/5/11

22 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

23 THIS MATTER having come on for hearing on July 5, 2011, with respect to Defendant's  
24 Motion to Tax Costs, before the Honorable Jessie Walsh, presiding, and the Court having  
25 considered the evidence and the arguments of counsel and taken the matter under advisement for  
26 further consideration, this Court finds and concludes as follows:

27 *///*

28 *///*

1 **FINDINGS OF FACT**

2 The Court finds that Plaintiff's Memorandum of Costs fails to document, itemize, and justify  
3 its costs. In Plaintiff's Opposition to Defendant's Motion to Tax Costs, Plaintiff had the  
4 opportunity to produce documents or evidence substantiating its claimed costs but failed to do so.

5 In addition, Plaintiff's memorandum of costs seeks recovery of other costs that either exceed  
6 certain statutory limits or are not recoverable under Nevada law.

7 **CONCLUSIONS OF LAW**

8 Notwithstanding the language of Nev.Rev.Stat. § 18.020, the district court still retains  
9 discretion in determining the reasonableness of the amounts and the items of costs to be awarded.  
10 Decisional law holds that discretion should be sparingly exercised. Further, the trial court should  
11 exercise restraint as statutes permitting recovery of costs, being in derogation of the common law,  
12 must be strictly construed.

13 The prevailing party must also show how the costs were necessary to and incurred in the  
14 action and provide sufficient justifying documentation and specific itemization to demonstrate the  
15 reasonableness and the accuracy of the costs claimed. The filing a memorandum is not sufficient  
16 verification of the incurred costs.

17 Plaintiff's costs memorandum provided a generic breakdown of claimed costs, and did not  
18 contain the required itemization or documentation for each individual item. The court is unable to  
19 determine what method of calculation, if any, was used by the Plaintiff to confirm that these costs  
20 were actually incurred for this matter, necessary, and reasonable. The itemized materials are  
21 necessary to make such a determination and any award of costs without this information is improper.

22 The Plaintiff must itemize and provide supporting documentation for each cost he seeks to  
23 recover. No such showing has been made, and Plaintiff's costs in the sum of \$149, 146.18 must be  
24 disallowed.

25 Nevada Revised Statute, section 18.005 specifically provides what costs are recoverable.  
26 Litigation cost and attorney fee statutes are exceptions to the common law American Rule that every  
27 litigant pays his or her own fees. Restraint therefore must be exercised when awarding costs that are  
28 not allowed by statute or case law. Even if Plaintiff properly itemizes and documents various costs,

1 these costs are still not recoverable under any statute or judicial opinion. Such costs include costs  
2 categories within Plaintiff's Memorandum of Costs including: e-filing retainer; trial transcript costs;  
3 and, Telecopies, Photocopies, Long Distance Telephone Calls, and Postage. As for witness fees,  
4 plaintiff has failed to substantiate the amounts sought in recovery as costs, and seeks amounts far in  
5 excess of that allowed by statute. Further, the Court determines that Plaintiff's Memorandum of  
6 Costs fails to allocate costs between the various defendants.

7 According'y, Plaintiff's costs in the sum of \$149, 146.18 must be disallowed.

8  
9 Dated: July 26, 2011

ARCHER NORRIS

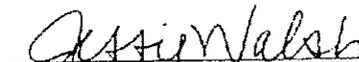
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12 Keith R. Gillette (Bar No. 11140)  
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16 (925) 930-6600  
17 Attorneys for Defendant FIESTA PALMS,  
18 LLC, a Nevada Limited Liability Company,  
19 d/b/a/ THE PALMS CASINO RESORT

20  
21 **ORDER**

22 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to  
23 Tax Costs is GRANTED.

24 Dated: 10 Sept 2011

25  
26   
27 Hon. JESSIE WALSH  
28 DISTRICT COURT JUDGE ↗



[ ORIGINAL ]

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Attorneys for Plaintiff

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*Allen D. Shuman*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

9 ENRIQUE RODRIGUEZ, an individual,	CASE NO: A531538
10 11 Plaintiff,	DEPT NO: 10
12 vs.	
13 FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/baa/a PALMS CASINO 14 RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, 15 and ROE BUSINESS ENTITIES I through X, inclusive,	
16 Defendants.	

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING  
DEFENDANT'S MOTION FOR NEW TRIAL**

17  
18  
19 THIS MATTER having come on for hearing on July 5, 2011 with respect to  
20 Defendant's Motion for New Trial before the Honorable Jessie Walsh, presiding, and the  
21 Court having considered the evidence and the arguments of counsel and taken the matter  
22 under advisement for further consideration hereby finds,

**FINDINGS OF FACT**

23  
24 In seeking a new trial, Defendant offered the following four (4) arguments:

- 25 1. Plaintiff's counsel engaged in misconduct;
- 26 2. The Court erred in allowing testimony of certain providers;
- 27 3. The evidence was insufficient to justify the verdict; and
- 28

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4. The Court erred in striking defense experts.

This Court makes the following Findings of Fact with respect to the following Conclusions of Law and Order as set forth herein.

1. **Plaintiff's Counsel Did Not Engage In Misconduct**

Defense counsel, during Opening Argument, the evidentiary phase of the trial, and Closing Argument, accused Plaintiff's counsel of engaging in a systematic "medical build-up," and manipulation of the medical records.

Post-trial, Defense counsel, in moving for a mistrial, then accused Plaintiff's counsel and this Court of engaging in a systematic *ex parte* conspiracy, rendering the trial unfair and impartial. At no time did this Court engage in unpermitted contact with the Plaintiff, nor did this Court rely on the contents and/or points and authorities contained in any "blind" briefing in support of its findings, conclusions, and/or verdict herein.

Post-judgment, Defense counsel, in moving for a new trial, argued that Plaintiff's counsel engaged in blatant premeditated and reprehensible misconduct.

Defendant argued that Plaintiff's counsel's alleged misconduct constituted an *irregularity in the proceedings*. Defense counsel argued that it was well settled under Nevada law that attorney misconduct constitutes an irregularity in the proceedings; however, they cited no Nevada law, or any authority, for that matter, in support of this position.

Defense counsel pointed to two (2) *examples* (arguments) of misconduct:

1. Plaintiff's counsel withheld evidence in regards to Plaintiff's tax returns; and
2. Plaintiff's counsel withheld evidence relied upon by Dr. Schifini.



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This Court finds that Plaintiff's counsel did not withhold evidence in regarding Plaintiff's tax returns.

Mr. Dinneen was asked to look at the vocational issues, the types of work that Plaintiff was able to do prior to his accident, to look at what vocational options he may have in the future and then calculate that loss. He was also asked to look at the costs of future medical care and calculate those values, as well.

Mr. Dinneen met with the Plaintiff, reviewed his medical records, three (3) years of tax returns, and social security materials in forming an opinion that Plaintiff was disabled.

Mr. Dinneen testified that Plaintiff was qualified by the Federal Government as being disabled.

Mr. Dinneen testified to a reasonable degree of economic and professional probability that Plaintiff's income was *reported*.

Defense counsel was critical of the fact that Mr. Dinneen, during his testimony at trial, and in response to defense counsel's inquiry as to whether Mr. Dinneen knew if any of Plaintiff's income was reported, indicated that he had received a letter from Plaintiff's tax preparer advising that the subject returns had, in fact been filed.

Mr. Dinneen's trial testimony occurred on November 2, 2010. The letter was dated October 20, 2010. Defense counsel did not mark the letter as an exhibit or move to admit the letter.

The subject letter was not the subject of direct examination, and the information relative to the same was brought out through cross-examination in response to counsel's inquiry as to whether Mr. Dinneen knew if any of Plaintiff's income was in fact reported. Mr. Dinneen was provided the letter from the tax preparer subsequent to his deposition, but



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merely days before his testimony. Defense counsel never moved to admit the document, but did question Mr. Dinneen as to the authenticity of the letter.

Equally, this Court finds that Plaintiff's Counsel did not withhold evidence relied upon by Dr. Schifini.

Defense counsel argued that Plaintiff's counsel withheld 100+ documents that Dr. Schifini relied upon in providing expert opinions at trial.

First, defense counsel decided **not** to depose Dr. Schifini.

Secondly, Dr. Schifini reviewed *all* the medical records in the case.

Third, defense counsel's only objections relative to Dr. Schifini's testimony were foundation and hearsay. Defense counsel did not object to the records relied upon, or the introduction of the documents other than on a *foundation and hearsay basis*, which related to Dr. Schifini's ability to provide expert testimony, and not his reliance on the documents.

Fourth, the records that counsel referred to were introduced and admitted into evidence, with the only objections being *foundation and hearsay*. Each any every one of these documents had been previously disclosed to the Defendant and were no more than the records of other treating physicians contained in Dr. Schifini's file.

**2. The Court Did Not Err In Allowing The Testimony Of Certain Providers**

Defense counsel was also critical of the fact that this Court qualified and admitted certain treating providers during trial. Defense counsel's position was that none of the providers were designated as expert witnesses nor provided expert reports. Defense counsel's argument was that they never had notice of the testifying providers' opinions until trial and that they were *prejudiced* as a result.



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This Court finds that defense decided not to depose a single treating physician in a case where the Plaintiff was alleging a constellation of profound injuries.

Defense counsel was fully aware of the nature and substance of the claimed injuries and had also been given the medical records generated by all of Plaintiff's physicians. Defense counsel was free to depose the treating physicians. They chose not to do so.

**3. The Court Finds Evidence Was Substantial To Justify The Verdict**

This Court heard the extensive testimony of Plaintiff's treating physicians, including, but not limited to Dr. Schifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shah, Dr. Shannon, and Dr. Tauber on the issues of injury to the Plaintiff and the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial, and heard testimony regarding past medical expenses of \$376,773.38 and future medical expenses in the amount of \$1,854,738.00.

The Court also heard testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and "before and after" lay witnesses who testified at the time of trial that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that finding, awarded as past pain and suffering the amount of \$1,243,350.00 and future pain and suffering in the amount of \$1,865,025.00.

The Court heard the testimony of Plaintiff's vocational and economic loss expert, Terrence Dinncn, on the issue of Plaintiff's loss of economic opportunity, vocational



1 disability, and loss of past and future earnings, and heard evidence concerning the significant  
2 detrimental impact of Plaintiff's injuries upon his ability to transact in the field of real-estate  
3 purchases, refurbishment, was presented with evidence and testimony that sufficient  
4 opportunity existed and exists in the repressed real estate market for Plaintiff to continue to  
5 profitably purchase, refurbish and sell real-estate absent said physical limitations, was  
6 presented with the calculations of Mr. Dinneen with respect to the same and, in this Court's  
7 discretion, awarded past lost income in the amount of \$289,111.00 and future lost income in  
8 the amount of \$422,593.00.

10 As to the allocation of liability, the Court found liability against Defendant Fiesta Palms,  
11 LLC, and found that Defendant Beavers also failed to act in the manner of the average  
12 reasonable person under similar circumstances in a manner creating a foreseeable harm to  
13 patrons of the Palms by throwing promotional items into a crowded environment and in other  
14 and further manners as elucidated at the time of trial. In reaching its verdict, the Court heard  
15 and relied upon the testimony of Brandy Beavers with respect to the conduct of both herself  
16 and the Palms, and the testimony of Palms' employees regarding the fact the Palms know that  
17 promotional items were being thrown into crowds prior to the subject event, had a meeting  
18 and set up policies to prohibit said conduct, and then knowingly violated said policies. The  
19 Court, in its discretion, therefore apportioned liability at 60% to the Palms and 40% to  
20 Beavers, with no finding of comparative fault on the part of the Plaintiff.

23 **4. The Court Did Not Err In Striking Defense Experts**

24 Defendant presented two (2) non-medical experts in this trial, Dr. Thomas Cargill  
25 (Economist) and Forrest Franklin (Liability), neither of whom opined that their opinions were  
26 given to a reasonable degree of professional probability as required under Nevada law.



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Forrest Franklin, Defendant's liability expert, was retained to develop and render an opinion with respect to the standard of care as it relates to throwing objects, memorabilia, and promotional articles into crowds.

Mr. Franklin offered the following opinions:

1. Throwing memorabilia as a promotional effort into crowds is not a substandard protocol;
2. It is not unsafe to throw things into crowds; and
3. It is not below the standard of care to throw items into a crowd.

None of these opinions, however, were given to a reasonable degree of professional probability.

Dr. Cargill offered the following two (2) opinions at trial:

1. Plaintiff could not have made as much in the current financial market as he could have back in 2004 because the bubble burst in the housing market; and
2. Mr. Dineen's discount rates were inappropriate.

Neither of these opinions was given to a reasonable degree of professional/scientific probability.

**CONCLUSIONS OF LAW**

**1. Plaintiff's Counsel Did Not Engage In Misconduct**

This Court concludes as follows:

As supported by substantial evidence, Plaintiff's counsel did not engage in misconduct.

Specifically, Plaintiff's counsel did not withhold evidence in regarding Plaintiff's tax returns. The information relied upon by Mr. Dinneen was of the type contemplated and permitted by NRS 50.275.



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Equally, this Court concludes that Plaintiff's Counsel did not withhold evidence relied upon by Dr. Schifini.

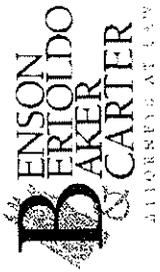
Nevada law makes it clear that a new trial is not warranted on grounds of *surprise* based on testimony which, *with reasonable diligence*, could have been anticipated.

Furthermore, the "surprise" contemplated by Rule 59 (a) must result from some fact, circumstance, or situation in which a party is placed unexpectedly, to his injury, without any default or negligence of his own, and which ordinary prudence could not have guarded against.

Defense counsel did not exercise reasonable diligence and cannot argue *surprise* since they chose not to depose a single treating provider. As a result of this failure, defendant did not discover the entirety of the materials contained in Dr. Schifini's file.

The records about which Defendant complains were introduced and admitted into evidence, with the only objections being *foundation* and *hearsay*. Each and every one of these documents had been previously disclosed to the Defendant and were no more than the records of other treating physicians contained in Dr. Schifini's file. Accordingly, no documents were withheld by the Plaintiff, Defendants were timely provided with all documents serving as the basis of Dr. Schifini's opinion, and no prejudice resulted.

As such, the Court concludes that there was no misconduct on the part of Plaintiff's Counsel.



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2. The Court Did Not Err in Allowing The Testimony of Certain Providers

This Court concludes as follows:

Defense counsel cannot argue *surprise* with respect to the testimony of Plaintiff's treating physicians since they chose not to depose a single treating provider and did not exercise reasonable diligence.

The scope of a witness' testimony and whether that witness will be permitted to testify as an expert are within the discretion of trial court. *Prabhu v. Levine*, 1996, 930 P.2d 103, 112 Nev. 1538, rehearing denied.

Once the district court certifies an expert as qualified, the expert may testify to all matters within the expert's experience or training, and the expert is generally given reasonably wide latitude in the opinions and conclusions he or she can state. *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992); *Brown v. Capanna*, 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989) (a proposed medical expert should not be scrutinized by an excessively strict test of qualifications); *Freeman v. Davidson*, 105 Nev. 13, 15, 768 P.2d 885, 886 (1989) (“[a]n expert witness need not be licensed to testify as an expert, as long as he or she possesses special knowledge, training and education, or in this case, knowledge of the standard of care”); *Wright v. Las Vegas Hacienda*, 102 Nev. 261, 263, 720 P.2d 696, 697 (1986) (“[a] witness need not be licensed to practice in a given field ... to be qualified to testify as an expert”).

Under Nevada law, treating physicians are not considered retained experts. They should be allowed to testify as to treatment, diagnosis (including causation), and prognosis based upon their treatment of the patient and their medical training. *Id.*



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Plaintiff's treating providers were not subject to the strict disclosure or reporting requirements under Nevada law. *Id.*

Even if this Court were to determine that Plaintiff's counsel failed to comply with the disclosure requirements, which it does not, the decision whether to permit expert witness to testify where there has been failure to comply with disclosure requirements is committed to the trial court's discretion. NRCP 26(b)(4). *Murphy v. Federal Deposit Ins. Corp.*, 1990, 787 P.2d 370, 106 Nev. 26.

Defense counsel was fully aware of the nature and substance of the claimed injuries and had also been given the medical records generated by all of Plaintiff's physicians. Defense counsel was free to depose the treating physicians. They chose not to do so.

Plaintiff's treating providers were permitted to rely on the opinions of non-testifying experts as a foundation for their opinions given at trial.

As such, the Court concludes that there was no error in allowing the testimony of certain providers.

**3. The Evidence In The Case Was Substantial And Sufficient To Justify The Verdict.**

The Court concludes that the testimony of Plaintiff's treating physicians, including, but not limited to Dr. Schifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shah, Dr. Shannon, and Dr. Tauber to be persuasive and to provide substantial evidence on the issues of Plaintiff's injury and the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial and, accordingly, and in this Court's discretion,



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awards as past medical expenses the amount of \$376,773.38 and future medical expenses in the amount of \$1,854,738.00.

Based upon the testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and “before and after” lay witnesses who testified at the time of trial, the Court concludes that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that conclusion, and in this Courts discretion, awards as past pain and suffering the amount of \$1,243,350.00 and future pain and suffering in the amount of \$1,865,025.00.

The Court concludes the testimony of Plaintiff’s vocational and economic expert, Terrence Dineen, was substantial and persuasive on the issue of Plaintiff’s loss of economic opportunity, vocational disability, and loss of past and future earnings, and concludes the Plaintiff suffered significant detrimental impact to his ability to transact in the field of real-estate purchases, refurbishment, and sales due to his physical limitations resultant of the subject injury, concludes that sufficient opportunity existed and exists in the repressed real estate market for Plaintiff to continue to profitably purchase, refurbish and sell real-estate absent said physical limitations, and is persuaded by and accepts the calculations of Mr. Dineen with respect to the same and, in this Court’s discretion, awarded past lost income in the amount of \$289,111.00 and future lost income in the amount of \$422,593.00.

As to the allocation of liability, the Court concludes that liability lies against Defendant Fiesta Palms, L.L.C, and concludes that Defendant Beavers also failed to act in the manner of the average reasonable person under similar circumstances in a manner creating a foreseeable harm to patrons of the Palms by throwing promotional items into a crowded environment and



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in other and further manners as elucidated at the time of trial. The Court's conclusion with respect to liability is made and based upon the testimony of Brandy Beavers with respect to the conduct of both herself and the Palms, and the testimony of Palms' employees to the fact the Palms knew that promotional items were being thrown into crowds prior to the subject event, had a meeting and set up policies to prohibit said conduct, and then knowingly violated said policies. The Court, in its discretion, therefore apportions liability at 60% to the Palms and 40% to Beavers, with no finding of comparative fault on the part of the Plaintiff.

As such, the Court concludes that the evidence in the case was substantial and sufficient to justify the verdict.

**4. The Court Did Not Err In Striking Defense Experts**

To testify as an expert witness under NRS 50.275, a witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Dr. Cargill and Mr. Franklin's testimony failed to satisfy the "assistance" requirement of NRS 50.275, in that neither expert provided opinions to a reasonable degree of professional/scientific probability.

Accordingly, their opinions did not rise to the level of "scientific knowledge" within the meaning of NRS 50.275.

The opinions of Dr. Cargill and Mr. Franklin offered insufficient foundation for this court to take judicial notice of the scientific basis of those conclusions.



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While counsel for the Defendant may have properly qualified said individuals as experts, the opinions rendered by the respective experts were speculative, as the court was not advised and the record does not reflect whether such opinions were made on the basis of “possibility” or some other standard lower than “a reasonable degree of professional probability.”

Accordingly, the testimony of Cargil and Franklin did not satisfy the “assistance” requirement of NRS 50.275.

Regardless, this Court determined both liability and damages independent of striking the testimony of Defendant’s two expert witnesses aforesaid, and determined the same upon the basis and weight of Plaintiff’s economics and vocational expert, Mr. Dincen, Plaintiff’s testimony, and the testimony of Defendant’s employees called in Plaintiff’s case-in-chief.

As such, this Court concludes that there was no error in striking Defense experts.

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ORDER

On the basis of the foregoing, it is hereby Ordered that Defendant's Motion for a New Trial be denied.

Dated this 26 day of Sept, 2011.

Justin Walsh  
DISTRICT COURT JUDGE

Submitted by:

BENSON, BERTOLDO, BAKER & CARTER, CHTD

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**Attorneys for Plaintiff**





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CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

ENRIQUE RODRIGUEZ, an individual,

Plaintiff,

vs.

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,

Defendants.

CASE NO: A531538

DEPT NO: 10

BENCH TRIAL DATE: 10/4/10

HEARING DATE: 10/20/11

HEARING TIME: In chambers

**PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER GRANTING  
DEFENDANT'S MOTION TO RETAX COSTS; EX PARTE APPLICATION FOR  
ORDER SHORTENING TIME; ORDER**

COMES NOW Plaintiff Enrique Rodriguez by and through his counsel of record, Steven M. Baker, Esq. of Benson, Bertoldo, Baker & Carter, Chtd. and hereby requests this Honorable Court to reconsider its Order Granting Defendant's Motion to Retax Costs. This motion is based on the pleadings and papers on file and oral argument of counsel at the time of hearing.

Rodriguez v. Fiesta Palms, L.L.C.  
Motion for Reconsideration

Page 1



ORDER SHORTENING TIME

1  
2 After consideration of the moving papers, the Court hereby orders that the hearing  
3 regarding the within MOTION TO RECONSIDER ORDER GRANTING DEFENDANT'S  
4 MOTION TO RETAX COSTS be scheduled on shortened time. Said hearing is hereby  
5 scheduled on the 20 day of OCTOBER, 2011, in Department X of this Court, at  
6 CHAMBERS     .m., or as soon thereafter as counsel can be heard.

8 DATED this 5<sup>th</sup> day of Oct, 2011.

9  
10   
11 DISTRICT COURT JUDGE *g*

12 SUBMITTED BY:

13   
14 \_\_\_\_\_  
15 STEVEN M. BAKER  
16 Nevada Bar No. 4522  
17 BENSON, BERTOLDO, BAKER & CARTER  
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19 Las Vegas, Nevada 89117  
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22 Attorneys for Plaintiff





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I.

INTRODUCTION

Plaintiff is seeking an Order of Reconsideration of this Court’s granting of Defendant’s Motion to Tax.

The basis of this Court’s decision to grant Defendant’s Motion was that Plaintiff did not attach any invoices to his Memorandum of Costs or Opposition to the Motion to Retax.

Rather, Plaintiff, in total compliance with relevant statutes and Nevada law, provided a Memorandum of Costs, setting forth an itemization of said costs, and supported the same with an Affidavit, attesting that the costs set forth therein were correct and necessarily incurred.<sup>1</sup>

Plaintiff submits, and Nevada law supports, that the Affidavit submitted in support of the Memorandum of Costs was sufficient. *Canepa v. Durham*, 1945, 155 P.2d 788, 62 Nev. 417.

II.

STATEMENT OF FACTS

Defendant moved this Court for an Order to Tax on the “grounds that Plaintiff failed to document, itemize, and justify its costs.”<sup>2</sup>

Plaintiff, in turn, argued compliance with the relevant statutes and Nevada law in setting forth an itemization of costs which were both actual and reasonable. In support of the Memorandum, Plaintiff’s counsel submitted an Affidavit attesting that the costs were correct and necessarily incurred.

On July 5, 2011, at the time of Defendant’s Motion to Tax, Defense counsel argued that although he was not contesting the veracity of Plaintiff’s counsel’s affidavit, no invoices or

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<sup>1</sup> See Exhibit “1,” Memorandum of Costs, including Affidavit of Steven M. Baker, Esq.

<sup>2</sup> See Exhibit “2,” Motion to Tax Costs, 2: 8-9.



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documentation were provided to allow a determination as to whether the costs were reasonable or necessary.

This Honorable Court granted said motion on the grounds that no invoices were provided in support of the Memorandum of Costs.

Plaintiff submits that Invoices were/are not required, and that the Affidavit of Plaintiff's counsel was, in fact, sufficient.

In an effort to further support the reasonableness of the costs, however, Plaintiff hereby submits invoices for each of the asserted costs.<sup>3</sup>

Lastly, and as argued at the time of the hearing of this matter, this was a 2 ½ week bench trial involving a case of disputed liability and causation. Certainly, there can be no argument, and there was no argument, that the costs asserted were unreasonable.

III.

LEGAL ARGUMENT

NRS 18.020(3) states that costs must be allowed to the prevailing party against any adverse party against whom judgment is rendered in "an action for the recovery of money or damages, where the plaintiff seeks to recover more than \$2,500."

Under NRS 18.110(1), a prevailing party must submit:

a memorandum of the items of his costs in the action or proceeding, which memorandum **must be verified by the oath** of the party, **or his attorney** or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are **correct**, and **that the costs have been necessarily incurred in the action or proceeding.**

<sup>3</sup> See Exhibit "3," Cost Invoices.



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The subject statute does not specify that invoices or receipts are required; rather, the statute simply calls for an affidavit of the party or his counsel, which is what was accomplished in this case.

It is conceded that costs must “be interpreted to mean actual costs that are also reasonable, rather than a reasonable estimate or calculation of such costs based upon administrative convenience.” *Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994). Plaintiff’s Memorandum, as argued in his Opposition, set forth actual, rather than estimated costs.

In support of its Motion, Defendant cited three (3) cases, each of which are factually and legally distinguishable. Importantly, none of the cases cited stand for the proposition that invoices must be provided; rather, the cases simply stand for the proposition that costs must be shown to have been actual and necessarily incurred. This is exactly what Plaintiff’s Memorandum and supporting Affidavit of Counsel accomplished.

In *Gibellini v. Klindt*, supra, the court addressed a situation where the district court awarded costs for photocopying, telephoning, and postage expenses. In that case, the prevailing party based its estimate of costs on the law firm’s *customary practice* of charging four percent of the client’s total billable charges for such expenses. The court determined that the district court abused its discretion because there was no indication that the costs involved were *actually* incurred by the prevailing party.

In this case, as pointed out in Plaintiff’s Opposition to Motion to Retax and supported by the undersigned counsel’s affidavit in support of Plaintiff’s Memorandum, rather than a reasonable estimate or calculation, Plaintiff’s costs were actual and necessarily incurred.

This Court certainly has the ability and discretion to determine the reasonableness of the asserted costs.

*Rodriguez v. Fiesta Palms, L.L.C.*  
Motion for Reconsideration  
Page 6



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In *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 386 (1998), the Nevada Supreme Court determined that the district court abused its discretion because it granted an award of costs based upon the prevailing party's submission of itemized materials that **did not** show how the costs "were necessary to and incurred in the present action."

Again, in this case, the undersigned attested to the actual and necessary nature of the costs.

Lastly, in *Vill. Builders 96 v. U.S. Labs.*, 121 Nev. 261, 277-78 (2005), U.S. Labs **did not** file a verification of counsel in support of its Memorandum and **did not** attach an Affidavit.

In this case, the undersigned submitted an affidavit in support of the Memorandum. Importantly, Nevada law establishes that the Affidavit was sufficient. *Canepa v. Durham*, 1945, 155 P.2d 788, 62 Nev. 417.

In *Canepa*, the Supreme Court held that an Affidavit attached to a memorandum of costs stating that items therein are correct to best of deponent's knowledge and belief, and that said disbursements had been necessarily incurred and paid, was sufficient.

This is exactly what occurred in this case. Further, The Nevada Supreme Court, citing *Village Builders*, supra and *Berosini*, recently held that in a situation where a party provides a memorandum detailing costs and the court failed to conduct any analysis of the adequacy of the memorandum, and instead denies costs, it was an abuse of discretion. *Southern Nevada Chinese Weekly v. Chinese American Chamber of Commerce of Nevada*, --- P.3d ----, 2010 WL 4807566 (Nev. Nov 19, 2010) (Table, text in WESTLAW, NO. 54554).



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IV.

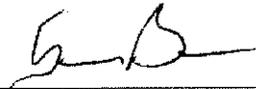
CONCLUSION

Plaintiff submits that the Memorandum of Costs, supporting Affidavit, arguments set forth in the Opposition to Defendant's Motion to Retax, and most importantly, this Court's understanding and appreciation of the complexities of the 2 ½ week bench trial provided ample and sufficient support of the actual, reasonable and necessary nature of the costs asserted.

Plaintiff respectfully submits that an Order for Reconsideration of this Court's granting of Defendant's Motion to Retax is warranted.

DATED this 3<sup>rd</sup> day of October, 2011.

**BENSON BERTOLDO, BAKER & CARTER, CHFD.**

By: 

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*Attorneys for Plaintiff*

CLERK OF THE COURT

1 STEVEN M. BAKER  
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8 Attorneys for Plaintiff

9  
10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

12 \* \* \*

13 ENRIQUE RODRIGUEZ, an individual,  
14 Plaintiff,

CASE NO: A531538

DEPT NO: 10

15 vs.

16 FIESTA PALMS, L.L.C., a Nevada Limited  
17 Liability Company, d/baa/a PALMS CASINO  
18 RESORT, BRANDY L. BEAVERS,  
19 individually, DOES 1 through X, inclusive,  
20 and ROE BUSINESS ENTITIES 1 through X,  
21 inclusive,

22 Defendants.

23 PLAINTIFF'S MEMORANDUM OF COSTS AND  
24 DISBURSEMENTS PURSUANT TO NRS 18.020

25	Cost Description	Amount
26	Clerk's Fees	268.00
27	E-Filing Retainer	27.50
28	Reporter's Fees for Depositions	3,958.66
	Steve Ferrero	
	Enrique Rodriguez	
	Brandy Beavers	
	Vicki Kooinga	
	Kathleen Hartmann, R.N.	
	Steven T. Baker, C.P.P.	
	Sheri Long	
	Frank Sciulla	
	Terry Dinneen	
	Fees for witnesses at trial, pretrial hearings and deposing witnesses	
	Louis Mortillaro, Ph.D.	5,500.00





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Cost Description	Amount
Vicki Kooinga - trial	26.00
Sheri Long - trial	26.00
Terry Dinneen	12,931.00
Steven T. Baker, C.P.P./VTI Associates	3,400.00
Mary Ann Shannon, M.D.	10,000.00
Kathleen Hartmann, R.N.	500.00
Russell J. Shah, M.D.	16,000.00
Joseph Schifini, M.D.	15,450.00
Walter Kidwell, M.D.	5,000.00
Jacob Tauber, M.D.	13,200.00
Govind Koka, D.O.	2,500.00
<b>General Expert Witness Fees ("Professional Fees")</b>	
Consulting	17,228.55
Terry Dinneen	12,172.00
Witness Hotel Stays for Trial	267.81
<b>The fee of any sheriff or licensed process server for the delivery or service of any summons or subpoena used in the action</b>	1,352.74
<b>Compensation for the official reporter or reporter pro tempore</b>	630.00
Trial Transcript Cost (via A/V services)	12,397.50
<b>Telecopies (facsimiles)</b>	124.00
<b>Photocopies</b>	
Vendors and medical providers	7,252.15
Firm in-house expense	2,765.50
<b>Long Distance Telephone Calls</b>	195.91
<b>Postage</b>	361.82
<b>Reasonable costs for travel and lodging incurred taking depositions and conducting discovery</b>	
IME of Plaintiff in San Francisco (travel to/from Riverside, CA)	600.00
	CONTD.

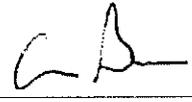


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Cost Description	Amount
<b>Any other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research</b>	
Locate Brandy Beavers for service of process	200.00
Courier service	671.04
Case value research	4,140.00
<b>TOTAL COSTS DISBURSED</b>	<b>\$149,146.18</b>

DATED this 15<sup>th</sup> day of March, 2011.

BENSON BERTOLDO, BAKER & CARTER, CHTD.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 15<sup>th</sup> day of March, 2011, I served a copy of the foregoing document via 1<sup>st</sup> Class, U.S. Mail, postage thereon fully prepaid to the following:

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10676-05 Attorneys for Fiesta Palms  
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1 MOT

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17 Attorneys for Defendant FIESTA PALMS, LLC, a

18 Nevada Limited Liability Company, d/b/a/ THE

19 PALMS CASINO RESORT

20 DISTRICT COURT

21 CLARK COUNTY, NEVADA

22 ENRIQUE RODRIGUEZ,

23 Plaintiffs,

24 v.

25 FIESTA PALMS, LLC, a Nevada Limited  
26 Liability Company, d/b/a/ The Palms  
27 Casino Resort, et al.,

28 Defendants.

Case No. A531538

Dept: 10

DEFENDANT FIESTA PALMS, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY, d/b/a/ THE PALMS CASINO  
RESORTS' NOTICE OF MOTION AND  
MOTION TO TAX COSTS

29 MOTION TO TAX COSTS

30 Defendant FIESTA PALMS, LLC d/b/a THE PALMS CASINO RESORT ("The Palms"),  
31 by and through its attorney of record Kenneth C. Ward K, Esq., Keith R. Gillette, and ARCHER  
32 NORRIS, moves to tax Plaintiff's Memorandum of Costs and Disbursements Pursuant to NRS  
33 18.020. This motion is made by virtue of NRS 18.005 and on the grounds that Plaintiff failed to  
34 itemize and document his claimed costs and, as a result, failed to demonstrate such costs are

ZA126/1108737-1

A531538

1 reasonable and necessary. In addition, Plaintiff attempts to recover costs that are not recoverable  
2 under any statute or judicial and should therefore be disallowed.

3 This motion is further based upon the papers and pleading on file herein, the below Points  
4 and Authorities, and oral argument.

## 5 MEMORANDUM OF POINTS AND AUTHORITIES

### 6 I.

#### 7 Introduction

8 Defendant Fiesta Palms, LLC objects to Plaintiff's memorandum of costs on the grounds  
9 that Plaintiff failed to document, itemize, and justify its costs. It is impossible to determine if these  
10 expenses were reasonable and necessary without this information. In addition, Plaintiff also seeks  
11 recovery of costs that either exceed certain statutory limits or are not recoverable under Nevada law.  
12 Plaintiff's haphazard compilation of its costs without any support or justification is insufficient to  
13 award costs in the sum \$149,146.18.

### 14 II.

#### 15 Background

16 This is a personal injury action for damages stemming from accident that occurred at a  
17 Monday night football game promotion event at The Palms Race and Sports Book.

18 On March 9, 2011, the court returned a verdict against The Palms and Brandy Beavers.

19 Plaintiff filed and served its Memorandum of Costs on March 15, 2011. The memorandum is  
20 simply a diagram that contains virtually no detail. Plaintiff did not provide any supporting or  
21 itemized documentation or even attempt to demonstrate that these costs are reasonable and  
22 necessary. Based on the insufficient documentation, it is impossible to determine whether these  
23 costs are reasonable or necessary and, as a result, Plaintiff is not entitled to an award of its costs.

### 24 III.

#### 25 Legal Argument

##### 26 A. Legal Standard

27 While Nev.Rev.Stat. § 18.020 sets forth certain costs that are recoverable to a prevailing party  
28 as a matter of right, the district court still retains discretion in determining the reasonableness of the

1 amounts and the items of costs to be awarded. (*Schwartz v. Estate of Greenspan*, 110 Nev. 1042, 1050  
2 (1994).) This “discretion should be sparingly exercised when considering whether or not to allow  
3 expenses not specifically allowed by statute and precedent.” (*Bergmann v. Boyce*, 109 Nev. 670, 679  
4 (1993).) And the trial court should exercise restraint because “statutes permitting recovery of costs,  
5 being in derogation of the common law, must be strictly construed.” (*Ibid.*)

6 **B. The Plaintiff Is Not Entitled To An Award Of Costs Because He Failed To**  
7 **Demonstrate—Through Itemization Or Documentation—That His Costs Are**  
8 **Necessary And Reasonable**

9 The prevailing party must also show how the costs were necessary to and incurred in the  
10 action and provide sufficient justifying documentation and specific itemization to demonstrate the  
11 reasonableness and the accuracy of the costs claimed. (*Waddell v. L.V.R.V., Inc.*, 122 Nev. 15 (2006);  
12 *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348 (1998).) Simply filing a  
13 memorandum is not sufficient verification of the incurred costs. (*See Vill. Builders 96 v. U.S. Labs.*,  
14 121 Nev. 261, 277-78 (2005)(requiring justifying documentation for each individual item of costs and  
15 substantiating the reason for such costs rather than merely providing documentation to support that  
16 amount of the total costs is reasonable.)

17 Here, Plaintiff merely provided a generic breakdown of his costs. The memorandum did not  
18 contain the required itemization or documentation for each individual item. It is unclear what  
19 method of calculation, if any, was used by the Plaintiff to confirm that these costs were actually  
20 incurred for this matter, necessary, and reasonable. The itemized materials are necessary to make  
21 such a determination and any award of costs without this information is improper. (*Bobby Berosini,*  
22 *Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348 (1998).)

23 The Plaintiff must itemize and provide supporting documentation for each cost he seeks to  
24 recover. No such showing has been made. Therefore, Plaintiff’s cost in the sum of \$149, 146.18  
25 must be disallowed.

26 ///

27 ///

28 ///

1           C.     **The Plaintiff Seeks Costs That Are Not Recoverable Under Nevada Law And,**  
2                 **As A Result, These Costs Items Must Be Disallowed Even If Plaintiff Can**  
3                 **Document And Itemize These Impermissible Costs.**

3           Nevada Revised Statute, section 18.005 specifically provides what costs are recoverable.  
4     Litigation cost and attorney fee statutes are exceptions to the common law American Rule that every  
5     litigant pays his or her own fees. (*Dobron v. Bunch*, 215 P.3d 35, 41, 2009 Nev.LEXIS 58 (2009).)  
6     Restraint therefore must be exercised when awarding costs that are not allowed by statute or case  
7     law. (*Bergmann v. Boyce*, 109 Nev. 670, 679 (1993).) Even if Plaintiff properly itemizes and  
8     documents the following costs, these costs are still not recoverable under any statute or judicial  
9     opinion.

10           1.     **E-Filing Retainer**

11           Plaintiff seeks to recover \$27.50 for an “E-Filing Retainer.” This item is not expressly  
12     recoverable under Nev.Rev.Stat. § 18.005. The Plaintiff attempts to shoehorn this item into “Clerks’  
13     Fees.” To accomplish this result, Plaintiff attempts to impermissibly expand—without any  
14     support— “Clerks’ Fees” under section 18.005 to include e-filing fees or retainers. Such expansion is  
15     not permissible because cost statutes are strictly construed. Therefore, \$27.50 should be disallowed.

16           2.     **Fees for Witnesses**

17           The Plaintiff lumps together under “fees for witness at trial, pretrial hearings and deposing  
18     witnesses” approximately fourteen witnesses. It appears that most of these witnesses, if not all, are  
19     experts based on the Plaintiff’s use of post nominal abbreviations. The Plaintiff conveniently ignored  
20     the cap set forth in Nevada Revised Statute § 18.005(5). Under this section, a party’s expert witness  
21     fees are limited to reasonable fees for “not more than five expert witnesses in an amount of not more  
22     than \$1,500 for each witness, unless the court allows a larger fee after determining that the  
23     circumstances surrounding the expert’s testimony were of such necessity as to require the larger fee.”  
24     (Nev.Rev.Stat. § 18.005(5).)

25           While the Plaintiff seeks expert witness fees in the sum of \$114,201.36, his recovery is  
26     capped at \$7,500. Almost all of the witnesses listed in the memorandum are at a sum well above the  
27     statutory cap of \$1,500. In fact, 12 out of the 14 witnesses are listed at sums well above that amount.

1 One witness—Terry Dinneen—is billed for twice in the memorandum at \$12,931 and \$12,172.

2 Finally, the Plaintiff has not made any showing that there are any circumstances that forced  
3 the Plaintiff to spend an additional \$106,701.36 in expert witness fees. Therefore, Plaintiff is  
4 statutorily limited to a recovery of \$7,500 in expert witness fees, provided he can demonstrate  
5 these fees were reasonable and necessary for the proceedings.

6 **3. Trial Transcript Costs**

7 Plaintiff seeks to recover \$12,397.50 for a “Trial Transcript Cost.” This item is not expressly  
8 recoverable under Nev.Rev.Stat. § 18.005. This attempt to characterize transcript costs as  
9 “compensation for the official reporter or reporter pro tempore” impermissibly expands section  
10 18.005. Such an interpretation is contrary to established Nevada law, which provides cost recovery  
11 statutes must be strictly construed. Therefore, \$12,397.50 should be disallowed.

12 **4. Telecopies, Photocopies, Long Distance Telephone Calls, and Postage**

13 Plaintiff seeks to recover costs for photocopies, telecopies, long distance phone charges, and  
14 postage. While these items are listed in Nev.Rev.Stat. § 18.005(12), normal out-of-pocket and routine  
15 overhead expenses are not recoverable as taxable costs. As noted above, Plaintiff did not provide  
16 any documentation or itemization of its costs. These costs were likely incurred as normal out-of-  
17 pocket expenses. The minimal description provided by Plaintiff further demonstrates that these  
18 costs are normal office expenses. For instance, Plaintiff acknowledges that \$2,765.50 of the  
19 photocopy expenses are “Firm in-house” costs. Such in-house or routine overhead expenses are not  
20 recoverable.

21 **D. Plaintiff Is Not Entitled To The Costs Under Nevada Revised Statute, Section**  
22 **18.005(17) Because These Costs Are Not Reasonable Or Necessary.**

23 Plaintiff seeks another \$5,011 in costs under Nev.Rev.Stat. 18.005(17). The court must  
24 construe NRS 18.005(17) narrowly and Plaintiff must justify that the expenses incurred under this  
25 section were reasonable and necessary. (*See Bergmann v. Boyce*, 109 Nev. 670, 679 (1993).) The *only*  
26 costs Plaintiff seeks to recover under this section are costs to locate Brandy Beavers, courier service,  
27 and case value research. Therefore, Plaintiff is not claiming that any other costs are recoverable  
28

1 under this section.

2 As demonstrated above, Plaintiff did not attach any documentation or provide a detailed  
3 itemization of the costs for the courier service, service of process, and case value research fees.  
4 Without this information, this Court cannot determine whether such expenses are reasonable and  
5 necessary to the proceedings. To recover fees under section 18.005(17), the Plaintiff must  
6 affirmatively show such costs were reasonable and necessary. Such a showing has not been made  
7 and, as a result, these costs should not be allowed.

8 **E. Before Any Costs Are Awarded, The Court Must First Attempt To Apportion**  
9 **The Costs.**

10 Before any award of costs is made, the district court must therefore attempt to apportion the  
11 costs or determine apportionment is impracticable. (*Mayfield v. Koroghli*, 184 P.3d 362; 2008 Nev.Lexis  
12 36 (2008).) Plaintiff has not made any showing that apportionment is impossible. The Palms is not  
13 responsible for any costs associated with locating co-defendant Brandy Beavers. These costs or any  
14 other costs related to the pursuit of claims against Beavers by Plaintiff are not recoverable against  
15 The Palms. Plaintiff has failed to demonstrate that such costs to pursue Beavers are necessary to the  
16 claims against The Palms. Therefore, this item along with other claimed costs must be apportioned  
17 between The Palms and Beavers.

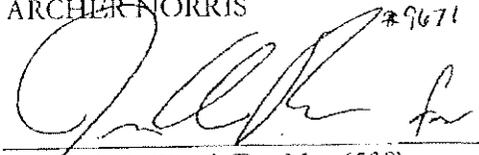
18 **IV.**

19 **Conclusion**

20 Plaintiff failed to show that the claimed costs are reasonable or necessary. Any costs that the  
21 Plaintiff may be entitled to must first be apportioned before any award can be entered in this matter.  
22 Even if Plaintiff can document and itemize these costs, many of the items are either statutorily  
23 capped or impermissible under Nevada law. Therefore, Plaintiff's costs must be disallowed or  
24 reduced to the statutorily permissible amounts upon a showing that these costs are actual, reasonable,  
25 and necessary.

1 Dated: March 21, 2011

ARCHER NORRIS

 #9671

Kenneth C. Ward (Bar No. 6530)  
Keith R. Gillette (Bar No. 11140)  
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Attorneys for Defendant FIESTA PALMS,  
LLC, a Nevada Limited Liability Company,  
d/b/a/ THE PALMS CASINO RESORT

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CERTIFICATE OF SERVICE

Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC  
Court and Action No: District Court, Clark County, Nevada Action No. A531538

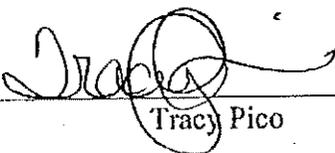
I, Tracy Pico, certify that I am over the age of eighteen years and not a party to this action or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035, Walnut Creek, California 94596-3728. On March 21, 2011, I caused the following document(s) to be served: **DEFENDANT FIESTA PALMS, LLC, A NEVADA LIMITED LIABILITY COMPANY, d/b/a/ THE PALMS CASINO RESORTS' NOTICE OF MOTION AND MOTION TO TAX COSTS**

by placing a true copy of the document(s) listed above, enclosed in a sealed envelope, addressed as set forth below, for collection and mailing on the date and at the business address shown above following our ordinary business practices. I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that a sealed envelope is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

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Fiesta Palms, LLC a Nevada Limited  
Liability Company, d/b/a The Palms  
Casino Resort

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 21, 2011, at Walnut Creek, California.

  
\_\_\_\_\_  
Tracy Pico

Case 10676  
 Schedule of client costs

Date	Invoice #	Amount	Description	Vendor Name	
10/13/08	3700492	31.36	Runner Service	??????	
02/12/08	39834	28.05	runner svc	??????	
07/13/09	1045311	638.00	Depo Transcript ~	All-American Court Reporters	
12/1/2014	2010004767	75.00	Process Service	AM:PM Legal Solutions	
12/15/05	3010261011	1.80	MEDICAL RECORDS	American Medical Response	
06/22/10	10676-05	4140.00	demand itr/package	Ardella W. Short	
11/07/06	10676-05	9.14	Medical Records	Centennial Medical Group	
11/08/07	57217	46.20	medical records	Center for Diseases & Surgery	
07/25/05	2711571077	9.52	medical records	ChartOne, Inc.	
08/20/07	0305022374	36.45	medical records	ChartOne, Inc.	
12/15/05	227550	39.82	MEDICAL RECORDS	ChartOne, Inc.	85.79
09/29/09	10676-05	148.00	FILING FEE	Clark County District Court	
12/10/2014	A531538	630.00	transcriber billing	Clark County Treasurer	
8/18/2014	6347	442.00	Professional Fees	Devinney & Dinneen Career &	
12/1/2014	6426	2716.00	Professional Fees	Devinney & Dinneen Career &	
12/1/2014	6420	1278.00	Professional Fees	Devinney & Dinneen Career &	
12/1/2014	6453	2040.00	Professional Fees	Devinney & Dinneen Career &	
12/1/2014	6469	6367.00	Professional Fees	Devinney & Dinneen Career &	
07/16/10	6309	754.00	professional fees	Devinney & Dinneen Career &	
04/21/10	6207	234.00	File Review	Devinney & Dinneen Career &	
12/22/09	6101	428.00	prof svcs	Devinney & Dinneen Career &	
11/24/08	5707	4369.00	prof svcs	Devinney & Dinneen Career &	
11/13/08	5693	3856.00	prof svcs	Devinney & Dinneen Career &	
10/17/08	5688	944.00	Expert Fees	Devinney & Dinneen Career &	
10/17/08	5685	875.00	Expert Fees	Devinney & Dinneen Career &	
10/24/08	618173	15.31	Medical Records	Discovery Support Services, LLC	
01/14/10	10676-05	600.00	reim ime charges per smb	ENRIQUE RODRIGUEZ	
12/08/09	10676-05	550.00	REIM LIT COSTS	ENRIQUE RODRIGUEZ	
10/13/2014	722819984	25.47	overnight postage	Federal Express	
10/15/2014	725180291	36.49	overnight postage	Federal Express	
11/5/2014	727578318	12.10	overnight postage	Federal Express	
10/28/08	296516852	23.30	overnight mail	Federal Express	
10/28/08	296516852	23.30	overnight mail	Federal Express	
10/28/08	296516852	33.15	overnight mail	Federal Express	
04/06/10	10676-05	1500.00	PATIENT INTERVIEW	Ferrante & Associates, Inc. — ? D cost?	
8/5/2014	101759	213.25	depo transcript ~	First-Choice Reporting Services, Inc.	
07/08/10	98253	262.81	depo transcript ~	First-Choice Reporting Services, Inc.	
10/23/2014	10676-05	3200.00	expert trial fee	Jack Tauber, M.D.	
11/9/2014	10676-05	10000.00	expert trial fee	Jacob E. Tauber, M.D.	
10/23/2014	10676-05	4000.00	expert trial fee	Joseph Schifini, MD	
12/1/2014	767	4000.00	trial expert fee	Joseph Schifini, MD	
12/1/2014	765	7450.00	record review/trial prep	Joseph Schifini, MD	
10/25/07	10676-05	15.19	medical records	Joseph Schifini, MD	
10/22/2014	10676-05	500.00	expert fees	Kathleen Hartman	
11/08/07	10676-05	18.00	medical records	Kelly G. Hawkins & Associates	
11/12/09	10676-05	500.00	depo prep fee	L.F. Mortillaro, Ph.D., LTD	
08/18/09	10676-05	56.05	MED RECORDS	L.F. Mortillaro, Ph.D., LTD	
02/11/08	10676-05	33.53	medical records	L.F. Mortillaro, Ph.D., LTD	
01/25/07	562294767	75.00	MEDICAL RECORDS	L.F. Mortillaro, Ph.D., LTD	
12/1/2014	10676-05	5000.00	record review&teleconf	Las Vegas Neurosurgery,	
02/11/08	10676-05	43.00	MEDICAL RECORDS	Las Vegas Neurosurgery,	
03/21/07	10676-05	14.93	medical records	Las Vegas Neurosurgery,	

11/4/2014	2010002649	85.00	Process Service	Legal Express, Inc.
11/4/2014	2010002649	95.00	Process Service	Legal Express, Inc.
11/4/2014	2010002649	95.00	Process Service	Legal Express, Inc.
11/4/2014	2010002649	95.00	Process Service	Legal Express, Inc.
01/28/10	71428	112.50	process svc	Legal Express, Inc.
11/28/07	56906	10.50	runner service	Legal Express, Inc.
12/12/06	50312	36.35	RUNNER	Legal Express, Inc.
08/09/07	35489	176.88	copy job	Legal Wings, Inc.
10/13/2014	867260	295.50	depo transcript	Litigation Services & Technologies, LLC
10/13/2014	867264	194.00	depo transcript	Litigation Services & Technologies, LLC
10/13/2014	867626	223.05	depo transcript	Litigation Services & Technologies, LLC
11/9/2014	868117	354.50	depo transcript	Litigation Services & Technologies, LLC
09/15/09	847865	401.55	depo transcript	Litigation Services & Technologies, LLC
02/10/09	836849	1376.00	depo transcript	Litigation Services & Technologies, LLC
01/22/09	835775	100.00	appearance fee	Litigation Services & Technologies, LLC
10/22/2014	10676-05	5000.00	trial fees	Louis Mortillaro, Ph.D.
10/22/2014	10676-05	5000.00	trial fees	Mary Ann Shannon, M.D.
11/16/09	RP18843	34.20	medical records	Matt Smith Physical Therapy
06/23/09	10676-05	52.80	medical records	Medical Associates of
04/12/07	106590	58.80	MEDICAL RECORDS	Medical District Surgery Center
03/31/10	10-1526	6.49	medical records	Med-R Medical Retrieval
12/01/09	09-4176	117.86	medical records	Med-R Medical Retrieval
01/20/10	09-4054	14.73	medical records	Med-R Medical Retrieval
11/20/2014	10676-05	48.11	roim parking/meal	Monique Krystek
10/22/2014	10676-05	26.00	trial subpoena	Nathan Heaps, M.D.
11/4/2014	10676-05	-26.00	void ck 11306	Nathan Heaps, M.D.
09/28/09	10676-05	100.00	amen summons publication	nevada legal news
11/08/07	10676-05	26.00	subpoena fee	NV Private Investigators Licensing Board → 1053505
11/07/05	10676-05	12.60	medical records	Pain Institute of Nevada, Inc.
10/22/2014	10676-05	2500.00	trial fees	Primary Care Consultants
08/19/09	10676-05	63.00	medical records	Primary Care Consultants
01/19/06	10676-05	-52.80	credit	Primary Care Consultants
07/28/05	SR1761734	0.60	medical records	Professional Billing, LTD.
12/1/2014	72534	4434.05	copy job	QUIVX
09/01/06	23203	75.25	COPIES	QUIVX
11/08/07	10676-05	25.00	MEDICAL RECORDS	Radnet Film Library
10/15/09	900343948	20.00	medical records	Reimbursement Technologies, Inc.
11/27/06	16780	10.20	MEDICLA RECORDS	Robert C. Gutierrez, M.D.
10/23/2014	10676-05	5600.00	expert trial fee	Russell J. Shah MD
10/28/2014	10676-05	1200.00	expert trial fee	Russell J. Shah MD
11/3/2014	10676-05	5600.00	Russell J. Sh-10676-05	Russell J. Shah MD
12/1/2014	5037	1200.00	trial prep fee	Russell J. Shah MD
12/1/2014	5037	2400.00	trial prep&record review	Russell J. Shah MD
10/28/08	10676-05	48.60	medical records	Russell J. Shah MD
10/02/08	2694	2137.50	Expert Fees	Salutory Services, Inc.
07/17/08	2592	675.00	Expert Fees	Salutory Services, Inc.
04/15/08	2512	2070.00	expert fees	Salutory Services, Inc.
11/19/07	2389	2091.00	prof svcs	Salutory Services, Inc.
12/13/06	2086	1722.00	PROF SVCS	Salutory Services, Inc.
10/04/06	2020	587.00	PROF. SERV.	Salutory Services, Inc.
11/02/06	2008	779.00	RECORDS REVIEW	Salutory Services, Inc.
08/01/06	1977	430.50	PROF. SERV.	Salutory Services, Inc.
06/30/06	1932	871.25	PROF. SERV.	Salutory Services, Inc.
04/28/06	1869	164.00	PROF. SERV.	Salutory Services, Inc.
04/10/06	1833	256.50	PROF SERV.	Salutory Services, Inc.
03/16/06	1797	830.25	PROF SERV.	Salutory Services, Inc.
05/30/06	1788	143.50	LEGAL SVCS	Salutory Services, Inc.

03/10/06	1788	143.50	PROF. SERV.	Salutory Services, Inc.
02/27/06	1729	328.00	PROF. SERV.	Salutory Services, Inc.
10/22/2014	10676-05	26.00	trial subpoena	Sheri Long
9/10/2014	SEP10034	121.41	Sierra Legal -SEP10034	Sierra Legal Duplicating, Inc.
8/26/2014	10676-05	26.00	witness fee	Steve Ferraro
11/18/2014	10676-05	14586.30	transcript/hotel/meals	Steven M. Baker
10/22/2014	10676-05	900.00	trial fees	Steven T. Baker
05/12/10	10676-05	2500.00	record review/crovetti	The Bone & Joint Institute
12/03/08	08-10404	130.85	copy job	The Litigation Document Group, Inc.
10/16/08	08-10220	17.16	Copy Job	The Litigation Document Group, Inc.
11/13/07	07-115557	331.16	copy job	The Litigation Document Group, Inc.
11/27/06	06118135T	205.54	SCANNING TO CD	The Litigation Document Group, Inc.
09/10/08	08-9040	642.84	Copy Job	The Litigation Document Group, Inc.
09/08/08	08-9020	23.65	Copy Job	The Litigation Document Group, Inc.
08/25/08	08-8477	98.43	copy job	The Litigation Document Group, Inc.
07/02/08	08-6600	55.71	copy job	The Litigation Document Group, Inc.
07/09/09	09-5099	24.74	Copy Job	The Litigation Document Group, Inc.
04/30/09	09-4409	12.07	copy job	The Litigation Document Group, Inc.
8/28/2014	3706630	27.50	E-Filing retainer	US Legal Management Services, Inc.
9/17/2014	3706793	32.77	Runner Service	US Legal Management Services, Inc.
9/17/2014	3706793	61.77	Runner Service	US Legal Management Services, Inc.
9/17/2014	3706793	32.77	Runner Service	US Legal Management Services, Inc.
9/17/2014	3706793	32.77	Runner Service	US Legal Management Services, Inc.
10/19/2014	3707082	61.77	Runner Service	US Legal Management Services, Inc.
10/19/2014	3707082	61.77	Runner Service	US Legal Management Services, Inc.
11/20/2014	3707330	31.36	Runner Service	US Legal Management Services, Inc.
11/20/2014	3707330	32.77	Runner Service	US Legal Management Services, Inc.
1/15/2015	3707711	84.82	Runner Service	US Legal Management Services, Inc.
06/04/10	3705605	32.77	runner svc	US Legal Management Services, Inc.
12/30/09	3704049	32.77	runner svc	US Legal Management Services, Inc.
12/30/09	3704049	25.99	runner svc	US Legal Management Services, Inc.
08/28/09	3703042	54.24	process svc -	US Legal Management Services, Inc.
08/28/09	3703042	641.00	process svc -	US Legal Management Services, Inc.
03/24/09	3701606	40.68	Runner Service	US Legal Management Services, Inc.
10/19/06	10676-05	5.40	medical records	VaterSpine, Ltd.
10/22/2014	10676-05	26.00	trial subpoena	Vicki Kooinga
9/21/2014	09-182	200.00	locate witness	VTI Associates
05/12/10	09-167	2500.00	expert retainer	vti associates
01/12/09	707367	55.00	Medical Records	Walgreen Company, Inc.
10/23/2014	10676-05	5000.00	expert trial fee	Walter Kidwell, M.D.
07/22/08	10676-05	45.00	medical records	Wiltshire Surgicenter, Inc.
04/28/08	10676-05	45.00	MEDICAL RECORDS	Wiltshire Surgicenter, Inc.
	grand total	147678.32		
		0.00		

+ Wiznet fees



**DeVinney & Dinneen Career and Vocational Economic Services, LTD.**

445 Apple Street, Suite 102

Reno, NV 89509

Local: 775/825-5558

Toll Free: 888/235-6549

Fax: 775/825-4511

terry@dinneen.com

STATE OF NEVADA [02]

March 14, 2011

ENRIQUE RODRIGUEZ v PALMS HOTEL, et al

Monique Keyser  
 Benson, Bertoldo, Baker & Carter  
 7408 West Sahara Ave.  
 Las Vegas, NV 89117

DATE	DESCRIPTION	PAID	BALANCE
9/30/08	Inv. #5685 file review and contact with Mr. Rodriguez	\$875.00	\$0.00
9/30/08	Inv. #5688 medical record review & contacts with Mr. Rodriguez	\$944.00	\$0.00
10/31/08	Inv. #5693 Travel & meeting with Rodriguez, Life Care Plan report	\$3,856.00	\$0.00
10/31/08	Inv. #5707 Travel & interview with Rodriguez, research & report	\$4,369.00	\$0.00
9/3/09	Inv. #6013 Contacts with Rodriguez, review of file, fax	\$234.00	\$0.00
12/4/09	Inv. #6101 Review of new docs, contact with Attorney	\$494.00	\$0.00
4/5/10	Inv. #6207 Review of file, contact with Attorney	\$234.00	\$0.00
7/6/10	Inv. #6309 Contact with Attorney, file review, vac loss report	\$754.00	\$0.00
8/5/10	Inv. #6347 Review of new docs, contact with Attorney	\$442.00	\$0.00
10/4/10	Inv. #6420 Depo prep, contact with Rodriguez, update figures	\$1,278.00	\$0.00
10/5/10	Inv. #6426 Contact with Attorney re. new LCP costs, travel & additional prep depo	\$2,715.00	\$0.00
11/2/10	Inv. #6453 Review of file, contact with Attorney re. trial, travel and pre-trial conference, follow up and prep for trial	\$2,040.00	\$0.00
11/5/10	Inv. #6469 Trial prep, travel, contact with Attorney, new docs review, update reports.	\$5,867.00	\$0.00
	<b>TOTAL- please see individual invoices for complete descriptions.</b>	<b>\$25,103.00</b>	

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CURRENT	1-30 DAYS PAST DUE	31-60 DAYS PAST DUE	61-90 DAYS PAST DUE	OVER 90 DAYS PAST DUE	AMOUNT DUE
\$0.00					\$0.00

**REMITTANCE**

Statement # 11071  
 Date  
 Amount Due \$0.00  
 Amount Enclosed

Make all checks payable to DeVinney & Dinneen  
**THANK YOU FOR YOUR BUSINESS!**

RODRIGUEZ TRIAL EXPENSES

10/21	Golden Nugget	\$ 134.47	] <i>which witnesses?</i>
10/26	Golden Nugget	133.34	
10/23	La Quinta	457.34	] <i>client</i>
11/11	La Quinta	1136.46	
11/12	La Quinta	77.87	
11/04	AV Trans	1080.00	
11/04	AV Trans	607.50	
11/06	AV Trans	2500.00	
11/06	AV Trans	270.00	
11/10	AV Trans	5742.50	
11/11	AV Trans	870.00	
11/12	AV Trans	1327.50	
11/08	RJC	5.98	] <i>meals</i>
11/08	RJC	11.63	
11/10	RJC	3.89	
11/09	Roma Deli	72.92	
11/08	Hennessey's	82.64	
11/10	Hennessey's	72.26	
<hr/>			
Total		\$14586.30	

Listing of Actual Cost Detail Entries

Searching all Numbers  
 Searching Job Codes Between 010676 and 010676  
 Searching all Dates

Number	Date	Job No	Phase	SubPhase	Vendor Code	Invoice No	Description	Category	Cost Amount	Type
014604	07/25/05	010676			CHARTONE	2711571077	medical records	1	9.52	AP
034700	07/29/05	010676			FBS	SR1761734	medical records	1	0.60	AP
035572	09/22/05	010676			MORTILLARO	10676-05	MED RECORDS	1	58.05	AP
037054	12/15/05	010676			CHARTONE	227550	MEDICAL RECORDS	1	39.82	AP
037055	12/15/05	010676			AMR	3010261011	MEDICAL RECORDS	1	1.60	AP
037652	01/19/06	010676			LVNCR	10676-05	MEDICAL RECORDS	1	43.00	AP
038345	02/27/06	010676			SS	1729	PROF. SERV.	1	328.00	AP
038521	03/10/06	010676			SS	1788	PROF. SERV.	1	143.50	AP
038651	03/16/06	010676			SS	1797	PROF SERV.	1	830.25	AP
039252	04/10/06	010676			SS	1632	PROF SERV.	1	255.50	AP
039581	04/28/06	010676			SS	1869	PROF. SERV.	1	104.00	AP
040120	05/30/06	010676			SS	1788	LEGAL SVCS	1	143.50	AP
040738	06/19/06	010676			SS	1788	DOUBLE POSTING	1	-143.50	AP
040956	06/30/06	010676			SS	1932	PROF. SERV.	1	871.25	AP
041158	07/07/06	010676			SS	1788		1	143.50	AP
041753	06/01/06	010676			SS	1977	PROF. SERV.	1	430.50	AP
042324	09/01/06	010676			LDS	23203	COPIES	1	75.25	AP
042889	10/04/06	010676			SS	2020	PROF. SERV.	1	587.00	AP
045053	10/19/06	010676			CCDC	10676-05	FILING FEE	1	178.00	AP
045075	10/19/06	010676			P&A	10676-05	PATIENT INTERVIEW	1	1,500.00	AP
043250	11/02/06	010676			SS	2008	RECORDS REVIEW	1	779.00	AP
043294	11/07/06	010676			CCDC	10676-05	VOID CK 45968	1	-178.00	AP
043295	11/07/06	010676			CCDC	10676-05	FILING FEE	1	148.00	AP
043634	11/27/06	010676			TLDG	06118135T	SCANNING TO CD	1	205.54	AP
043638	11/27/06	010676			GUTIERREZ	56780	MEDICAL RECORDS	1	10.20	AP
043847	12/12/06	010676			LE	50212	RUNNER	1	26.35	AP
043866	12/13/06	010676			SS	2086	PROF SVCS	1	1,722.00	AP
044300	01/25/07	010676			MORTILLARO	562294767	MEDICAL RECORDS	1	75.00	AP
045437	03/21/07	010676			WS	10676-05	MEDICAL RECORDS	1	45.00	AP
045594	03/29/07	010676			RFL	10676-05	MEDICAL RECORDS	1	25.00	AP
045903	04/12/07	010676			MDSC	106590	MEDICAL RECORDS	1	58.80	AP
047319	08/09/07	010676			LWI	35489	copy job	1	176.88	AP
048025	08/20/07	010676			CHARTONE	0305022174	medical records	1	26.45	AP
049129	10/25/07	010676			MORTILLARO	10676-05	medical records	1	35.53	AP
049425	11/08/07	010676			CENTERP	57217	medical records	1	46.20	AP
049431	11/08/07	010676			WS	10676-05	medical records	1	45.00	AP
049432	11/08/07	010676			PION	10676-05	medical records	1	12.60	AP
049434	11/08/07	010676			PRIMARY	10676-05	medical records	1	63.00	AP
049452	11/13/07	010676			TLDG	07-115557	copy job	1	531.16	AP
049520	11/19/07	010676			SS	2389	prof svcs	1	2,051.00	AP
049744	11/28/07	010676			LE	56906	runner service	1	10.50	AP
051039	02/11/08	010676			PRIMARY	10676-05	credit	1	-52.80	AP
051040	02/11/08	010676			MAOSN	10676-05	medical records	1	52.80	AP
051112	02/12/08	010676			USLMS	39834	runner svc	1	28.05	AP
052356	04/15/08	010676			SS	2512	expert fees	1	2,070.00	AP
052597	04/28/08	010676			RJS	10676-05	medical records	1	46.60	AP
053808	07/02/08	010676			TLDG	08-6600	copy job	1	55.71	AP
053932	07/17/08	010676			SS	2592	Expert Fees	1	675.00	AP
054544	08/25/08	010676			TLDG	08-8477	copy job	1	96.43	AP
054775	09/08/08	010676			TLDG	08-9020	Copy Job	1	23.65	AP
054785	09/10/08	010676			TLDG	08-9040	Copy Job	1	642.84	AP
054028	07/22/08	010676			TB&JL	10676-05	record review/crovetti	1	2,500.00	AP
055111	10/02/08	010676			SS	2694	Expert Fees	1	2,137.50	AP
055261	10/13/08	010676			USLMS	3700492	Runner Service	1	31.36	AP
055361	10/16/08	010676			TLDG	08-10229	Copy Job	1	17.16	AP
055376	10/17/08	010676			DEVINNEY	5685	Expert Fees	1	875.00	AP
055377	10/17/08	010676			DEVINNEY	5688	Expert Fees	1	944.00	AP
055543	10/24/08	010676			DISCOVERY	618173	Medical Records	1	15.31	AP
055548	10/28/08	010676			CEMKNMIAL	10676-05	Medical Records	1	9.14	AP
055556	10/28/08	010676			FE	296516852	overnight mail	1	33.15	AP
055558	10/28/08	010676			FE	296516852	overnight mail	1	22.30	AP
055559	10/28/08	010676			FE	296516852	overnight mail	1	23.30	AP
055859	11/13/08	010676			DEVINNEY	5693	prof svcs	1	1,856.00	AP
056100	11/24/08	010676			DEVINNEY	5707	prof svcs	1	4,369.00	AP
056221	12/03/09	010676			TLDG	08-10404	copy job	1	130.85	AP
056770	01/12/09	010676			WALGREEN	787387	Medical Records	1	55.00	AP
055944	01/22/09	010676			LS&T	835775	appearance fee	1	100.00	AP
057247	02/10/09	010676			LS&T	816849	depo transcript	1	1,376.00	AP
058002	03/24/09	010676			1USLMS	3701606	Runner Service	1	40.66	AP
058662	04/30/09	010676			TLDG	09-4409	copy job	1	12.07	AP
059575	06/23/09	010676			ENRIQUE	10676-05	REIM LIT COSTS	1	550.00	AP
059815	07/09/09	010676			TLDG	09-5099	Copy Job	1	24.74	AP

Listing of Actual Cost Detail Entries

Searching all Numbers  
 Searching Job Codes Between 010676 and 010676  
 Searching all Dates

Number	Date	Job No	Phase	SubPhase	Vendor Code	Invoice No	Description	Category	Cost Amount	Type
057833	07/13/09	010676			ALL AMER	1045311	Depo Transcript	1	630.00	AP
060418	08/18/09	010676			INNO&R	10676-05	medical records	1	14.93	AP
060434	08/19/09	010676			ENRIQUE	10676-05	reim ime charges per amb	1	680.00	AP
060524	08/28/09	010676			IUSLMS	3703042	process svc	1	641.00	AP
060539	08/28/09	010676			IUSLMS	3703042	process svc	1	54.24	AP
060645	09/15/09	010676			LS&T	847885	depo transcript	1	401.55	AP
060863	09/28/09	010676			IAS	10676-05	demand ltr/package	1	4,140.00	AP
060888	09/29/09	010676			SCHIFONI	10676-05	medical records	1	15.19	AP
060949	10/02/09	010676			KGHCHARLES	10676-05	medical records	1	18.00	AP
061071	10/15/09	010676			REIMTECHN	900343946	medical records	1	20.00	AP
061599	11/12/09	010676			VATERSPINE	10676-05	medical records	1	5.40	AP
061708	11/16/09	010676			MATTSMITH	RP18843	medical records	1	34.20	AP
061926	11/01/09	010676			MED-R	09-4176	medical records	1	117.86	AP
062022	12/08/09	010676			NLN	10676-05	amen summons publication	1	100.00	AP
062170	12/22/09	010676			DEVINNEY	6101	prof svcs	1	428.00	AP
062324	12/30/09	010676			IUSLMS	3704049	runner svc	1	25.95	AP
062332	12/30/09	010676			IUSLMS	3704049	runner svc	1	32.77	AP
062595	01/14/10	010676			QDI	10676-05	medical records	1	15.00	AP
062626	01/20/10	010676			MED-R	09-4354	medical records	1	14.73	AP
062753	01/28/10	010676			LE	71428	process svc	1	112.50	AP
063703	03/31/10	010676			MED-R	10-1526	medical records	1	6.49	AP
063732	04/06/10	010676			QDI	10676-05	void ck 9593	1	15.00	AP
063912	04/12/10	010676			LBOA	FILING FEE	e-file fee	1	0	AP
063930	04/12/10	010676			LBOA	FILING FEE	e-file fee	1	0	AP
064089	04/21/10	010676			DEVINNEY	6207	File Review	1	234.00	AP
064369	05/12/10	010676			VTI ASSOC	05-167	expert retainer	1	2,500.00	AP
064385	05/12/10	010676			NVPILB	10676-05	subpoena fee	1	25.00	AP
064705	06/04/10	010676			IUSLMS	3705605	runner svc	1	32.77	AP
065036	06/22/10	010676			MORTILLARO	10676-05	depo prep fee	1	500.00	AP
065250	07/08/10	010676			FIRSTCHOIC	96253	depo transcript	1	262.81	AP
065338	07/16/10	010676			DEVINNEY	6309	professional fees	1	754.00	AP
Sub Totals :									43,928.02	
Totals :									43,928.02	

Job Code	Description	Tran Date	Inv #	Tran #	Amount	Vendor Code	Vendor Name
10676	depo transcript	08/04/10	101759	0000078577	213.25	FIRSTCHOIC	First-Choice Reporting Services, Inc.
10676	Professional Fees	08/17/10	6347	0000078733	442.00	DEVINNEY	Devinney & Dinneen Career &
10676	witness fee	08/25/10	10676-05	0000078865	26.00	FERRARO	Steve Ferraro
10676	E-Filing retainer	08/27/10	3706630	0000078909	27.50	USLMS	US Legal Management Services, Inc.
10676	Sierra Legal -SEP10034	09/09/10	SEP10034	0000079016	121.41	SLD	Sierra Legal Duplicating, Inc.
10676	Runner Service	09/16/10	3706793	0000079132	32.77	USLMS	US Legal Management Services, Inc.
10676	Runner Service	09/16/10	3706793	0000079132	61.77	USLMS	US Legal Management Services, Inc.
10676	Runner Service	09/16/10	3706793	0000079132	32.77	USLMS	US Legal Management Services, Inc.
10676	Runner Service	09/16/10	3706793	0000079132	32.77	USLMS	US Legal Management Services, Inc.
10676	locate witness	09/20/10	09-182	0000079182	200.00	VTI ASSOC	VTI Associates
10676	overnight postage	10/12/10	722819984	0000079405	25.47	FE	Federal Express
10676	depo transcript	10/12/10	867260	0000079453	295.50	LS&T	Litigation Services & Technologies, LLC
10676	depo transcript	10/12/10	867264	0000079455	194.00	LS&T	Litigation Services & Technologies, LLC
10676	depo transcript	10/12/10	867626	0000079470	223.05	LS&T	Litigation Services & Technologies, LLC
10676	overnight postage	10/14/10	725180291	0000079493	36.49	FE	Federal Express
10676	Runner Service	10/18/10	3707082	0000079553	61.77	USLMS	US Legal Management Services, Inc.
10676	Runner Service	10/18/10	3707082	0000079553	61.77	USLMS	US Legal Management Services, Inc.
10676	trial subpoena	10/21/10	10676-05	0000079592	26.00	KOOINGA	Vicki Kooinga
10676	trial subpoena	10/21/10	10676-05	0000079593	26.00	SLONG	Sheri Long
10676	Brandy Beaver-10676-05	10/21/10	10676-05	0000079594	26.00	BBAVERS	Brandy Beavers
10676	trial subpoena	10/21/10	10676-05	0000079595	26.00	HEAPS	Nathan Heaps, M.D.
10676	trial fees	10/21/10	10676-05	0000079596	2500.00	PRIMARY	Primary Care Consultants
10676	trial fees	10/21/10	10676-05	0000079597	5000.00	LM,PH	Louis Mortillaro, Ph.D.
10676	trial fees	10/21/10	10676-05	0000079598	900.00	BAKER	Steven T. Baker
10676	trial fees	10/21/10	10676-05	0000079599	5000.00	SHANNON	Mary Ann Shannon, M.D.
10676	expert fees	10/21/10	10676-05	0000079600	500.00	HARTMAN	Kathleen Hartman
10676	expert trial fee	10/22/10	10676-05	0000079629	5600.00	RJS	Russell J. Shah MD
10676	expert trial fee	10/22/10	10676-05	0000079630	4000.00	SCHIFINI	Joseph Schifini, MD
10676	expert trial fee	10/22/10	10676-05	0000079631	3200.00	TAUBER	Jack Tauber, M.D.
10676	expert trial fee	10/22/10	10676-05	0000079632	5000.00	KIDWELL	Walter Kidwell, M.D.
10676	expert trial fee	10/22/10	10676-05	0000079643	1200.00	RJS	Russell J. Shah MD
10676	Russell J. Sh-10676-05	11/02/10	10676-05	0000079696	5600.00	RJS	Russell J. Shah MD
10676	Process Service	11/03/10	2010002649	0000079735	85.00	LE	Legal Express, Inc.
10676	Process Service	11/03/10	2010002649	0000079735	95.00	LE	Legal Express, Inc.
10676	Process Service	11/03/10	2010002649	0000079735	95.00	LE	Legal Express, Inc.
10676	Process Service	11/03/10	2010002649	0000079735	95.00	LE	Legal Express, Inc.
10676	void ck 11306	11/03/10	10676-05	0000079763	-26.00	HEAPS	Nathan Heaps, M.D.
10676	void ck 11303	11/03/10	10676-05	0000079764	-26.00	BBAVERS	Brandy Beavers
10676	overnight postage	11/04/10	727578318	0000079790	12.10	FE	Federal Express
10676	trial fees	11/05/10	10676-05	0000079800	2500.00	MORTILLARO	L.F. Mortillaro, Ph.D., LTD
10676	expert trial fee	11/08/10	10676-05	0000079813	10000.00	TAUBER	Jacob E. Tauber, M.D.
10676	depo transcript	11/08/10	868117	0000079832	354.50	LS&T	Litigation Services & Technologies, LLC
10676	void ck 11479	11/17/10	10676-05	0000079870	-2500.00	MORTILLARO	L.F. Mortillaro, Ph.D., LTD
10676	transcript/hotel/meals	11/17/10	10676-05	0000079880	14586.30	SB	Steven M. Baker --
10676	Runner Service	11/19/10	3707330	0000079939	31.36	USLMS	US Legal Management Services, Inc.
10676	Runner Service	11/19/10	3707330	0000079939	32.77	USLMS	US Legal Management Services, Inc.
10676	reim parking/meal	11/19/10	10676-05	0000079940	48.11	KRYSTEK	Monicue Krystek
10676	Professional Fees	11/30/10	6426	0000079981	2716.00	DEVINNEY	Devinney & Dinneen Career &
10676	Professional Fees	11/30/10	6420	0000079982	1278.00	DEVINNEY	Devinney & Dinneen Career &
10676	copy job	11/30/10	72534	0000079983	4434.05	LDS	QUIVX
10676	trial expert fee	11/30/10	767	0000079984	4000.00	SCHIFINI	Joseph Schifini, MD
10676	Professional Fees	11/30/10	6453	0000079985	2040.00	DEVINNEY	Devinney & Dinneen Career &
10676	Professional Fees	11/30/10	6469	0000079986	6367.00	DEVINNEY	Devinney & Dinneen Career &
10676	record review/trial prep	11/30/10	765	0000079987	7450.00	SCHIFINI	Joseph Schifini, MD
10676	trial prep fee	11/30/10	5037	0000079988	1200.00	RJS	Russell J. Shah MD
10676	trial prep&record review	11/30/10	5037	0000079989	2400.00	RJS	Russell J. Shah MD
10676	record review&teleconf	11/30/10	10676-05	0000079990	5000.00	LVNO&R	Las Vegas Neurosurgery,
10676	Process Service	11/30/10	2010004767	0000079991	75.00	AM:PMLS	AM:PM Legal Solutions
10676	transcriber billing	12/09/10	A531538	0000080155	630.00	CTREAS	Clark County Treasurer --
10676	Runner Service	01/14/11	3707711	0000080586	84.82	USLMS	US Legal Management Services, Inc.

Grand Total for Client code # 10676

103750.30



Generated

Thursday, March 10, 2011  
at 3:37:13PM

Consolidated Account Summary

Client='10676'

Starting Date: 8/26/2009      Ending Date: 3/10/2011      Number of Days: 562

<u>Location/Client</u>	<u>Trxs.</u>	<u>Page Count</u>	<u>Amount</u>
<b>Location: LAS:Las Vegas</b>			
<b>Client: 10676:ENRIQUE RODRIGUEZ</b>			
Totals for Matter: 05:2005	469	21,872	\$5,799.50
<b>Totals for Client: 10676</b>	<b>469</b>	<b>21,872</b>	<b>\$5,799.50</b>
<b>Totals for Location: LAS</b>	<b>469</b>	<b>21,872</b>	<b>\$5,799.50</b>

**Benson & Bertoldo**

**Consolidated Summary Report by Client**

**Detail Report**

**Criteria: Date Between 04/01/2000 00:00:00 And 09/01/2009 23:59:59 AND Client = "10676"**

<u>Client ID/ Year</u>	<u>Transaction</u>	<u>Phone Number</u>	<u>Duration</u>	<u>Count</u>	<u>Amount</u>
SubTotals Year: 10676 / 05	Copy		76800	11182	\$2,795.50
	<b>SubTotal for Trx: Copy</b>		<b>76800</b>	<b>11182</b>	<b>\$2,795.50</b>
SubTotals Year: 10676 / 05	Disbursements		8160	0	\$195.91
	<b>SubTotal for Trx: Disbursements</b>		<b>8160</b>	<b>0</b>	<b>\$195.91</b>
SubTotals Year: 10676 / 05	Fax	8781558	19247	118	\$124.00
	<b>SubTotal for Trx: Fax</b>		<b>19247</b>	<b>118</b>	<b>\$124.00</b>
	<b>Grand Total</b>		<b>104207</b>	<b>11300</b>	<b>\$3,115.41</b>

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INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
1402	10676-05	1925.00	0.00	1925.00

Date  
06/03/11

Monique

Check Number  
00013043

Check Amount  
\$ 1925.00

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

13043

CHECK NO.  
00013043

\*\* ONE THOUSAND NINE HUNDRED TWENTY FIVE DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF** PrivateTrials, Inc.  
 701 Bridger Avenue  
 Suite 570  
 Las Vegas NV 89101

DATE: 06/03/11  
 AMOUNT: \*\*\*\*1,925.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: mediation fees&costs/rodriguez

⑈013043⑈ ⑆321270742⑆6733267691⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
1402	10676-05	1925.00	0.00	1925.00

Date  
06/03/11

Check Number  
00013043

Check Amount  
\$ 1925.00

Payee  
PrivateTrials, Inc.

NON-NEGOTIABLE

# PrivateTrials.com

To: STEVEN M. BAKER, ESQ.  
JOHN L. BERTOLDO, ESQ.  
ROBERT CARDENAS, ESQ.

Fax No.: 228-2333

To: JOHN M. NAYLOR, ESQ.

Fax No.: 383-8845

From: GENE T. PORTER

Date: May 17, 2011

Re: RODRIGUEZ v. FIESTA PALMS

Pages: 5 (including cover page)

ORIGINAL WILL  WILL NOT  follow by regular mail.

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If you did not receive this entire fax, please call CAROLINA (702) 932-2600

THIS MESSAGE IS INTENDED ONLY FOR THE INDIVIDUAL OR ENTITY TO WHOM IT IS TRANSMITTED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND/OR EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAWS. IF THE READER OF THIS COMMUNICATION IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AUTHORIZED AGENT RESPONSIBLE FOR DELIVERING THE COMMUNICATION TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL COMMUNICATION TO US AT THE ADDRESS ABOVE VIA THE U.S. POSTAL SERVICE. WE WILL REIMBURSE YOU FOR MAILING COSTS. THANK YOU.

Honorable A. William Maupin  
Nevada Supreme Court, Ret.

**PrivateTrials.com**

10676-05  
Honorable Gene T. Porter  
8th Judicial District Court, Ret.

May 17, 2011

**VIA FACSIMILE ONLY: 228-2333**

Steven M. Baker, Esq.  
John L. Bertoldo, Esq.  
Robert Cardenas, Esq.  
Benson, Bertoldo, Baker & Carter, Chtd.  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117

**VIA FACSIMILE ONLY: 383-8845**

John M. Naylor, Esq.  
Lionel, Sawyer & Collins  
300 S. Fourth Street, Suite 1700  
Las Vegas, Nevada

RE: RODRIGUEZ v. FIESTA PALMS

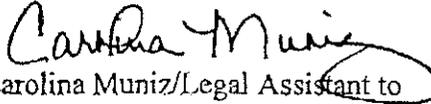
Dear Counsel:

Mr. Porter enjoyed meeting with you on May 16, 2011. Enclosed please find our invoice and billing statement for services rendered in the amount of \$3,850.00. It is my understanding that you will be dividing our fees between you, with each side to pay the sum of \$1,925.00. Please make check payable to "*PrivateTrials.com*." Also enclosed please find a W-9 form for your records. Please forward to your carrier if applicable. *In order to insure proper credit for payment, please reference case name on check.* Please forward this information to your accounting department so that your payment can be received in a timely fashion.

Thank you for the opportunity to serve you.

Very truly yours,

PrivateTrials.com

  
Carolina Muniz/Legal Assistant to  
Gene T. Porter, Esq.

/cam

**BILLING STATEMENT**

MEDIATION SERVICES PROVIDED BY GENE T. PORTER, ESQ.  
RODRIGUEZ v. FIESTA PALMS

PrivateTrials.com/Tax ID #26-4096970

Total Time Expended : 7.70 hrs.  
Agreed Hourly Rate : \$500.00  
Total Due : \$3,850.00

\$1,925.00 each.

**DUE AND PAYABLE UPON RECEIPT.**

**PLEASE MAKE CHECK PAYABLE TO "PrivateTrials.com"**

*Please reference case name on check to insure proper credit for payment.*

PrivateTrials.com

701 Bridger Avenue  
 Suite 570  
 Las Vegas, NV 89101

# Invoice

Date	Invoice #
5/17/2011	1402

Bill To
RODRIGUEZ v. FIESTA PALMS

TAX ID NO. 26-4096970
-----------------------

Date	Description	Time	Amount
05/15/2011	REVIEW MISCELLANEOUS DOCUMENTS PROVIDED BY THE PARTIES PRIOR TO MEDIATION	2.70	1,350.00
05/16/2011	CONDUCT MEDIATION	5.00	2,500.00
<p>*****EACH PARTY TO PAY \$1,925.00*****</p>			

Time is calculated at a rate of \$500.00 per hour	<b>Payments/Credits</b>	\$0.00
	<b>Balance Due</b>	\$3,850.00

Form **W-9**  
(Rev. October 2007)  
Department of the Treasury  
Internal Revenue Service

### Request for Taxpayer Identification Number and Certification

Give form to the  
requester. Do not  
send to the IRS.

Name (as shown on your income tax return)  
**PrivateTrials.com**

Business name, if different from above

Check appropriate box:  Individual/sole proprietor  Corporation  Partnership  
 Limited liability company. Enter the tax classification (D=disregarded entity, C=corporation, P=partnership) ▶ .....  Exempt payee  
 Other (see instructions) ▶

Address (number, street, and apt. or suite no.)  
**701 Bridger Avenue, Suite 570**

City, state, and ZIP code  
**Las Vegas, Nevada 89101**

List account number(s) here (optional)

Requester's name and address (optional)

**Part I Taxpayer Identification Number (TIN)**

Enter your TIN in the appropriate box. The TIN provided must match the name given on Line 1 to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Social security number
OR
Employer identification number
26 4096970

**Part II Certification**

Under penalties of perjury, I certify that:

- The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
- I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
- I am a U.S. citizen or other U.S. person (defined below).

**Certification Instructions.** You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. See the instructions on page 4.

Sign Here Signature of U.S. person ▶ *[Signature]* Date ▶ **5/17/11**

**General Instructions**

Section references are to the Internal Revenue Code unless otherwise noted.

**Purpose of Form**

A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

- Certify that the TIN you are giving is correct (or you are waiting for a number to be issued).
- Certify that you are not subject to backup withholding, or
- Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

Note. If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

**Definition of a U.S. person.** For federal tax purposes, you are considered a U.S. person if you are:

- An individual who is a U.S. citizen or U.S. resident alien,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,
- An estate (other than a foreign estate), or
- A domestic trust (as defined in Regulations section 301.7701-7).

**Special rules for partnerships.** Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

The person who gives Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States is in the following cases:

- The U.S. owner of a disregarded entity and not the entity.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
09-167	10676-05	2500.00	0.00	2500.00

Date  
06/17/10

Check Number  
00010281

Check Amount  
\$ 2500.00

*Monique*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228 2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

10281

CHECK NO.  
00010281

\*\* TWO THOUSAND FIVE HUNDRED DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
 VTI Associates  
 P.O. Box 60536  
 Boulder City NV 89006

DATE: 06/17/10  
 AMOUNT: \*\*\*\*2,500.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: retainer fee/rodriguez

⑈0⑆028⑆⑈ ⑆32⑆2707⑆2⑆673326769⑆⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
09-167	10676-05	2500.00	0.00	2500.00

Date  
06/17/10

Check Number  
00010281

Check Amount  
\$ 2500.00

Payee  
VTI Associates

NON-NEGOTIABLE



VTI Associates  
 P.O. Box 60536  
 Boulder City, NV 89006  
 702 647 5372  
 steve@VTIassociates.com

*OK by SMB  
 expert d/L = 6/15/10*

10676-05

**Invoice**

Date	Invoice #
5/10/2010	09-167

Bill To:

Benson Bertoldo Baker & Carter  
 7408 W. Sahara Avenue  
 Las Vegas, NV 89117

P.O. No.	Terms	EIN
		27-0050304

Description	Qty	Rate	Amount
Retainer for Expert Services of Steven T Baker: Enrique Rodriguez vs Fiesta Palms A531538	1	2,500.00	2,500.00
Clark County Sales Tax		8.10%	0.00
<b>Balance Due</b>			<b>\$2,500.00</b>

POSTED  
 ACCOUNTING DEPT

*Red*

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10-1737	14152-09	56.89	0.00	56.89
10-1644	14152-09	20.57	0.00	20.57
10-1608	14384-09	3.89	0.00	3.89
Date 10-1611	14559-09	18.81	0.00	18.81
05/21/10	10-1732	14.27	0.00	14.27
	10-1464	10.84	0.00	10.84
Check Number 10-1789	14550-09	34.19	0.00	34.19
00010051	10-1671	71.56	0.00	71.56
	10-1457	7.13	0.00	7.13
Check Amount 10-1526	10676-05	6.49	0.00	6.49
\$ 342.42	10-1523	24.00	0.00	24.00
	10-1195	23.81	0.00	23.81
	10-1394	38.48	0.00	38.48
	10-1189	11.49	0.00	11.49

NON-NEGOTIABLE

*Monique*

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 84-7074/3212

10051

CHECK NO.  
 00010051

\*\* THREE HUNDRED FORTY TWO DOLLARS AND 42 CENTS \*\*

**PAY TO THE ORDER OF**  
 Med-R Medical Retrieval  
 320 South Fourth Street  
 Las Vegas NV 89101

DATE 05/21/10  
 AMOUNT \*\*\*\*\*342.42

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: medical records

⑈010051⑈ ⑆32127074216733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10-1737	14152-09	56.89	0.00	56.89
10-1644	14152-09	20.57	0.00	20.57
10-1608	14384-09	3.89	0.00	3.89
Date 10-1611	14559-09	18.81	0.00	18.81
05/21/10	10-1732	14.27	0.00	14.27
	10-1464	10.84	0.00	10.84
Check Number 10-1789	14550-09	34.19	0.00	34.19
00010051	10-1671	71.56	0.00	71.56
	10-1457	7.13	0.00	7.13
Check Amount 10-1526	10676-05	6.49	0.00	6.49
\$ 342.42	10-1523	24.00	0.00	24.00
	10-1195	23.81	0.00	23.81
	10-1394	38.48	0.00	38.48
	10-1189	11.49	0.00	11.49

10051

NON-NEGOTIABLE

Payee  
 Med-R Medical Retrieval



Secure Documents Inc. dba Med-R  
 320 S. 4th Street  
 Las Vegas, NV 89101  
 Phone # (702)380-4283 Fax # (702)380-4286



11242-06

# Invoice

Date	Invoice #
3/12/2010	10-1189

Ordered By
Benson, Bertoldo, Baker & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

Bill To
Benson, Bertoldo, Baker & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

Name of Patient	Medical Facility	Terms	Due Date	Rep	Ordered By
Enrique Rodriguez	Crovetti Orthopedics	Due on receipt	3/12/2010	HN	
Quantity	Description			Amount	
10	Medical Records - NV Regulatory Fee			6.00T	
	Administer Oaths or Affirmations - Nevada Regulated Fee			5.00	
	Per Nevada Law you are responsible for paying the costs of making the copy:			0.00	
	NRS 629.061: Costs of making the copy, not to exceed .60 per page for photocopies and a reasonable cost for copies of x-ray photographs and other health care records produced by similar processes.				

All Invoices are Due of Receipt. Please make your prompt payment today! Thank you!		<b>Subtotal</b>	\$11.00
--	--	-----------------	---------

Please Mail Checks To:  
 MED-R.  
 Secure Documents Inc. dba Med-R  
 320 S. 4th Street  
 Las Vegas, Nv 89101

Sign: *Steve Baker*  
 Print: STEVE BAKER  
 Date: 3/22/10

TAX ID# 20-4088393

<b>Sales Tax (8.1%)</b>	\$0.49
<b>Total</b>	\$11.49
<b>Payments/Credits</b>	\$0.00
<b>Balance Due</b>	\$11.49

We accept all Major Credit Cards!

Sierra Legal Duplicating, Inc.

P.O. Box 2452  
 Reno, NV 89505  
 775-786-8224 or 888-753-5345  
 EIN 88-0369419

# Invoice

*COP paid !!  
 no 9-10-10*

DATE	INVOICE #
9/8/2010	SEP 10 034

<b>BILL TO</b>
Benson, Bertaldo, Baker & Carter 7408 West Sahara Ave Las Vegas, NV. 89117

<b>SHIP TO</b>
Benson, Bertaldo, Baker & Carter 7408 West Sahara Ave Las Vegas, NV 89117

TERMS	REP	SHIP	VIA	CLIENT/MATTER
C.O.D.	EF	9/8/2010	Hand Deliver	RODRIGUEZ

QUANTITY	ITEM CODE	DESCRIPTION	PRICE EACH	AMOUNT
496	0005	Heavy Grade Copywork	0.185	91.76T
1	CD	CD	15.00	15.00T
6	0013	Rebind	1.00	6.00
1	Fuel	Fuel Surcharge	0.00	0.00T
		Sales Tax	8.10%	8.65
<b>Total</b>				\$121.41

Please pay by this invoice. No monthly statement will be sent. Terms: Net 30 days, interest rate of 1.5% (18.0% per annum) will be added after 30 days. Now for your convenience, we accept Visa, Master Card, Discover and American Express.



INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	15.00	0.00	15.00

Date  
03/24/10

Check Number  
00009593

Check Amount  
\$ 15.00

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**

A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**

8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117

94-7074/3212

9593

CHECK NO.

00009593

\*\* FIFTEEN DOLLARS AND 00 CENTS \*\*

PAY  
TO THE  
ORDER  
OF

Quest Diagnostics Incorporated  
Compliance Department  
4230 Burnham Avenue  
Las Vegas NV 89119-5410

DATE AMOUNT  
03/24/10 \*\*\*\*\*15.00

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: med records/rodriguez

⑈009593⑈ ⑆321270742⑆6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	15.00	0.00	15.00

Date  
03/24/10

Check Number  
00009593

Check Amount  
\$ 15.00

Payee  
Quest Diagnostics Incorporated

NON-NEGOTIABLE

Quest Diagnostics Incorporated

8401 Fallbrook Avenue  
West Hills, California 91304  
818.737.6000  
[www.questdiagnostics.com](http://www.questdiagnostics.com)

10676-05



December 17, 2009

POSTED

Law Offices of Benson, Bertoldo, Baker & Carter  
7408 West Sahara Avenue  
Las Vegas, NV 89117

IAN 15 2010

ACCOUNTING DEPT

Re: Patient: Enrique J. Rodriguez  
DOB: 07/15/1963

Dear Sir/Madam,

A Fee of \$15.00 is required to cover the research/copy fees of each request. Please remit funds, payable to Quest Diagnostics to the address below.

Please call me if you have any questions.

Thank you,

A handwritten signature in cursive script, appearing to read "Elizabeth Gomez".

Elizabeth Gomez  
Custodian of Records  
8401 Fallbrook Ave.  
West Hills, CA 91304  
Office: 818-737-6472  
Fax: 818-737-6316  
TAX ID# 71-0897031

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
SEP10034	10676-05	121.41	0.00	121.41

Date  
09/09/10

Check Number  
00010895

Check Amount  
\$ 121.41

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

10895

CHECK NO.  
00010895

\*\* ONE HUNDRED TWENTY ONE DOLLARS AND 41 CENTS \*\*

**PAY TO THE ORDER OF**  
 Sierra Legal Duplicating, Inc.  
 P.O. Box 2452  
 Reno NV 89505

DATE: 09/09/10  
 AMOUNT: \*\*\*\*\*121.41

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: Rodriquez/Sep10 034

⑈010895⑈ ⑆321270742⑆6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
SEP10034	10676-05	121.41	0.00	121.41

Date  
09/09/10

Check Number  
00010895

Check Amount  
\$ 121.41

NON-NEGOTIABLE

C.O.D.

0676-05

Sierra Legal Duplicating, Inc.

P.O. Box 2452  
Reno, NV 89505  
775-786-8224 or 888-753-5345  
EIN 88-0369419

Delivery Fri 9/10/10

by noon

T.Dineen's job file

# Invoice

DATE	INVOICE #
9/8/2010	SEP 10 034

<b>BILL TO</b>
Benson, Bertaldo, Baker & Carter 7408 West Sahara Ave Las Vegas, NV. 89117

<b>SHIP TO</b>
Benson, Bertaldo, Baker & Carter 7408 West Sahara Ave Las Vegas, NV 89117

TERMS	REP	SHIP	VIA	CLIENT/MATTER
C.O.D.	EF	9/8/2010	Hand Deliver	RODRIQUEZ

QUANTITY	ITEM CODE	DESCRIPTION	PRICE EACH	AMOUNT
496	0005	Heavy Grade Copywork	0.185	91.76T
1	CD	CD	15.00	15.00T
6	0013	Rebind	1.00	6.00
1	Fuel	Fuel Surcharge	0.00	0.00T
		Sales Tax	8.10%	8.65
<b>Total</b>				\$121.41

Please pay by this invoice. No monthly statement will be sent. Terms: Net 30 days, interest rate of 1.5% (18.0% per annum) will be added after 30 days. Now for your convenience, we accept Visa, Master Card, Discover and American Express.



INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez,	26.00	0.00	26.00

Date  
05/12/10

Check Number  
00009975

Check Amount  
\$ 26.00

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

9975

CHECK NO.  
00009975

\*\* TWENTY SIX DOLLARS AND 00 CENTS \*\*

DATE	AMOUNT
05/12/10	*****26.00

**PAY TO THE ORDER OF**  
 NV Private Investigators Licensing Board  
 3476 Executive Pointe Way  
 Suite 14  
 Carson City NV 89706

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: subpoena fee/rodriguez

⑈009975⑈ ⑆321270742⑆673326769⑆⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez,	26.00	0.00	26.00

Date  
05/12/10

Check Number  
00009975

Check Amount  
\$ 26.00

NON-NEGOTIABLE

Payee  
NV Private Investigators Licensing Board

**Heidi Castro**

---

**From:** Monique Krystek  
**Sent:** Tuesday, May 11, 2010 12:24 PM  
**To:** Heidi Castro  
**Subject:** En. Rodz. 10676-05

Heidi,

Please issue a \$26.00 check for the subpoena of records from:

NEVADA PRIVATE INVESTIGATORS LICENSING BOARD  
3476 Executive Pointe Way, Suite 14  
Carson City Nevada 89706

Need to send for service by Friday, May 14th. Thanks!

Monique

"This email and any attachments are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this message in error, please contact the sender(s) at (702) 228-2600 and delete all copies from your system. It is not the intent of the sender to solicit any person or business. Please note that any opinions in this email are solely those of the author and do not necessarily represent those of Benson, Bertoldo, Baker & Carter, Chtd. Any views or opinions are not to be considered legal advice. Should you need legal advice with Nevada, please contact Benson, Bertoldo, Baker & Carter, Chtd. The Attorneys at Benson, Bertoldo, Baker & Carter, Chtd. are licensed in Nevada. Finally, the recipient should check this email and any attachments for the presence of viruses. The company accepts no liability for any damage or loss caused by any virus transmitted by this email."

POSTED  
ACCOUNTING DEPT

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
71349	12638-07	91.50	0.00	91.50
71824		95.00	0.00	95.00
71428	10676-05	112.50	0.00	112.50
Date 71715	12566-07	35.00	0.00	35.00
03/10/10 71348		90.00	0.00	90.00

Check Number  
00009259

Check Amount  
\$ 424.00

*Monique*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**  
8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

9259

CHECK NO.  
00009259

\*\* FOUR HUNDRED TWENTY FOUR DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
Legal Express, Inc.  
911 South 1st Street  
Las Vegas NV 89101

DATE AMOUNT  
03/10/10 \*\*\*\*\*424.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: Process Service

⑈009259⑈ ⑆321270742⑆ ⑆673326769⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
71349	12638-07	91.50	0.00	91.50
71824		95.00	0.00	95.00
71428	10676-05	112.50	0.00	112.50
Date 71715	12566-07	35.00	0.00	35.00
03/10/10 71348		90.00	0.00	90.00

Check Number  
00009259

Check Amount  
\$ 424.00

Payee  
Legal Express, Inc.

NON-NEGOTIABLE

LEGAL EXPRESS

911 S. 1ST STREET  
 LAS VEGAS, NV 89101  
 TX-ID-- 88-0317096  
 702-877-0200

LEGAL EXPRESS

DATE	INVOICE NO.
1/15/2010	71428

BILL TO
BENSON, BERTOLDO, BAKER & CARTER 7408 W. SAHARA AVE LAS VEGAS, NV 89117

TERMS	DUE DATE
Net 30	2/14/2010

DATE	DESCRIPTION	CASE NAME	SLIP #	QTY	RATE	AMOUNT
1/13/2010	PROCESS SERVICE IN 89101 - LAS VEGAS	10676-05	71428		39.00	39.00
	FUEL SURCHARGE	-	-		3.50	3.50
	ATTEMPT TO LOCATE	-	-		70.00	70.00
	Sales Tax				8.10%	0.00

POSTED  
 JAN 28 2010  
 ACCOUNTING DEPT

<b>Total</b>	\$112.50
<b>Balance Due</b>	\$112.50

January 19, 2010

**Legal Express**

911 S. 1st St

Las Vegas, NV, 89101

(702) 877-0200 . (702) 384-8170 Fax

**RETURN SERVICE REQUESTED**

**Invoice 71428**

BENSON BERTOLDO BAKER & CARTER  
7408 W. SAHARA AVENUE  
LAS VEGAS NV 89117

228-2600 Business  
228-2333 657-1107 HN Office Fax  
-----<

Legex Slip # **71428-Monique/10676-05**  
Enrique Rodriguez vs Fiesta Palms LLC dba Palms  
Casino Resort  
Substitute Service **Brandy L. Beavers**  
Type of Service: **see attached**  
Completed January 13, 2010 at 3:31 PM,  
at: At Dist, 200 Lewis Ave 3rd Floor, Las Vegas, NV  
89101

Attempt to Locate 1 at 70 per \$70.00  
Service 1 at 39 per \$39.00  
Fuel Surcharge 1 at 3.5 per \$3.50

Fee for Service: \$112.50

**BALANCE DUE: \$112.50**

We look forward to  
"Serving" you!

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
12704-08	Clark, M	-575.20	0.00	4.80
14404-09	Madison, M	3.60	0.00	3.60
11722-07	Calkins, A	1.20	0.00	1.20
Date 03/11/10	12021-07 Williams,	5.40	0.00	5.40
	14310-09 Christian,	2.40	0.00	2.40
Check Number	14346-09 Askin, G	5.40	0.00	5.40
00009451	13069-08 Lisby, R	4.20	0.00	4.20
	10676-05 Rodriguez,	5.40	0.00	5.40
Check Amount	13255-08 Torres, N	8.40	0.00	8.40
\$ 46.80	14279-09 Preisler,	3.60	0.00	3.60
	14019-09 Lazenby, J	2.40	0.00	2.40

NON-NEGOTIABLE

Monique

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228 2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

9451

CHECK NO.  
 00009451

\*\* FORTY SIX DOLLARS AND 80 CENTS \*\*

**PAY TO THE ORDER OF**  
 VaterSpine, Ltd.  
 7200 West Cathedral Rock Drive  
 Suite 210  
 Las Vegas NV 89128

DATE: 03/11/10  
 AMOUNT: \*\*\*\*\*46.80

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: Medical Records

⑈009451⑈ ⑆321270742⑆6733267691⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
12704-08	Clark, M	-575.20	0.00	4.80
14404-09	Madison, M	3.60	0.00	3.60
11722-07	Calkins, A	1.20	0.00	1.20
Date 03/11/10	12021-07 Williams,	5.40	0.00	5.40
	14310-09 Christian,	2.40	0.00	2.40
Check Number	14346-09 Askin, G	5.40	0.00	5.40
00009451	13069-08 Lisby, R	4.20	0.00	4.20
	10676-05 Rodriguez,	5.40	0.00	5.40
Check Amount	13255-08 Torres, N	8.40	0.00	8.40
\$ 46.80	14279-09 Preisler,	3.60	0.00	3.60
	14019-09 Lazenby, J	2.40	0.00	2.40

9451

Payee  
 VaterSpine, Ltd.

NON-NEGOTIABLE

10676-05



7200 West Cathedral Rock Drive Suite 210  
Las Vegas, Nevada 89128  
Phone 702-430-5000 Fax 702-363-9164

Payment Demand for Medical Records

POSTED  
NOV 12 2009  
ACCOUNTING DEPT

Date: 11/10/09  
Re: Rodriguez, Enrique  
SSN/DOB: 771511903

We received your authorization/request for medical records; we require payment for the medical records in question before we can release the records. \*\*Please note that any medical records that are 6 months or older and sent to our storage facility, there will be additional charges.\*\*

Delivery Charge and Retrieve Chart \$10.00

Number of copies 9 at sixty cents per page \$ 5.40

Postage amount (if mailed) \$ 0

Please remit a total of \$ 5.40 along with a copy of this form.

Send a copy of this form with your payment to:

VATERSPINE, LTD.  
7200 WEST CATHEDRAL ROCK DRIVE SUITE 210  
LAS VEGAS, NV 89128  
702-430-5000  
702-363-9164 FAX

Attn: Medical Records

Tax ID: 88-0477256

Thank you,  
VaterSpine

9266

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
6097	12552-07	-2208.00	0.00	2208.00
6101	10676-05	428.00	0.00	428.00

Date  
03/10/10

Check Number  
00009266

Check Amount  
\$ 2636.00

*Monique*

NON-NEGOTIABLE

V

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

9266

CHECK NO.  
00009266

\*\* TWO THOUSAND SIX HUNDRED THIRTY SIX DOLLARS AND 00 CENTS \*\*

DATE	AMOUNT
03/10/10	****2,636.00

**PAY TO THE ORDER OF**  
 Devinney & Dinneen Career & Vocational Service  
 445 Apple Street, Suite 102  
 Reno NV 89502

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: expert services

⑈009266⑈ ⑆321270742⑆673326769⑆⑈

V

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
6097	12552-07	-2208.00	0.00	2208.00
6101	10676-05	428.00	0.00	428.00

9266  
NET AMT.

Date  
03/10/10

Check Number  
00009266

Check Amount  
\$ 2636.00

Payee  
Devinney & Dinneen Career &

NON-NEGOTIABLE

V

1067605

# INVOICE



## DEVINNEY & DINNEEN CAREER AND VOCATIONAL ECONOMIC SERVICES, LTD.

445 Apple Street, Suite 102, Reno, NV 89502  
Phone (775) 825-5558 • Toll Free (888) 235-6549 • Fax (775) 825-4511  
terry@dinneent.com

INVOICE #6101  
DATE: DECEMBER 4, 2009

TO Mr. Steve Baker  
Benson, Bertoldo, Baker & Carter  
7408 West Sahara Ave  
Las Vegas, NV 89117

CASE NAME	OUR CASE NUMBER	PAYMENT TERMS	FEDERAL ID:
RODRIGUEZ, ENRIQUE	009 EXW 1492	Due on receipt	88-0237090

DESCRIPTION OF SERVICES	TOTAL HOURS
NOVEMBER BILLING:  Review of new earnings information. Review of earnings by education. Contact with Attorney's office regarding report.	1.9 hrs.
POSTED DEC 22 2009 ACCOUNTING DEPT	
1.9 Hours @ \$260/Hr:	\$494.00
Credit from Invoice #6013:	(\$66.00)
Balance:	\$428.00

If you have any questions or concerns please give us a call! Make all checks payable to DeVinney and Dinneen  
**THANK YOU FOR YOUR BUSINESS!**



DeVINNEY & DINNEEN CARTER and VOCATIONAL ECONOMIC SERVICES, LTD.

Terrance B Dinneen, M.S., C.R.C., C.R.E.  
Lawrence J. Dinneen, Ph.D., C.R.C.  
Carol A. Dinneen, M.S.

December 4, 2009

Mr. Steve Baker  
Benson, Bertoldo, Baker & Carter  
7408 West Sahara Ave  
Las Vegas, NV 89117

RE: RODRIGUEZ

Dear Mr. Baker:

Enclosed is my invoice for the RODRIGUEZ case. Please do not hesitate to contact our office if you have any questions or concerns regarding this invoice.

Respectfully Submitted,

Terrance Dinneen, M.S., C.R.C., C.R.E.  
Certified Earnings Analyst #032  
Certified in Rehabilitation Economist #0022  
Certified Rehabilitation Counselor #20325

Enclosure:  
TD/mt

*En. Rec.*

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	09-3928	12105-07	41.73	0.00	41.73
	09-4275	13138-08	98.59	0.00	98.59
	09-4054	10676-05	14.73	0.00	14.73
Date	09-4031	11916-07	20.57	0.00	20.57
01/29/10	09-4176	10676-05	117.86	0.00	117.86
	09-4069	14210-09	55.59	0.00	55.59
Check Number	09-4065	14181-09	114.15	0.00	114.15
00009053	09-4470		124.75	0.00	124.75
	09-4469		70.27	0.00	70.27
Check Amount	09-4641	14506-09	12.78	0.00	12.78
\$ 939.62	09-4297	12727-08	33.08	0.00	33.08
	10-0245	13079-0801	128.88	0.00	128.88
	10-0020	12852-0801	36.78	0.00	36.78
	10-0038	13301-0801	69.86	0.00	69.86

NON-NEGOTIABLE

*Monique*

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

CHECK NO.  
 00009053

\*\* NINE HUNDRED THIRTY NINE DOLLARS AND 62 CENTS \*\*

**PAY TO THE ORDER OF**  
 Med-R Medical Retrieval  
 320 South Fourth Street  
 Las Vegas NV 89101

DATE: 01/29/10  
 AMOUNT: \*\*\*\*\*939.62

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: Medical Records

⑈009053⑈ ⑆321270742⑆6733267691⑈

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	09-3928	12105-07	41.73	0.00	41.73
	09-4275	13138-08	98.59	0.00	98.59
	09-4054	10676-05	14.73	0.00	14.73
Date	09-4031	11916-07	20.57	0.00	20.57
01/29/10	09-4176	10676-05	117.86	0.00	117.86
	09-4069	14210-09	55.59	0.00	55.59
Check Number	09-4065	14181-09	114.15	0.00	114.15
00009053	09-4470		124.75	0.00	124.75
	09-4469		70.27	0.00	70.27
Check Amount	09-4641	14506-09	12.78	0.00	12.78
\$ 939.62	09-4297	12727-08	33.08	0.00	33.08
	10-0245	13079-0801	128.88	0.00	128.88
	10-0020	12852-0801	36.78	0.00	36.78
	10-0038	13301-0801	69.86	0.00	69.86

NON-NEGOTIABLE

Payee  
 Med-R Medical Retrieval



Secure Documents Inc. dba Med-R  
 320 S. 4th Street  
 Las Vegas, NV 89101  
 Phone # (702)380-4283 Fax # (702)380-4286



10676-05

# Invoice

Date	Invoice #
11/18/2009	09-4176

<b>Ordered By</b>
Benson, Bertoldo, Baker & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

<b>Bill To</b>
Benson, Bertoldo, Baker & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

Name of Patient	Medical Facility	Terms	Due Date	Rep	Ordered By
Enrique Rodriguez	Matt Smith	Due on receipt	11/18/2009	IIN	Steven Baker
Quantity	Description			Amount	
174	Medical Records - NV Regulatory Fee			104.40T	
	Administer Oaths or Affirmations - Nevada Regulated Fee			5.00	

POSTED  
 DEC 11 2009  
 ACCOUNTING DEPT

All Invoices are Due of Receipt. Please make your prompt payment today! Thank you!

<b>Subtotal</b>	\$109.40
<b>Sales Tax (8.1%)</b>	\$8.46
<b>Total</b>	\$117.86
<b>Payments/Credits</b>	\$0.00
<b>Balance Due</b>	\$117.86

Please Mail Checks To:  
 MED-R  
 Secure Documents Inc. dba Med-R  
 320 S. 4th Street  
 Las Vegas, NV 89101

Sign: *Steven Baker*  
 Print: *STEVEN BAKER / CAA*  
 Date: *11.30.09*

TAX ID# 20-4088393

We accept all Major Credit Cards!

*20. 10. 1.*

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	09-3928	12105-07	41.73	0.00	41.73
	09-4275	13138-08	98.59	0.00	98.59
	09-4054	10676-05	14.73	0.00	14.73
Date	09-4031	11916-07	20.57	0.00	20.57
01/29/10	09-4176	10676-05	117.86	0.00	117.86
	09-4069	14210-09	55.59	0.00	55.59
Check Number	09-4065	14181-09	114.15	0.00	114.15
00009053	09-4470		124.75	0.00	124.75
	09-4469		70.27	0.00	70.27
Check Amount	09-4641	14506-09	12.78	0.00	12.78
\$ 939.62	09-4297	12727-08	33.08	0.00	33.08
	10-0245	13079-0801	128.88	0.00	128.88
	10-0020	12852-0801	36.78	0.00	36.78
	10-0038	13301-0801	69.86	0.00	69.86

NON-NEGOTIABLE

*Monique*  
**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8180 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

9053

CHECK NO.  
 00009053

\*\* NINE HUNDRED THIRTY NINE DOLLARS AND 62 CENTS \*\*

**PAY TO THE ORDER OF**  
 Med-R Medical Retrieval  
 320 South Fourth Street  
 Las Vegas NV 89101

DATE: 01/29/10  
 AMOUNT: \*\*\*\*\*939.62

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: Medical Records

⑈009053⑈ 1232127074212673326769⑈

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	09-3928	12105-07	41.73	0.00	41.73
	09-4275	13138-08	98.59	0.00	98.59
	09-4054	10676-05	14.73	0.00	14.73
Date	09-4031	11916-07	20.57	0.00	20.57
01/29/10	09-4176	10676-05	117.86	0.00	117.86
	09-4069	14210-09	55.59	0.00	55.59
Check Number	09-4065	14181-09	114.15	0.00	114.15
00009053	09-4470		124.75	0.00	124.75
	09-4469		70.27	0.00	70.27
Check Amount	09-4641	14506-09	12.78	0.00	12.78
\$ 939.62	09-4297	12727-08	33.08	0.00	33.08
	10-0245	13079-0801	128.88	0.00	128.88
	10-0020	12852-0801	36.78	0.00	36.78
	10-0038	13301-0801	69.86	0.00	69.86

NON-NEGOTIABLE

Payee  
 Med-R Medical Retrieval



Secure Documents Inc. dba Med-R  
 320 S. 4th Street  
 Las Vegas, NV 89101  
 Phone # (702)380-4283 Fax # (702)380-4286



MEDICAL RECORD RETRIEVAL SERVICE

# Invoice

Date	Invoice #
11/11/2009	09-4054

<b>Ordered By</b>
Benson, Bertoldo, Baker & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

<b>Bill To</b>
Benson, Bertoldo, Baker & Carter 7408 W. Sahara Ave Las Vegas, NV 89117

POSTED

JAN 20 2010

Name of Patient	Medical Facility	Terms	Due Date	Rep	Ordered By
Enrique Rodriguez	Crovetti Orthopedics	Due on receipt	11/11/2009	HN	
Quantity	Description			Amount	
15	Medical Records - NV Regulatory Fee			9.00T	
	Administer Oaths or Affirmations - Nevada Regulated Fee			5.00	

*10674-05*

All Invoices are Due of Receipt. Please make your prompt payment today! Thank you!		<b>Subtotal</b>	\$14.00
Please Mail Checks To: MED-R. Secure Documents Inc. dba Med-R 320 S. 4th Street Las Vegas, Nv 89101  Sign: _____ Print: _____ Date: ___/___/___		<b>Sales Tax (8.1%)</b>	\$0.73
		<b>Total</b>	\$14.73
		<b>Payments/Credits</b>	\$0.00
		<b>Balance Due</b>	\$14.73

TAX ID# 20-4088393

We accept all Major Credit Cards!

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
385	10169-05	1100.00	0.00	1100.00
13060-08	McCauley,	16.39	0.00	16.39
10676-05	Rodriguez	15.19	0.00	15.19
Date	13565-0801	Clark, A	10.22	10.22
01/04/10	12116-07	Williams	64.98	64.98
	14053-09	Metcalf, A	8.25	8.25

Check Number  
00008827

Check Amount  
\$ 1215.03

Rodriguez NON-NEGOTIABLE  
Monique

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**  
8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

8827

CHECK NO.  
00008827

\*\* ONE THOUSAND TWO HUNDRED FIFTEEN DOLLARS AND 03 CENTS \*\*

PAY TO THE ORDER OF Joseph Schifini, MD  
526 S. Tonopah #160  
Las Vegas NV 89106

DATE 01/04/10 AMOUNT \*\*\*\*1,215.03

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: depo review/records

⑈008827⑈ ⑆321270742⑆6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
385	10169-05	1100.00	0.00	1100.00
13060-08	McCauley,	16.39	0.00	16.39
10676-05	Rodriguez	15.19	0.00	15.19
Date	13565-0801	Clark, A	10.22	10.22
01/04/10	12116-07	Williams	64.98	64.98
	14053-09	Metcalf, A	8.25	8.25

Check Number  
00008827

Check Amount  
\$ 1215.03

Payee  
Joseph Schifini, MD

NON-NEGOTIABLE

600 S. Tonopah Dr., Suite 240  
Las Vegas, NV 89106  
Phone: (702) 870-0011  
Fax: (702) 870-1144

10676-05  
**Joseph J. Schifini, M.D.  
Mark O. Reed, M.D., P.C.**

# Medical Record Copy Invoice

Date records sent out: 9/17/09

Sent to: B, B, B & C  
7408 W. SAHARA AVE  
LV, NV 89117

Phone: (    ) 228-2600 Fax: (    ) 228-2333

Patient: RODRIGUEZ, ENRIQUE

DOB: 7/15/63

Number of copies: 23 @ .60 ¢ each

Postage: \$ 1.39

Total amount due within 30 days: \$ 15.19

Please remit payment for your copies by 10/17/09.

Make checks payable to:

- Joseph J. Schifini, M.D.  
 Mark O. Reed, M.D., P.C.

POSTED  
10/17/09  
ACCOUNTING DEPT

Thank You.  
Medical Records Custodian

Up dated on 06-19-2008 1:56 pm

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.	
848417	10683-05	284.15	0.00	284.15	
847865	10676-05	401.55	0.00	401.55	
847297	11839-07	544.65	0.00	544.65	
Date 11/06/09	847419	10683-05	554.40	0.00	554.40

Check Number  
00008384

Check Amount  
\$ 1784.75

Rodriguez  
Monique

NON-NEGOTIABLE

BENSON, BERTOLDO, BAKER & CARTER, CHTD.  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

WELLS FARGO BANK  
8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

8384

CHECK NO.  
00008384

\*\* ONE THOUSAND SEVEN HUNDRED EIGHTY FOUR DOLLARS AND 75 CENTS \*\*

PAY TO THE ORDER OF  
Litigation Services & Technologies, LLC  
1640 West Alta Drive  
Suite 4  
Las Vegas NV 89106

DATE  
11/06/09

AMOUNT  
\*\*\*\*1,784.75

~~NON-NEGOTIABLE~~

MEMO: depo transcripts

VOID AFTER 90 DAYS

⑈008384⑈ ⑆321270742⑆6733267691⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.	
848417	10683-05	284.15	0.00	284.15	
847865	10676-05	401.55	0.00	401.55	
847297	11839-07	544.65	0.00	544.65	
Date 11/06/09	847419	10683-05	554.40	0.00	554.40

Check Number  
00008384

Check Amount  
\$ 1784.75

Payee  
Litigation Services & Technologies, LLC

NON-NEGOTIABLE

# INVOICE



**LITIGATION SERVICES™**  
 1640 W. Alta Drive, Suite 4  
 Las Vegas, NV 89106  
 Phone: 702-314-7200 Fax: 702-631-7351  
 Website: www.lit-l.com

Steven M. Baker, Esq.  
 Benson, Bertoldo, Baker & Carter, Chtd.  
 7408 West Sahara Avenue  
 Las Vegas, NV 89117

<b>Invoice No.</b>	<b>Invoice Date</b>	<b>Job No.</b>
847865	8/31/2009	109866
<b>Job Date</b>	<b>Case No.</b>	
8/19/2009	A531538	
<b>Case Name</b>		
Rodriguez vs. Fiesta Palms, LLC		
<b>Payment Terms</b>		
Due upon receipt		

1 CERTIFIED COPY OF TRANSCRIPT OF:  
 Enrique Rodriguez

401.55

**TOTAL DUE >>>** **\$401.55**  
 AFTER 9/30/2009 PAY \$441.71

Thank you for your business!

*10674-05*

POSTED  
 SEP 1 2009  
 ACCOUNTING DEPT

Tax ID: 88-0428399

Phone: 702-228-2600 Fax: 702-228-2333

Please detach bottom portion and return with payment.

Job No. : 109866 BU ID : LV-CR  
 Case No. : A531538  
 Case Name : Rodriguez vs. Fiesta Palms, LLC

Steven M. Baker, Esq.  
 Benson, Bertoldo, Baker & Carter, Chtd.  
 7408 West Sahara Avenue  
 Las Vegas, NV 89117

Invoice No. : 847865 Invoice Date : 8/31/2009  
**Total Due : \$ 401.55**  
 AFTER 9/30/2009 PAY \$441.71

Remit To: **Litigation Services**  
**1640 W. Alta Drive, Suite 4**  
**Las Vegas, NV 89106**

<b>PAYMENT WITH CREDIT CARD</b>			
Cardholder's Name: _____			
Card Number: _____			
Exp. Date: _____		Phone#: _____	
Billing Address: _____			
Zip: _____		Card Security Code: _____	
Amount to Charge: _____			
Cardholder's Signature: _____			4 App. 918

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	18.00	0.00	18.00

Date  
01/04/10

Check Number  
00008855

Check Amount  
\$ 18.00

*Monique*

*Rodriguez*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

8855

CHECK NO.  
00008855

\*\* EIGHTEEN DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
 Kelly G. Hawkins & Associates  
 3831 W. Charleston Blvd.  
 Las Vegas NV 89102

DATE: 01/04/10  
 AMOUNT: \*\*\*\*\*18.00

NON-NEGOTIABLE

VOID AFTER 90 DAYS

MEMO: med records/rodriguez

⑈008855⑈ ⑆321270742⑆673326769⑆⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	18.00	0.00	18.00

Date  
01/04/10

Check Number  
00008855

Check Amount  
\$ 18.00

Payee  
Kelly G. Hawkins & Associates

NON-NEGOTIABLE

Bill Chynoweth, PT  
Chief Executive Officer

Jeffrey D. Hill, PT  
Chief Operating Officer

Berna Leavitt, PT  
Chief Marketing Officer

Effective, personalized  
care for relief  
and recovery.

- Orthopedic/sports injuries
- Industrial rehab
- Functional capacity evaluations
- Work hardening
- Ergonomic assessments
- Preplacement testing & evaluations
- Postsurgical rehab
- Neurological disorders
- TMJ
- Pediatrics
- Personal injuries
- Pool therapy
- Manual therapy
- Vestibular rehab

Nevada's choice for  
personal service and  
convenience.

- Seven convenient locations
- State-of-the-art facilities
- Early morning & evening appointments
- Same-day appointments
- Top professional staff
- Patients always seen by PTs
- Most insurance accepted
- Competitive pricing
- Visa, MasterCard welcome
- Financing options available

**Valley View**

3831 W. Charleston Blvd.  
Las Vegas, NV 89102  
Fax: 702.878.2018  
702.876.1733

**Howard Hughes**

3753 Howard Hughes Pkwy.  
Suite 141  
Las Vegas, NV 89169  
Fax: 702.737.1822  
702.737.8820

**Bonanza/Nellis**

4800 E. Bonanza Rd., Suite 2  
Las Vegas, NV 89110  
Fax: 702.438.4550  
702.438.3188

**Summit/Tenaya**

2881 Business Park Ct., Suite 100  
Las Vegas, NV 89128  
Fax: 702.869.8959  
702.869.6978

**Green Valley**

375 N. Stephanie, Suite 1111  
Henderson, NV 89014  
Fax: 702.456.0035  
702.456.2024

**Pahrump**

921 S. Highway 160, Suite 409  
Pahrump, NV 89048  
Fax: 775.727.3781  
775.727.3838

**Russell/215 SW**

8925 W. Russell Rd., Suite 140  
Las Vegas, NV 89148  
Fax: 702.914.8885  
702.914.6787

KELLY HAWKINS THE DOCTOR'S  
PHYSICAL THERAPY CHOICE FOR  
**WORKS** EFFECTIVE.  
PERSONAL CARE.  
www.kellyhawkins.com

10676-05

To: STEVEN BAKER Date 09/25/09

Patient Name: ENRIQUE

Account #: RODRIGUEZ

Enclosed you will find copies of the medical records that your office/company has requested from our Charleston location.

Copy charges are \$0.60 per page for 30 copies = \$ 18.00

Thank you,

ACCOUNTING DEPT

Please remit payment to:  
Kelly Hawkins Physical Therapy Works  
3831 W, Charleston Blvd  
Las Vegas, NV 89102

Tax ID#: 56-2456868

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
900343948	VSD/10676	20.00	0.00	20.00

Date  
01/04/10

Check Number  
00008879

Check Amount  
\$ 20.00

*Monique*

NON-NEGOTIABLE

*Rodriguez*

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

8879

CHECK NO.  
00008879

\*\* TWENTY DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
 Reimbursement Technologies, Inc.  
 Attn: Accounting Department  
 1000 River Rd., Ste. 100  
 Conshohocken PA 19428

DATE: 01/04/10  
 AMOUNT: \*\*\*\*\*20.00

~~NON-NEGOTIABLE~~  
 VOID AFTER 90 DAYS

MEMO: med records/rodriguez

⑈008879⑈ ⑆321270742⑆6733267691⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
900343948	VSD/10676	20.00	0.00	20.00

Date  
01/04/10

Check Number  
00008879

Check Amount  
\$ 20.00

Payee  
Reimbursement Technologies, Inc.

NON-NEGOTIABLE

**SHADOW EMERGENCY PHYSICIANS**  
PO BOX 13917  
PHILADELPHIA PA 191013917  
1-800-355-2470

16676-45

September 30, 2009

\$20.00

Benson, Bertoldo, Baker & Carter  
7408 West Sahara Avenue  
Las Vegas, NV 89117

702-228-2333

POSTED  
ACCOUNTING DEPT

RE: **ENRIQUE RODRIGUEZ**  
**900343948vsd**

To Whom It May Concern

We have received your request for billing records for the above patient. Our fee for *billing records* is \$15.00. If a Notarial Act was required, remit an additional \$5.00 for each Notarial Act performed. Please make your check payable to "**Reimbursement Technologies Inc.**", Tax ID # 23-2634599.

Mail your check and return this form to:

Reimbursement Technologies Inc.  
Attn: Accounting Department  
1000 River Road  
Suite 100  
Conshohocken, PA 19428

If you have any questions, please contact our office at 1-800-355-2470.

Sincerely,

  
Gloria Moncion

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
RP18843	10676-05	34.20	0.00	34.20

Date  
01/04/10

*Monique*

Check Number  
00008883

Check Amount  
\$ 34.20

*Rodriguez*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 17021 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

8883

CHECK NO.  
00008883

\*\* THIRTY FOUR DOLLARS AND 20 CENTS \*\*

**PAY TO THE ORDER OF**  
 Matt Smith Physical Therapy  
 848 North Rainbow Blvd., #357  
 Las Vegas NV 89107-1103

DATE: 01/04/10  
 AMOUNT: \*\*\*\*\*34.20

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: med records/rodriguez

⑈008883⑈ ⑆321270742⑆6733267691⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
RP18843	10676-05	34.20	0.00	34.20

Date  
01/04/10

Check Number  
00008883

Check Amount  
\$ 34.20

Payee  
Matt Smith Physical Therapy

NON-NEGOTIABLE

10676-018  
05

**MATT SMITH PHYSICAL THERAPY**

848 N. Rainbow Blvd., Box #357

Las Vegas, NV. 89107-1103

(702) 804-0026

Tax ID: 88-0386672

Date: 9/21/09

Della Short

Benson, Bertoldo,  
Baker # CARTER

POSTED  
NOV 16 2009  
ACCOUNTING DEPT

Re: Enrique Rodriguez

Account: RP18843 ; 18843 ;  
23591

Please remit payment for Medical Records charge to the above address.

Number of pages: 57  
\$.60 per page: 34.20  
Postage:             
Total Due: 34.20

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
A531538	10676-05	630.00	0.00	630.00

Date  
02/07/11

Check Number  
00012100

Check Amount  
\$ 630.00

*E. Rodriguez*  
*Monique*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2800

**WELLS FARGO BANK**  
8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

CHECK NO.  
00012100

12100

\*\* SIX HUNDRED THIRTY DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
Clark County Treasurer  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas NV 89155-2311

DATE  
02/07/11

AMOUNT  
\*\*\*\*\*630.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: a531538/rodriguez

⑈012100⑈ ⑆321270742⑆6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
A531538	10676-05	630.00	0.00	630.00

Date  
02/07/11

Check Number  
00012100

Check Amount  
\$ 630.00

Payee  
Clark County Treasurer

NON-NEGOTIABLE

Ⓞ

Rodriguez trial

106.76.05



**FAX TRANSMISSION**  
**CLARK COUNTY**  
**EIGHTH JUDICIAL DISTRICT COURT**  
**REGIONAL JUSTICE CENTER**  
**200 LEWIS AVENUE**  
**LAS VEGAS, NEVADA 89155-2311**

REMINDER

To: Steven Baker Benson, Bertoldo, Baker & Carter	Date: 1-24-2011
Fax #228-2333	Page(s): 2 (including cover sheet)
From: Bernette Hubbard Cashiers Office - 3 <sup>rd</sup> floor	Phone #702-671-4507
Subject: Outstanding Invoice for \$ 630.00	CASE #(s) A531538 Hearing Date(s): 10-25 to 11/10-2010

REMINDER

Attorney Barker:

Attached is a copy of your invoice for \$630.00.

When making payment, it's important to write the Case # on your check.

If you need additional information, please give me a call at the above number or you may contact the Court Recorder in Dept. 10.

We are now accepting payments using your credit card.

(MasterCard/VISA)

Thank you,

**TRANSCRIBER'S BILLING INFORMATION**

<b>CASE #</b>	A-531538		
<b>CASE NAME:</b>	Enrique Rodriguez v. Fiesta Palms		
<b>HEARING DATE:</b>	10/25/10 to 11/10/10		
<b>DEPARTMENT #</b>	10		
<b>ORDERED BY:</b>	Steven Baker		
<b>FIRM:</b>	Benson, Bertoldo, Baker & Carter		
<b>EMAIL:</b>	cardenas@bensonlawyers.com		
<b>PAYABLE TO COUNTY:</b>	Make check payable to: Clark County Treasurer County Tax ID#: 88-6000028 Include case number on check		
<b>BILL AMOUNT:</b>		CDs @ \$25 each =	\$
	21	hours @ \$30 an hour recording fee =	\$630.00
		pages @ \$	per page of trans. \$
	<b>Total</b>		<b>\$630.00</b>
<b>PAYABLE TO OUTSIDE TRANSCRIBER:</b>	Make check payable to:		
<b>BILL AMOUNT:</b>	pages @	\$	per page of trans \$
<b>DATE PAID:</b>			
<b>TRANSCRIPTS WILL NOT BE FILED OR RELEASED UNTIL PAYMENT IS RECEIVED</b>			

Rec'd 11/12/10  
 V # 4202



520 S. 7<sup>TH</sup> ST., STE. B  
 LAS VEGAS, NV 89101  
 TEL (702) 385-AMPM (2676)  
 FAX (702) 386-AMPM (2676)  
 NV LIC. # 1190

FOR SERVICE CALL  
 385-2676

Date: 11/11/10  
 Rush: Yes

Firm: AM:PM  
 Sender/Preparer: [Signature]  
 E-Mail: \_\_\_\_\_  
 Billing Ref: 11/11/10

**SERVICE OF PROCESS REQUEST FORM**

Document(s): [Handwritten]  
 Serve upon: [Handwritten]

(Circle one)     Individual     Company / Corporation     Resident Agent     Custodian of Records

Last date to serve: [Handwritten]    Witness fees attached: \$ \_\_\_\_\_  
 Date of Depo / Trial / Hearing: 11/9/10    Court: [Handwritten]    Case# [Handwritten]

**ADDITIONAL SERVICES**

*File after service effectuated (COPY FEES MAY APPLY)	Y/N
*Skiptrace if unable to serve (ADDITIONAL FEES APPLY)	Y/N
*Serve at additional address if necessary (i.e., office relocated, evasive individuals, etc.)	Y/N
*Advance fees if needed (REIMBURSEMENT FEES APPLY)	Y/N

**NOTES**

[Handwritten notes]

*S. Koch*

11911

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
2010005004	15078-10	40.00	0.00	40.00
2010005008	15078-10	40.00	0.00	40.00
2010004767	10676-05	75.00	0.00	75.00

Date  
01/18/11

Check Number  
00011911

Check Amount  
\$ 155.00

*Monique*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11911

CHECK NO.  
00011911

\*\* ONE HUNDRED FIFTY FIVE DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
 AM:PM Legal Solutions  
 520 S. 7th Street  
 Suite B  
 Las Vegas NV 89101

DATE: 01/18/11  
 AMOUNT: \*\*\*\*\*155.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: process service

⑈011911⑈ ⑆321270742⑆673326769⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
2010005004	15078-10	40.00	0.00	40.00
2010005008	15078-10	40.00	0.00	40.00
2010004767	10676-05	75.00	0.00	75.00

Date  
01/18/11

Check Number  
00011911

Check Amount  
\$ 155.00

Payee  
AM:PM Legal Solutions

NON-NEGOTIABLE

AM:PM Legal Solutions  
520 S. 7th St., Ste. B  
Las Vegas, NV 89101  
Phone: (702) 385-2676  
Fax: (702) 386-2676  
20-0095172

INVOICE

Invoice #AMP-2010004767  
11/5/2010

**PROCESS SERVICE**

10676-05

Benson Bertoldo Baker & Carter, Chtd.  
7408 W. Sahara Ave.  
Las Vegas, NV 89117

Reference Number: 10676.05  
Your Contact: Cheryl Shapiro  
Case Number: Clark A531538 DEPT. 10

Plaintiff:  
Enrique Rodriguez

Defendant:  
Fiesta Palms, LLC, et al.

Received: 11/5/2010 Non-Served: 11/5/2010 NON SERVICE/DILIGENCE  
To be served on: Louis Mortillaro, Ph.D.

POSTED  
NOV 23 2010  
ACCOUNTING DEPT

ITEMIZED LISTING

Line/Item	Quantity	Price	Amount
RUSH FEE	1.00	25.00	25.00
attempted service at: 501 S. Rancho Dr., Ste. F37	1.00	40.00	40.00
misc. fees: rush court issuance	1.00	10.00	10.00
TOTAL CHARGED:			\$75.00
BALANCE DUE:			\$75.00

©

10676.05  
**INVOICE**



**DEVINNEY & DINNEEN CAREER AND  
 VOCATIONAL ECONOMIC SERVICES, LTD.**

445 Apple Street, Suite 102, Reno, NV 89502  
 Phone (775) 825-5558 • Toll Free (888) 235-6549 • Fax (775) 825-4511  
 terry@dinneent.com

INVOICE #6453  
 DATE: NOVEMBER 2, 2010

TO Mr. Steve Baker  
 Benson, Bertoldo, Baker & Carter  
 7408 West Sahara Ave  
 Las Vegas, NV 89117

CASE NAME	OUR CASE NUMBER	PAYMENT TERMS	FEDERAL ID:
RODRIGUEZ, ENRIQUE	009 EXW 1492	Due on receipt	88-0237090

**POSTED**  
 NOV 23 2010  
 ACCOUNTING DEPT

DESCRIPTION OF SERVICES	TOTAL HOURS
<b>OCTOBER BILLING:</b>  Review of file information. Contact with Attorney regarding trial. Travel and pre-trial appearance conference. Follow up contacts with Attorney regarding scheduling. Preparation for trial appearance.	6.9 hrs.

6.9 Hours @ \$280/Hr:	\$1,932.00
Travel Expense (pro-rated):	\$108.00
<b>Balance Due:</b>	<b>\$2,040.00</b>

If you have any questions or concerns please give us a call! Make all checks payable to DeVinney and Dinneen  
**THANK YOU FOR YOUR BUSINESS!**

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	6420	10676-05	1278.00	0.00	1278.00
	6426	10676-05	2716.00	0.00	2716.00
	6453	10676-05	2040.00	0.00	2040.00
Date	6469	10676-05	6367.00	0.00	6367.00
01/14/11	6441	11722-07	3332.00	0.00	3332.00
	6435	10684-05	1932.00	0.00	1932.00
Check Number	6442	12555-07	2684.00	0.00	2684.00
00011898					

Check Amount  
\$ 20349.00

NON-NEGOTIABLE

*Monique*

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**  
8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

11898

CHECK NO.  
00011898

\*\* TWENTY THOUSAND THREE HUNDRED FORTY NINE DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
Devinney & Dinneen Career & Vocational Service  
445 Apple Street, Suite 102  
Reno NV 89502

DATE: 01/14/11  
AMOUNT: \*\*\*20,349.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: professional services

⑈011898⑈ ⑆321270742⑆6733267691⑈

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	6420	10676-05	1278.00	0.00	1278.00
	6426	10676-05	2716.00	0.00	2716.00
	6453	10676-05	2040.00	0.00	2040.00
Date	6469	10676-05	6367.00	0.00	6367.00
01/14/11	6441	11722-07	3332.00	0.00	3332.00
	6435	10684-05	1932.00	0.00	1932.00
Check Number	6442	12555-07	2684.00	0.00	2684.00
00011898					

Check Amount  
\$ 20349.00

NON-NEGOTIABLE

Payee  
Devinney & Dinneen Career &



**DEVINNEY & DINNEEN CAREER AND  
VOCATIONAL ECONOMIC SERVICES, LTD.**

**INVOICE**

10676-05

445 Apple Street, Suite 102, Reno, NV 89502  
Phone (775) 825-5558 • Toll Free (888) 235-6549 • Fax (775) 825-4511  
terry@dinneent.com

INVOICE #6420  
DATE: OCTOBER 4, 2010

TO Mr. Steve Baker  
Benson, Bertoldo, Baker & Carter  
7408 West Sahara Ave  
Las Vegas, NV 89117

CASE NAME	OUR CASE NUMBER	PAYMENT TERMS	FEDERAL ID:
RODRIGUEZ, ENRIQUE	009 EXW 1492	Due on receipt	88-0237090

DESCRIPTION OF SERVICES	TOTAL HOURS
<p><b>KATHLEEN R. HARTMANN, R.N., B.S.N., C.C.M., C.L.C.P.</b></p> <p>SEPTEMBER BILLING: Review of additional documents in preparation for deposition. Review of Life Care Plan. Telephone contact with Mr. Rodriguez. Update figures for deposition.</p>	7.1 hrs.
7.1 Hours @ \$180/Hr:	\$1,278.00
Other:	--
<b>Balance Due:</b>	<b>\$1,278.00</b>

POSTED  
NOV 23 2010  
ACCOUNTING DEPT

If you have any questions or concerns please give us a call! Make all checks payable to DeVinney and Dinneen  
**THANK YOU FOR YOUR BUSINESS!**

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	6420	10676-05	1278.00	0.00	1278.00
	6426	10676-05	2716.00	0.00	2716.00
	6453	10676-05	2040.00	0.00	2040.00
Date	6469	10676-05	6367.00	0.00	6367.00
01/14/11	6441	11722-07	3332.00	0.00	3332.00
	6435	10684-05	1932.00	0.00	1932.00
Check Number	6442	12555-07	2684.00	0.00	2684.00
00011898					

Check Amount \$ 20349.00

*Mowiac*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11898

CHECK NO. 00011898

\*\* TWENTY THOUSAND THREE HUNDRED FORTY NINE DOLLARS AND 00 CENTS \*\*

DATE	AMOUNT
01/14/11	***20,349.00

**PAY TO THE ORDER OF** Devinney & Dinneen Career & Vocational Service  
 445 Apple Street, Suite 102  
 Reno NV 89502

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: professional services

⑈011898⑈ ⑆321270742⑆673326769⑆⑈

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	6420	10676-05	1278.00	0.00	1278.00
	6426	10676-05	2716.00	0.00	2716.00
	6453	10676-05	2040.00	0.00	2040.00
Date	6469	10676-05	6367.00	0.00	6367.00
01/14/11	6441	11722-07	3332.00	0.00	3332.00
	6435	10684-05	1932.00	0.00	1932.00
Check Number	6442	12555-07	2684.00	0.00	2684.00
00011898					

Check Amount \$ 20349.00

Payee Devinney & Dinneen Career &

NON-NEGOTIABLE



DEVINNEY & DINNEEN CAREER AND  
VOCATIONAL ECONOMIC SERVICES, LTD.

INVOICE

10676-08

445 Apple Street, Suite 102, Reno, NV 89502  
Phone (775) 825-5558 • Toll Free (888) 235-6549 • Fax (775) 825-4511  
terry@dinneent.com

INVOICE #6426  
DATE: OCTOBER 5, 2010

TO Mr. Steve Baker  
Benson, Bertoldo, Baker & Carter  
7408 West Sahara Ave  
Las Vegas, NV 89117

e

CASE NAME	OUR CASE NUMBER	PAYMENT TERMS	FEDERAL ID:
RODRIGUEZ, ENRIQUE	009 EXW 1492	Due on receipt	88-0237090

DESCRIPTION OF SERVICES	TOTAL HOURS
<p><b>SEPTEMBER BILLING:</b></p> <p>Contacts regarding new information regarding updated Life Care Plan costs. Contact with Attorney regarding Life Care Plan costs. Calculate present value of updated Life Care Plan costs. Review file for deposition. Travel to deposition.</p> <p style="text-align: right;">POSTED NOV 23 2010 ACCOUNTING DEPT</p>	9.7 hrs.
9.7 Hours @ \$280/Hr:	\$2,716.00
Other:	--
<b>Balance Due:</b>	<b>\$2,716.00</b>

If you have any questions or concerns please give us a call! Make all checks payable to DeVinney and Dinneen  
THANK YOU FOR YOUR BUSINESS!



10676-05

# INVOICE

INVOICE # 767  
DATE: NOVEMBER 1, 2010

**Joseph Schifini, M.D. Ltd.**  
600 S. Tonopah #240  
Las Vegas, NV 89106  
Phone 702-870-0011 Fax 702-870-1144  
Tax ID 88-0424633

To: Benson, Bertoldo, Baker & Carter  
Attn: Steven M. Baker, Esq.  
7408 W. Sahara Ave.  
Las Vegas, NV 89117  
702-228-2600  
Fax 702-228-2333

**FOR: ENRIQUE RODRIGUEZ**

DESCRIPTION	AMOUNT
11-1-2010 Additional 1/2 Day Trial Testimony 1:00 PM	<p style="text-align: center;"> <b>POSTED</b>            NOV 13 2010  <b>ACCOUNTING DEPT</b>            \$ 4,000.00         </p>
<b>TOTAL</b>	<b>\$ 4,000.00</b>

Make all checks payable to Joseph J Schifini, M.D.

**Payment is due within 30 days.**

If you have any questions concerning this invoice, contact Marsha @ 702-870-0011

**Thank You for your business!**

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.	
745	10684-05	1650.00	0.00	1650.00	
753	10740-05	3300.00	0.00	3300.00	
767	10676-05	4000.00	0.00	4000.00	
Date 01/14/11	765	10676-05	7450.00	0.00	7450.00
	612	14231-09	3025.00	0.00	3025.00
Check Number 00011899	14915-10	Manning, R	28.24	0.00	28.24

Date  
01/14/11  
Check Number  
00011899  
Check Amount  
\$ 19453.24

*Monique* NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**  
8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

11899

CHECK NO.  
00011899

\*\* NINETEEN THOUSAND FOUR HUNDRED FIFTY THREE DOLLARS AND 24 CENTS \*\*

**PAY TO THE ORDER OF**  
Joseph Schifini, MD  
600 S. Tonopah #240  
Las Vegas NV 89106

DATE  
01/14/11  
AMOUNT  
\*\*\*19,453.24

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: med records/expert fees

⑈011899⑈ 1:321270742:6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.	
745	10684-05	1650.00	0.00	1650.00	
753	10740-05	3300.00	0.00	3300.00	
767	10676-05	4000.00	0.00	4000.00	
Date 01/14/11	765	10676-05	7450.00	0.00	7450.00
	612	14231-09	3025.00	0.00	3025.00
Check Number 00011899	14915-10	Manning, R	28.24	0.00	28.24

Check Amount  
\$ 19453.24

Payee  
Joseph Schifini, MD

NON-NEGOTIABLE

10676-05

# INVOICE

**Joseph Schifini, M.D. Ltd.**  
 600 S. Tonopah #240  
 Las Vegas, NV 89106  
 Phone 702-870-0011 Fax 702-870-1144  
 Tax ID 88-0424633

INVOICE # 765  
 DATE: NOVEMBER 1, 2010

To: Benson, Bertoldo, Baker & Carter  
 Attn: Steven M. Baker, Esq.  
 7408 W. Sahara Ave.  
 Las Vegas, NV 89117  
 702-228-2600  
 Fax 702-228-2333

**FOR: ENRIQUE RODRIGUEZ**

POSTED  
 NOV 23 2010  
 ACCOUNTING DEPT

DESCRIPTION	AMOUNT
10-20-2010 6hrs Additional Medical Record Review (@ \$550.00 per/hr)	\$ 3,300.00
10-22-2010 2hrs Trial Preparation (@ \$1,250.00 per/hr)	\$ 2,500.00
10-30-2010 3hrs Additional Medical Record Review (@ \$550.00 per/hr)	\$ 1,650.00
<b>TOTAL</b>	<b>\$ 7,450.00</b>

Make all checks payable to Joseph J Schifini, M.D.

**Payment is due within 30 days.**

If you have any questions concerning this invoice, contact Marsha @ 702-870-0011

**Thank You for your business!**

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.	
12728-08	Wollman, P	17.93	0.00	17.93	
13490-0801	Stowell, D	9.35	0.00	9.35	
14813-10	Barille, A	20.33	0.00	20.33	
Date 01/14/11	5037	10676-05	3600.00	0.00	3600.00

Check Number  
00011900

Check Amount  
\$ 3647.61

*Mowique*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**  
8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

11900

CHECK NO.  
00011900

\*\* THREE THOUSAND SIX HUNDRED FORTY SEVEN DOLLARS AND 61 CENTS \*\*

**PAY TO THE ORDER OF**  
Russell J. Shah MD  
10624 South Eastern Avenue  
Suite A-425  
Henderson NV 89052

DATE  
01/14/11

AMOUNT  
\*\*\*\*3,647.61

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: medical records/expert fees

⑈011900⑈ ⑆321270742⑆ ⑆6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.	
12728-08	Wollman, P	17.93	0.00	17.93	
13490-0801	Stowell, D	9.35	0.00	9.35	
14813-10	Barille, A	20.33	0.00	20.33	
Date 01/14/11	5037	10676-05	3600.00	0.00	3600.00

Check Number  
00011900

Check Amount  
\$ 3647.61

Payee  
Russell J. Shah MD

NON-NEGOTIABLE

10-6-05

**Russell J. Shah MD**

10624 S. Eastern Ave #A-425  
Henderson, NV 89052  
Phone (702) 644-0500 Fax (702) 641-4600

**INVOICE**

ACCT # 5037  
DATE: NOVEMBER 9, 2010

**TO:**  
Benson, Bertoldo, Baker & Carter  
7408 W. Sahara Avenue  
Las Vegas, NV 89117  
Phone (702) 228-2600 Fax (702) 228-2333

**FOR:**  
Pre-Trial on October 28, 2010  
for client Enrique Rodriguez

DESCRIPTION	HOURS	RATE	AMOUNT
Pre-Trial with Mr. Baker at his office for client Enrique Rodriguez 9:AM-11:AM	2	\$1,200.00	\$2,400.00
Pre payment received was of \$1,200.00 for one hour only	1	\$1,200.00	-\$1,200.00
<b>TOTAL BALANCE</b>			<b>\$1,200.00</b>

POSTED  
NOV 13 2010  
ACCOUNTING DEPT

Make all checks payable to :  
Russell J. Shah MD  
TAX ID: 77-0637238  
MAILING ADDRESS:  
10624 S. Eastern Ave #A-425  
Henderson, NV 89052  
Phone (702) 644-0500 Fax (702) 641-4600

*Thank you*

10676-05

# INVOICE

## Russell J. Shah MD

10624 S. Eastern Ave #A-425  
Henderson, NV 89052  
Phone (702) 644-0500 Fax (702) 641-4600

ACCT # 5037  
DATE: NOVEMBER 9, 2010

**TO:**  
Benson, Bertoldo, Baker & Carter  
7408 W. Sahara Avenue  
Las Vegas, NV 89117  
Phone (702) 228-2600 Fax (702) 228-2333

**FOR:**  
Trial Preparation on October 31, 2010  
for client Enrique Rodriguez

DESCRIPTION	HOURS	RATE	AMOUNT
Medical Legal Preparation for Trial & Records Review for Enrique Rodriguez	2	\$1,200.00	\$2,400.00
<b>TOTAL BALANCE</b>			<b>\$2,400.00</b>

POSTED  
NOV 23 2010  
ACCOUNTING DEPT

Make all checks payable to :  
Russell J. Shah MD  
TAX ID: 77-0637238  
MAILING ADDRESS:  
10624 S. Eastern Ave #A-425  
Henderson, NV 89052  
Phone (702) 644-0500 Fax (702) 641-4600

*Thank you*

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	RODRIGUEZ	5000.00	0.00	5000.00

Date  
01/14/11

*Mowigae*

Check Number  
00011897

Check Amount  
\$ 5000.00

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11897

CHECK NO.  
00011897

\*\* FIVE THOUSAND DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
 Las Vegas Neurosurgery,  
 Orthopaedics & Rehabilitation  
 501 S. Rancho Drive, Suite I-67  
 Las Vegas NV 89106

DATE                      AMOUNT  
 01/14/11                  \*\*\*\*\*5,000.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: trial expert fees/rodriguez

⑈011897⑈ ⑆321270742⑆673326769⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	RODRIGUEZ	5000.00	0.00	5000.00

Date  
01/14/11

Check Number  
00011897

Check Amount  
\$ 5000.00

NON-NEGOTIABLE

Payee  
Las Vegas Neurosurgery,

10676-05<sub>1</sub>

**LAS VEGAS  
NEUROSURGERY, ORTHOPAEDICS, & REHABILITATION**

Wednesday, October 27, 2010

*Sent via Facsimile*

BENSON, BERTOLDO, BAKER & CARTER, CHTD  
Attn: Steven Baker, Esq.  
7408 W. Sahara Ave.  
Las Vegas, NV 89117  
(702) 228-2600  
(702) 228-2333 Fax

@

RE: ENRIQUE RODRIQUEZ

Dear Attorney Baker,

This is an invoice of \$1000.00 for the teleconference of Dr. Mary Ann Shannon on 10/26/10 & 10/27/10 regarding Mr. Rodriguez. Our fee is \$300.00 per 15 minutes. The teleconference was for one hour. Our policy is that payment is due one week before the scheduled appointment otherwise it will be rescheduled for another day.

POSTED  
NOV 27 2010  
ACCOUNTING DEPT

Please remit your payment of \$1000.00 to:

**Las Vegas Neurosurgery, Orthopaedics, and Rehabilitation  
501 South Rancho Drive, Suite I-67  
Las Vegas, NV 89106**

Tax ID # 43-2041736

We appreciate your business and look forward to working with you in the future. If you have any questions or concerns, please contact me at (702) 673-1522.

Sincerely,

  
Nancy L. Smith

**501 S RANCHO DRIVE, SUITE I-67  
LAS VEGAS, NV 89106  
(702) 243-4700  
(702) 243-7074 FAX**

**LAS VEGAS**

**NEUROSURGERY, ORTHOPAEDICS, & REHABILITATION**

EFFECTIVE 4-1-2010/SS

DEPOSITIONS -99075

\$1500.00 per hour

VIDEO DEPOSITIONS

\$2500.00 per hour

*Payment is due 7 days in advance otherwise the deposition may be canceled/rescheduled*

DEPO PREP -99075

\$300.00 at 15 min intervals

TRIAL PREP -99499

\$500.00 per 30 minutes

HEARING/TRIAL TESTIMONY -99499

*This amount does not include out of state trials nor travel expenses*

1/2 day (4 hrs)

\$ 5,000.00

Full Day (8 hrs)

\$10,000.00

IME (Independent Medical Exam) -99499

\$1500.00 minimum

*Extensive Medical Records - additional fee will apply*

MEETING/VIDEO REVIEW -99080

\$300.00 per 15 min. intervals

TELEPHONE CONFERENCE FEE -99373

\$300.00 per 15 min. intervals

\* Payment must be received at least 7 days prior to the above scheduled appointments or it may be cancelled/rescheduled.

- 1) Cancellation with at least 7 days notice: Full Refund
- 2) Less than 7 days notice: No Refund

NARRATIVE REPORT -99080

\$750.00 minimum

REVIEW OF RECORDS -99080

\$1,000.00- per inch of records  
\$750.00- less than an inch (minimum charge)

SURGICAL COST LETTER -99080

\$750.00

\* Payment must be received prior to the start of any review of records, narrative reports or surgical cost letters.

TAX ID # 43-2041736

Contact Mariela at (702) 673-1589 to schedule for Dr. Kabins  
Contact Nancy at 243-4700 ext. 1522 to schedule for Dr. Shannon

501 S RANCHO DRIVE, SUITE I-67  
LAS VEGAS, NV 89106  
(702) 243-4700  
(702) 243-7074 FAX

Las Vegas  
Neurosurgery Orthopaedic Rehabilitation  
501 South Rancho, Suite 1-67  
Las Vegas, NV 89106  
(702) 243-4700 fax: (702) 243-7074

facsimile transmittal

To: Cheryl	Fax: 228-2333
From: Nancy Smith	Date: 10/27/10
Re: Enrique Rodriguez	Pages: 3
Fax: 702-243-7074	Phone: 702-673-1522

- Urgent
- For Review
- Please Comment
- Please Reply



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CONFIDENTIAL

**LAS VEGAS  
NEUROSURGERY, ORTHOPAEDICS, & REHABILITATION**

1

Thursday, October 28, 2010

10676-05

*Sent via Facsimile*

Benson Bertoldo Baker & Carter  
7408 W. Sahara Avenue  
Las Vegas, NV 89117  
(702) 228-2600  
(702) 228-2333 Fax

**RE: ENRIQUE RODRIQUEZ**

Dear Attorney Baker:

This letter is an invoice for the additional amount of \$4000.00 for the medical records review for trial by Dr Mary Ann Shannon regarding Mr. Rodriguez. Our policy is that the minimum amount of \$4000.00 be paid for the records reviewed.

ACCOUNTING DEPT  
NOV 2 2010  
POSTAL

Please remit your payment to:

Las Vegas Neurosurgery, Orthopaedics, & Rehabilitation  
Attn: Nancy L. Smith  
501 S Rancho Drive, Suite 1-67  
Las Vegas, NV 89106

Tax ID # 43-2041736

We appreciate your business and look forward to working with you in the future. If you have any questions or concerns, please contact me at (702) 673-1522.

Sincerely,

*Nancy L. Smith*  
Nancy L. Smith

@

501 S RANCHO DRIVE, SUITE 1-67  
LAS VEGAS, NV 89106  
(702) 243-4700  
(702) 243-7074 FAX

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	10000.00	0.00	10000.00

Date  
11/23/10

Check Number  
00011623

Check Amount  
\$ 10000.00

*Monique*

NON-NEGOTIABLE

V

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11623

CHECK NO.  
00011623

\*\* TEN THOUSAND DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
 Jacob E. Tauber, M.D.  
 9033 Wilshire Blvd.  
 Suite 401  
 Beverly Hills CA 90211

DATE: 11/23/10  
 AMOUNT: \*\*\*10,000.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: Expert Fees/Rodriguez

⑈011623⑈ ⑈321270742⑈6733267691⑈

V

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	10000.00	0.00	10000.00

Date  
11/23/10

Check Number  
00011623

Check Amount  
\$ 10000.00

Payee  
Jacob E. Tauber, M.D.

NON-NEGOTIABLE

V

Heidi Castro

---

From: Monique Krystek  
Sent: Tuesday, November 09, 2010 8:52 AM  
To: Heidi Castro  
Cc: 'stevembaker@cox.net'  
Subject: FW: Enrique Rodriguez - Operative Report by Dr. Shannon

Please issue and mail a check to Dr. Tauber as outlines below. Steve knows about it. Dr. Tauber already testified.

Thanks,

Mo

-----Original Message-----

From: Steven Ainbinder, M.D. [<mailto:medlegal@gmail.com>]  
Sent: Thursday, November 04, 2010 8:36 PM  
To: Monique Krystek  
Cc: Cheryl Shapiro; [stevembaker@cox.net](mailto:stevembaker@cox.net)  
Subject: RE: Enrique Rodriguez - Operative Report by Dr. Shannon

POSTED  
ACCOUNTING DEPT

MO,  
Please have a check ready for Dr. Tauber for 10k  
Tax ID= 953746611  
He will be at the court house at noon.

Thank you,  
-Steven

Steven Ainbinder, M.D.  
10624 S. Eastern Ave  
Suite A 284  
Henderson, NV 89052  
Office- 702-914-0301  
Cel-702-580-3065  
Fax-702-914-9913  
[MedLegal@gmail.com](mailto:MedLegal@gmail.com)

\*IMPORTANT WARNING: This email (and any attachments) is only intended for the use of the person or entity to which it is addressed, and may contain information that is privileged and confidential. You, the recipient, are obligated to maintain it in a safe, secure and confidential manner. Unauthorized redisclosure or failure to maintain confidentiality may subject you to federal and state penalties. If you are not the intended recipient, please immediately notify us by return email, and delete this message from your computer.

-----Original Message-----

From: Monique Krystek [<mailto:monique@bensonlawyers.com>]  
Sent: Thursday, November 04, 2010 8:58 AM  
To: [jetmd76@aol.com](mailto:jetmd76@aol.com)  
Subject: Enrique Rodriguez - Operative Report by Dr. Shannon

Dear Dr. Tauber,

Per your request, attached please find a copy of the operative report by Dr. Shannon.

Thank you,

Shanique Krystek, Litigation Paralegal

"This email and any attachments are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this message in error, please contact the sender(s) at (702) 228-2600 and delete all copies from your system. It is not the intent of the sender to solicit any person or business. Please note that any opinions in this email are solely those of the author and do not necessarily represent those of Benson, Bertoldo, Baker & Carter, Chtd. Any views or opinions are not to be considered legal advice. Should you need legal advice with Nevada, please contact Benson, Bertoldo, Baker & Carter, Chtd. The Attorneys at Benson, Bertoldo, Baker & Carter, Chtd. are licensed in Nevada. Finally, the recipient should check this email and any attachments for the presence of viruses. The company accepts no liability for any damage or loss caused by any virus transmitted by this email."

10676-05

**JACOB E. TAUBER, M.D.**  
A PROFESSIONAL CORPORATION

Orthopaedic Surgery  
Diplomate American Board of Orthopaedic Surgery  
Fellow, American Academy of Orthopaedic Surgeons

9033 WILSHIRE BOULEVARD  
SUITE 401  
BEVERLY HILLS, CA 90211  
(310) 273-1003  
Fax (310) 273-2551

1505 WILSON TERRACE  
SUITE 310  
GLENDALE, CA 91206  
(818) 502-1130  
Fax (818) 501-9031

4 November 2010

Wm. Jonathan Weber, Esq.  
7408 W. Sahara Ave  
Las Vegas, Nv 89117

Re: Enrique Rodriguez

5 November 2010    Communications, review of records, travel to court, court prep    \$10,000.00





10676-05



Phone: 702-384-3840  
Fax: 702-384-1853

### Invoice

Date	Invoice #
10/21/2010	72534

720 East Charleston Blvd. Suite 203  
Las Vegas, NV 89104  
Tax ID #: 56-2317932

Please note that our address has changed.  
Please send payment to our new address.  
Thank you.

Bill To:

Benson Bertoldo Baker & Carter  
7408 W. Sahara Avenue  
Las Vegas, NV 89117

Phone 702-228-2600 Fax 702-228-2333

For Legal Document Solutions' Use

Delivered by:

Received by:

P.O. No.	Terms	Rep	Ship Date	Ordered By	LDS Job #	Client Matter #
	Net 30	JH	10/21/2010	Monique	72810	Rodriguez
Qty	Description					Amount
	Copy binders x6					
19,895	Medium Litigation Copy Services				3	3,183.20T
432	Tabs				Tabs	129.60T
12	Custom Tabs of various descriptions				Custom Tabs	9.00T
18	5" D-ring binder				5"D	630.00T
6	4" D-ring binder				4"D	150.00T
	Sales Tax					332.25
Received by:					<b>Total</b>	
Signature: _____					\$4,434.05	
Printed Name: _____						

ACCOUNTING DEPT  
POSTED

Trial Exhibit  
notebooks

Invoices past due will incur a 1.5% late fee each month.  
We recognize that some of our customers may be billing these expenses to their clients. However, QUIVX' customers remain ultimately responsible for payment within our terms regardless of their receivables.

Please make checks payable to: QUIVX  
Tax Information: CHOICE LEGAL DOCUMENT SOLUTIONS, INC. Tax ID# 56-2317932

Rodriguez

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	5600.00	0.00	5600.00

Date  
10/28/10

Check Number  
00011371

Monique

Check Amount  
\$ 5600.00

NON-NEGOTIABLE

V

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2800

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11371

CHECK NO.  
00011371

\*\* FIVE THOUSAND SIX HUNDRED DOLLARS AND 00 CENTS \*\*

DATE	AMOUNT
10/28/10	****5,600.00

**PAY TO THE ORDER OF**  
 Russell J. Shah MD  
 10624 South Eastern Avenue  
 Suite A-425  
 Henderson NV 89052

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: trial expert fees/rodriguez

⑈011371⑈ ⑈321270742⑈6733267691⑈

V

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	5600.00	0.00	5600.00

Date  
10/28/10

Check Number  
00011371

Check Amount  
\$ 5600.00

NON-NEGOTIABLE

Payee  
Russell J. Shah MD

V

**Heidi Castro**

---

**From:** Cheryl Shapiro  
**Sent:** Monday, November 01, 2010 3:44 PM  
**To:** Heidi Castro  
**Cc:** Monique Krystek  
**Subject:** RE: Request # 5 Enrique Rodriguez CHECKS NEEDED 10676.6

**14. \$5,600.00 MORE to Russell Shah, M.D.**

**From:** Cheryl Shapiro  
**Sent:** Tuesday, October 26, 2010 3:53 PM  
**To:** Heidi Castro  
**Cc:** Monique Krystek  
**Subject:** RE: Request # 5 Enrique Rodriguez CHECKS NEEDED 10676.6

**13. \$1,200.00 to Russell Shah, M.D. yes this is addition to the \$5,600 you already provided!**

**From:** Cheryl Shapiro  
**Sent:** Friday, October 22, 2010 10:26 AM  
**To:** Heidi Castro  
**Cc:** Monique Krystek  
**Subject:** RE: Request # 4 Enrique Rodriguez CHECKS NEEDED 10676.6  
**Importance:** High

**12. \$4,000.00 to Joseph Schifini, M.D. need by 2:00 pm TODAY. He will be meeting with Steve.**

**From:** Cheryl Shapiro  
**Sent:** Thursday, October 21, 2010 3:48 PM  
**To:** Heidi Castro  
**Cc:** Monique Krystek  
**Subject:** Request # 3 Enrique Rodriguez CHECKS NEEDED 10676.6

POSTED  
ACCOUNTING DEPT

**11. \$5,600.00 to Russell Shah, M.D.**

**From:** Cheryl Shapiro  
**Sent:** Thursday, October 21, 2010 2:02 PM  
**To:** Heidi Castro  
**Cc:** Monique Krystek  
**Subject:** MORE CHECKS Enrique Rodriguez CHECKS NEEDED 10676.6

8. \$3,200.00 to Jack Tauber, M.D. 95-3746611

9. \$5,000.00 Walter Kidwell, M.D.

10. Nathan Heaps, M.D. to be provided

Heidi:

Enrique's trial is on Monday. We need the follow witness/expert checks:

Rodriguez

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
09-182	10676-05	200.00	0.00	200.00

Date  
11/18/10

Check Number  
00011592

Check Amount  
\$ 200.00

Monique

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11592

CHECK NO.  
00011592

\*\* TWO HUNDRED DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
 VTI Associates  
 P.O. Box 60536  
 Boulder City NV 89006

DATE: 11/18/10  
 AMOUNT: \*\*\*\*\*200.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: locate witness/rodriguez

⑈011592⑈ ⑆321270742⑆6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
09-182	10676-05	200.00	0.00	200.00

Date  
11/18/10

Check Number  
00011592

Check Amount  
\$ 200.00

Payee  
VTI Associates

NON-NEGOTIABLE

VTI Associates  
P.O. Box 60536  
Boulder City, NV 89006  
702 647 5372

steve@VTIassociates.com

0676-05

**Invoice**

Date	Invoice #
9/8/2010	09-182

**Bill To:**

Benson Bertoldo Baker & Carter  
7408 W. Sahara Avenue  
Las Vegas, NV 89117

P.O. No.	Terms	EIN	
	Due on receipt	27-0050304	
Description	Qty	Rate	Amount
Address locate for Maureen Holden and Stephen Ferrero-Rodriguez v Palms	2	100.00	200.00
Clark County Sales Tax		10%	0.00
<b>Balance Due</b>			<b>\$200.00</b>

POSTED  
ACCOUNTING DEPT

www.VTIassociates.com

~~XXXXXXXXXX~~  
*Rodriguez*

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
867264	10676-05	194.00	0.00	194.00
868215	11642-06	459.95	0.00	459.95
867260	10676-05	295.50	0.00	295.50
Date 11/17/10	867626	10676-05	223.05	223.05
	868117	10676-05	354.50	354.50

Check Number  
00011521

Check Amount  
\$ 1527.00

*Monique*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**  
6190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

11521

CHECK NO.  
00011521

\*\* ONE THOUSAND FIVE HUNDRED TWENTY SEVEN DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
Litigation Services & Technologies, LLC  
3770 Howard Hughes Parkway  
Suite 300  
Las Vegas NV 89169

DATE  
11/17/10

AMOUNT  
\*\*\*\*1,527.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: depo transcripts

⑈011521⑈ ⑈321270742⑈6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
867264	10676-05	194.00	0.00	194.00
868215	11642-06	459.95	0.00	459.95
867260	10676-05	295.50	0.00	295.50
Date 11/17/10	867626	10676-05	223.05	223.05
	868117	10676-05	354.50	354.50

Check Number  
00011521

Check Amount  
\$ 1527.00

Payee  
Litigation Services & Technologies, LLC

NON-NEGOTIABLE

10676-05

# INVOICE

Litigation Services  
3770 Howard Hughes Parkway  
Suite 300  
Las Vegas, NV 89169  
Phone:702-314-7200 Fax:702-631-7351

<b>Invoice No.</b>	<b>Invoice Date</b>	<b>Job No.</b>
867626	9/29/2010	127682
<b>Job Date</b>	<b>Case No.</b>	
9/20/2010	A531538	
<b>Case Name</b>		
Rodriguez vs. Fiesta Palms, LLC		
<b>Payment Terms</b>		
Due upon receipt		

Steven M. Baker, Esq.  
Benson, Bertoldo, Baker & Carter, Chtd.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

1 CERTIFIED COPY OF TRANSCRIPT OF:  
Kathleen Hartmann, RN, BSN, CCM

223.05

**TOTAL DUE >>>** **\$223.05**

AFTER 10/29/2010 PAY \$245.36

POSTED  
ACCOUNTING DEPT

Thank you for your business!

Tax ID: 88-0428399

Phone: 702-228-2600 Fax:702-228-2333

Please detach bottom portion and return with payment.

Steven M. Baker, Esq.  
Benson, Bertoldo, Baker & Carter, Chtd.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

Job No. : 127682 BU ID : Zurich-CR  
Case No. : A531538  
Case Name : Rodriguez vs. Fiesta Palms, LLC

Invoice No. : 867626 Invoice Date : 9/29/2010

**Total Due : \$ 223.05**  
AFTER 10/29/2010 PAY \$245.36

Remit To: **Litigation Services**  
**3770 Howard Hughes Parkway**  
**Suite 300**  
**Las Vegas, NV 89169**

<b>PAYMENT WITH CREDIT CARD</b>			
Cardholder's Name: _____			
Card Number: _____			
Exp. Date: _____		Phone#: _____	
Billing Address: _____			
Zip: _____		Card Security Code: _____	
Amount to Charge: _____			
Cardholder's Signature: _____			4 App. 959

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	6420	10676-05	1278.00	0.00	1278.00
	6426	10676-05	2716.00	0.00	2716.00
	6453	10676-05	2040.00	0.00	2040.00
Date	6469	10676-05	6367.00	0.00	6367.00
01/14/11	6441	11722-07	3332.00	0.00	3332.00
	6435	10684-05	1932.00	0.00	1932.00
Check Number	6442	12555-07	2684.00	0.00	2684.00
00011898					

Check Amount  
\$ 20349.00

*Mowiac*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**  
8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

11898

CHECK NO.  
00011898

\*\* TWENTY THOUSAND THREE HUNDRED FORTY NINE DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
Devinney & Dinneen Career &  
Vocational Service  
445 Apple Street, Suite 102  
Reno NV 89502

DATE: 01/14/11  
AMOUNT: \*\*\*20,349.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: professional services

⑈011898⑈ ⑆321270742⑆6733267691⑈

	INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
	6420	10676-05	1278.00	0.00	1278.00
	6426	10676-05	2716.00	0.00	2716.00
	6453	10676-05	2040.00	0.00	2040.00
Date	6469	10676-05	6367.00	0.00	6367.00
01/14/11	6441	11722-07	3332.00	0.00	3332.00
	6435	10684-05	1932.00	0.00	1932.00
Check Number	6442	12555-07	2684.00	0.00	2684.00
00011898					

Check Amount \$ 20349.00

Payee  
Devinney & Dinneen Career &

NON-NEGOTIABLE



DEVINNEY & DINNEEN CAREER AND  
VOCATIONAL ECONOMIC SERVICES, LTD.

INVOICE

10676-05

445 Appic Street, Suite 102, Reno, NV 89502  
Phone (775) 825-5558 • Toll Free (888) 235-6549 • Fax (775) 825-4511  
terry@dinneent.com

INVOICE #6469  
DATE: NOVEMBER 5, 2010

TO Mr. Steve Baker  
Benson, Bertoldo, Baker & Carter  
7408 West Sahara Ave  
Las Vegas, NV 89117

POSTED  
NOV 23 2010  
ACCOUNTING DEPT

CASE NAME	OUR CASE NUMBER	PAYMENT TERMS	FEDERAL ID:
RODRIGUEZ, ENRIQUE	009 EXW 1492	Due on receipt	88-0237090

DESCRIPTION OF SERVICES	TOTAL HOURS
<b>NOVEMBER BILLING:</b>	
Review of the trial testimony of Dr. Schifini.	
Analyze Dr. Schifini's stated cost of future medical care.	
Prepare present value analysis of Dr. Schifini's costs.	
Update 2008 present value analysis given Dr. Schifini's testimony.	
Prepare present value analysis based on Hartmann's deposition.	
Prepare trial exhibits including exhibits regarding cost of future medical care and including exhibits for lost income.	
Calculate lost income with a return to work option.	
Telephone contact with Attorney.	
Travel and file review for trial appearance.	19.3 hrs.
Trial appearance.	2.7 hrs.
19.3 Hours @ \$280/Hr:	\$5,404.00
2.7 Hours Trial Appearance @ \$400/Hr:	\$1,080.00
Travel Expenses:	\$383.00
Sub-Total:	\$6,867.00
Credit from ck #11311 dated 10/21/10:	(-\$500.00)
Balance Due:	\$6,367.00

If you have any questions or concerns please give us a call! Make all checks payable to DeVinney and Dinneen  
THANK YOU FOR YOUR BUSINESS!

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	RODRIGUEZ	500.00	0.00	500.00

*Mortillaro*

Date  
09/30/10

Check Number  
00011053

Check Amount  
\$ 500.00

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8180 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11053

CHECK NO.  
00011053

\*\* FIVE HUNDRED DOLLARS AND 00 CENTS \*\*

DATE	AMOUNT
09/30/10	*****500.00

**PAY TO THE ORDER OF**  
 L.F. Mortillaro, Ph.D., LTD  
 501 S. Rancho Dr., Ste. F37  
 Las Vegas NV 89106

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: depo fee/rodriguez

⑈011053⑈ ⑆321270742⑆6733267691⑈

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	RODRIGUEZ	500.00	0.00	500.00

Date  
09/30/10

Check Number  
00011053

Check Amount  
\$ 500.00

NON-NEGOTIABLE

Payee  
L.F. Mortillaro, Ph.D., LTD

10676-05

**LOUIS F. MORTILLARO, PH.D.**  
**AND**  
**ASSOCIATES**

*Louis F. Mortillaro, Ph.D.*  
*Licensed Psychologist*  
*Licensed Marriage & Family*  
*Therapist*

*Manuel F. Gamazo, Ph.D.*  
*Licensed Alcohol & Drug*  
*Counselor*

*Donald J. Johnson, Ph.D.*  
*Licensed Marriage & Family*  
*Therapist*

*Volmar Franz, Ph.D.*  
*Licensed Marriage & Family*  
*Therapist*

*Janet L. Kraft, Psy.D.*  
*Psychological Assistant*

To: Steven M. Baker, Esq.  
Benson Bertoldo Baker & Carter

From: Louis F. Mortillaro, Ph.D.  
L.F. Mortillaro, Ph.D., LTD

Date: May 24, 2010

Re: Enrique Rodriguez v. Palms

POSTED  
ACCOUNTING DEPT

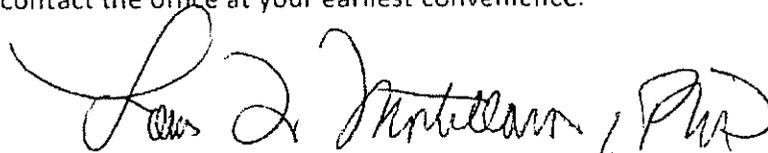
Please remit five hundred dollars (\$500.00) for the deposition preparation regarding the above named case.

Remit payment to:

L.F. Mortillaro, Ph.D., LTD  
501 S. Rancho Drive, Ste F-37  
Las Vegas, NV 89106

Tax ID#: 88-0513518

If you have any questions regarding this correspondence, please feel free to contact the office at your earliest convenience.



Louis F. Mortillaro, Ph.D.  
Psychologist

- *Psychological, Presurgical & Neuropsychological Evaluations*
- *Individual, Group, Marriage, Family & Child Counseling/ Psychotherapy*
- *Biofeedback Therapy & Relaxation Training*
- *Forensic Evaluations*
- *Drug & Alcohol Rehabilitation Therapy*
- *Hypnotherapy*
- *Pain/Stress Management*
- *Vocational Rehabilitation Services*
- *Bilingual Services*

501 South Rancho Drive  
Suite F-37  
Las Vegas, Nevada 89106  
702-388-9403 (Office)  
702-388-9643 (FAX)  
mortpsych501@aol.com (e-mail)

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	26.00	0.00	26.00

Date  
10/21/10

Check Number  
00011306

Check Amount  
\$ 26.00

NON-NEGOTIABLE

V

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11306

CHECK NO.  
00011306

\*\* TWENTY SIX DOLLARS AND 00 CENTS \*\*

**PAY** Nathan Heaps, M.D.  
**TO THE** 500 North Rainbow Blvd.  
**ORDER** Suite 203  
**OF** Las Vegas NV 89107

DATE AMOUNT  
 10/21/10 \*\*\*\*\*26.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: trial subpoena/rodriguez

⑈011306⑈ ⑆321270742⑆ ⑆733267691⑈

V

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
10676-05	Rodriguez	26.00	0.00	26.00

Date  
10/21/10

Check Number  
00011306

Check Amount  
\$ 26.00

NON-NEGOTIABLE

Payee  
Nathan Heaps, M.D.

V

**Heidi Castro**

---

**From:** Monique Krystek  
**Sent:** Thursday, October 21, 2010 10:55 AM  
**To:** Heidi Castro  
**Subject:** FW: Rodriguez - URGENT CHECK REQUESTS  
**Importance:** High

Another one:

\$26.00  
Nathan Heaps, M.D.  
500 N. Rainbow Blvd., #203  
Las Vegas, NV 89107

-----Original Message-----

**From:** Monique Krystek  
**Sent:** Thursday, October 21, 2010 10:15 AM  
**To:** Heidi Castro  
**Subject:** Rodriguez - URGENT CHECK REQUESTS  
**Importance:** High

Heidi,

I need these by noon:

\$26.00 each for trial subpoenas

Vicki Kooinga  
5416 Donna Avenue  
North Las Vegas, NV 89081

Sheri Long  
2238 Driftwood Tide Ave.  
Henderson, NV 89052

Brandy Beavers  
1973 Thunder Ridge Circle  
Henderson, NV 89012

I MUST SEND THESE OUT BY NOON, IF AT ALL POSSIBLE.

Thanks,

Mo

"This email and any attachments are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this message in error, please contact the sender(s) at (702) 228-2600 and delete all copies from your system. It is not the intent of the sender to solicit any person or business. Please note that any opinions in

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
101759	10676-05	213.25	0.00	213.25
98253	10676-05	262.81	0.00	262.81

*Monique*

Date  
09/30/10

Check Number  
00011048

Check Amount  
\$ 476.06

NON-NEGOTIABLE

V

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8180 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94 7074/3212

11048

CHECK NO.  
00011048

\*\* FOUR HUNDRED SEVENTY SIX DOLLARS AND 06 CENTS \*\*

DATE	AMOUNT
09/30/10	*****476.06

**PAY** First-Choice Reporting Services, Inc.  
**TO THE** 121 South Orange Avenue  
**ORDER** Suite 800  
**OF** Orlando FL 32801

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: depo transcripts

⑈011048⑈ ⑆321270742⑆8733267691⑈

V

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
101759	10676-05	213.25	0.00	213.25
98253	10676-05	262.81	0.00	262.81

Date  
09/30/10

Check Number  
00011048

Check Amount  
\$ 476.06

NON-NEGOTIABLE

Payee  
First-Choice Reporting Services, Inc.

V

10676-05

# INVOICE

First-Choice Reporting Services, Inc.  
121 South Orange Avenue  
Suite 800  
Orlando FL 32801  
Phone:407-830-9044 Fax:407-767-8166

<b>Invoice No.</b>	<b>Invoice Date</b>	<b>Job No.</b>
101759	7/14/2010	131137
<b>Job Date</b>	<b>Case No.</b>	
6/4/2010	A531538	
<b>Case Name</b>		
Rodriguez, Enrique vs Fiesta Palms, LLC		
<b>Payment Terms</b>		
Due upon receipt		

Steven M. Baker, Esq.  
Benson, Bertoldo, Baker & Carter, CHTD.  
7408 West Sahara Boulevard  
Suite 8  
Las Vegas NV 89117

Deposition transcript copy of:					
Dr. Nathan Heaps	54.00	Pages	@	2.80	151.20
Exhibit	15.00	Pages	@	0.55	8.25
Condensed Transcript - c				30.00	30.00
Postage/Handling				23.80	23.80
<b>TOTAL DUE &gt;&gt;&gt;</b>					<b>\$213.25</b>
AFTER 8/13/2010 PAY					\$234.58

Reference No. : 5432  
Payment is not contingent upon client reimbursement.

POSTED  
ACCOUNTING DEPT

Tax ID: 59-3473648

Phone: (702) 228-2600 Fax:

Please detach bottom portion and return with payment.

Steven M. Baker, Esq.  
Benson, Bertoldo, Baker & Carter, CHTD.  
7408 West Sahara Boulevard  
Suite 8  
Las Vegas NV 89117

Job No. : 131137 BU ID : ZNevada  
Case No. : A531538  
Case Name : Rodriguez, Enrique vs Fiesta Palms, LLC

Invoice No. : 101759 Invoice Date : 7/14/2010  
**Total Due : \$ 213.25**  
AFTER 8/13/2010 PAY \$234.58

Remit To: **First-Choice Reporting Services, Inc.**  
**121 South Orange Avenue**  
**Suite 800**  
**Orlando FL 32801**

**PAYMENT WITH CREDIT CARD** 

Cardholder's Name: \_\_\_\_\_

Card Number: \_\_\_\_\_

Exp. Date: \_\_\_\_\_ Phone#: \_\_\_\_\_

Billing Address: \_\_\_\_\_

Zip: \_\_\_\_\_ Card Security Code: \_\_\_\_\_

Amount to Charge: \_\_\_\_\_

Cardholder's Signature: \_\_\_\_\_ 4 App. 967

10676-05

# INVOICE

First-Choice Reporting Services, Inc.  
121 South Orange Avenue  
Suite 800  
Orlando FL 32801  
Phone:407-830-9044 Fax:407-767-8166

<b>Invoice No.</b>	<b>Invoice Date</b>	<b>Job No.</b>
98253	6/24/2010	130144
<b>Job Date</b>	<b>Case No.</b>	
5/24/2010	A531538	
<b>Case Name</b>		
Rodriguez, Enrique vs Fiesta Palms, LLC		
<b>Payment Terms</b>		
Due upon receipt		

Steven M. Baker, Esq.  
Benson, Bertoldo, Baker & Carter, CHTD.  
7408 West Sahara Boulevard  
Suite 8  
Las Vegas NV 89117

Deposition transcript copy of:  
L.F. Mortillaro, Ph.D.  
Postage/Handling

262.81

**TOTAL DUE >>>** **\$262.81**  
AFTER 7/24/2010 PAY \$289.09

Reference No. : 5389

Payment is not contingent upon client reimbursement.

POSTED  
ACCOUNTING DEPT

Tax ID: 59-3473648

Phone: (702) 228-2600 Fax:

Please detach bottom portion and return with payment.

Steven M. Baker, Esq.  
Benson, Bertoldo, Baker & Carter, CHTD.  
7408 West Sahara Boulevard  
Suite 8  
Las Vegas NV 89117

Job No. : 130144 BU ID : ZNevada  
Case No. : A531538  
Case Name : Rodriguez, Enrique vs Fiesta Palms, LLC

Invoice No. : 98253 Invoice Date : 6/24/2010  
**Total Due : \$ 262.81**  
AFTER 7/24/2010 PAY \$289.09

Remit To: **First-Choice Reporting Services, Inc.**  
**121 South Orange Avenue**  
**Suite 800**  
**Orlando FL 32801**

<b>PAYMENT WITH CREDIT CARD</b>			
Cardholder's Name: _____			
Card Number: _____			
Exp. Date: _____		Phone#: _____	
Billing Address: _____			
Zip: _____		Card Security Code: _____	
Amount to Charge: _____			
Cardholder's Signature: _____			4 App. 968





3770 Howard Hughes Pkwy.  
 Suite 300  
 Las Vegas, NV 89169  
 Phone: 800-330-1112  
 Fax: 702-631-7351  
 www.litigationservices.com

# STATEMENT

Account No.	Date
F1241	11/4/2010

Current	30 Days	60 Days
\$814.45	\$783.81	\$0.00
90 Days	120 Days & Over	Total Due
\$0.00	\$0.00	<b>\$1,598.26</b>

Accounts Payable  
 Benson, Bertoldo, Baker & Carter, Chtd.  
 7408 West Sahara Avenue  
 Las Vegas, NV 89117

Invoice Date	Invoice No.	Balance	Job Date	Witness	Case Name
9/20/2010	<del>867260</del>	325.05	9/13/2010	Steve Ferrero	Rodriguez vs. Fiesta Palms
9/22/2010	<del>867264</del>	213.40	9/13/2010	Steven T. Baker	Rodriguez vs. Fiesta Palms
9/29/2010	<del>867626</del>	245.36	9/20/2010	Kathleen Hartmann, RN, BSN, CCM	Rodriguez vs. Fiesta Palms
10/7/2010	<del>868117</del>	354.50	9/29/2010	Terrance B. Dinneen	Rodriguez vs. Fiesta Palms
10/7/2010	<del>888215</del>	459.95	9/24/2010	Mark Bowman	Broeske vs. Oliviera-Filho

**PAST DUE!**

Tax ID: 88-0428399

Phone: 702-228-2600 Fax: 702-228-2333

*Please detach bottom portion and return with payment.*

Accounts Payable  
 Benson, Bertoldo, Baker & Carter, Chtd.  
 7408 West Sahara Avenue  
 Las Vegas, NV 89117

Account No. : F1241  
 Date : 11/4/2010  
 Total Due : **\$ 1,598.26**

Remit To: **Litigation Services**  
**3770 Howard Hughes Parkway**  
**Suite 300**  
**Las Vegas, NV 89169**

*Rodriguez*

Date  
11/17/10

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
867264	10676-05	194.00	0.00	194.00
868215	11642-06	459.95	0.00	459.95
867260	10676-05	295.50	0.00	295.50
867626	10676-05	223.05	0.00	223.05
868117	10676-05	354.50	0.00	354.50

Check Number  
00011521

Check Amount  
\$ 1527.00

*Monique*

NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2600

**WELLS FARGO BANK**  
 8180 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11521

CHECK NO.  
00011521

\*\* ONE THOUSAND FIVE HUNDRED TWENTY SEVEN DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
 Litigation Services & Technologies, LLC  
 3770 Howard Hughes Parkway  
 Suite 300  
 Las Vegas NV 89169

DATE  
11/17/10

AMOUNT  
\*\*\*\*1,527.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: depo transcripts

⑈011521⑈ ⑈321270742⑈6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
867264	10676-05	194.00	0.00	194.00
868215	11642-06	459.95	0.00	459.95
867260	10676-05	295.50	0.00	295.50
Date 11/17/10	867626	10676-05	223.05	223.05
	868117	10676-05	354.50	354.50

Check Number  
00011521

Check Amount  
\$ 1527.00

Payee  
Litigation Services & Technologies, LLC

NON-NEGOTIABLE

10676-05

# INVOICE

Litigation Services  
3770 Howard Hughes Parkway  
Suite 300  
Las Vegas, NV 89169  
Phone:702-314-7200 Fax:702-631-7351

<b>Invoice No.</b>	<b>Invoice Date</b>	<b>Job No.</b>
867264	9/22/2010	127616
<b>Job Date</b>	<b>Case No.</b>	
9/13/2010	A531538	
<b>Case Name</b>		
Rodriguez vs. Fiesta Palms, LLC		
<b>Payment Terms</b>		
Due upon receipt		

Steven M. Baker, Esq.  
Benson, Bertoldo, Baker & Carter, Chtd.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

1 CERTIFIED COPY OF TRANSCRIPT OF:  
Steven T. Baker

Thank you for your business!

	194.00
<b>TOTAL DUE &gt;&gt;&gt;</b>	<b>\$194.00</b>
AFTER 10/22/2010 PAY	\$213.40

ACCOUNTING DEPARTMENT

Tax ID: 88-0428399

Phone: 702-228-2600 Fax:702-228-2333

Please detach bottom portion and return with payment.

Steven M. Baker, Esq.  
Benson, Bertoldo, Baker & Carter, Chtd.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

Job No. : 127616 BU ID : Zurich-CR  
Case No. : A531538  
Case Name : Rodriguez vs. Fiesta Palms, LLC

Invoice No. : 867264 Invoice Date : 9/22/2010

**Total Due : \$ 194.00**  
AFTER 10/22/2010 PAY \$213.40

Remit To: **Litigation Services**  
**3770 Howard Hughes Parkway**  
**Suite 300**  
**Las Vegas, NV 89169**

<b>PAYMENT WITH CREDIT CARD</b>			
Cardholder's Name: _____			
Card Number: _____			
Exp. Date: _____		Phone#: _____	
Billing Address: _____			
Zip: _____		Card Security Code: _____	
Amount to Charge: _____			
Cardholder's Signature: _____			

Rodriguez

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.	
867264	10676-05	194.00	0.00	194.00	
868215	11642-06	459.95	0.00	459.95	
867260	10676-05	295.50	0.00	295.50	
Date	867626	10676-05	223.05	0.00	223.05
11/17/10	868117	10676-05	354.50	0.00	354.50

Check Number  
00011521

Check Amount  
\$ 1527.00

Monique NON-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
A PROFESSIONAL CORPORATION  
GENERAL ACCOUNT  
7408 W. SAHARA AVENUE  
LAS VEGAS, NV 89117  
(702) 228-2600

**WELLS FARGO BANK**  
8190 W. SAHARA AVENUE  
LAS VEGAS, NEVADA 89117  
94-7074/3212

11521

CHECK NO.  
00011521

\*\* ONE THOUSAND FIVE HUNDRED TWENTY SEVEN DOLLARS AND 00 CENTS \*\*

DATE AMOUNT  
11/17/10 \*\*\*\*1,527.00

**PAY TO THE ORDER OF**  
Litigation Services & Technologies, LLC  
3770 Howard Hughes Parkway  
Suite 300  
Las Vegas NV 89169

~~NON-NEGOTIABLE~~  
VOID AFTER 90 DAYS

MEMO: depo transcripts

⑈011521⑈ ⑆321270742⑆ ⑆6733267691⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.	
867264	10676-05	194.00	0.00	194.00	
868215	11642-06	459.95	0.00	459.95	
867260	10676-05	295.50	0.00	295.50	
Date	867626	10676-05	223.05	0.00	223.05
11/17/10	868117	10676-05	354.50	0.00	354.50

Check Number  
00011521

Check Amount  
\$ 1527.00

Payee  
Litigation Services & Technologies, LLC

NON-NEGOTIABLE

1067605

# INVOICE



1640 W. Alta Drive, Suite 4  
Las Vegas, NV 89106  
Phone: 800-330-1112  
Fax: 702-631-7351  
www.litigationervices.com

Steven M. Baker, Esq.  
Benson, Bertoldo, Baker & Carter, Chtd.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

<b>Invoice No.</b>	<b>Invoice Date</b>	<b>Job No.</b>
867260	9/20/2010	126846
<b>Job Date</b>	<b>Case No.</b>	
9/13/2010	A531538	
<b>Case Name</b>		
Rodriguez vs. Fiesta Palms, LLC		
<b>Payment Terms</b>		
Due upon receipt		

ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF:  
Steve Ferrero

POSTED  
ACCOUNTING DEPT

	295.50
<b>TOTAL DUE &gt;&gt;&gt;</b>	<b>\$295.50</b>
AFTER 10/20/2010 PAY	\$325.05

Thank you for your business!

Tax ID: 88-0428399

Phone: 702-228-2600 Fax: 702-228-2333

Please detach bottom portion and return with payment.

Steven M. Baker, Esq.  
Benson, Bertoldo, Baker & Carter, Chtd.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

Job No. : 126846 BU ID : LV-CR  
Case No. : A531538  
Case Name : Rodriguez vs. Fiesta Palms, LLC

Invoice No. : 867260 Invoice Date : 9/20/2010  
**Total Due : \$ 295.50**  
AFTER 10/20/2010 PAY \$325.05

Remit To: **Litigation Services**  
**1640 W. Alta Drive, Suite 4**  
**Las Vegas, NV 89106**

<b>PAYMENT WITH CREDIT CARD</b>			
Cardholder's Name: _____			
Card Number: _____			
Exp. Date: _____		Phone#: _____	
Billing Address: _____			
Zip: _____		Card Security Code: _____	
Amount to Charge: _____			
Cardholder's Signature: _____			

Rodriguez

Date  
11/17/10

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.
867264	10676-05	194.00	0.00	194.00
868215	11642-06	459.95	0.00	459.95
867260	10676-05	295.50	0.00	295.50
867626	10676-05	223.05	0.00	223.05
868117	10676-05	354.50	0.00	354.50

Check Number  
00011521

Check Amount  
\$ 1527.00

Moniguenon-NEGOTIABLE

**BENSON, BERTOLDO, BAKER & CARTER, CHTD.**  
 A PROFESSIONAL CORPORATION  
 GENERAL ACCOUNT  
 7408 W. SAHARA AVENUE  
 LAS VEGAS, NV 89117  
 (702) 228-2800

**WELLS FARGO BANK**  
 8190 W. SAHARA AVENUE  
 LAS VEGAS, NEVADA 89117  
 94-7074/3212

11521

CHECK NO.  
00011521

\*\* ONE THOUSAND FIVE HUNDRED TWENTY SEVEN DOLLARS AND 00 CENTS \*\*

**PAY TO THE ORDER OF**  
 Litigation Services & Technologies, LLC  
 3770 Howard Hughes Parkway  
 Suite 300  
 Las Vegas NV 89169

DATE  
11/17/10

AMOUNT  
\*\*\*\*1,527.00

~~NON-NEGOTIABLE~~

VOID AFTER 90 DAYS

MEMO: depo transcripts

⑈011521⑈ ⑆321270742⑆673326769⑈

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

INVOICE NO.	REFERENCE	AMOUNT	DISCOUNT	NET AMT.	
867264	10676-05	194.00	0.00	194.00	
868215	11642-06	459.95	0.00	459.95	
867260	10676-05	295.50	0.00	295.50	
Date 11/17/10	867626	10676-05	223.05	0.00	223.05
	868117	10676-05	354.50	0.00	354.50

Check Number  
00011521

Check Amount  
\$ 1527.00

Payee  
Litigation Services & Technologies, LLC

NON-NEGOTIABLE

# INVOICE

Litigation Services  
3770 Howard Hughes Parkway  
Suite 300  
Las Vegas, NV 89169  
Phone:702-314-7200 Fax:702-631-7351

Invoice No.	Invoice Date	Job No.
868117	10/7/2010	127683
Job Date	Case No.	
9/29/2010	A531538	
Case Name		
Rodriguez vs. Fiesta Palms		
Payment Terms		
Due upon receipt		

Steven M. Baker, Esq.  
Benson, Bertoldo, Baker & Carter, Chtd.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

I CERTIFIED COPY OF TRANSCRIPT OF:

Terrance B. Dinneen

354.50

**TOTAL DUE >>>** **\$354.50**

AFTER 11/6/2010 PAY \$389.95

Thank you for your business!

Billing issues must be received in writing within 30 days of invoice date.

(-) Payments/Credits: 0.00

(+) Finance Charges/Debits: 0.00

(=) New Balance: **\$354.50**

Tax ID: 88-0428399

Phone: 702-228-2600 Fax:702-228-2333

*Please detach bottom portion and return with payment.*

Steven M. Baker, Esq.  
Benson, Bertoldo, Baker & Carter, Chtd.  
7408 West Sahara Avenue  
Las Vegas, NV 89117

Invoice No. : 868117  
Invoice Date : 10/7/2010  
Total Due : **\$ 354.50**

Remit To: **Litigation Services**  
**3770 Howard Hughes Parkway**  
**Suite 300**  
**Las Vegas, NV 89169**

Job No. : 127683  
BU ID : Zurich-CR  
Case No. : A531538  
Case Name : Rodriguez vs. Fiesta Palms

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

\_\_\_\_\_ /

**APPELLANT'S APPENDIX**  
**VOLUME 3**

**ROBERT L. EISENBERG (Bar # 0950)**  
**Lemons, Grundy & Eisenberg**  
**6005 Plumas Street, Third Floor**  
**Reno, Nevada 89519**  
**775-786-6868**  
**Email: [rle@lge.net](mailto:rle@lge.net)**

**ATTORNEYS FOR APPELLANT**

CHRONO INDEX

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

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5.	Plaintiff's Sixth Supplemental Early Case Conference List of Documents and Witnesses	01/25/08	1	36 - 39
6.	Plaintiff's Seventh Supplemental Early Case Conference List of Documents and Witnesses	07/01/08	1	40 - 45
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9.	Plaintiff's Tenth Supplemental Early Case Conference List of Documents and Witnesses	10/30/08	1	56 - 60
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15.	Rebuttal Expert Disclosure [NRCP 16.1 (a)(2)]	07/14/10	1	85 - 125

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

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16.	Motion to Compel Responses to Request for Production of Documents, to Compel Further Responses to Interrogatories; Request for Sanctions; and Motion to Compel Independent Medical Examinations of Plaintiff	07/28/10	1	126 - 134
17.	Plaintiff's Opposition to Defendant's Motion to Compel Responses to Request for Production of Documents, to Compel Further Responses to Interrogatories; Request for Sanctions; and Motion to Compel Independent Medical Examination of Plaintiff	08/09/10	1	135 - 137
18.	Plaintiff's Pre-Trial Memorandum	09/27/10	1	138 - 145
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20.	Defendant The Palms' Opposition to Plaintiff's Motion to Strike	11/23/10	1	151 - 157
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24.	Defendant Fiesta Palms, LLC's Motion for Mistrial, or, Alternatively, Motion to Strike Plaintiff's Confidential Pretrial and Trial Briefs on Ex Parte Application for Order Shortening Time; Order	01/20/11	1	240 - 248
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27.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Strike Defendant's Post-Trial Brief]	03/10/11	2	262 - 264

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<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
28.	Findings of Fact, Conclusions of Law, and Order [re: Plaintiff's Rule 52 Motion on the Issue of Liability]	03/10/11	2	265 - 268a
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33.	Memorandum Re: Pre-Judgment Interest	03/22/11	2	288 - 292
34.	Defendant Fiesta Palms, LLC DBA The Palms Casino Resort's Memorandum of Points and Authorities in Support of its Motion for New Trial	03/25/11	2	293 - 324
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36.	Declaration of Kenneth C. Ward (2nd) in Support of Defendant Fiesta Palms, LLC's Motion for New Trial	03/25/11	2	412 - 491
37.	Defendant Fiesta Palms, LLC DBA The Palms Casino Resort's Memorandum of Points and Authorities in Support of its Motion for New Trial	03/28/11	3	492 - 523
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40.	Defendant Fiesta Palms, LLC's Reply Memorandum/Opposition to Plaintiff's Memorandum re: Pre-Judgment Interest	04/01/11	3	689 - 692
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49.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, D/B/A The Palms Casino Resort's Reply to Plaintiff's Opposition to the Motion for New Trial	05/02/11	4	825 - 834
50.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Amend Judgment on Verdict]	09/19/11	4	835 - 837
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52.	Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion for New Trial	09/29/11	4	841 - 854

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53.	Plaintiff's Motion for Reconsideration of Order Granting Defendant's Motion to Retax Costs; Ex Parte Application for Order Shortening Time; Order	10/5/11	4 5	855 - 976 977- 1149
54.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, D/B/A The Palms Casino Resort's Opposition to Plaintiff's Motion for Reconsideration of Order to Retax Costs	10/14/11	5	1150 - 1191
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**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

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<b><u>Trial Transcripts</u></b>				
65.	Partial Transcript- Bench Trial (Opening statements; Dr. Heaps)	10/25/10	7	1315 - 1404
66.	Partial Transcript- Bench Trial (Sheri Long)	10/25/10	8	1405 - 1431
67.	Partial Transcript- Bench Trial (Vikki Kooinga)	10/25/10	8	1432 - 1444
68.	Partial Transcript- Bench Trial Vol. 1 (Enrique Rodriguez)	10/26/10	8	1445 - 1579
69.	Partial Transcript- Bench Trial (Dr. Maryanne Shannon)	10/27/10	9	1580 - 1777
70.	Partial Transcript- Bench Trial Vol. 2 (Enrique Rodriguez)	10/27/10	9	1778 - 1810
71.	Partial Transcript- Bench Trial (Dr. Joseph Schifini)	10/28/10	10	1811 - 1892
72.	Partial Transcript- Bench Trial (Dr. Joseph Schifini)	11/1/10	10	1893 - 2037
73.	Partial Transcript- Bench Trial Vol. 1(Dr. Russell Shah)	11/1/10	11	2038 - 2191
74.	Partial Transcript- Bench Trial Vol. 3 (Enrique Rodriguez)	11/2/10	11	2192 - 2220
75.	Partial Transcript- Bench Trial Vol. 2 (Dr. Russell Shah)	11/2/10	12	2221 - 2339
76.	Partial Transcript- Bench Trial (Forrest P. Franklin)	11/3/10	12	2340 - 2375
77.	Partial Transcript- Bench Trial (Maria Perez)	11/3/10	12	2376 - 2393
78.	Partial Transcript- Bench Trial (Nicholas Tavaglione)	11/4/10	12	2394 - 2426
79.	Partial Transcript- Bench Trial (Terrance Dinneen)	11/4/10	13	2427 - 2543

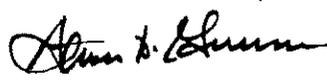
**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
80.	Partial Transcript- Bench Trial (Dr. George Becker)	11/5/10	13 14	2544 - 2676 2677 - 2742
81.	Partial Transcript - Bench Trial (Dr. Jacob Tauber)	11/5/10	14	2743 - 2777
82.	Partial Transcript- Bench Trial (Dr. Walter Kidwell)	11/8/10	14	2778 - 2894
83.	Partial Transcript- Bench Trial (Dr. Louis Mortillaro)	11/9/10	15	2895 - 3004
84.	Partial Transcript- Bench Trial (Dr. Thomas Cargill)	11/9/10	15	3005 - 3061
85.	Partial Transcript- Bench Trial (Frank Sciulla)	11/9/10	15	3062 - 3073
86.	Partial Transcript- Bench Trial (Closing Arguments)	11/10/10	16	3074 - 3150

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87.	Defendant's Motion for Jury Trial	10/20/10	16	3151 - 3163
88.	Defendant's Motion for Mistrial, etc.	01/27/11	16	3164 - 3186
89.	Defendant's Motion for A New Trial, etc.	07/05/11	16	3187 - 3212





CLERK OF THE COURT

1 **PTAT**  
Kenneth C. Ward (Bar No. 6530)  
2 keward@archernorris.com  
Keith R. Gillette (Bar No. 11140)  
3 kgillette@archernorris.com  
ARCHER NORRIS  
4 A Professional Law Corporation  
2033 North Main Street, Suite 800  
5 Walnut Creek, California 94596-3759  
Telephone: 925.930.6600  
6 Facsimile: 925.930.6620

7 Marsha L. Stephenson, (Bar No. 6150)  
STEPHEN & DICKINSON, P.C.  
8 2820 West Charleston Blvd., Suite 19  
Las Vegas, NV 89102-1942  
9 Telephone: 702.474.7229  
Facsimile: 702.474.7237

10 Attorneys for Defendant  
11 FIESTA PALMS, LLC, a Nevada Limited Liability  
Company, d/b/a THE PALMS CASINO RESORT

12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

15 ENRIQUE RODRIGUEZ,  
16 Plaintiff,

17 v.

18 FIESTA PALMS, LLC, a Nevada Limited  
19 Liability Company, d/b/a THE PALMS  
20 CASINO RESORT, et al. ,  
21 Defendants.

Case No. A531538

**DEFENDANT FIESTA PALMS, LLC DBA  
THE PALMS CASINO RESORT'S  
MEMORANDUM OF POINTS &  
AUTHORITIES IN SUPPORT OF ITS  
MOTION FOR NEW TRIAL**

Dept: X  
Hearing Date:  
Hearing Time:  
Hearing Dept:

22  
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**I.  
INTRODUCTION**

The verdict in this case constitutes a serious miscarriage of justice. There were several irregularities that led to an unjust verdict against defendant FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a THE PALMS CASINO RESORT (“the Palms”). First, the prevailing party, plaintiff Enrique Rodriguez (“Plaintiff”), and his counsel, engaged in misconduct that materially prejudiced the Palms by producing documents at trial for the first time, which prevented the Palms from being able to review the documents and prepare for the documents prior to trial. Second, the court committed error in permitting the Plaintiff to have four medical treaters testify on behalf of 25 treaters, and in subject areas in which they are not qualified. Third, the body of evidence the Palms produced at trial demonstrated that Plaintiff’s evidence was insufficient to justify the verdict. Finally, the Court was in error when it granted Plaintiff’s motion to strike the Palms’ experts’ opinions.

As will be unveiled in these moving papers, these facts, issues and circumstances all combined to deny the Palms a fair trial. These defects can only be remedied by the granting of new trial.

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**II.  
FACTUAL BACKGROUND**

This case involves claims that on November 22, 2004, plaintiff Enrique Rodriguez (“Plaintiff”) was in the sports bar at The Palms Casino for the purposes of watching a football game, and during the game’s half-time, an unknown patron dove for a souvenir, thrown into the bar area by a blindfolded “Palms girl,” and struck the Plaintiff’s left knee. Plaintiff further alleges that he then struck another patron while falling and injured the left side of his head. Over the last five years, Plaintiff has been under the care of numerous medical providers with a diverse range of specialties.

On October 25, 2010, the bench trial began in the matter of *Enrique Rodriguez v. the Palms*, No. A531538, in the Eastern District of Nevada, Clark County, and concluded with the parties’ closing arguments on November 10, 2010. (See Declaration of Kenneth C. Ward (“Ward  
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1 Decl.”), filed in conjunction herewith, ¶ 2.) The Honorable Jessie Walsh returned the verdict in  
2 favor of Plaintiff on March 7, 2011, with Notice of Entry of Judgment served on the Palms on  
3 March 15, 2011. (Ex. A to the Ward Decl., ¶ 3.)

4 **A. Plaintiff’s Economist Expert’s Testimony.**

5 The Palms’ economist expert, Thomas Cargill, took the position that there was insufficient  
6 information from which to calculate a wage loss. Plaintiff’s own economist, Terrance Dinneen,  
7 testified that he met with the plaintiff in 2008 and asked for information with which to calculate  
8 his wage loss. (Deposition of Terrance Dinneen (“Dinneen Depo.”), attached as Exhibit B to the  
9 Ward Decl., 41:15-42:14, 30:2-20.) In response to Mr. Dinneen’s request, Plaintiff produced no  
10 social security information, but did produce three tax returns during the six-year period of 1999 to  
11 2004. (Dinneen Depo, 46:2-17, 56:17-20, 55:5-6, 73:23-74:10, Ex. B to Ward Decl.) Of those  
12 six years, there were three years without any returns at all.

13 To calculate past and future lost earnings, Plaintiff’s economist took the total income and  
14 averaged it over six years. (Dinneen Depo., 30:8-20, 75:22-76:15.) Approximately 70% of that  
15 income came from one year, 2004. (*Id.* at 75:22-76:15.) Oddly enough, the tax returns from  
16 2001 and 2004 were prepared and signed in 2009 after the economist had requested the  
17 information, and once litigation was underway. (Dinneen Depo., 39:24-42:4, Ex. B to the Ward  
18 Decl.) Mr. Dinneen stated that he did not know if they were filed or not filed, reporting that all  
19 he had was the tax returns, signed on various dates, such as 2009 for a 2004 tax return. (*Id.* at  
20 41:2-9.) Plaintiff testified from the witness stand that he gave his economist all of the back up  
21 information to support his income claim, and that he prepared and signed the 2004 tax return in  
22 2009 after the economist requested the information. (Ward Decl., ¶ 5.) However, at trial, Mr.  
23 Dinneen produced a letter from a person who allegedly prepared the returns saying that the  
24 returns had been filed; it was a one line letter from the tax preparer dated October 20, 2010.  
25 (Ward Decl., ¶ 6; November 4, 2010 Trial testimony, 71:20-73:19, 81:12-22, attached as Exhibit  
26 K to the Ward Decl.) Mr. Dinneen testified at trial that he never provided the document to the  
27 Palms. (*Id.*) This document was never provided to the Palms, even though Mr. Dinneen had  
28 purportedly provided his entire work file and that letter was not included. (Ward Decl., ¶ 6.)

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1 **B. Plaintiff's Medical Treaters' Testimony.**

2 Plaintiff did not have any disclosed medical experts and none of his treaters (52 of them)  
3 prepared reports. In spite of this, the Court allowed treaters to testify about other treaters'  
4 findings, and those same treaters were also permitted to testify as to what they thought other  
5 treaters' opinions were or would be if they were aware of the patient's ongoing complaints.  
6 Additionally, two anesthesiologists were allowed to testify about back surgeries and knee  
7 replacements which had not been specified by the orthopedists.

8 There was a spine surgeon, Dr. Thalgott, who had at least six entries in his records that he  
9 would not do surgery on this plaintiff's back. (Ward Decl., ¶ 9.) Further, he had not seen the  
10 plaintiff in over three years. (*Id.*) In spite of that, the anesthesiologist, who also had not seen the  
11 plaintiff for over three years, testified that the plaintiff needed a multi-level back fusion and that  
12 he was quite certain that if Dr. Thalgott knew what had transpired with this plaintiff in the last  
13 three years, that Dr. Thalgott would change his mind and agree that surgery was necessary.  
14 (November 8, 2010 Trial Testimony, 91:21-95:20, 96:18-98:4, 98:17-101:22, Exhibit M to Ward  
15 Decl.)

16 Plaintiff's disclosed life care planner, Kathleen Hartmann, provided a life care plan calling  
17 for \$294,000 for all of the medical relating to a spinal stimulator. (Dinneen & Hartman initial  
18 expert report, Ex. L to the Ward Decl., ¶12.) Dr. Schifini, an anesthesiologist, was allowed to  
19 testify that these numbers were all wrong and the number was actually \$960,000. (*Id.*; Nov. 1,  
20 2010 Trial Testimony, 53:13-56:19, 122:17-25, Ex. J to the Ward Decl. ) The life care planner's  
21 numbers also did not include a figure for fusion and she included a range of \$80,000 to \$160,000  
22 for knee replacements. (*Id.*) Again, Dr. Schifini, the anesthesiologist, was able to testify that his  
23 back surgeries and knee replacements would be \$686,000. (*Id.*)

24 **C. Dr. Joseph Schifini's "New" Documents.**

25 The Palms subpoenaed all records from Plaintiff's treater, Dr. Joseph Schifini. (Ward  
26 Decl., ¶10.) The Palms only received approximately 21 pages from Dr. Schifini at that time.  
27 (*Id.*) However, at trial, Dr. Schifini was permitted to testify regarding approximately 117 pages  
28 of documents that the Palms were unaware of and the Palms were never been notified by Dr.

1 Schifini or Plaintiff's counsel that such documents existed. (Ward Decl., ¶ 11.) Plaintiff's failure  
2 to disclose the documents put the Palms at a great disadvantage in its cross-examination of Dr.  
3 Schifini, who provided critical testimony during the trial. (Ward Decl., ¶ 11.)

4 **D. The Plaintiff Moved to Strike the Palms' Experts' Testimony, and the Court**  
5 **Granted the Motion.**

6 Plaintiff filed his Motion to Strike Trial Testimony on approximately November 16, 2010.  
7 (See Ex. G to Ward Decl., ¶ 13.) Plaintiff's points and authorities essentially argued that the  
8 Palms' experts, Forrest Franklin and Thomas Cargill "did not establish a sufficient foundation  
9 since neither provided opinions to a reasonable degree of probability." (*Id.*) Plaintiff stipulated  
10 on the record that Mr. Franklin and Dr. Cargill are both qualified. (*Id.* at ¶ 14.) The Court granted  
11 the Motion to Strike on March 2, 2011. (Ex. H to the Ward Decl.).

12 **III.**  
13 **LEGAL ANALYSIS**

14 **A. The Court May Grant A New Trial.**

15 A new trial may be granted pursuant to N.R.C.P. 59(a) when an aggrieved party's  
16 substantial rights have been materially affected by any of the [grounds stated in the rule]."  
17 *Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1035-37; N.R.C.P. 59. Pursuant to N.R.C.P.  
18 Rule 59, a new trial may be granted to a party "for any of the following causes or grounds  
19 materially affecting the substantial rights of an aggrieved party":

20 (1) Irregularity in the proceedings of the court, jury, master, or  
21 adverse party, or any order of the court, or master, or abuse of  
22 discretion by which either party was prevented from having a fair  
23 trial;

24 (2) Misconduct of the jury or prevailing party;

25 (3) Accident or surprise which ordinary prudence could not have  
26 guarded against;

27 (4) Newly discovered evidence material for the party making the  
28 motion which the party could not, with reasonable diligence, have  
discovered and produced at the trial;

...

(7) Error in law occurring at the trial and objected to by the party  
making the motion. On a motion for a new trial in an action tried  
without a jury, the court may open the judgment if one has been

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1 entered, take additional testimony, amend findings of fact and  
2 conclusions of law or make new findings and conclusions, and  
direct the entry of a new judgment.

3 **B. Plaintiff Counsel's Blatant and Premeditated Act of Putting Evidence On that It**  
4 **Knew Defense Counsel Had No Knowledge of Constitutes Reprehensible Attorney**  
5 **Misconduct and is Grounds for this Court to Grant a New Trial.**

6 In this case, Plaintiff and Plaintiff's counsel engaged in misconduct by putting on  
7 evidence they knew the Palms was unaware of, which resulted in the Palms being surprised and  
8 unprepared for the evidence, such that a new trial is justified. N.R.C.P. Rule 59 provides that a  
9 court may grant a new trial for an irregularity in the proceedings by adverse counsel. A new trial  
10 based upon the prevailing party's misconduct does not require proof that the result would have  
11 been different in the first trial without such misconduct. *Barrett v. Baird*, 111 Nev. 1496, 908  
12 P.2d 689 (1995) (overruled on other grounds by *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970  
13 (2008).) "The 'surprise' contemplated by NRCP 59(a) must result from some fact, circumstance,  
14 or situation in which a party is placed unexpectedly, to his injury, without any default or  
15 negligence of his own, and which ordinary prudence could not have guarded against." *Havas v.*  
*Haupt*, 94 Nev. 591, 593 (1978).

16 It is well settled under Nevada law that attorney misconduct or the prevailing party's  
17 misconduct constitutes an irregularity in the proceedings that is grounds for a new trial. Although  
18 there are many instances of misconduct by Plaintiff and Plaintiff's counsel, two particular acts  
19 constitute misconduct that materially affected the Palms. First, Plaintiff withheld evidence  
20 regarding Plaintiff's tax returns. Although he never reported to Mr. Ward again, when Plaintiff's  
21 economist, Mr. Dinneen testified at trial, he had with him a letter from the person who allegedly  
22 prepared the returns saying that the returns had been filed. Mr. Dinneen based the majority of his  
23 wage loss claim opinions on Mr. Rodriguez's tax returns, which were admittedly prepared only  
24 after Mr. Dinneen had requested them to form his opinion for this litigation.

25 From this scant information, Mr. Dinneen projected a wage loss of almost a million  
26 dollars. Although Plaintiff claimed to have bought and sold hundreds of home as a real estate  
27 investor, there was no evidence to support this claim. It may be that he has bought and sold a few  
28 homes, but it is unlikely that he has been involved in this business to any great extent.

1 The Palms was also blindsided by one of Plaintiff's treating specialists, Dr. Schifini, who  
2 presented at trial approximately 100+ documents in support of his opinions—none of which had  
3 ever been provided to the Palms, and were not included in the 21+ documents Dr. Schifini  
4 produced in response to his document subpoena. Dr. Schifini was introduced as one of plaintiff's  
5 treating anesthesiologist/pain management specialists. Dr. Schifini testified that his first visit  
6 with plaintiff was in November 2007. (Oct. 28, 2010, Trial Testimony, 7:14-16, attached as  
7 Exhibit I.) He was well aware that he had over 120+ documents regarding Plaintiff's treatment,  
8 yet he only produced 21+ documents to the Palms prior to trial. It was only at trial that he (and  
9 arguably Plaintiff and Plaintiff's counsel) opted to "surprise" the Palms with 100+ documents that  
10 it had never seen before. This made it incredibly difficult for Defendant to continue to properly  
11 defend the case and cross-examine Dr. Schifini.

12 **C. The Court's Order Permitting Plaintiff to Introduce Evidence of Testimony of**  
13 **Unavailable Treators Prejudiced the Palms' Right to a Fair Trial and is Grounds for**  
14 **Grant of a New Trial.**

15 Pursuant to N.R.C.P. Rule 59(a)(1), a Court may grant a new trial if there are "irregularity  
16 of the proceedings" or an "abuse of discretion" preventing a fair trial. In addition, Rule 59(a)(7)  
17 authorizes a new trial where an error of law occurred during trial and the moving party objected  
18 to that error during trial. See *Bass-Davis v. Davis*, 122 Nev. 442, 453, 134 P.3d 103, 110 (2006).

19 The Court permitted Plaintiff, over the vehement objections of the Palms' counsel, to  
20 introduce opinion testimony of Plaintiff's non-retained, non-disclosed expert treating doctors, Dr.  
21 Shannon, Schifini, Shaw and Kidwell. Plaintiff's failure to disclose these experts put the Palms  
22 in a quagmire, because the Palms never had notice of the testifying treaters' "expert" opinions  
23 until they were given at trial, and once the opinions were given, the Palms was not allowed to  
24 rebut them using its own properly designated expert Dr. Becker, since Dr. Becker had not  
25 included his rebuttal opinions in his written report. The Palms was severely prejudiced by  
26 Plaintiff's failure to disclose the identities of his testifying expert witnesses, and was further  
27 severely prejudiced by the Court's allowing those unidentified experts to testify.

28 Treating healthcare providers, who were neither designated per NRCP 26 as non-retained  
experts nor provided expert reports, may not offer expert opinions on aspects of Plaintiff's

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1 condition outside the scope of their treatment of plaintiff. As the Court saw throughout the  
 2 progress of the trial, Plaintiff did not have any retained medical experts. With regard to Plaintiff's  
 3 medical case, his counsel elicited testimony from only four treating healthcare providers, not from  
 4 all of Plaintiff's treaters. Plaintiff attempted to have these four treaters aggregate the opinions and  
 5 conclusions of the other 25+ treaters. The testimony by witness is represented in this chart:

<b>Witness</b>	<b>Testified Regarding</b>
Mary Ann Shannon / Las Vegas Neurosurgery	American Medical Response
Mary Ann Shannon / Las Vegas Neurosurgery	Nathan Heaps, M.D. (Spring Valley Hospital Medical Center)
Mary Ann Shannon / Las Vegas Neurosurgery	John G. Nork, M.D. (Associated Physicians)
Mary Ann Shannon / Las Vegas Neurosurgery	Eric Campbell, D.C. / William Simpson, M.D. (Wellness Group)
Mary Ann Shannon, Las Vegas Neurosurgery	Mary Ann Shannon (Las Vegas Neurosurgery)
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Joseph Nicola, D.C. (Integrated Health Care)
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Yakov Treyzon, M.D.
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Casiano Flaviano, M.D. (Family Wellness Center)
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Walter M. Kidwell, M.D. (Pain Institute of Nevada)
Russell J. Shah, M.D.	Rancho Physical Therapy
Russell J. Shah, M.D.	F. Michael Ferrante, M.D. (UCLA)
Russell J. Shah, M.D.	Lawrence Miller, M.D. (California Hand Surgery / Olympic Anesthesia)
Russell J. Shah, M.D.	Robert Gutierrez, M.D. (orthopedic surgeon)
Russell J. Shah, M.D.	Matt Smith Physical Therapy
Russell J. Shah, M.D.	Valley Rehabilitation
Russell J. Shah, M.D.	G. Michael Elkhanich, M.D. (Bone & Joint Institute)
Russell J. Shah, M.D.	Russell J. Shah, M.D.
Russell J. Shah, M.D.	Kelly Hawkins Physical Therapy
Joseph Schifini, M.D. / Las Vegas Surgery Center	F. Michael Ferrante, M.D. (UCLA)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Douglas S. Stacey, D.P.M. (Foot & Ankle Surgery Group)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Govind Koka, D.O. (Medical Associates of Southern Nevada / Primary Care Consultants)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Michael J. Crovetti, D.O. (Bone and Joint Institute)
Joseph Schifini, M.D. / Las Vegas Surgery Center	John Thalgott, M.D. (Center for Disease and Surgery of the Spine)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Joseph J. Schifini, M.D. (Las Vegas Surgery Center)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Lawrence Miller, M.D. (California Hand Surgery)

Witness	Testified Regarding
Joseph Schifini, M.D. / Las Vegas Surgery Center	Thomas Vater, D.O. (VaterSpine)

Those four providers (Schifini, Shah, Kidwell and Shannon) offered their own “expert” opinions as to all of the other nontestifying, treating healthcare providers’ (such as orthopedic surgeons) opinions, conclusions, and courses of treatment, both past and future, as well as testifying that the non-testifying treaters’ bills and expenses were reasonable and necessary, and finally provided cost information for treatments outside the scope of their normal treatment or expertise.

A particularly striking example comes in the testimony of Dr. Schifini, one of Plaintiff’s treating anesthesiologist/pain management specialists. Dr. Schifini testified that his first visit with plaintiff was in November 2007. (Oct. 28 Trial Testimony, 7:14-16, Ex. J to the Ward Decl.) He testified he did not speak with Dr. Ferrante, a pain management specialist at UCLA who saw Rodriguez once in September or October 2006 and performed 1 1/2 hour IME at the specific request of his attorneys. (Nov. 1 Trial Testimony, 64:23-65:5, Ex. J to Ward Decl.; Trial Exh. 25, UCLA 000006). In short, Dr. Schifini had no connection whatsoever with Dr. Ferrante or Dr. Ferrante’s treatment of plaintiff. This notwithstanding, on questioning from Plaintiff’s counsel, Dr. Schifini testified as to Dr. Ferrante’s qualifications and background. (Nov. Trial Testimony, 10:3-11:8, Ex. I to Ward. Decl.) Dr. Schifini then proceeded to discuss in detail the opinions and conclusions that he believed that Dr. Ferrante would have reached had he followed Plaintiff’s treatment. (Nov. 1 Trial Testimony, 141:2-142:17, Ex. J to the Ward Decl.)

Dr. Schifini then began to discuss what he believed was Dr. Larry Miller’s treatment of Plaintiff as memorialized in his records. Dr. Miller, an anesthesiologist and pain management specialist in Los Angeles, last saw Plaintiff in May 2007, fully six months before Dr. Schifini’s first consult with plaintiff. Dr. Schifini did not refer Plaintiff to Dr. Miller. Dr. Miller did not refer Plaintiff to Dr. Schifini. The two doctors did not consult. Dr. Schifini knew nothing about Dr. Miller’s treatment except what was reflected in his records. Yet, Dr. Schifini testified that he agreed with Dr. Miller’s diagnosis, and that Dr. Miller’s treatments were medically necessary and related to the Palms injury, and the charges were reasonable. (Oct. 28 Trial Testimony, 22:4-

1 27:22, 44:20-9, Ex. I to Ward Decl.,)

2 Dr. Schifini next proceeded to give the same sort of expert testimony with regard to the  
3 treatment of plaintiff by Drs. Crovetti, Koka, Stacey, Vater, and Thalgott, all as memorialized in  
4 their records. (*Id.* at 28:6-30:12, 44:10-45:12, 45:14-48:10, 54:22-55:15, 64:13-65:20.)

5 Finally, and most significantly, Dr. Schifini proceeded to testify as to the specific costs of  
6 the proposed spinal cord stimulator that he opined to Dr. Ferrante would believe was necessary,  
7 had Dr. Ferrante actually treated plaintiff within the past several years. He specifically stated that  
8 the costs of lifetime surgeries, surgeons, replacement batteries, replacement electrodes, and office  
9 visits would total \$721,000. (Oct. 28, 2010 Trial Testimony, Ex. I to Ward Decl, 76:14-25.) This  
10 was an improper expert opinion, as no foundation was laid for it, nor was it disclosed previously,  
11 nor was Dr. Schifini disclosed as an expert. Moreover, Dr. Schifini's costings are some three  
12 times greater than Plaintiff's own expert lifecare planner Kathleen Hartman, R. N.'s estimates:

24:11-17 Spinal Stimulator had trial July 14 <sup>th</sup> helped 32.77 yrs <sup>†</sup>	2008	2009	Permanent to be placed by Dr. Vater	Pain control and control of symptoms of chronic pain disorder Trial completed	Perm - \$96,145(2) Elec - \$10,310 (5) Battery\$4,000 (8) Remove - \$9,320(2)***	192,290 51,950 32,000 18,640	192,290 <sup>†</sup> 51,550 <sup>†</sup> 32,000 <sup>†</sup> 18,640 <sup>†</sup>
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16 (Dinneen & Hartman initial expert report, p. 17, attached as Exhibit L to the Ward Decl.)

17 By way of further example, Dr. Kidwell, one of plaintiff's treating anesthesiologists/pain  
18 specialists, testified that although he had never spoken with Dr. Thalgott (an orthopedic surgeon  
19 in Los Angeles who had not seen plaintiff for at least three years before the date of trial), and  
20 although Dr. Thalgott had written that plaintiff was not a surgical candidate, it was Dr. Kidwell's  
21 opinion that if Dr. Thalgott knew what had transpired between then and now, he would change  
22 his opinion. Dr. Kidwell testified not as to what he thought would be the course, but what he  
23 thought Dr. Thalgott, a non-testifying treating doctor, would prescribe. (November 8, 2010 Trial  
24 Testimony, 40:24-41:14, , Exhibit M to the Ward. Decl.) This is pure speculation.

25 Via this tactic, Plaintiff was able to offer into evidence the "expert opinions" of 28  
26 different healthcare providers through only four witnesses, subjecting only four witnesses to  
27 cross-examination on the "opinions" of 28 different providers as understood by the four testifying  
28 treaters. However, the law does not allow a treating provider, otherwise not disclosed as an

1 expert, to offer expert opinions as to the treatment that would be prescribed or recommended by  
2 another, non-testifying treater. The Court's considering this testimony in its verdict is error.

3 Plaintiff's entire medical case, a series of opinions of "experts by proxy" is improper  
4 under NRC 16 and 26, is inadmissible hearsay, and is completely without foundation. Plaintiff  
5 did not demonstrate any foundation for any of the testifying treaters to offer the opinions they  
6 offered with regard to plaintiff's back surgery needs, what Plaintiff's MRIs showed, whether his  
7 knee surgeries were necessary, whether the non-testifying treaters' bills were reasonable, or the  
8 lifetime costs for plaintiff's proposed spinal cord stimulator, some \$723,000 as testified by Dr.  
9 Schifini of his trial testimony. These opinions and the other opinions like them should not have  
10 been considered by this Court in rendering its verdict in this case.

11 *Prabhu v. Levine (a.k.a. Franco) inapposite*

12 At a pretrial hearing on this issue, Plaintiff relied on *Prabhu v. Levine (a.k.a. Franco)*, 112  
13 Nev. 1538 (1996) in support of his argument that treating doctors can provide expert testimony  
14 regardless of whether they have been disclosed as expert witnesses or issued NRC 26 reports.  
15 The Court allowed this testimony, over defendant's objection. The Court did, though, note the  
16 Palms' continuing hearsay and relevance objections regarding the use of testifying treaters to get  
17 into evidence the opinions of nontestifying treaters, as well as foundationless opinions on costs,  
18 future treatment and other relevant issues, as well as the Palms' objections on the basis that the  
19 experts were not disclosed as experts and did not issue reports per NRC 16 and 26.

20 *Prabhu*, as the Court is aware, was a medical malpractice lawsuit. The manner in which  
21 the trial court allowed the treating doctor to provide expert testimony in that case is substantially  
22 different from the manner in which plaintiff was allowed to present "expert" testimony via  
23 treating physicians in this case. The Palms respectfully submits that the Court committed error by  
24 considering the non-disclosed "expert" testimony of plaintiff's treating physicians.

25 In *Prabhu*, the plaintiff Ms. Franco sued her doctor for medical malpractice. Ms. Franco's  
26 treating ophthalmologic surgeon Dr. Levine performed five surgeries on her to correct maladies  
27 caused by Dr. Prabhu's misdiagnoses. Dr. Levine did not testify at trial, but his deposition was  
28 read into the record, providing his opinions as to causation and standard of care, as well as Ms.

1 Franco's prognosis.

2 Prabhu's counsel made objection to Dr. Levine's testimony because he was not disclosed  
3 as an expert under NRCP 26 (no mention was made of expert reports), but was only identified as  
4 a treating physician. However, the decision reflects that Prabhu's counsel was unable to show  
5 prejudice at this technical failure because Prabhu's counsel deposed Dr. Levine and learned all of  
6 his opinions at deposition. Prabhu's counsel, then, had the opportunity to secure his own experts'  
7 opinions to counter Dr. Levine's. Accordingly, Prabhu's counsel could not show any surprise or  
8 prejudice at Levine's testimony at trial, especially considering that testimony was simply  
9 Levine's own deposition taken by Prabhu's own counsel. Under those circumstances, the Court  
10 found no abuse of discretion in allowing the testimony of the treating doctor on ultimate issues in  
11 the case.

12 The nature of Dr. Levine's testimony and treatment of plaintiff is different from the  
13 testimony—to which the Palms objected—that was offered by Drs. Shannon, Schifini, Shah and  
14 Kidwell. Unfortunately, defendants have been unable to locate any other Nevada decision  
15 discussing the exact issue confronting this Court on this point. Unlike Dr. Levine's testimony,  
16 though, where he offered expert opinions on issues learned within the scope of his own specific  
17 and detailed treatment of Ms. Franco, Mr. Rodriguez's testifying treating doctors as described  
18 above have offered opinions on ultimate issues such as causation based not on their own treating  
19 opinions, but on the opinions and records of other doctors, unrelated to their treatment of plaintiff.

20 This testimony is far broader than—and radically different from—the testimony offered  
21 by Dr. Levine in the *Prabhu* case, and should not be allowed.

22 1. *Two parts to valid expert disclosure*

23 Indeed, under the prevailing authorities, these providers cannot offer testimony at all other  
24 than as percipient witnesses (i.e., testimony outside the scope of their specific treatment of  
25 plaintiff) without having been disclosed as experts pursuant to NRCP 16(a)(2)(A) and NRCP 26.  
26 While the Supreme Court in *Prabhu* seemed to minimize plaintiff's failure to designate Levine as  
27 an expert, the fact is that defendant in that case was not prejudiced and so the trial court had not  
28 abused its discretion. In the case where prejudice is patent—as here—expert disclosures are

1 crucially important in allowing a defendant to prepare its case.

2 Under Nevada law, there is a two-part disclosure requirement for expert witnesses.  
3 Nevada Rule of Civil Procedure 16.1(a) provides a party must disclose the identities of potential  
4 experts, and the disclosure must be accompanied by a written report prepared and signed by the  
5 witness. NRCP 16.1(a)(2)(A) and (B). Accordingly, for a witness to be allowed to offer expert  
6 testimony at trial, he must first be formally disclosed as such and, if specifically retained to  
7 provide expert testimony, he must generate a formal written report.

8 None of Mr. Rodriguez's testifying treating doctors were designated as experts. They  
9 were all identified in 16.1 disclosures as treating physicians and percipient witnesses, but none  
10 were disclosed in Plaintiff's expert disclosures as "non-retained" experts. This may seem like a  
11 technical distinction. After all, all of them were available for deposition, and, like in the *Levine*  
12 case, the Palms could have deposed all of them and learned their opinions. However, plaintiff  
13 had 30+ treating healthcare providers in this case. It is patently unfair and prejudicial to either  
14 require the Palms to have deposed every single one of them on the off chance that one might offer  
15 expert testimony, or for the Palms to have to wait until trial to find out which providers are going  
16 to offer expert testimony. Here, Plaintiff was required by NRCP 16.1 and 26 to have timely  
17 designated as experts the four treaters who testified at trial. Because he did not, the Palms was  
18 severely prejudiced in preparing its defense.

19 2. *NRCP 16 disclosure of treating healthcare provider as expert is mandatory.*

20 While so-called "non-retained experts" like treating healthcare providers may not  
21 necessarily be required to provide written reports under 16.1(a)(2)(B), they still must be timely  
22 and formally disclosed as experts under 16.1(a)(2)(A). The reason is the nature of their opinion  
23 testimony: Lay witnesses, those "not testifying as an expert," (NRS 50.265), may provide  
24 opinions rationally based on the perception of the witness (e.g., speed or height), only experts can  
25 provide opinions "based on scientific, technical, or other specialized knowledge," (NRS 50.275),  
26 which are by definition expert opinions.

27 The authorities are clear that a treating doctor, otherwise **not** retained for purposes of  
28 litigation, is nonetheless **still providing** expert testimony if the testimony consists of opinions

1 based on "scientific, technical, or other specialized knowledge," regardless of whether those  
2 opinions were formed during the scope of interaction with a party prior to litigation. *Musser v.*  
3 *Gentiva Health Servs.*, 356 F.3d 751, 757, fn. 2 (7th Cir. 2004); *Cf. O'Conner v. Commonwealth*  
4 *Edison Co.*, 13 F.3d 1090, 1105 n.14 (7th Cir. 1994).<sup>1</sup> Accordingly, it is clear that while a  
5 treating physician may not necessarily be required to offer a written expert report, the treating  
6 physician/healthcare provider must always be disclosed as an expert if he/she is going to be called  
7 at trial to offer any testimony outside the bare facts of his/her treatment.

8 Plaintiff has argued that he did comply with all of the Court's disclosure rules with regard  
9 to percipient witnesses and accordingly the Palms has for years known the identities of all of  
10 Plaintiff's treating healthcare providers. He has argued that no prejudice will result from  
11 Plaintiff's "form over substance" failure to formally disclose the treating healthcare providers,  
12 previously disclosed as percipient witnesses, as experts under NRCP 16.1(a)(2)(A). This was,  
13 after all, essentially the ruling in *Prabhu*. However, and in addition to the specific prejudice to  
14 the Palms here discussed above, the authorities are clear that the federal rules and their NRCP  
15 counterpart demand this formal disclosure:

16 Formal disclosure of experts is not pointless. Knowing the identity  
17 of the opponent's expert witnesses allows a party to properly  
18 prepare for trial. Gentiva should not be made to assume that each  
19 witness disclosed by the Mussers could be an expert witness at trial.  
20 Cf. Patel v. Gayes, 984 F.2d 214, 217-18 (7th Cir. 1993) (affirming,  
21 under the pre-1993 Federal Rules of Civil Procedure, the exclusion  
22 of expert testimony as to duty of care from treating physicians when  
23 they were not disclosed as experts). The failure to disclose experts  
24 prejudiced Gentiva because there are countermeasures that could  
25 have been taken that are not applicable to fact witnesses, such as  
26 attempting to disqualify the expert testimony on grounds set forth in  
27 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125  
28 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), retaining rebuttal experts,  
and holding additional depositions to retrieve the information not  
available because of the absence of a report. In sum, we agree with  
the district court that even treating physicians and treating nurses  
must be designated as experts if they are to provide expert  
testimony.

*Musser, supra*, at 757 – 758 (emphasis added).

In this case, just as in *Musser*, Plaintiff sought to elicit expert opinion testimony from

<sup>1</sup> Treating physicians are not exempt from the disclosure and report requirements because "we do not distinguish the  
treating physician from other experts when the treating physician is offering expert testimony...."  
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1 treating healthcare providers including physicians, none of whom were formally designated as  
2 experts under the civil rules. The Palms never had the opportunity to depose any of plaintiff's  
3 treating providers as experts, as they were never designated as such.

4 This is an important distinction, as the court in *Musser* recognized. There are  
5 "countermeasures" that the Palms could have taken to address the treating providers' "expert"  
6 testimony, most significantly developing rebuttal expert testimony on the various providers'  
7 opinions as elicited in their depositions. The Palms could not do this here, as Plaintiff never  
8 designated which providers it would seek to elicit expert testimony from at trial. There is no  
9 Nevada authority on point unfortunately, but the federal authorities, including *Musser*, affirm that  
10 treating physicians must be disclosed as experts if they are to provide expert testimony.  
11 Defendant has been sorely prejudiced by Plaintiff's having elicited expert testimony from non-  
12 disclosed, non-retained experts at trial.

13 3. *A written report required where bases for opinions stray from the core of*  
14 *treatment*

15 The second part of the expert disclosure under Nevada law is the written report  
16 requirement. Of course, an expert witness specifically hired by counsel to provide testimony in  
17 litigation must also prepare a written report containing all of his opinions and conclusions as well  
18 as the factual bases therefor. NRCPP 16.1(a)(2)(B). A properly disclosed treating physician or  
19 healthcare provider may provide expert testimony without issuing an expert report, but only so  
20 long as the bases for her opinions are limited to her personal observations, diagnosis, and  
21 treatment of plaintiff. *Roberson v. Bair*, 242 F.R.D. 130, 134 (D.D.C. 2007).

22 However, and significantly for this case, an expert report is required when that treatment  
23 provider's testimony strays from the core of the physician's treatment. *Fielden v. CSX Transp.,*  
24 *Inc.*, 482 F.3d 866, 870 (6th Cir. 2007). See *Kirkham v. Societe Air Fr.*, 236 F.R.D. 9, 12 (D.D.C.  
25 2006) (written report requirement applies to opinions on causation, prognosis, and permanency.)  
26 By way of example, any opinion offered by a treating physician or healthcare provider (who has  
27 been otherwise properly disclosed) that is based on information contained in a report of a defense  
28 medical examination, an agreed medical examination for purposes of workers compensation, or

1 any other information outside of the scope of a treating physician's examination and treatment of  
2 plaintiff, is of a consulting nature, and the witness purporting to offer that opinion will be  
3 considered a consulting expert who is subject to the report requirement. *Shapardon v. West*  
4 *Beach Estates*, 172 F.R.D. 415, 417 (D. Haw. 1997).

5 Here, this is exactly the sort of opinion that Plaintiff's for testifying treaters offered. Their  
6 opinions were of a consulting nature, and were not formed solely within the scope of their  
7 treatment of Plaintiff. Many of the facts and opinions testified to by Dr. Shannon, Dr. Schifini,  
8 Dr. Kidwell and Dr. Shah were outside the scope of their treatment of Plaintiff, and were based  
9 on reviews of the other non-testifying treaters' records as well as defendants' own experts'  
10 reports—they criticized the Palms' own expert Dr. Becker. This is something a treating doctor  
11 would never normally do, and something that is the exclusive provenance of retained expert  
12 witnesses. Those select few treating healthcare providers aggregated the hearsay testimony of  
13 these nontestifying providers and offered previously non-disclosed expert opinions based thereon  
14 at trial. Such testimony is clearly inadmissible, and to admit it is an abuse of discretion and an  
15 error in law.

16 4. *Plaintiff's testifying treaters not qualified under Daubert to offer opinions on*  
17 *treatment/conclusions/opinions of nontestifying treaters.*

18 Assuming *arguendo* that Plaintiff's treating providers were properly disclosed, they still  
19 must be qualified to offer the opinions they seek to offer. The statute governing the admissibility  
20 of expert testimony in Nevada courts is NRS 50.275, which has been construed to track with  
21 Federal Rule of Evidence 702. *Hallmark v. Eldridge*, 189 P.3d 646, 650 (Nev. 2008). NRS  
22 50.275 states that

23 [i]f scientific, technical or other specialized knowledge will assist  
24 the trier of fact to understand the evidence or to determine a fact in  
25 issue, a witness qualified as an expert by special knowledge, skill,  
26 experience, training or education may testify to matters within the  
27 scope of such knowledge. *Id.*

28 Therefore, to qualify as an expert witness under NRS 50.275, the witness must satisfy  
three requirements:

(1) he or she must be qualified in an area of 'scientific, technical or  
other specialized knowledge' (the qualification requirement); (2)

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1 his or her specialized knowledge must 'assist the trier of fact to  
2 understand the evidence or to determine a fact in issue' (the  
3 assistance requirement); and (3) his or her testimony must be  
4 limited 'to matters within the scope of [his or her specialized]  
5 knowledge' (the limited scope requirement). *Hallmark, supra*, 189  
6 P.3d at 650.

7 The determination of competency of an expert witness is largely within the discretion of  
8 the trial judge. *Walton v. Eighth Judicial Dist. Court ex rel. County of Clark*, 94 Nev. 690, 693  
9 (1978). Before a person can testify as an expert witness, the court must first determine whether  
10 that person is qualified in an area of scientific, technical, or other specialized knowledge. The  
11 court should consider the following non-exhaustive factors: (1) formal schooling and academic  
12 degrees, (2) licensure, (3) work/employment experience, and (4) practical experience and  
13 specialized training. *Hallmark, supra*, 189 P.3d at 650-51.

14 Second, once a witness is found to be qualified, the anticipated testimony must assist the  
15 trier of fact in understanding the evidence or determining a fact in issue. NRS 50.275.  
16 Testimony will only assist the trier of fact if it is both relevant and the product of reliable  
17 methodology. *Hallmark, supra*, 189 P.3d at 651. Nevada does not blindly follow *Daubert*, but  
18 does use the factors outlined in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), for  
19 guidance in determining whether an expert's testimony is based on reliable methodology. *Higgs*  
20 *v. State*, 222 P.3d 648, 657-58 (2010). Under *Daubert*, a judge may wish to consider whether the  
21 evidence at issue (1) has been tested, (2) has been subjected to peer review and publication, (3)  
22 has a known or potential error rate, and (4) has general or widespread acceptance. *Daubert*,  
23 *supra*, 509 U.S. at 593-94. However, application of the Daubert factors is not mechanical;  
24 Nevada judges are allowed to consider any other relevant factors. *Higgs, supra*, 222 P.3d at 657-  
25 58.

26 Finally, once a physician is qualified as an expert, he or she may testify to all matters  
27 within the scope of his or her knowledge, experience or training, subject to the court's discretion  
28 concerning whether the expert is truly qualified to render such testimony. *Fernandez v.*  
*Admirand*, 108 Nev. 963, 969 (1992). Mere designation as an expert in one area, though, does  
not give the witness a license to unconstrained testimony on all scientific, technical, or other

1 specialized matters. *Eagleston v. Guido*, 41 F.3d 865 (2d Cir. 1994) (holding that an expert  
2 sociologist could not testify as to criminology or domestic violence); *see also Lord v. State*, 107  
3 Nev. 28, 33 (a detective witness was not qualified to testify that a person's injuries were caused  
4 by a fight despite the witness' extensive law enforcement experience).

5 Notwithstanding that none of the testifying treaters were disclosed as experts, the  
6 testifying treaters themselves did not have the qualifications to opine on any and every medical  
7 issue in this case. For example, Dr. Kidwell, an anesthesiologist, is not qualified to offer credible  
8 expert testimony as to what treatment Dr. Thalgott, an orthopedic spine surgeon who had not seen  
9 plaintiff since 2008, would currently prescribe if he were to examine Plaintiff. In 2007 Dr.  
10 Thalgott wrote in his treatment record that Plaintiff was not a candidate for back surgery.  
11 However, at trial, Dr. Kidwell testified that, had Dr. Thalgott followed plaintiff's treatment since  
12 2007, he would now recommend back surgery. There is simply no foundation for this "opinion"  
13 from Dr. Thalgott via Dr. Kidwell. Likewise, Dr. Schifini simply is not qualified to testify as to  
14 what Dr. Ferrante, a pain management specialist at UCLA who saw Plaintiff several years before,  
15 and with whom Dr. Schifini never consulted, would currently recommend for Plaintiff. These  
16 and the other "opinions" elicited by Plaintiff's counsel are improper and should not have been  
17 admitted as evidence.

18 5. *Plaintiff's selected few treaters' aggregation of nontestifying providers' opinions*  
19 *and records are inadmissible hearsay*

20 NRS 51.035 defines hearsay generally as a statement offered into evidence to prove the  
21 truth of the matter asserted. Hearsay is inadmissible except as otherwise provided by law. NRS  
22 51.065.

23 Testimony of one treating physician as to the collective opinion of a group of other  
24 physicians of different opinions and specialties who do not testify is inadmissible hearsay under  
25 NRS 50.285. *Estes v. State*, 122 Nev. 1123, 1140-41 (2006). In *Estes v. State*, in a proceeding to  
26 determine the defendant's competency to stand trial, one of the defendant's physicians—who had  
27 been properly disclosed as an expert—testified as to his mental illness. *Id.* at 1141. During this  
28 testimony, the physician voiced a "collective opinion" of the defendant's competency on behalf

1 of herself and other mental health professionals who were currently treating plaintiff but who were  
2 not called to testify at the proceedings. *Id.* On review, the Supreme Court of Nevada held that  
3 such testimony constituted inadmissible hearsay. *Id.*

4 However, the Court noted that NRS 50.285 allows otherwise properly disclosed and  
5 qualified experts to base their opinions on facts or data not otherwise admissible, if that  
6 information is of a type reasonably relied on by experts in the field. *Id.* Therefore, the  
7 physician's reasonable reliance on the opinions of her colleagues in forming her own diagnosis  
8 was "marginally appropriate." *Id.*

9 Applying the rule in *Estes* to this case, since Plaintiff's treating healthcare providers were  
10 never disclosed as experts (*supra*, at pp. 1-5), they cannot be otherwise accepted as experts,  
11 regardless of their qualifications. Accordingly, such non-disclosed treating healthcare providers  
12 may not offer testimony based on hearsay, which they might otherwise do had they been properly  
13 qualified. As set out above, treating healthcare providers who *have been* disclosed as non-  
14 retained experts may testify *only* as to what is encompassed within their personal observations  
15 and treatment of the Plaintiff. Treating healthcare providers who *have not been* disclosed as non-  
16 retained experts *may not* testify as to any matters "based on scientific, technical or other  
17 specialized knowledge."

18 Here, Plaintiff did not disclose any treating physicians as experts, and so they must be  
19 precluded from offering any expert testimony on any matters "based on scientific, technical or  
20 other specialized knowledge." Regardless of disclosure, Plaintiff's selected few experts were  
21 never qualified to aggregate the records, observations and opinions of the non-testifying treaters.  
22 Finally, because plaintiff's treating healthcare providers were never disclosed, they may not rely  
23 on hearsay, which they otherwise might be allowed to do.

24 "The exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1)  
25 unless non-disclosure was justified or harmless." *Musser* at 758, citing *Finley v. Marathon Oil*  
26 *Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996). While defendant had the opportunity to depose the  
27 treaters during discovery, it never had the opportunity to depose them as experts because they  
28 were never disclosed as such. As discussed in *Musser*, this is a very important distinction, and

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1 plaintiff's failure to disclose prevented defendant from being able to prepare for trial, which has  
2 severely prejudiced the Palms.

3 Clearly, the Court considered some, if not all, of the inadmissible testimony in calculating  
4 its almost \$6 million verdict in this matter. This testimony should never have been admitted, and  
5 by permitting its admission, the Court made it difficult, if not impossible, for the Palms to  
6 effectively defend against Plaintiff's medical damages claims.

7 **D. The Body of Evidence that the Palms Presented at Trial Conclusively Demonstrates**  
8 **the Evidence was Insufficient to Justify the Verdict.**

9 N.R.C.P. Rule 59 authorizes new trials where the verdict is against law, or where the  
10 evidence is insufficient to justify the verdict. The general rule is that when there is substantial  
11 evidence to sustain the judgment, it will not be disturbed, but an exception to the general rule  
12 exists where, upon all the evidence, it is clear that a wrong conclusion has been reached. *Brechan*  
13 *v. Scott*, 92 Nev. 633, 555 P.2d 1230 (1976).

14 Plaintiff has the burden of proving the fact of damage and the amount of damages. *Mort*  
15 *Wallin v. Commercial Cabinet Co.*, 105 Nev. 855, 857 (Nev. 1989). Each item of damages must  
16 be "proven by a preponderance of the evidence." *Las Vegas-Tonopah-Reno Stage Lines v. Gray*  
17 *Line Tours*, 106 Nev. 283, 290 (Nev. 1990).

18 1. *Plaintiff Must Establish the Amount of Damages by Substantial Evidence.*

19 "[T]o justify a money judgment the amount ... must be proved," and "there must be  
20 substantial evidence as to the amount of damage, as the law does not permit arriving at such  
21 amount by conjecture[.]" *Cathcart v. Robison, Lyle, Belaustegui & Robb*, 106 Nev. 477, 480  
22 (Nev. 1990). "[T]o prove the right to damages without proving the amount, entitles a plaintiff to  
23 nominal damages only." *Id.* Thus, Plaintiff must prove the amount of damages to be awarded by  
24 substantial evidence. Any lesser standard opens the door to conjecture and unjust awards.

25 2. *Plaintiff Must Prove the Amount of Damages With Reasonable Certainty.*

26 Plaintiff must prove the "amount" of damages "to a reasonable certainty" that is "not  
27 arrived at by mere conjecture but through substantial evidence." *All Nite Garage v. A. A. A.*  
28 *Towing*, 85 Nev. 193, 199 (Nev. 1969). While the amount "need not be met with mathematical

1 exactitude,” and “some uncertainty in the amount is allowed,” there “must be an evidentiary basis  
2 for determining a *reasonably accurate amount* of damages.” *Mort Wallin*, 105 Nev. at 857. The  
3 Restatement (Second) of Torts permits the plaintiff to recover damages “if, and only if, he  
4 establishes by proof the extent of the harm and the amount of money representing adequate  
5 compensation with as much certainty as the nature of the tort and the circumstances permit.”  
6 Rest. (2d) Torts § 912.

7 Plaintiff must provide a reasonable method for determining the amount of damages.  
8 “[I]f ... a reasonable method for ascertaining the extent of damage is offered through testimony,”  
9 it will be “sufficient if the evidence adduced will permit the jury to make a fair and reasonable  
10 approximation.” *Bader v. Cerri*, 96 Nev. 352, 358 (Nev. 1980) (citation omitted) (overruled on  
11 other grounds, *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 608 (2000).)

12 In *Mort Wallin*, plaintiff sought damages for diminution in the value of a store caused by  
13 defendant’s breach of contract, put on evidence of the fact of diminution, but did not provide  
14 evidence of the value of the store had defendant performed as promised and its value as a result of  
15 its actual performance. 105 Nev. at 857. The Supreme Court held plaintiff “failed to carry its  
16 burden to reasonably establish the amount of the diminution in property value” and vacated the  
17 diminution-in-value damages award.

18 Under Nevada case law, if the evidence a plaintiff provides is not substantial and does not  
19 permit the fact-finder to determine the amount of damages with reasonable accuracy, he has not  
20 carried his burden. Rather, plaintiff must put on evidence of the amount of damages that permits  
21 the fact finder to make a reasonably accurate award of damages based on a reasonable method.

22 Plaintiff claims that he is a real estate investor/developer and has had his own real estate  
23 business for over fifteen years. Plaintiff claims lost earnings resulting from injuries he attributes  
24 to the subject accident. Because Plaintiff is in business for himself through his professional  
25 corporation, his lost earnings may be measured by the lost profits of his business. *Strauss v.*  
26 *Continental Airlines*, 67 S.W.3d 428, 437-438 (Tex. App. 2002).

27 3. *Plaintiff Cannot Prove that the Accident Caused Specified Losses.*

28 Proof that the accident caused Plaintiff specified losses is essential:

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1           There is no automatic award for loss of income due to partial  
2           disability. The disability must result in a loss of income for it to be  
3           compensable. In this case, the plaintiff is a professional, whose  
4           earnings depend upon his training and professional skills, **which**  
5           **are more mental than physical. Therefore, a curtailment of his**  
6           **physical activities does not necessarily translate into a**  
7           **diminution in his earning capacity.**

8           *Nobile v. New Orleans Public Service, Inc.*, 419 So.2d 35, 39 (La.  
9           App. 1982) (emphasis added).

10           The evidence here has shown that, similar to *Nobile*, Plaintiff's earnings from his real  
11           estate endeavors are the result more of his mental abilities and professional skills than physical  
12           capacities. Therefore, loss of earnings is not an inevitable result of physical injury. Plaintiff  
13           contends that, as a result of his injuries, he lost the ability to purchase and "flip" residential real  
14           estate, and thus lost profits. He must provide evidence that he lost business as a result of the  
15           injury, and not from other causes such as bad investments on his part or indeed the recent crash in  
16           the real estate market. For example, Plaintiff must provide evidence that he was unable to buy  
17           and sell real estate because of his injuries. He did not do so. Without such evidence, an award  
18           would be based on conjecture.

19           The *Strauss* case involved similarly insufficient evidence. There, an attorney sued the  
20           airline for lost profits caused by personal injuries suffered while boarding a flight. 67 S.W.3d at  
21           432, 433. After trial, the court granted defendant's motion for judgment notwithstanding the  
22           verdict on the jury's \$1 million award of lost past profits. *Id.* at 434. The attorney argued that he  
23           lost profits as a result of his injuries because he could no longer travel to a particular small town  
24           in Mississippi and thus solicit personal injury cases from that town's sympathetic population,  
25           made up of persons working in and related to the maritime offshore oil industry. 67 S.W.3d at  
26           439.

27           The *Strauss* plaintiff, however, did not provide what the court called the "**presumably**  
28           **available evidence**" of "**the numbers of cases he had represented [in that town] or the net**  
          **earnings he made on each case prior to the injury.**" *Id.* (emphasis added). The court held, "**in**  
          **the absence of additional available evidence, and the absence of any explanation as to why it**  
          **was not provided,**" the evidence that was provided "is not sufficient." *Id.* (emphasis added). In

1 addition, the attorney did not attempt to “segregate the fees earned from similar cases [to those  
2 from that town] from fees earned from other types of cases,” with the result, “there is nothing  
3 from which a jury could determine the number of maritime cases from Kosciusko that Strauss  
4 might have obtained[.]” *Id.* The court held that the attorney did not demonstrate his damages “to  
5 the degree of proof to which they were susceptible.” *Id.*

6 Mr. Rodriguez’s proof of damages here was like the attorney in the *Strauss* case. The only  
7 evidence Plaintiff has produced to support his lost earnings claims are his individual tax returns  
8 from 1999, 2001 and 2004, none of which were completed in any of those years, e.g., the 2004  
9 tax return was signed in 2009. These three tax returns, none of which were completed  
10 contemporaneously, by themselves, are wholly insufficient to support Plaintiff’s \$400,000 per  
11 year lost earnings claim. Plaintiff failed to produce any other evidence in support of his lost  
12 earnings claim during discovery.

13 4. *Plaintiff Has Failed to Provide Substantial Evidence of Revenues and Expenses to*  
14 *Prove Lost Profits.*

15 To determine his lost earnings, Plaintiff may not rely on his business’s gross revenues.  
16 “Gross fees,” the *Strauss* court held, “are not an appropriate basis” for determining lost earnings.  
17 *Id.* at 440. He must provide evidence of “expenses.” *Id.* “Net earnings ... must include a  
18 deduction for expenses incurred[.]” such as “office expenses, court fees, copy costs and the  
19 myriad other expenses associated with a case[.]” *Id.* In *Strauss*, the attorney failed to provide  
20 such evidence, and the court held the evidence insufficient to support an award of lost profits. *Id.*  
21 at 442.

22 To prove lost profits, Plaintiff must have, in addition to proving that the accident caused  
23 him to lose opportunities and sales, provided evidence of the gross revenues the sales reasonably  
24 would have generated, his expenses for the sales and the expenses of his professional corporation  
25 allocable to those sales, and ultimately estimated net revenues. Plaintiff failed to produce any  
26 such evidence during discovery or at trial.

27 5. *Plaintiff Has Failed to Provide Evidence of Lost Earnings to Support an Award of*  
28 *Damages for Lost Earning Capacity.*

Nevada has not expressly recognized loss of earning capacity as a recoverable loss distinct  
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1 from lost future earnings. Nevada cases addressing lost earning capacity treat it as the same as  
2 lost future earnings. e.g., *Silver State Disposal Co. v. Shelley*, 105 Nev. 309, 311-312, 774 P.2d  
3 1044, 1046 (1989) (“the jury was adequately instructed on the recovery for lost wages and future  
4 lost wages (reduced earning capacity)”).

5 Loss of earning capacity has been distinguished from loss of earnings. Loss of earnings is  
6 “actual loss of income due to an inability to perform a specific job a party held from the time of  
7 injury to the date of trial.” *Strauss*, 67 S.W.3d at 435; *Johnson v. International of United Bhd. of*  
8 *C. & J.*, 54 Nev. 332, 336 (1932) (“loss of what plaintiff would otherwise have earned in his  
9 calling, and has been deprived of earning by the wrongful act”). Loss of earning capacity is  
10 diminished “ability and fitness to work in gainful employment” caused by the accident. *Id.* at 435  
11 & n.2.

12 The issue of lost earning capacity is clearly presented when the injured plaintiff is a child  
13 who never held a job. *Id.* at 436. The distinction between lost earning capacity and lost future  
14 earnings largely disappears for injured plaintiffs, like Plaintiff, who has avowed a commitment to  
15 a particular profession. *Id.*

16 To recover for lost earning capacity, Plaintiff must have presented evidence that his  
17 earnings and earning capacity have been harmed by the accident. In *City of Fairbanks v. Nesbett*,  
18 432 P.2d 607, 617 (Alaska 1967), the Alaska Supreme Court held, in a case involving an attorney,  
19 “In determining the extent of impairment of an attorney’s earning capacity and the measurement  
20 of loss therefrom, we hold that there must be evidence presented to the jury concerning the extent  
21 of impairment.” The attorney did not place any evidence in the record of the effect of his ankle  
22 injury on his earning capacity. The court held, “it was error to submit this issue to the jury since  
23 they could only have speculated as to the extent of any impairment of appellee’s capacity to earn  
24 money and the resulting monetary loss therefrom.” *Id.*

25 As previously stated, the only evidence Plaintiff has produced in an effort to support his  
26 lost earnings claim are his individual tax returns from 1999, 2001 and 2004, which were created  
27 in response to his expert’s request for them, and during this litigation, and his own self-serving  
28 anecdotal testimony. Plaintiff testified he had a business, Mary Star Enterprises, which he

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23

1 operated further to his real estate investments. He has produced no income/earnings records or  
2 profit and loss statements for this company. Plaintiff has failed to produce, other than these three  
3 individual tax returns, any evidence of his lost earnings. Indeed, his own expert, Terrance  
4 Dinneen, simply took a six-year average of the three tax returns provided (add the three incomes  
5 and divide by six). There is no evidence of lost earnings or profits.

6 *6. Plaintiff Did Not Prove Lost Earnings or Lost Earnings Capacity.*

7 To recover lost earnings, and to prove that he has suffered a loss of earning capacity as a  
8 result of the accident, Plaintiff must have provided substantial evidence that the accident, and no  
9 other cause such as the crash in the real estate market, is the cause of lost earnings. Besides three  
10 years of tax returns, Plaintiff elected not to provide any of the other evidence he presumably has  
11 (or could have collected) all of which is necessary to make this showing.

12 Plaintiff claims to have had his own real estate business, Mary Star Enterprises, for over  
13 fifteen years. That business presumably has records, including business tax returns, profit and  
14 loss statements, and other indicia of legitimacy. Plaintiff certainly has information or access to  
15 information about key facts necessary to prove lost earnings and lost earning capacity. He knows  
16 or should know the number of sales he had for the 15 years preceding the subject accident. It was  
17 his business. He knows or should know his expenses attributed to such sales. He knows or has  
18 information about the revenues various types of sales generate. Plaintiff, however, failed to  
19 provide any such evidence at deposition or in discovery or at trial.

20 Plaintiff has not shown that his alleged injuries have had any effect on his ability to do the  
21 mental and professional work of a real estate flipper. On this record, Plaintiff has failed to  
22 provide substantial evidence in support of a reasonably certain award of damages. Thus, it  
23 was against the law for the Court to award any lost earnings or loss of earning capacity in this  
24 case.

25 **E. Finally, the Court Was in Error When It Granted Plaintiff's Motion to Strike the**  
26 **Palms' Experts' Opinions.**

27 Plaintiff filed a Motion to Strike Trial Testimony as to the Palms' experts, Mr. Franklin  
28 and Dr. Cargill, and against the Palms' opposition, the Court granted the Motion. The Palms

1 produced hospitality safety/security expert, Forrest Franklin as a witness at trial. Mr. Franklin  
2 testified that: (1) throwing memorabilia as a promotional effort into crowds is not a substandard  
3 protocol; (2) it is not unsafe to throw things into crowds; and (3) it is within the standard of care  
4 to throw promotional items into crowds. (November 3, 2010 Trial Testimony, 14: 6-8, 31: 17-21,  
5 33: 7-13, Exhibit N to the Ward Decl.)

6 Mr. Franklin addressed whether throwing promotional items into a crowd was within the  
7 standard of care in the casino/hospitality industry, and indeed opined that the activity was within  
8 the standard of care, notwithstanding the fact that the Palms had an internal procedure in place  
9 forbidding throwing items. Mr. Franklin's testimony was clearly relevant because his opinions  
10 made it more probable that the Palms did not act negligently in allowing items to be thrown. Mr.  
11 Franklin's testimony was thus helpful to the trier of fact.

12 In this case, Mr. Franklin's testimony was reliable per NRS 50.275, and *Daubert v.*  
13 *Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). As he testified, Mr. Franklin has had  
14 extensive experience as a security officer dealing with persons throwing objects into crowds.  
15 (November 3, 2010 Trial Testimony, 13: 14-21, Exhibit N to Ward Decl.) Before offering an  
16 opinion, he visited the area of the Palms where the accident occurred, reviewed the relevant  
17 deposition testimony and the Palms security manual. (*Id.*, 13:22-25; 15:16-18.) These "facts and  
18 data" are reliable and are sufficient bases upon which a qualified expert like Mr. Franklin may  
19 offer an opinion.

20 Dr. Cargill, an economist, testified as to Plaintiff's wage earning history and damages. He  
21 commented on the reports prepared by Plaintiff's expert Mr. Dinneen, and rebutted Mr.  
22 Dinneen's opinions. Dr. Cargill specifically testified that: (1) it was inappropriate to use an  
23 average of plaintiff's earnings over the period from 1999 to 2004 to predict future earnings; and  
24 (2) using current interest rates to calculate future wage loss is improper. (November 9, 2010 Trial  
25 Testimony, 22: 6-25, 55: 15-20, Exhibit O to the Ward Decl.)

26 Dr. Cargill offered two opinions, both of which survive the *Daubert* "relevancy and  
27 reliability" standard for admissibility of expert testimony. First, Dr. Cargill testified that  
28 plaintiff's projected future income was derived through a flawed method of calculation of past

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25

1 income. (*Id.* at 16: 4-8). He testified that averaging just three tax returns over a perhaps 6-year  
2 period does not accurately estimate past earnings and thus likewise is unreliable for forecasting  
3 future earnings. It was inappropriate to average these three tax returns (1999, 2001, 2004, all of  
4 which were prepared several years after the tax liabilities were incurred) in the context of an  
5 artificially inflated real estate bubble. (*Id.* at 29: 7-12.) This testimony makes a fact of  
6 consequence—whether Mr. Dinneen’s wage loss estimates are reliable—less probable than  
7 without the Cargill testimony. Therefore, the testimony is relevant and helpful to the trier of fact.

8         Second, Dr. Cargill offered the opinion that using current interest rates to project future  
9 lost income did not make economic sense because it did not take into account rates of inflation in  
10 the future. This testimony was relevant because it makes a fact of consequence, whether Mr.  
11 Dinneen’s computation of damages is accurate, less probable than without it. It is relevant to  
12 total damages and does “assist the trier of fact to understand the evidence or to determine a fact in  
13 issue.”

14         Dr. Cargill’s technique is also reliable and generally accepted in the field of forensic  
15 economics. Under *Daubert*, the Court must determine whether the reasoning and methodology  
16 underlying the proposed expert’s testimony is valid. In making this inquiry, *Daubert* offers four  
17 non-exclusive factors: (1) whether the concept has been tested, (2) whether the concept has been  
18 subject to peer review, (3) what the known rate of error is, and (4) whether the concept is  
19 generally accepted by the community. *Shaffer v. Amada Am., Inc.*, 335 F. Supp. 2d 992, 995  
20 (E.D. Mo. 2003), citing *Daubert*, 509 U.S. at 593-95.

21         Here, Dr. Cargill offers testimony based on sound, proven economic theory. In fact, Dr.  
22 Cargill performed his calculations by using a rate that is used by the U.S. Congressional Budget  
23 Office and the trustees of the Social Security Administration. (*Id.* at 48:17-18.) Thus, the  
24 technique utilized by Dr. Cargill has attained “widespread acceptance.” The evidence serves an  
25 important function in this case because it presents contrary evidence to Mr. Dinneen.

26         Accordingly, the Court should have denied, and not granted, Plaintiff’s motion to strike certain  
27 expert testimony because the evidence meets the “assistance” requirement of NRS 50.275, FRE

28 702, *Daubert*, and *Hallmark*.  
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1 By erroneously granting Plaintiff's motion, the Court made it virtually impossible for the  
2 Palms to rebut Plaintiff's expert's opinions.

3  
4 **IV.**  
5 **CONCLUSION**

6 For all of the reasons set forth above, the Palms respectfully submits that the Court must  
7 vacate the verdict and order a new trial.

8 Dated: March 22, 2011

ARCHER NORRIS

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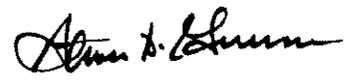
11 Kenneth C. Ward  
12 Keith R. Gillette  
13 Attorneys for Defendant  
14 FIESTA PALMS, LLC, a Nevada Limited  
15 Liability Compay, d/b/a THE PALMS  
16 CASINO RESORT  
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CLERK OF THE COURT

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Attorneys for Defendant  
FIESTA PALMS, LLC, a Nevada Limited Liability  
Company, d/b/a THE PALMS CASINO RESORT

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ,  
  
Plaintiff,  
  
v.  
  
FIESTA PALMS, LLC, a Nevada Limited  
Liability Company, d/b/a THE PALMS  
CASINO RESORT, et al. ,  
  
Defendants.

Case No. A531538  
  
**DECLARATION OF KENNETH C. WARD  
IN SUPPORT OF DEFENDANT FIESTA  
PALMS, LLC'S MOTION FOR NEW  
TRIAL**  
  
Dept: X  
Hearing Date:  
Hearing Time:  
Hearing Dept:

I, Kenneth C. Ward, declare as follows:

1. I am a shareholder with the law firm of Archer Norris, counsel of record for Defendant FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a THE PALMS CASINO RESORT. I have personal knowledge of the facts stated in this affidavit and if called as a witness at trial, could and would competently testify thereto. I have reviewed the Memorandum of Points and Authorities in Support of this motion, and incorporate by reference the facts alleged

1 therein.

2 2. I served as co-counsel for FIESTA PALMS, LLC, a Nevada Limited Liability  
3 Compay, d/b/a THE PALMS CASINO RESORT (“the Palms”) in the trial of this matter with  
4 Marsha Stephenson of Stephenson & Dickinson. We began the bench trial on October 25, 2010  
5 of the matter of *Enrique Rodriguez v. the Palms*, No. A531538, in the Eastern Judicial District of  
6 Clark County, Nevada, and trial concluded with the parties’ closing arguments on November 10,  
7 2010.

8 3. The Honorable Jessie Walsh returned a verdict in favor of plaintiff Enrique  
9 Rodriguez on March 7, 2011, with Notice of Entry of Judgment served on the Palms on March  
10 15, 2011. A true and correct copy of the March 7, 2011 verdict is attached hereto as **Exhibit A**.

11 4. I took the deposition of Terrance Dinneen on September 9, 2010. Mr. Dinneen  
12 stated that he provided his entire work file and there were no letters regarding the filing status of  
13 plaintiff Enrique Rodriguez’s tax returns. A true and correct copy of the September 9, 2010  
14 Deposition of Terrence Dinneen is attached hereto as **Exhibit B**.

15 5. Plaintiff testified from the witness stand at trial that he gave Mr. Dinneen all of the  
16 backup information to support his income claim, and that he prepared and signed the 2004 tax  
17 return in 2009 after the economist requested the information.

18 6. At trial, while I questioned Mr. Dinneen on cross-examination, Mr. Dinneen  
19 produced a letter from a person who allegedly prepared the returns saying that the returns had  
20 been filed; it was a one line letter from the tax preparer dated October 20, 2010. Mr. Dinneen  
21 testified at trial that he never provided the document to the Palms. This document was never  
22 provided to the Palms, even though Mr. Dinneen had purportedly provided his entire work file  
23 and that letter was not included.

24 7. Plaintiff did not disclose any medical experts. Attached hereto as **Exhibit C** is a  
25 true and correct copy of Plaintiff’s Expert Disclosure, and attached hereto as **Exhibit D** is a true  
26 and correct copy of Plaintiff’s Supplement Expert Disclosure.

27 8. Plaintiff also listed all of his witnesses at trial in his Pre-Trial Memorandum, but  
28 did not designate any medical treatment providers as experts. Attached hereto as **Exhibit E** is a

1 true and correct copy of Plaintiff's Pre-Trial Memorandum.

2 9. Dr. Thalgott was a treatment provider for Plaintiff who was a spine surgeon who  
3 had at least six entries in his records that he would not do surgery on this plaintiff's back. In  
4 addition, his reports indicated that he had not seen Plaintiff in over three years. In spite of this,  
5 the anesthesiologist, who had also not seen the Plaintiff for over three years, testified at trial that  
6 the Plaintiff needed a multi-level back fusion and that he was quite certain if Dr. Thalgott knew  
7 what had transpired with this Plaintiff in the last three years, Dr. Thalgott would change his mind  
8 and agree that surgery was necessary.

9 10. My office subpoenaed all records from Plaintiff's treater, Dr. Joseph Schifini, and  
10 received approximately 21 pages from Dr. Schifini at that time. True and correct copies of the  
11 first and last consecutively bates numbered pages of Dr. Schifini's document production are  
12 attached hereto as **Exhibit F**.

13 11. However, at trial, Dr. Schifini was permitted to testify regarding approximately  
14 117 pages of documents that the Palms were unaware of and the Palms were never been notified  
15 by Dr. Schifini or Plaintiff's counsel that such documents existed. Plaintiff's failure to disclose  
16 the documents put the Palms at a great disadvantage in its cross-examination of Dr. Schifini, who  
17 provided critical testimony during the trial.

18 12. Plaintiff's life care planner, Kathleen Hartmann, provided a life care plan calling  
19 for \$294,000 for all of the medical relating to a spinal stimulator. Dr. Schifini, an  
20 anesthesiologist, was allowed to testify that these numbers were all wrong and the number was  
21 actually \$960,000. Ms. Hartmann's numbers did not include a figure for fusion and she included  
22 a range of \$80,000 to \$160,000 for knee replacements. Again, Dr. Schifini, the anesthesiologist,  
23 was able to testify that his back surgeries and knee replacements would be \$686,000.

24 13. Plaintiff filed a Motion to Strike Trial Testimony on approximately November 16,  
25 2010. Plaintiff's points and authorities essentially argued that the Palms' experts, Forrest  
26 Franklin and Thomas Cargill "did not establish a sufficient foundation since neither provided  
27 opinions to a reasonable degree of probability." A true and correct copy of Plaintiff's Motion to  
28 Strike Trial Testimony is attached hereto as **Exhibit G**, and the Court's Order granting it is

1 attached Exhibit H.

2 14. Plaintiff stipulated on the record that Mr. Franklin and Dr. Cargill are both  
3 qualified.

4 15. Attached hereto as **Exhibit I** are true and correct copies of excerpts of the  
5 Reporter's Transcript of Proceedings of October 28, 2010.

6 16. Attached hereto as **Exhibit J** are true and correct copies of excerpts of the  
7 Reporter's Transcript of Proceedings of November 1, 2010.

8 17. Attached hereto as **Exhibit K** are true and correct copies of excerpts of the  
9 Reporter's Transcript of Proceedings of November 4, 2010.

10 18. Attached hereto as **Exhibit L** is a true and correct copy of the Dinneen & Hartman  
11 initial expert report.

12 19. Attached hereto as **Exhibit M** are true and correct copies of excerpts of the  
13 Reporter's Transcript of Proceedings of November 8, 2010.

14 20. Attached hereto as **Exhibit N** are true and correct copies of excerpts of the  
15 Reporter's Transcript of Proceedings of November 3, 2010.

16 21. Attached hereto as **Exhibit O** are true and correct copies of excerpts of the  
17 Reporter's Transcript of Proceedings of November 9, 2010.

18

19 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing  
20 is true and correct. This declaration is executed on March 22, 2011 at Walnut Creek,  
21 California.

22

23

  
\_\_\_\_\_  
Kenneth C. Ward (NV Bar No. 6530)

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# **EXHIBIT A**

*Alan D. Quinn*  
CLERK OF THE COURT

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

CASE NO: A531538

DEPT NO: 10

vs.

TRIAL DATE: 10/25/10

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT; BRANDY BEAVERS; DOES I  
through X, inclusive, and ROE BUSINESS  
ENTITIES I through X, inclusive,

Defendants.

**VERDICT**

The Honorable Jessie Walsh, presiding judge in the above-entitled action, hereby finds for  
Plaintiff ENRIQUE RODRIGUEZ as follows:

1. The Court finds against Defendant FIESTA PALMS, L.L.C.
2. The Court finds against Defendant BRANDY BEAVERS.

Yes / No

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**EXHIBIT A**



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3. The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C.	<u>00</u> %
Defendant BRANDY BEAVERS	<u>40</u> %

4. The total amount of the plaintiff's damages is divided as follows:

Past Medical Expenses	<u>\$ 376,773.38</u>
Future Medical Expenses	<u>\$1,854,738.</u>
Past Pain and Suffering	<u>\$1,243,350</u>
Future Pain and Suffering	<u>\$1,465,025.</u>
Past Lost Income	<u>\$ 289,111.</u>
Future Lost Income	<u>\$ 422,592.</u>

5. Further, the Court finds that Defendant Fiesta Palms, L.L.C. acted with conscious disregard of the rights or safety of others when it was aware of the probable dangerous consequences of its conduct and willfully and deliberately failed to avoid those consequences.

Yes / No

DATED this 1<sup>st</sup> day of Mar, 2011.

Jessie Walsh  
HON. JESSIE WALSH, District Court Judge

# **EXHIBIT B**

Case No. A531538

Department No. X

DISTRICT COURT  
CLARK COUNTY, NEVADA

-oOo-

ENRIQUE RODRIGUEZ,

Plaintiff,

vs.

FIESTA PALMS, et al.,

Defendants.

\_\_\_\_\_ /

DEPOSITION OF  
TERRANCE B. DINNEEN  
SEPTEMBER 29, 2010  
RENO, NEVADA

LST JOB NO.: 127683

**EXHIBIT B**

1 BY MR. WARD:

2 Q I understand you're going to continue that  
3 out but that was the day you happened to do the  
4 calculation?

5 A Those were the past losses at the time I did  
6 them.

7 Q And so when you did that calculation you  
8 calculated the number of days, weeks, months,  
9 whatever, years, that were involved in that and you  
10 multiplied that times a certain number?

11 A Correct.

12 Q Where did you get the number that you  
13 multiplied it by?

14 A I looked at his earnings from his tax returns  
15 from 1999, to 2004, and I took an average of those  
16 earnings during that period.

17 And that was, it's mentioned in my report, I  
18 think it's approximately 47 or \$46,000, and I used  
19 that figure as the baseline earnings figure.

20 It's on page five of my report.

21 Q Okay. Now, what was Mr. Rodriguez doing in  
22 the year 1999 for employment?

23 MR. BAKER: I'm sorry. That cut out.

24 Can you read the question back to me?

25 MR. WARD: I'll state it again.

1 A I think in 2004, was the last transaction.

2 Yes.

3 That's where he starts the loss. 1-1-2005.

4 Q When in 2004 did he sell his last house?

5 A I don't know if I have the transactional data  
6 on that or not. Seems like I have some material on  
7 that in the 2004 year.

8 There is a 9-7 of '04 statement that looks  
9 like a distribution of funds in 2004.

10 I believe that to be the latest one that I  
11 have.

12 I also have some transactional statements in  
13 January of '04.

14 But September of '04 is the last transaction  
15 statement I have.

16 Q Is it your belief he sold a house in  
17 September of 2004?

18 A Around that period. Yes.

19 Q When did he buy that house?

20 A I don't know if I can tell that from the  
21 transactional statement or not.

22 No. Just the sales date. I don't know the  
23 date that he bought that house.

24 Q When did he file that tax return for 2004?

25 A I don't know when it was filed.

1 Q When was it signed?

2 A Looks like 11-3 of either '07 or '09. I  
3 would say it's '09.

4 But that's when it was signed.

5 Q Okay. And do you know when a tax return that  
6 was for the year 2004, if it was timely filed, when it  
7 would be timely filed?

8 A Well, you'd anticipate early 2005, for most  
9 of us.

10 And I don't have any information as to the  
11 delay in filing these returns. They were provided to  
12 me as tax returns and I took them as provided.

13 Q So if we are correct that this was signed  
14 November 3 2009 --

15 Well, let me strike that. Let me --

16 A I'm sorry. No. That one was 2009. I was  
17 just looking. I thought I flipped to the same one.

18 But the '01 was filed in '04.

19 So it looks like all of these were filed --

20 I was just looking for any other dates to see  
21 when the rest of them were filed.

22 Q Sure. And I want to ask you and give you an  
23 opportunity to clarify. I want to ask you another  
24 question here relating to what you just said. I want  
25 to give you an opportunity to make sure that you

1 stated it correctly.

2 Is it true that you don't know when any of  
3 these tax returns were filed?

4 A That's true. I don't.

5 I just have the signature dates.

6 Q Right. Is it true that you don't know  
7 whether any of these tax returns were even filed?

8 A All I have is the return.

9 I don't know if they were filed or not filed.

10 Q Okay. And the return that you have for at  
11 least 2004, is dated some four plus years after the  
12 year that it would have been filed had it been filed  
13 timely?

14 A Yes.

15 Q Now, when you met with Mr. Rodriguez in  
16 October of 2008, did you ask him for information?

17 A I don't remember if I asked him or his  
18 attorney.

19 But I did ask them to supply me with earnings  
20 information.

21 Q Did you tell them what kind of earnings  
22 information you wanted?

23 A Yes.

24 Q What did you tell them you wanted?

25 A Normally if somebody is employed we like

1 W-2's or Social Security reports of earnings.

2 With self-employed people often times tax  
3 returns. Some times Social Security reports that  
4 would provide us with what their earnings were.

5 Q The reason I take it that you would like --

6 Did you say W-2's? Is that what you said?

7 Or did I say that myself?

8 A No. I said W-2's.

9 Q Okay. So you like to get a W --

10 If someone is employed by another company,  
11 party, whatever, someone has an employer, you'd like  
12 to have the W-2?

13 A W-2's or Social Security reports are always  
14 our first choice.

15 Q Let's start with the W-2.

16 That's one of your first choices?

17 A Yes.

18 Q Why?

19 A The W-2's itself will show the gross earnings  
20 that were paid to the employee by the employer in box  
21 5 and it's helpful information to determine what the  
22 person actually earned.

23 Q Is there also a certain reliable factor?

24 A Yes.

25 Q Because it comes from someone other than the

1 A Yes.

2 Q Okay. When you looked at the report for Mr.  
3 Rodriguez about the self employment taxes that he had  
4 paid, the alternative to Social Security, what did you  
5 find?

6 A Well, all I had was the tax returns for those  
7 years. I don't have a report of anything from the  
8 Social Security Administration. I just have the  
9 report of earnings from the tax returns and then some  
10 transactional records from the transactions that  
11 supported the figures that were in his return. That's  
12 all I have.

13 I don't have any W-2's. I don't have a  
14 Social Security report.

15 I just have some of the transactional  
16 material that shows the income and then the 1040's for  
17 1999, through 2004, that are in my file.

18 Q So you don't have any confirming information  
19 that any of this information is accurate?

20 A Is accurate?

21 Q Yeah.

22 The information included in the -- in those  
23 tax returns, don't they include a portion for self  
24 employment tax?

25 A Well, they include a portion for self

1 Can I go back and check that whole thing?

2 Q Sure.

3 A Also, it's poorly stated, incorrectly stated,  
4 in my report.

5 The returns that I have were the '99 return,  
6 the 2001 return and the 2004 return.

7 What I did was I assigned zero income to the  
8 year 2000, zero income to the years 2001, 2002 --

9 Not 2001. Sorry.

10 Zero for 2000.

11 I used the 2001 return to represent the  
12 income earned in 2000.

13 Zero income in 2003.

14 Zero income in 2004. Because --

15 Zero income in 2002.

16 Zero income in 2003.

17 And then used the 2004 income.

18 I hope that makes sense.

19 The '99, the '01, and the '04, where I used  
20 the actual figures.

21 In the intervening years I used zero as  
22 income for those years seeing that I did not have the  
23 return.

24 The report doesn't read that way but that is  
25 what I did.

1 A Yeah.

2 He told me that he did not have all of his  
3 documentation.

4 So I did follow up and ask if there was any  
5 more of the underlying documentation and he said no.

6 Q So he didn't have all of his documentation?

7 A That's correct.

8 Q He didn't have all of his tax returns?

9 A That's correct, too.

10 Q He didn't have all of his Social Security  
11 statements?

12 A Yes. That's correct.

13 Q In fact, he didn't have any.

14 A He didn't have any Social Security  
15 statements.

16 Q So did you ask to get that information? Did  
17 you tell him how he can get that information?

18 A I usually do tell them.

19 I don't have an independent recollection of  
20 it.

21 But I was told this is what information was  
22 available.

23 Q So you don't know whether you told him that  
24 it's relatively easy to find out what his self  
25 employment income basis is?

1           A    Like I said, I don't have an independent  
2   recollection.

3                    I can tell you I usually do run through with  
4   a person we like to see tax returns, W-2's, Social  
5   Security information.

6                    And ultimately I said this is -- ultimately  
7   what I got was this was all that was available.

8           Q    Irrespective of what you told him you didn't  
9   get any more than what you have got here today?

10          A    That's correct.

11          Q    And what was his income from the year 1998?

12          A    I don't have anything prior to 1999.

13          Q    Did you ask him what he was doing in 1998?

14          A    Usually I try to get five years before.

15                    But this is what -- This is what I have.

16                    I don't have anything --

17                    The oldest I have is 1999, five years before  
18   the accident.

19          Q    Did you ask him what he was doing in 1998?

20          A    I'm sorry. I misunderstood your question. I  
21   thought you were talking about documentation.

22                    I know he was from the period of time in the  
23   1990's, up through 2004, he was involved in the buying  
24   and selling of houses.

25                    There was no other work activity other than

1 the foster parenting activity that he did.

2 I didn't have any records from that so I did  
3 not include anything from that.

4 Q The market for buying and selling houses  
5 since 2004, has that been pretty good where Mr.  
6 Rodriguez lived and bought and sold houses?

7 A Well, from 2004, till about mid 2007, the  
8 market was very active.

9 Starting, of course, in 2007, is where the  
10 decline in houses began and then accelerated through  
11 today depending upon who's statistics you look at.

12 So the market up through '07, was good. The  
13 declining market that we're in now started two and a  
14 half years ago and continues.

15 Q And the information that you've seen suggests  
16 to you that from the day of Mr. Rodriguez' accident,  
17 the accident we're talking about that is the subject  
18 matter of this lawsuit, that from that day forward  
19 he's been unable to maintain any of these activities  
20 on any sort of sustainable basis?

21 A That's correct.

22 Q Now, aside from your assessment of his  
23 returns and your assessment here in the year 2004, the  
24 \$208,000 that you have for that year, is substantially  
25 all of, not all but it's like three-quarters of, his

1 income loss, isn't it, based on that?

2 A Three-quarters of the income loss?

3 Well, I think I already answered that  
4 earlier. I used the average over that six years.  
5 Because I felt using --

6 There are definitions of earning capacity  
7 that would say the 2008 would be a reasonable figure  
8 to use, assuming that the underlying tax returns are  
9 an accurate reflection of his work activity.

10 However, I felt assessing his earning  
11 capacity given the information I had, it was better to  
12 use an average.

13 The 2008 certainly would be the heaviest  
14 weight in that average. But I also used zero in three  
15 years as well.

16 Q Let me ask you this: If you had someone who  
17 had a full-time job and was working 50 weeks out of  
18 the year, it would be -- the year before the loss  
19 might well be the most accurate year for their losses;  
20 is that correct?

21 A Not always.

22 You have to look at what the person brings to  
23 the table in terms of their earning capacity.

24 Somebody can have an exceptionally good year.  
25 As in this case 2008 is the highest that we have any

# **EXHIBIT C**





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is also attached.

Plaintiff reserves the right to call any and all experts designated by other parties in this case to render expert testimony. This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.

Plaintiff reserves the right to call any and all witnesses necessary for impeachment or rebuttal purposes.

Plaintiff reserves the right to supplement this list of expert witnesses as discovery continues and as new information becomes available.

DATED this 29 day of October, 2008.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No. 4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that on this 30 day of October, 2008, a true and correct copy of the foregoing PLAINTIFF'S EXPERT WITNESS DISCLOSURE was mailed in a sealed envelope by U.S. Mail, postage prepaid to the following addressees:

10676-05  
Jeffery A. Bendavid, Esq.  
Moran & Associates  
630 S. Fourth St.  
Las Vegas, NV 89101  
Attorneys for Defendant Fiesta Palms, LLC  
384-8424 Telephone  
384-6568 Facsimile

10676-05  
Kenneth C. Ward, Esq.  
Archer Norris  
2033 North Main Street, Suite 800  
P.O. Box 8035  
Walnut Creek, CA 94596  
Co-Counsel for Fiesta Palms  
925-930-6600 Telephone  
925-930-6620 Facsimile

*S. Sorderson*

An Employee of Benson, Bertoldo, Baker & Carter



# **EXHIBIT D**





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vocational and economical report, a copy of which is attached hereto. A copy of Mr. Dinneen's curriculum vitae and fee schedule is also attached.

- 2. Firooz Mashood, M.D.  
734 East Sahara Avenue  
Las Vegas, NV 89104

Dr. Mashood is anticipated to testify regarding the reasonable and necessary treatment of Mr. Rodriguez for injuries sustained resultant of the subject fall as well as prognosis and anticipated future treatment. Dr. Mashood will further testify regarding reasonable and customary charges for past and future treatment of Plaintiff. It is anticipated that Dr. Mashood will provide expert testimony consistent with his report, to be supplemented upon receipt, along with a copy of Dr. Mashood's curriculum vitae and fee schedule.

- 3. Steven T. Baker, C.P.P., P.S.P., P.C.I.  
VTI Associates  
Post Office Box 60536  
Boulder City, NV 89001  
(702) 647-5372

Mr. Baker is anticipated to testify regarding security protocol and safety measures of the Palms Resort and Casino at the time of the Incident at issue. He will further testify that Palms Management knew or should have known of the dangerous condition created in the Sports Book's Monday Night Football promotion and that injury to patrons and employees was possible. A copy of Mr. Baker's report, curriculum vitae and fee schedule are attached.

Plaintiff reserves the right to call any and all experts designated by other parties in this case to render expert testimony. This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.

Plaintiff reserves the right to call any and all witnesses necessary for impeachment or



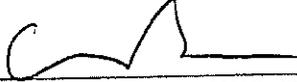
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rebuttal purposes.

Plaintiff reserves the right to supplement this list of expert witnesses as discovery continues and as new information becomes available.

DATED this 21<sup>st</sup> day of June, 2010.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No. 4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21<sup>st</sup> day of June, 2010, a true and correct copy of the foregoing PLAINTIFF'S SECOND SUPPLEMENTAL EXPERT WITNESS DISCLOSURE was mailed in a sealed envelope by U.S. Mail, postage prepaid to the following addressees:

10676-05 Jeffery A. Bendavid, Esq. Moran & Associates 630 S. Fourth St. Las Vegas, NV 89101 Attorneys for Defendant Fiesta Palms	384-8424 Telephone 384-6568 Facsimile
10676-05 Keith Gillette, Esq. Archer Norris 2033 North Main Street, Suite 800 P.O. Box 8035 Walnut Creek, California 94596 Co-counsel for Fiesta Palms	925-930-6600 Telephone 925-930-6620 Facsimile
10676-05 Marsha L. Stephenson, Esq. Stephenson & Dickinson 2820 West Charleston Blvd., Suite 19 Las Vegas, Nevada 89102 Co-counsel for Fiesta Palms	474-7229 Telephone 474-7237 Facsimile

  
An Employee of Benson, Bertoldo, Baker & Carter

# **EXHIBIT E**



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STEVEN M. BAKER  
Nevada Bar No. 4522  
BENSON, BERTOLDO, BAKER & CARTER  
7408 W. Sahara Avenue  
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Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
e-mail : [monique@bensonlawyers.com](mailto:monique@bensonlawyers.com)  
Attorneys for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

vs.

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,  
Defendants.

CASE NO: A531538

DEPT NO: 10

BENCH TRIAL DATE: 10/25/10

PLAINTIFF'S PRE-TRIAL MEMORANDUM

Plaintiff, ENRIQUE RODRIGUEZ, by and through his attorney of record, STEVEN M. BAKER, ESQ. of the law firm of BENSON, BERTOLDO, BAKER & CARTER, hereby submits his Pre-Trial Memorandum pursuant to EDCR Rule 2.68.

I.

STATEMENT OF FACTS

This action arises from personal injuries suffered by the Plaintiff on November 22, 2004 o the premises of Fiesta Palms, L.L.C., d/b/a Palms Casino Resort. At said time, Plaintiff was a patron at the Palms and was in attendance at a promotional Monday Night Football party sponsored by the Defendant. At half-time, promotional objects were thrown into the crowd,

EXHIBIT E



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causing a patron to rush for the item, contacting the Plaintiff on the side of his knee, resulting in multiple injuries to Plaintiff.

II.

LIST OF ALL CLAIMS FOR RELIEF

Plaintiff makes the following claims for relief: Negligence; Negligent Employee Hiring, Training, Retention and Supervision; and Punitive Damages.

III.

AFFIRMATIVE DEFENSES

A. FIESTA PALMS, L.L.C. :

1. Defendant FIESTA PALMS, LLC, allege twelve affirmative defenses:
2. Failure to state a claim;
3. Estoppel;
4. Laches;
5. Plaintiff has not suffered any injuries;
6. Plaintiff failed to mitigate his damages;
7. Unclean hands;
8. By virtue of acts, deeds, conduct and/or failure or omission to act under the circumstances, Plaintiff waived his right to assert claim;
9. Damages in whole or in part result of Plaintiff's actions;
10. Defendant had no control, right, duty or obligation to control;
11. Lack of standing;
12. Deny allegations and require strict proof of allegations;



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13. Superseding or intervening causes;

14. Claims barred; injuries not caused by any improper or unwarranted action by Defendant.

**B. BRANDY BEAVERS – Default Issued**

**IV.**

**CLAIMS OR DEFENSES TO BE ABANDONED**

None.

**V.**

**PROPOSED AMENDMENTS TO THE PLEADINGS**

None.

**B. DOCUMENTS**

1. Incident Report (FP0118-124) – produced by Defendant
2. Palms Security Policy Manual – produced by Defendant
3. Medical records and billing statement from Spring Valley Hospital (SVMC 0000001-11)
4. Medical records and billing statement from Desert Radiologists (Desert Radiologist 0000001-2)
5. Medical records and billing statement from Shadow Emergency Physicians (Shadow Emergency 0000001-4)
6. Medical records and billing statement from Associated Physicians (Associated Physicians 0000001-16)
7. Medical records and billing statement from Open MRI of Inland Valley (OPEN MRI 0000001-4)
8. Medical records and billing statement from Wellness Group (Wellness Center 0000001-14)
9. Medical records and billing statement from Vision Radiology (Vision Radiology Consultants 0000001-3)
10. Medical records and billing statement from VQ Ortho Care (VQ Orthocare 0000001-6)
11. Medical records and billing statement from IV League Pharmacy (IV League 0000001-22)



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12. Medical records and billing statement from Valley Hospital Medical Center (VHMC 0000001-61)
13. Medical records and billing statement from Strehlow Radiology (Strehlow 0000001-2)
14. Medical records and billing statement from Insight Mountain Diagnostics (INSIGHT 0000001-24)
15. Medical records and billing statement from Rancho Physical Therapy (Rancho P.T. 0000001-302)
16. Medical records and billing statement from Las Vegas Neurosurgery, Orthopedics & Rehabilitation (LVNORA 0000001-24)
17. Medical records and billing statement from Integrated Health Care (Integrated 0000001- 33)
18. Medical records and billing statement from NV Sleep Diagnostics (NV Sleep 0000001- 20)
19. Medical records and billing statement from Village East Drugs (Village East Drugs 0000001-11)
20. Medical records and billing statement from Medical District Surgery Center (Medical District Surgery Center 0000001- 79)
21. Medical records and billing statement from Beverly Tower Wilshire Advanced Imaging (Beverly Tower Imaging 0000001- 3)
22. Pharmacy Record from Safeway Pharmacy (Safeway 0000001)
23. Medical records and billing statement from Jacob Tauber, M.D. and George Graf, M.D. (Dr. Tauber 0000001-28)
24. Medical records and billing statement from Yakov Treyzon, M.D. (Treyzon, M.D. 0000001-9)
25. Medical records and billing statement from F. Michael Ferrante, M.D. (UCLA 0000001-6)
26. Medical records and billing statement from Quality Respiratory Solutions/King Medical Supply (Quality Resp. Solu. 0000001- 24)
27. Medical records and billing statement from Casiano Flaviano, M.D., Family Wellness Center (Family Wellness 0000001-3)
28. Medical records and billing statement from Walter Kidwell, M.D., Pain Institute of Nevada (Kidwell 0000001-22)
29. Medical records and billing statement from Olympia Anesthesia (Olympic 0000001- 10)
30. Medical records and billing statement from Wilshire Surgicenter (Wilshire Surgicenter 0000001-121; Wilshire 0000001-3)
31. Daniel Kim, D.O., Nevada Ear, Nose & Throat
32. Medical records and billing statement from Douglas S. Stacey, D.P.M., Foot & Ankle Surgical Group (Dr. Stacey, D.P.M. 0000001-5)
33. Medical records and billing statement from North Valley Medical Supply (0000001- 6)
34. Medical records and billing statement from Nevada Imaging Centers/Lake Mead Radiology (Lake Mead Rad. 0000001-18)



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35. Medical records and billing statement from Robert Gutierrez, M.D. ( Robert Gutierrez, M.D. 0000001-59)
36. Craig Jorgenson, M.D., Govind Koka, D.O., Advanced Urgent Care (Advanced Urgent Care 0000001- 2)
37. Medical records and billing statement from Govind Koka, D.O., Medical Associates of Southern Nevada/Primary Care Consultants (Primary Care Consultants KOKA 0000001-330)
38. Medical records and billing statement from Michael J. Crovetti, D.O., Bone & Joint Institute (Crovetti 0000001-38)
39. Medical records and billing statement from John Thalgott, M.D., Center for Disease and Surgery of the Spine (CDSS 0000001-72)
40. Medical records and billing statement from Las Vegas Surgery Center (LV Survery Center 0000001-10)
41. Medical records and billing statement from Joseph J. Schifini, M.D. (Schifini 0000001-19)
42. Medical records and billing statement from Lawrence Miller, M.D., Cal Hand Surgery (Cal. Hand 0000001-86)
43. Medical records and billing statement from Matt Smith Physical Therapy (Dr. Matt Smith 0000001-143; Valley Rehab. 0000001- 180)
44. Medical records and billing statement from Centennial Upright MRI (Centennial Upright MRI 0000001-12)
45. Billing statement from G. Michael Elkhanich, M.D., Bone & Joint Institute (Elkhanich 000001-2)
46. Pharmacy Statement from Walgreen's Pharmacy (Walgreens 0000001-75)
47. Medical records and billing statement from Thomas Vater, D.O. (Dr. Vater 0000001-18)
48. Medical records and billing statement from Russell J. Shah, M.D. (Shah 0000001-88)
49. Medical records and billing statement from Kelly Hawkins Physical Therapy/ Chynoweth, Hill & Leavitt (KHPT 0000001-44)
50. Medical records and billing statement from Louis F. Mortillaro, Ph.D. & Associates (Mortillaro 0000001-243)
51. Medical records and billing statement from Quest Diagnostics (Quest Diagnostics 0000001-15)
52. 1999 Tax Records (W-2 1999 0000001-8)
53. 2001 Tax Records (W-2 2001 0000001-8)
54. 2004 Tax Records (W-2 2004 0000001-10)
55. Medical bills from Total Wellness Clinic (Total Wellness 000001-8) – *Records will be supplemented upon receipt*
56. Expert Report of Terrence Dinneen (provided previously)
57. Expert Report of Steven T. Baker (provided previously)
58. List of Past Medical Expenses (Plaintiff's Computation of Damages)
59. Any exhibits designated by Defendants, and/or items produced pursuant to NRCPC 16.1.



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- 60. Any and all disclosures by Plaintiff and Defendants
- 61. Any and all responsive documents to Requests for Production of Documents

**DEMONSTRATIVE EXHIBITS TO BE USED AT TRIAL**

- 1. Pain Stimulator
- 2. CPAP Machine
- 3. Cane
- 4. Model of Knee
- 5. Poster of R.S.D. explanation

**VII.**

**OBJECTIONS TO OTHER PARTY'S EXHIBITS**

Plaintiff and Defendants have met pursuant to EDCR Rule 2.67 and have agreed that they each reserve the right to object to the other side's exhibits after they have been fully identified and produced.

**A. WITNESSES EXPECTED TO TESTIFY**

- 1. Enrique Rodriguez
- 2. Maria Perez
- 3. Joaquin Mendoza
- 4. Ron Merkerson
- 5. Steve Ferrero
- 6. Vikki Kooinga
- 7. Sherri Long
- 8. Frank Schiula
- 9. Joseph Schifini, M.D.
- 10. Mary Ann Shannon, M.D.
- 11. Russell Shah, M.D.
- 12. Thomas Vater, M.D.
- 13. Terrance Dinneen, M.S., C.R.C., C.R.E., Expert Witness
- 14. Steven T. Baker, C.P.P., P.S.P., P.C.I., Expert Witness
- 15. Nick Tavaglione
- 16. Rich Ramirez
- 17. Dell Roberts
- 18. Any and all witnesses previously disclosed by either Plaintiff or Defendant.



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IX.

ISSUES OF LAW

Joint & Several Liability

Default against Brandy Beavers

X.

ESTIMATE OF TIME REQUIRED FOR TRIAL

It is estimated that this trial will take 7 – 10 Court days.

DATED this 27<sup>th</sup> day of September, 2010.

BENSON, BERTOLDO, BAKER & CARTER

STEVEN M. BAKER, ESQ.  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
(702) 228-2600  
Attorney for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCPP 5(b) and EDCR 7.26, I hereby certify that on the 27<sup>th</sup> day of Sept, 2010, I served the above and foregoing PLAINTIFF'S PRE-TRIAL MEMORANDUM, on all parties to this action by 1<sup>st</sup> Class, U.S. Mail, postage thereon fully prepaid addressed as follows:

10676-05 Co-Counsel for Fiesta Palms  
Kenneth C. Ward, Esq.  
Archer Norris  
2033 North Main Street, Suite 800  
P.O. Box 8035  
Walnut Creek, California 94596  
925-930-6600 Telephone  
925-930-6620 Facsimile

10676-05 Attorneys for Fiesta Palms  
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An employee of:  
BENSON, BERTOLDO, BAKER & CARTER



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# **EXHIBIT F**

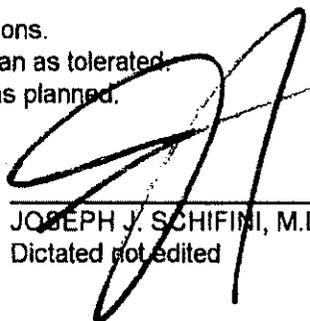


**PAGE THREE**

The patient was taken to the recovery room in stable condition. In the recovery room, he was given instruction by myself and the Medtronic representative on the care and use of this spinal cord stimulator. The patient understands that he will call my office with any questions and will be reevaluated for lead removal on July 18, 2008.

**PLAN:**

1. The patient is to follow up in my office on July 18, 2008, for reevaluation and possible lead removal.
2. No heavy lifting, bending, twisting or working overhead.
3. No showing, swimming or bathing.
4. The patient is to call the office with questions.
5. Continue current medication regimen, wean as tolerated.
6. The patient is to follow up with Dr. Koka as planned.



JOSEPH J. SCHIFINI, M.D.  
Dictated not edited

JJS/bjs

DOT: 07/14/08

cc: Govind Koka, D.O., Fax 492-6368

**PATIENT: RODRIGUEZ, ENRIQUE J.**  
**CONF#:**  
**PHYSICIAN: JOSEPH J. SCHIFINI, M.D.**

**DATE OF DICTATION: 07/14/08**  
**DATE OF PROCEDURE: 07/14/08**  
**TRANSCRIBER: bjs**

JOSEPH J SCHIFINI MD-00021

# **EXHIBIT G**



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Attorneys for Plaintiff  
5

6 **DISTRICT COURT**  
7 **CLARK COUNTY, NEVADA**

8 \* \* \*

9 ENRIQUE RODRIGUEZ, an individual,	CASE NO: A531538
10 Plaintiff,	DEPT NO: 10
11 vs.	
12 FIESTA PALMS, L.L.C., a Nevada Limited	<b>HEARING DATE:</b>
13 Liability Company, d/b/a PALMS CASINO	<b>HEARING TIME:</b>
14 RESORT, BRANDY L. BEAVERS,	
15 individually, DOES I through X, inclusive,	
and ROE BUSINESS ENTITIES I through X,	
16 inclusive,	
Defendants.	

17 **PLAINTIFF'S MOTION TO STRIKE**

18 COMES NOW, Plaintiff ENRIQUE RODRIGUEZ, by and through his attorney of  
19 record, STEVEN M. BAKER, ESQ., of the law firm of BENSON, BERTOLDO BAKER &  
20 CARTER, CHTD., and hereby files his Motion to Strike  
21

22 This Motion is made and based on the pleadings and papers on file herein, the  
23 following Points and Authorities and any oral argument that may be presented.

24 I. **Introduction**

25 Defendant presented two (2) experts in this trial<sup>1</sup>, neither of whom opined that their  
26 opinions were given to a reasonable degree of professional probability as required under  
27

28 <sup>1</sup> Dr. Thomas Cargill (Economist) and Forrest Franklin (Liability).



1 Nevada law.<sup>2</sup>

2 Accordingly, Plaintiff is seeking an Order to Strike Dr. Cargill's testimony in its  
3 entirety, as well as an Order to Strike Mr. Franklin's opinions relative to standard of care and  
4 dangerous activity.

5  
6 **II. Statement of Facts**

7 **A. Forrest Franklin**

8 Forrest Franklin, Defendant's liability expert, was retained to develop, and render an  
9 opinion with respect to the standard of care as it relates to throwing objects, memorabilia,  
10 promotional articles into crowds.<sup>3</sup>

11 Mr. Franklin offered the following opinions:

- 12 1. That throwing memorabilia as a promotional effort  
13 into crowds is not a substandard protocol;<sup>4</sup>
- 14 2. That it is not unsafe to throw things into  
15 crowds;<sup>5</sup> and
- 16 3. That it is not below the standard of care to throw items into a crowd.<sup>6</sup>

17 None of these opinions, however, were given to a reasonable degree of professional  
18 probability. Moreover, they are in contradiction to the testimony of Ms. Long and Ms.  
19 Kooinga, as well as the legal theory of assumption of duty.

20  
21 **B. Dr. Thomas Cargill**

22 Dr. Cargill offered the following two (2) opinions at trial:

- 23 1. That Plaintiff could not have made as much in the current financial market that he  
24 could have back in 2004 because the bubble burst;<sup>7</sup> and

25  
26 <sup>2</sup> NRS 50.275; Hallmark v. Eldridge, 189 P.3d 646 (Nev. Jul 24, 2008) (NO. 46722)

27 <sup>3</sup> See **Exhibit "1,"** Trial Transcript of Franklin, 13: 9-13.

28 <sup>4</sup> Id., at 14: 6-8.

<sup>5</sup> Id., at 31: 17-21.

<sup>6</sup> Id., at 33: 7-9.

<sup>7</sup> See **Exhibit "2,"** Trial Testimony of Cargill, 43: 5-25.



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2. Mr. Dineen's discount rates were inappropriate.<sup>8</sup>

Neither of these opinions were given to a reasonable degree of economic probability.

**III. Legal Argument**

The statute governing the admissibility of expert testimony in Nevada district courts is NRS 50.275, which, as construed by the Nevada Supreme Court<sup>9</sup>, tracks Federal Rule of Evidence (FRE) 702.<sup>10</sup>

NRS 50.275 states:

"[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."

To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

---

<sup>8</sup> *Id.*, at 48: 1-3.

<sup>9</sup> See, e.g., Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1482, 970 P.2d 98, 107-08 (1998), overruled in part on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 270-71, 21 P.3d 11, 14-15 (2001); Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 242, 955 P.2d 661, 667 (1998); Fernandez v. Admirand, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992); Wright v. Las Vegas Hacienda, 102 Nev. 261, 262-63, 720 P.2d 696, 697 (1986).

<sup>10</sup> FRE 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.



1 Plaintiff is not challenging the “qualification requirement” relative to either Dr. Cargill  
2 or Mr. Franklin.

3 However, Plaintiff submits that both Dr. Cargill and Mr. Franklin’s testimony failed to  
4 satisfy the “assistance” requirement of NRS 50.275, in that neither expert provided opinions  
5 to a reasonable degree of professional, or in the case of Dr. Cargill, economic, probability.  
6

7 Accordingly, their opinions do not rise to the level of “scientific knowledge” within  
8 the meaning of Hallmark<sup>11</sup>, Daubert, NRS 50.275 and Federal Rule 702. Daubert, 509 U.S. at  
9 589-90, 113 S.Ct. at 2795 (declaring expert scientific testimony grounded only in speculation  
10 or conjecture to be inadmissible under Rule 702).

11 Nevada law requires expert opinions to be given to a reasonable degree of medical,  
12 professional and/or economic probability.<sup>12</sup> The opinions of Dr. Cargill and Mr. Franklin  
13 offered insufficient foundation for this court to take judicial notice of the scientific basis of  
14 those conclusions.<sup>13</sup>

15  
16 In United Exposition Service Co. v. SJIS, the Nevada Supreme Court concluded that  
17 an “award of compensation cannot be based solely upon possibilities and speculative  
18 testimony.”<sup>14</sup> In that case, which involved the payment of workers’ compensation benefits  
19 after an industrial injury, the Nevada Supreme Court held that “physician[s] must state to a  
20 degree of reasonable medical probability that the condition in question was caused by the  
21 industrial injury, or sufficient facts must be shown so that the trier of fact can make the  
22 reasonable conclusion that the condition was caused by the industrial injury.”<sup>15</sup> The  
23 speculative nature of an opinion that an injury possibly could have been a precipitating factor  
24

25  
26 <sup>11</sup> Hallmark v. Eldridge, 189 P.3d 646 (Nev. Jul 24, 2008) (NO. 46722)

<sup>12</sup> See NRS 50.275; Hallmark v. Eldridge, 189 P.3d 646 (Nev. Jul 24, 2008) (NO. 46722)

<sup>13</sup> Id.

<sup>14</sup> 109 Nev. 421, 424, 851 P.2d 423, 425 (1993).

<sup>15</sup> Id. at 424-25, 851 P.2d at 425.



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was insufficient to support a finding of causation; specifically, the court stated, "A possibility is not the same as a probability."<sup>16</sup>

Nevada Federal Courts<sup>17</sup>, interpreting Nevada law, have also held that Daubert's "gatekeeping" obligation, requiring inquiry into both relevance and reliability, applies not only to "scientific" testimony, but to all expert testimony.

While counsel for the Defendant may have properly laid a foundation for their testimony, neither expert established a sufficient foundation in this case, since neither provided opinions to a reasonable degree of probability.

Accordingly, their testimony did not satisfy the "assistance" requirement of NRS 50.275.

**IV. Conclusion**

Based on the failure to provide opinions to a reasonable degree of professional and/or economic probability, Plaintiff respectfully requests for an Order to Strike the Opinions of Dr. Cargill and Forrest Franklin.

Dated this 16 day of Nov, 2010.

BENSON, BERTOLDO, BAKER & CARTER

STEVEN M. BAKER, ESQ.  
Nevada Bar No. 4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
(702) 228-2600  
Attorneys for Plaintiff

<sup>16</sup> Id. at 425, 851 P.2d at 425.

<sup>17</sup> Culbertson v. Freightliner Corp. 50 F.Supp.2d 998D Nev., 1999. March 23, 1999

# **EXHIBIT H**

*Anna D. Quinn*  
CLERK OF THE COURT

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**FFCL**  
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Attorneys for Plaintiff

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

vs.

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES 1 through X,  
inclusive,  
Defendants.

CASE NO: A531538  
DEPT NO: 10

**BENCH TRIAL DATE: 10/25/10  
HEARING DATE: 1/31/11**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

THIS MATTER having come on for hearing on January 31, 2011 with respect to Plaintiff's Motion to Strike Defendant's Experts before the Honorable Jessie Walsh, presiding, and the Court having considered the evidence and the arguments of counsel and taken the matter under advisement for further consideration, this Honorable Court finds and concludes as follows:

**FINDINGS OF FACT**

Defendant presented two (2) experts in this trial, Dr. Thomas Cargill (Economist) and Forrest Franklin (Liability), neither of whom opined that their opinions were given to a

**EXHIBIT H**





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reasonable degree of professional probability as required under Nevada law.

Forrest Franklin, Defendant's liability expert, was retained to develop and render an opinion with respect to the standard of care as it relates to throwing objects, memorabilia, and promotional articles into crowds.

Mr. Franklin offered the following opinions:

1. Throwing memorabilia as a promotional effort into crowds is not a substandard protocol;
2. It is not unsafe to throw things into crowds; and
3. It is not below the standard of care to throw items into a crowd.

None of these opinions, however, were given to a reasonable degree of professional probability.

Dr. Cargill offered the following two (2) opinions at trial:

1. Plaintiff could not have made as much in the current financial market as he could have back in 2004 because the bubble burst in the housing market; and
2. Mr. Dineen's discount rates were inappropriate.

Neither of these opinions was given to a reasonable degree of professional probability.

**CONCLUSIONS OF LAW**

To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

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Dr. Cargill and Mr. Franklin's testimony failed to satisfy the "assistance" requirement of NRS 50.275, in that neither expert provided opinions to a reasonable degree of professional probability.

Accordingly, their opinions did not rise to the level of "scientific knowledge" within the meaning of NRS 50.275.

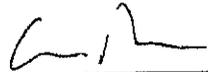
The opinions of Dr. Cargill and Mr. Franklin offered insufficient foundation for this court to take judicial notice of the scientific basis of those conclusions.

While counsel for the Defendant may have properly qualified said individuals as experts, the opinions rendered by the respective experts were speculative, as the court was not advised and the record does not reflect whether such opinions were made on the basis of "possibility" or some other standard lower than "a reasonable degree of professional probability."

Accordingly, the testimony of Cargil and Franklin did not satisfy the "assistance" requirement of NRS 50.275.

DATED this 7<sup>th</sup> day of ~~January~~<sup>February</sup>, 2011.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
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**ORDER**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Strike Defendant's Experts Cargill and Franklin is granted.

Date: 3/2/11

*Jessie Nelson*  
DISTRICT COURT JUDGE

# **EXHIBIT I**

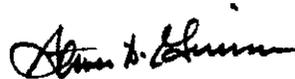
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DISTRICT COURT  
CLARK COUNTY, NEVADA



CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538

DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 28, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. JOSEPH SCHIFINI

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
Benson, Bertoldo & Baker

For the Defendant: KENNETH C. WARD, ESQ.  
Archer \* Norris

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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CLERK OF THE COURT

**AVTranz**

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Denver (303) 634-2295

**EXHIBIT I**

1 with one of the Palms girls or something that was occurring,  
2 where I've seen a couple different accounts of -- whether or  
3 not they were throwing something into the crowd, whether it  
4 was a water bottle wrapped with a t-shirt, or some sort of  
5 promotional item that was being thrown into the crowd by a  
6 girl who was blindfolded and being spun around and she was  
7 meant to throw these things out into the crowd. During the --  
8 one of the tosses of the items, one of the items was coming  
9 towards Mr. Rodriguez and another patron of the casino dove  
10 for the item, the promotional item, striking Mr. Rodriguez in  
11 the area of his knee. And based on the contact with his knee,  
12 he became unstable and fell into the gentleman who was  
13 standing next to him.

14 Q And when was the first time that you saw Mr.  
15 Rodriguez?

16 A The first consultation was November 26, 2007.

17 Q And I would refer you to a Bates number, but as  
18 we've talked about, I've brought the non-Bates stamped  
19 documents. However, someone from my office is coming down.  
20 And if they get in quick enough, perhaps we can do something  
21 about that. And your last visit was November 26th, 2007?

22 A That is correct.

23 Q And are you referring to -- well, that's really  
24 strange because mine is Bates stamped.

25 THE COURT: Kept the good stuff for yourself, did

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1           A     Yes. Oh, Exhibit 20 -- all right. I thought you  
2 meant 25 of what we have. Okay. I'm there.

3           Q     Did Dr. Ferrente do an examination of Mr. Rodriguez?

4           A     Yes. It appears he did an examination on November  
5 14th, 2006.

6           Q     And as Chairman of the Department of Pain Management  
7 at UCLA, to your knowledge he studied RSD causal to a complex  
8 regional pain syndrome and a variety of neurologically  
9 mediated pathologies?

10          A     Yes, that --

11          MR. WARD: Object; hearsay.

12          THE WITNESS: Dr. --

13          MR. BAKER: It's not a statement, Your Honor.

14          THE COURT: Mr. Ward, what was that?

15          MR. WARD: Hearsay. This witness is going to testify as  
16 to qualifications. And presumably he's going to testify as to  
17 qualifications and presumably he's going to testify as to  
18 findings, and I think it's all hearsay.

19          MR. BAKER: Your Honor, we dealt with that issue  
20 yesterday when I gave you the problem case and the remainder  
21 of the cases in yesterday, your ruling was that the doctors  
22 were allowed to refer to information that they had reviewed.

23                 He's been qualified as an expert, under the Omastat  
24 [phonetic] case that I handed you yesterday. Not Omastat,  
25 that was -- but you know the one I'm talking about. But

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1 yesterday you've already ruled on the same issue.

2 MR. WARD: And I don't believe the case says that, but I  
3 will -- I'm not going to argue it anymore, and I'll simply  
4 note my objection.

5 MR. BAKER: A continuing objection is stipulated to, Your  
6 Honor.

7 THE COURT: Very well, noted for the record. Please  
8 proceed.

9 BY MR. BAKER:

10 Q If you go to page five of Exhibit 25, would you  
11 discuss with the Court what Dr. Ferrente's [phonetic] was of  
12 Enrique Rodriguez?

13 A Dr. Ferrente, during that visit, said it is possible  
14 that the patient has complex regional pain syndrome, or  
15 regional sympathetic dystrophy. However, his physical  
16 examination is more consistent with a chronic knee pain of a  
17 mechanical nature. Furthermore, we don't have sufficient  
18 objective information for which to make a definitive  
19 diagnosis.

20 He goes onto say that if the pain continues or  
21 worsens, he suggests that the patient undergoes bone scans,  
22 lumbar sympathetic blocks, trial of clonidine patches and  
23 neurontin, all of which are geared towards dealing with nerve-  
24 type pain or neurogenic pain of a nature consistent with  
25 complex regional pain syndrome.

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1 Q And if you'll turn to page 11 --

2 A Yes.

3 Q -- did Dr. Miller come to a diagnostic impression  
4 with respect to Mr. Rodriguez?

5 A Yes. On page 11, it's noted that Dr. Lawrence  
6 Miller felt that Mr. Rodriguez was suffering from complex  
7 regional pain syndrome of the left lower extremity.

8 Q And if you'll turn to page 22, what were Dr.  
9 Miller's examination findings?

10 A Dr. Miller noted temperature and color changes,  
11 edema or swelling, atrophic changes in the hair and nail  
12 growth patterns, impaired motor function, so stiffness in the  
13 joint, and then hyperpathia or allodynia, which is the painful  
14 sensation of touch, and then pseudo-motor changes, which  
15 involve changes of vascular supply or sweating. So you may  
16 notice that a hand is very sweaty, versus the other hand is  
17 not. That's an unusual finding. That's the findings that he  
18 diagnosed with him, which led him to believe that the  
19 diagnosis of complex regional pain syndrome existed in Mr.  
20 Rodriguez.

21 Q Now, this was a clinical diagnosis. Is that fair to  
22 say?

23 A Yes.

24 Q And do you agree with that diagnosis based upon  
25 those six findings?

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1 A Yes.

2 Q But then, he was sent out for a diagnostic  
3 examination. Is that true?

4 A The diagnostic examination was the lumbar  
5 sympathetic blocks that we discussed before.

6 Q When were they conducted? If you'll go to 27 --

7 A Okay. It looks like the first one was April 18th,  
8 2007.

9 Q The second?

10 A And the second one appears to be -- well, I think  
11 March 14th, 2007 was the first one. April 18th, 2007 was the  
12 second one.

13 Q And was it reasonable, necessary and causally  
14 related to the injuries Enrique sustained at the Palms, to  
15 conduct those sympathetic blocks?

16 A Absolutely.

17 Q And with respect to the examination?

18 A Yes.

19 Q And are those your opinions to a reasonable degree  
20 of probability?

21 A Medical probability, yes.

22 Q Thank you. What was the result in the sympathetic  
23 blocks?

24 A With both injections, Mr. Rodriguez noted complete  
25 relief of his symptoms in his left lower extremity, indicating

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1 a significant sympathetic component to his pain, indicating  
2 that his presumptive diagnosis of complex regional pain  
3 syndrome, or RSD, was correct.

4 Q And so, it was diagnostic for our stay?

5 A Yes.

6 Q And do you agree with that opinion --

7 A Yes.

8 Q -- to a reasonable degree of medical probability?

9 A Yes.

10 Q And what was Dr. Miller's bill in this case? If you  
11 can, turn to 4208.

12 MR. BAKER: I'm still having that problem, Your Honor.

13 THE COURT: Me, too, Mr. Baker.

14 BY MR. BAKER:

15 Q Page eight?

16 A It looks like \$1,470.11.

17 Q And were those bills reasonable, necessary and  
18 causally related to the subject incident --

19 A Yes.

20 Q -- to a reasonable degree of medical probability?

21 A Yes.

22 MR. BAKER: Move to admit 42, Your Honor.

23 THE COURT: Any objection to 42, Mr. Ward?

24 MR. WARD: Hearsay, Your Honor.

25 THE COURT: Okay. As on the Court's previous ruling, the

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1 objection is overruled. The item is admitted, 42.

2 [Plaintiff's Exhibit 42 Received]

3 BY MR. BAKER:

4 Q Now, where was the sympathetic blocks conducted?

5 A They were conducted at a UCLA-affiliated surgery  
6 center called the Wilshire Surgery Center, Incorporated, in  
7 Beverly Hills, California.

8 Q That's Wilshire Surgical Center?

9 A Yes.

10 Q Would you turn to Exhibit 30, please? You might  
11 want to leave that on the ground near your feet.

12 A Okay.

13 Q I assume this is a surgery you wouldn't want to do  
14 in a kitchen or something of the sort?

15 A No. It's not. Because of the potential  
16 complications with this procedure, you want to do this at a  
17 facility that you can deal with complications.

18 Q Was it reasonable, necessary and causally related to  
19 the Palms incident, to do these lumbar sympathetic blocks at a  
20 surgical center?

21 A Yes.

22 Q And particular, at Wilshire?

23 A Yes.

24 Q And that's your opinion to a reasonable degree of  
25 medical probability?

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1 A Yes.

2 Q And if you'll turn to pages 399 and 300 [sic] --

3 A Which exhibit?

4 Q -- of Exhibit number 30 --

5 A Were there that many pages in number 30?

6 Q Yeah. It's the last two pages before 31. You're  
7 not seeing it?

8 A No. I've got 121 -- okay. All right. It's under  
9 the Defendant's supplements. Okay. I'm sorry. Yes. I'm  
10 there now.

11 Q And the record will note to thank the Defendants for  
12 supplementing the bill. You're familiar with customary  
13 charges for surgical centers?

14 A I am. Yes.

15 Q And for the first block, would you state to the  
16 Court what the amount charged for the block was?

17 A The first block --

18 Q Which would be on 299? Are you not seeing it?

19 A No. Yeah. There's a surgery that was performed on  
20 04/21/06. The balance there was \$17,991. And then, the  
21 next --

22 Q And you would presume that that's a charge for the  
23 surgery performed on the 18th?

24 A Yes.

25 Q And was that charge reasonable, necessary and

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1 causally related to the injury at the Palms?

2 A Yes.

3 Q And is that your opinion to a reasonable degree of  
4 medical probability?

5 A Yes.

6 Q And with respect to the second block --

7 A The second block was -- the charges were \$8,260.

8 Q And we -- actually, what's confusing you and why  
9 you're looking at me funny is, we have those in reverse order,  
10 don't we?

11 A Yes.

12 Q So at the page 300, it's the first block. Is that  
13 right?

14 A Yes.

15 Q And the charge for that is how much?

16 A \$8,260. And the second one is \$17,991.

17 Q And were both of those charges reasonable, necessary  
18 and causally related to the subject accident?

19 A Yes.

20 Q And is that your opinion to a reasonable degree of  
21 probability?

22 A Yes.

23 MR. BAKER: Move to admit 30, Your Honor.

24 THE COURT: Any objection to 30?

25 MR. WARD: Just hearsay, Your Honor.

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1 THE COURT: Noted for the record.

2 MR. WARD: And the lack of foundation.

3 THE COURT: Noted for the record. 30 will be admitted.  
4 [Plaintiff's Exhibit 30 Received]

5 BY MR. BAKER:

6 Q Now, are you aware that the patient was also sent to  
7 see Dr. Cravetti [phonetic]?

8 A Yes. An orthopedic surgeon. Yes.

9 Q And Dr. Cravetti is an orthopedic surgeon in the  
10 area?

11 A Yes. In Las Vegas.

12 Q Do you know who referred him to Dr. Cravetti?

13 A I believe he was originally referred to Dr. Cravetti  
14 by either Dr. Coca [phonetic] or myself. I don't know the --  
15 I can't remember the exact timing.

16 Q But you were working with Dr. Coca in attempting to  
17 get Enrique back to health at this time, weren't you?

18 A Yes.

19 Q Okay. And what was the purpose for sending Enrique  
20 to Dr. Cravetti?

21 A It was the same concern that Dr. Ferrente had, that  
22 I had. I evaluated Mr. Rodriguez as to whether or not he had  
23 any mechanical component to his knee pain, that was  
24 contributing or maintaining the CRPS or the RSD-type syndrome.  
25 So --

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1 Q Would you explain what you mean by that?

2 A Well, yeah. I would --

3 Q Were you worried if it --

4 A I was just about to.

5 Q I'll be quiet. I'm going to go sit.

6 A Essentially, if you have something that's constantly  
7 irritating a particular area or nerve, unless you address the  
8 original problem, you're not going to get rid of the secondary  
9 problem, which is the RSD or the CRPS. So if there's an  
10 ongoing knee issue in the patient, or other issues that are  
11 going on, in this particular case the knee issue, unless you  
12 verify that there's no problem with the knee that can be  
13 corrected, you're treating sort of symptoms, if you will, or  
14 secondary problems, but you're ignoring the first problem.

15 And you'll never get rid of the secondary problem  
16 unless you address the first one. So the purpose of going to  
17 Dr. Cravetti as an orthopedic specialist was to determine --  
18 is there anything else surgically that needed to be addressed  
19 in the knee? Or are we now dealing with a knee that was  
20 relatively stable, from a surgical point of view, you know,  
21 short of a knee replacement, and now we're dealing with the  
22 secondary problem, which becomes in a sense, the primary  
23 problem. Because you've surgically corrected the primary  
24 problem.

25 You've kind of gotten rid of that one essentially.

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1 Now, you're dealing with the remainder of the issues. So the  
2 secondary problem is now the primary issue. So we wanted Dr.  
3 Cravetti to evaluate Mr. Rodriguez to make sure that we could  
4 address everything, that we've checked all the boxes before we  
5 just start looking to correct the pain with other modalities,  
6 such as this spinal cord stimulator that I'm sure we'll talk  
7 about in the near future.

8 Q Now, with respect to you working with Dr. Coca, what  
9 was your joint effort?

10 A Well, I mean, our joint effort was to confirm a  
11 diagnosis, come up with a treatment plan, and without input  
12 from an orthopedic surgeon, that treatment plan was  
13 incomplete.

14 Q And give me a second to find the exhibit for  
15 Dr. Coca. Would you turn to Exhibit 36, please?

16 A Okay.

17 MR. WARD: What number was that?

18 THE WITNESS: 36.

19 MR. BAKER: No. I'll do that at a later time. Let's  
20 keep going to your treatment.

21 THE WITNESS: Okay.

22 BY MR. BAKER:

23 Q When was the first time that you saw Enrique  
24 Rodriguez?

25 A November 26th, 2007.

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1     Rodriguez that believed it, including Dr. Furante, the  
2     chairman at UCLA, whom I've heard lecture. I've read articles  
3     he's written. So I mean, he's very well known and recognized.  
4     If he didn't believe that the diagnosis was likely, I would  
5     have had reason to question it. But not only did I look at  
6     other doctors who documented very adequately that this is a  
7     complex reasonable pain syndrome, I had my own opportunity to  
8     evaluate and treat Mr. Rodriguez. And I came to a similar  
9     conclusion.

10         Q     Before we move on to your treatment course, would  
11     you turn to Exhibit 38. You spoke to me, did you not, about  
12     Dr. Cravetti [phonetic]?

13         A     Yes, I did.

14         Q     And you informed us you wanted to make sure there  
15     was no mechanical component associated with his pain?

16         A     Yes, that was my concern.

17         Q     And you've reviewed the bills of Dr. Cravetti?

18         A     I have.

19         Q     Was Dr. Cravetti's examination reasonable and  
20     necessary and causally related?

21         A     Yes.

22         Q     To a reasonable degree of medical probability?

23         A     Yes.

24         Q     I'll give you a few seconds to open up your --  
25     that's okay. That's what I was doing earlier.

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1 A I am at 38.

2 Q And the billing amount was \$700 as set forth on  
3 Cravetti 1?

4 A That is correct.

5 Q Is that bill reasonable and necessary and causally  
6 related to the subject to a reasonable degree of medical  
7 probability?

8 A Yes.

9 MR. BAKER: I move to admit 38, Your Honor.

10 THE COURT: Any objection?

11 MR. WARD: Hearsay, Your Honor. Lack of foundation.

12 THE COURT: Noted for the record. Overruled.

13 BY MR. BAKER:

14 Q And you're aware at the same time he was seeing Dr.  
15 Thowgott [phonetic]. Is that true?

16 A Yes. Dr. Thowgott is an orthopedic spine surgeon.

17 Q And would you turn to Exhibit Number 39, please.

18 THE COURT: When you moved for admission of 38, was it  
19 just for this one page?

20 MR. BAKER: It's for -- yeah.

21 THE COURT: The one page, 000001?

22 MR. BAKER: Is that all there is?

23 THE COURT: Well, there's a whole lot of pages behind it.

24 MR. BAKER: No. No. No. I move for the admission of  
25 the entirety of the Exhibit 38.

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1 THE COURT: I'm just going to --

2 BY MR. BAKER:

3 Q You've reviewed the entirety of Exhibit 38?

4 A Yes, I have.

5 Q And that's sets forth his examination and treatment,  
6 prognosis, diagnosis, and treatment course?

7 A Yes.

8 Q And that was reasonable, necessary and causally  
9 related to a reasonable degree of medical probability?

10 A Yes.

11 Q And the bill as well?

12 A Yes.

13 Q To a reasonable degree of medical probability?

14 A Yes.

15 MR. BAKER: Move to admit 38, Your Honor.

16 MR. WARD: Objection. Hearsay. Foundation.

17 THE COURT: Noted for the record. 38 will be admitted.

18 [Plaintiff's Exhibit 38 Received]

19 BY MR. BAKER:

20 Q And at the same time he was treating with  
21 Dr. Thowgott. Is that right?

22 A That is correct.

23 Q When you were seeing Enrique, was he not only  
24 complaining of the RSD related pain to his knee, but also  
25 cervical lumbar and other pains?

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1 A Yes, he was.

2 Q And was Dr. Thowgott seeing him for all of those  
3 issues?

4 A He was, yes.

5 Q And you've reviewed the file of Dr. Thowgott?

6 A I have.

7 Q And if you'll turn to Page 8, Dr. Thowgott comments  
8 on Dr. Miller's treatment in California, is that right?

9 A That is correct.

10 Q And does Page 8 of Exhibit Number 40 -- 39, does Dr.  
11 Thowgott believe -- state his belief that an RSD diagnosis is  
12 reasonable?

13 A Yes.

14 Q Okay. And was Dr. Thowgott's treatment of Henry  
15 reasonable, necessary, and causally related to the subject --

16 A Yes.

17 Q To a reasonable degree of probability?

18 A Yes. Medical probability, yes.

19 Q Of medical probability? Thank you. And if you turn  
20 to Page 3, does that set forth Dr. Thowgott's bill? 3 of  
21 38 -- 39.

22 A Yes. \$4,154.50.

23 Q Is that bill reasonable, necessary and causally  
24 related to subject event?

25 A Yes, it was.

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1 Q To a reasonable degree of medical probability?

2 A Yes.

3 MR. BAKER: Move to admit the entirety of 39, Your Honor.

4 THE COURT: Same objection, Mr. Ward?

5 MR. WARD: Yes, Your Honor.

6 THE COURT: Same ruling noted for the record.

7 MR. WARD: I'm not surprised, of course. Lest you're not  
8 surprised.

9 THE COURT: No. 39 will be admitted.

10 MR. BAKER: I'd be surprised in a bad way.

11 [Plaintiff's Exhibit 39 Received]

12 BY MR. BAKER:

13 Q Dr. Schifini, did you set Enrique on a treatment  
14 course?

15 A I did.

16 Q What did that treatment course include?

17 A We talked to Mr. Rodriguez about -- kind of the  
18 risks, the benefits, the options and the alternatives, as is  
19 usual during my consultations. So we kind of go over  
20 different things after I evaluate the patient and the records  
21 that we look at. But the specific recommendations for him  
22 following that office visit was to repeat the lumbar  
23 sympathetic block. The repeating of the block was just for my  
24 own satisfaction that we're repeating the block. We're sort  
25 of checking things again in a different way. Other than Dr.

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1 other peripheral nerve kind of issue affecting that lower  
2 extremity, which can also maintain this diagnosis of CRPS or  
3 RSD.

4 So essentially what I did was rule out the diagnosis  
5 of sympathetically maintained pain. And I think in my  
6 dictation, there's sort of error because, again, during this  
7 timeframe was the transition between the terms and nobody had  
8 really said, everybody we're all using this term now versus  
9 this one. So what this should have said is really more we've  
10 -- you know, his RSD component of this was successfully  
11 treated rather than the RSD in the CRPS or the complex regions  
12 pain syndrome. So I think I misstate something in my record  
13 there from December 6th, 2007.

14 Q But you were still communicating with Dr. Cocha?

15 A Yes.

16 Q And if you could turn to Exhibit 37. I'm looking on  
17 the -- are you looking --

18 A Oh, I'm sorry. I thought you said Page 37. So  
19 Exhibit 37.

20 Q Right.

21 A Okay.

22 Q Is Exhibit 37 Dr. Cocha's records and bills?

23 A Yes, it is.

24 Q And was the treatment by Dr. Cocha reasonable,  
25 necessary and causally related to the subject incident to a

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1 reasonable degree of medical probability?

2 A Yes.

3 Q And could you tell me what Dr. Cocha's bill was?

4 A It appears Dr. Cocha's bill -- final bill was  
5 \$3,389.60.

6 Q And is that bill reasonable, necessary and causally  
7 related to the subject incident to a reasonable degree of  
8 medical probability?

9 A Yes.

10 Q And that's your opinion to a reasonable degree of  
11 medical probability?

12 A Yes.

13 MR. BAKER: Move to admit the entirety of 37, Your Honor.

14 MR. WARD: Foundation, hearsay, Your Honor.

15 THE COURT: Noted for the record. 37 will be admitted.

16 [Plaintiff's Exhibit 37 Received]

17 BY MR. BAKER:

18 Q What was your plan for Enrique now that the  
19 sympathetic aspect of his -- well, before I ask you that, did  
20 you believe he was still suffering from a neurologically  
21 mediated pain syndrome?

22 A Yes.

23 Q Even if the sympathetic component of it had been  
24 successfully treated?

25 A Yeah. Again, that's, as I've described, that's just

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1 A No.

2 Q And is it fair to say by this time he had been  
3 through two knee surgeries, three lumbar sympathetic blocks,  
4 and an implantation of a stimulator into his system?

5 A Yes. I mean, at best, he had some temporary relief  
6 during the first two lumbar sympathetic blocks. But that was  
7 a few hours. This was for four days, which gave him quite a  
8 bit of home.

9 Q The hound is out, the hunt is on. Right?

10 A Yes.

11 Q And did you send Henry to any physicians to discuss  
12 a permanent spine stimulator?

13 A Yes. He was seen by Dr. Thomas Votter [phonetic],  
14 who's an orthopedic spine surgeon.

15 MR. BAKER: Rob, what's Votter's -- you around?

16 MR. CARDENAS: What's that?

17 MR. BAKER: What's Votter's exhibit number?

18 MR. CARDENAS: It's 48.

19 MR. BAKER: Thank you.

20 BY MR. BAKER:

21 Q Would you turn to Exhibit 48, quickly. It's just  
22 Dr. Votter, his records.

23 A Okay.

24 Q Does 48 contain the examination and treatment  
25 performed upon Enrique Rodriquez from Dr. Votter --

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1 A Yes.

2 Q -- upon your referral?

3 A Yes.

4 Q And was that examination reasonable, necessary and  
5 causally related to the subject accident to a reasonable  
6 degree of medical probability?

7 A Yes.

8 Q What's Dr. Votter's bill?

9 A \$330.

10 Q That sounds pretty reasonable. Is that reasonable,  
11 necessary, and causally related to the subject incident?

12 A Yes.

13 Q To a reasonable degree of probability?

14 A Yes -- medical probability, yes.

15 Q Medical probability. Thank you.

16 MR. BAKER: Your Honor, move to admit 48.

17 MR. WARD: Foundation, hearsay, Your Honor.

18 THE COURT: Noted for the record.

19 MR. BAKER: Admitted, Your Honor?

20 THE COURT: 48 will be admitted.

21 [Plaintiff's Exhibit 48 Received]

22 BY MR. BAKER:

23 Q How does this permanent spinal cord stimulator  
24 differ from the temporary spinal cord stimulator other than  
25 obviously being permanent?

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1 programming changes. And the nice thing about having a  
2 computer is you can program it. Some of the programming Mr.  
3 Rodriguez can do on his own with the little computer. Some of  
4 it requires visits in my office to be done. Those are  
5 typically about a \$300 charge. The first year -- every year  
6 of the first year, so the -- of the four years, the first  
7 year, there's going to be three of those visits -- or excuse  
8 me, four of those visits. So you're talking about \$1200 each  
9 of the first years. And then additional years, that  
10 programming needs to be done once a year. So you're talking  
11 about an additional \$2100 every time the battery is changed  
12 for programming issues. So that's the other associated costs  
13 with this.

14 Q That would total?

15 A That's going to be \$21,000 times -- or excuse me,  
16 \$2100 times 10, so an additional \$21,000. I think those are  
17 all the costs. So I'm going to --

18 Q And that totals --

19 MR. BAKER: And we'll get the transcript and add it up,  
20 Your Honor, and make sure it's all consistent.

21 BY MR. BAKER:

22 Q -- \$721,000?

23 A That sounds about right over the lifetime --

24 Q 270 plus 160 plus 220 plus 50 plus 21,000.

25 A Yes.

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# **EXHIBIT J**

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TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

*Alan D. Schuman*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ,  
Plaintiff,  
v.  
FIESTA PALMS LLC,  
Defendant.

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MONDAY, NOVEMBER 1, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. JOSEPH SCHIFINI

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
Benson, Bertoldo & Baker

For the Defendant: KENNETH C. WARD, ESQ.  
Archer \* Norris

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EXHIBIT J

1 Q Could you project for the Court what the total value  
2 of the --

3 A Well, if we're using the present value and we're  
4 assuming the numbers are inverted, they're approximately  
5 \$11,000. Again, I would envision those would be decreased by  
6 75 percent as well, because much of the reason for the  
7 constipation is due to the use of the opiate type medicines,  
8 the hydrocodone and the morphine.

9 Q And that's your opinion to a reasonable degree of  
10 medical probability?

11 A Yes.

12 MR. BAKER: You have a objection?

13 MR. WARD: Yeah. I'd like to object for the record and  
14 move to strike. Your Honor, we've been given -- one of the  
15 experts that was disclosed in this case was a life care  
16 planner. And a life care plan was provided and the life care  
17 planner was deposed, and all of those questions were asked and  
18 answered.

19 Now we find out the life care planner's not going to be  
20 called and this treating physician is testifying as to  
21 expenses that are much higher than set forth in the life care  
22 plan. There's no point in disclosing experts at some point if  
23 you can just bring in everything that you want to any way you  
24 want to do it.

25 MR. BAKER: Your Honor, I --

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1 THE COURT: Mr. Baker?

2 MR. BAKER: I think that we have the right to put in  
3 futures through either a life care planner or through the  
4 physicians who are actually referring and prescribing the  
5 future treatment. And I think that it's typically preferred  
6 by the Court for the doctors to put in the evidence rather  
7 than to have the life care planner go through the medical  
8 records and pick the medical records and try to project  
9 expenses. And I believe that the life care planner would  
10 probably have drawn exactly the type of hearsay objection from  
11 Mr. Ward that we've been hearing through the whole trial.

12 This is a doctor testifying to medicines that have been  
13 prescribed to his patient, the future need for those medicines  
14 and the costs. And again, on the basis of the cases that  
15 we've given you, Gruber v. Levine [phonetic], the cases that  
16 we've cited to this Court for the wide discretion for him to  
17 speak, and the fact that he's actually a treating physician  
18 and not a retained expert. This is, respectfully, completely  
19 appropriate.

20 THE COURT: Any final thoughts, Mr. Ward?

21 MR. WARD: Yeah. I'll make it quick, Your Honor. I know  
22 Your Honor's tired of hearing this, but I feel the need to  
23 make the record because essentially here's the issue we have.  
24 When a life care planner comes in, the life care planner is  
25 given parameters about treatment. The life care planner

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1 doesn't say this person needs a back surgery, but they do go  
2 out and do things.

3       It's a -- to some extent it's a little bit like buying a  
4 car, say, you know, I went to this dealer and the car's this  
5 much and I went to this dealer and the car is this much, and I  
6 went to that dealer and the car is that much. And then when  
7 we take the life care planner's deposition, that's what we  
8 cross-examine him on. And essentially what we have instead is  
9 we have someone coming in and saying well, you know, off the  
10 top of my head, I just -- I'm not really sure what all those  
11 things cost, but I think it's a lot of money; and therefore, I  
12 think it's X dollars. And --

13       THE COURT: I think we're stuck with whatever the figures  
14 are in that exhibit. Is that an exhibit?

15       MR. BAKER: It's not an exhibit, Your Honor. And I'm  
16 actually asking him to testify not with respect to the  
17 exhibit, but whether what's put forward on it comports with  
18 his understanding as a treating physician and as a doctor of  
19 what these medicines would cost. And I believe I laid the  
20 foundation for that asking if he knew what these medicines  
21 cost in the community, if he was being prescribed these  
22 medicines currently, if those medicines were reasonable,  
23 necessary and causally related to the subject accident, and to  
24 what the future costs of it. If I don't want to call the life  
25 care planner and put it in through percipient witnesses, I

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1 believe that's completely appropriate.

2 THE COURT: Final thoughts?

3 MR. WARD: I would offer to voir dire their witness on  
4 this topic.

5 THE COURT: I think you're entitled to examine this  
6 witness as you have been doing, Mr. Baker, but I don't think  
7 he can speculate about some figures being inverted or anything  
8 like that. So --

9 MR. BAKER: Yeah. And actually, Your Honor --

10 THE COURT: -- to that extent --

11 MR. BAKER: -- I was going to -- I thought that his  
12 objection was going to be that. And I wasn't -- I was going  
13 to withdraw that testimony, because if he is speculating that  
14 they're inverted or there should be a one --

15 THE COURT: Right.

16 MR. BAKER: -- then that's not appropriate.

17 THE COURT: To that extent, Mr. Ward's objection is  
18 granted. Otherwise it's denied.

19 MR. BAKER: Okay.

20 BY MR. BAKER:

21 Q I asked you the question --

22 MR. BAKER: Thank you, Your Honor.

23 BY MR. BAKER:

24 Q I asked you the question about what his life would  
25 be like with the spinal cord stimulator. And let me ask you

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1 A Yes.

2 Q Okay. Now in 2008 we were four years post-accident?

3 A Yes.

4 Q And he had how many surgeries at that point?

5 A I think it was two surgeries on his left knees.

6 Q And how many doctors had he seen?

7 A I'd have to total them up, but approximately eight  
8 to ten.

9 Q Okay. And how many MRIs and arthrograms had he had?

10 A Several.

11 Q And how many times had he been to physical therapy?

12 A I don't know.

13 Q And that's your -- that's what you call conservative  
14 treatment?

15 A To the point where I was involved, yes, that -- I  
16 would consider that conservative treatment.

17 Q What do you call "non-conservative treatment"?

18 A Where we're implanting things in patients, like the  
19 spinal cord stimulator, things like that --

20 Q Oh.

21 A -- where we're talking about a major surgery on the  
22 spine.

23 Q Okay. Now, you never talked to Dr. Foranti, did  
24 you?

25 A I have talked to Dr. Foranti --

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1 Q About this case?

2 A -- but not in this particular circumstance.

3 Q Okay. So you haven't talked to Dr. Foranti about  
4 this case?

5 A No.

6 Q You haven't seen Dr. Foranti's notes about this  
7 case?

8 A Handwritten notes?

9 Q Notes?

10 A You're going to have to be a little more specific,  
11 because I've seen records from Dr. Foranti regarding the  
12 handwritten notes. I don't think those were made available to  
13 me.

14 Q You've seen a report, have you not?

15 A Yes.

16 Q You've seen more than that?

17 A I've seen what?

18 Q More than that --

19 A I think --

20 Q -- from Dr. Foranti?

21 A I think I've seen documentation, typed  
22 documentation. I'm not sure exactly what you're referring  
23 to.

24 MR. WARD: May I approach the witness, Your Honor?

25 THE COURT: Yes.

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1 Q Well, you did offer comments when you were on the  
2 stand just a few minutes ago.

3 A Not prior to this testimony today.

4 Q Okay. But you did offer comments about the life  
5 care plan from the witness stand today, correct?

6 A Specifically related to medications only.

7 Q And Thursday, you offered comments about the cost of  
8 a stimulator?

9 A Yes.

10 Q And you said \$22,000 a battery every four years..

11 A And that's wholesale costs to the surgery center.  
12 I'm not even including the markup that the surgery center or  
13 the hospital would charge to that. I didn't think that was  
14 necessary or helpful.

15 Q Okay. And the life care planner said \$4,000 a  
16 battery, correct?

17 A I am not sure exactly what she said. Again, I  
18 thought her life care plan was probably one of the worst life  
19 care plans I've ever seen. So, you know, it's one of those  
20 things where looking at the numbers that she quoted, I'm not  
21 sure who she actually spoke to, but I'm sure you had the  
22 opportunity to depose her and ask her these questions and I'm  
23 not sure exactly who she talked to or what her answer to that  
24 question was. But my answers sort of supersede hers. She's a  
25 nurse, I'm a doctor.

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1 BY MR. WARD:

2 Q What information do you have now to make a diagnosis  
3 that Dr. Foranti did not have at the time he wrote his report?

4 A I have the knowledge of the totality of the medical  
5 records. Dr. Foranti was dealing with his one piece of  
6 information and had not completed his thought yet. He wanted  
7 and requested additional diagnostic testing to be done which  
8 was ultimately performed by Dr. Miller. So he had not yet  
9 formulated all of his thoughts and if given an opportunity to  
10 review this, I am confident that Dr. Foranti would come to the  
11 same conclusions that I have.

12 MR. WARD: Move to strike as non-responsive.

13 THE COURT: Overruled.

14 BY MR. WARD:

15 Q How is it you know what Dr. Foranti would do? Have  
16 you talked to him?

17 A I have talked to him. Not in --

18 Q About this case?

19 A -- this case, no.

20 Q Then how is it you would know what he would do in  
21 this case?

22 A Because I'm a board certified anesthesiologist  
23 specializing in pain management just like Dr. Foranti and the  
24 information that he felt was valuable in the reference to the  
25 further diagnostic testing that he requested was ultimately

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1 done which helps me come to the diagnosis of complex regional  
2 pain syndrome in Mr. Rodriguez's case. So again Dr. Foranti  
3 did not have the opportunity to finish his thoughts because he  
4 -- there was an incomplete diagnostic workup.

5 Q Well, he suggested that there was insufficient  
6 objective information, correct?

7 A Yes.

8 Q And so he asked for a number of things.

9 A Yes.

10 Q One of those things that he asked for was a bone  
11 scan?

12 A Yes.

13 Q So you did a bone scan or you had a bone scan done?

14 A That's correct.

15 Q It was negative?

16 MR. BAKER: Your Honor, this is all asked and answered.

17 THE WITNESS: Yes.

18 THE COURT: It has been. Sustained.

19 MR. WARD: I wanted to go to the other areas, Your Honor.  
20 It is -- these are areas that he raised on redirect.

21 THE COURT: We covered the bone scan in your previous  
22 examination of this witness.

23 MR. WARD: I'm going to -- I was doing that as prefatory  
24 to go to the rest of the things in that sentence.

25 THE COURT: Well, then let's get to it.

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# **EXHIBIT K**

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DISTRICT COURT  
CLARK COUNTY, NEVADA

*Alan D. Linn*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ,	)	
	)	
Plaintiff,	)	CASE NO. A-531538
	)	
v.	)	DEPT. X
	)	
FIESTA PALMS LLC,	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

THURSDAY, NOVEMBER 4, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF TERRANCE DINNEEN

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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EXHIBIT K

1 Q 192?

2 A The 192 is the taxable income.

3 Q Okay.

4 A Okay.

5 Q And this first one, the gross income was income?

6 A That's business income.

7 Q Business income? Okay. So let's deal with the  
8 business income. Is it your opinion to a reasonable degree of  
9 professional probability that his business income, in the year  
10 2004, was \$208,000?

11 A If that's what's reported on the return, yes.

12 Q That's not my question. My question is, is it your  
13 opinion that that's what his income is, to a reasonable degree  
14 of professional responsibility?

15 A Sure. That's what the business income is.

16 Q Okay. When you say that's what the business income  
17 is, you used, in your direct examination, you used the term  
18 reported income?

19 A Yes.

20 Q Isn't it true that you don't know if any of this  
21 income was reported?

22 A I do know that it was reported.

23 Q Have you received additional information since I  
24 took your deposition --

25 A Yes.

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1 Q -- that you haven't told me about?

2 A I just received this. It's a letter dated October  
3 20th from the tax preparer, indicating that the returns were  
4 filed.

5 MR. WARD: Okay. I'd like to make that part of the  
6 record.

7 THE COURT: Do we need a copy of that, Mr. Dinneen?

8 THE WITNESS: I don't think we need to, Your Honor. You  
9 know, counsel provided it to me, so presumably, he has another  
10 copy. I can replace that in my file, just for expediency.

11 THE COURT: Very well.

12 MR. WARD: I'm sorry. But I'm not going to mark it?

13 THE COURT: Not?

14 MR. WARD: Not. Now --

15 THE COURT: I guess he's not going to move to admit it  
16 after all.

17 MR. WARD: I'm not going to move.

18 MR. BAKER: Okay.

19 BY MR. WARD:

20 Q Now, when your deposition was taken -- by the way,  
21 when does that say they were found?

22 A It doesn't. It just says -- it's short. I can read  
23 it.

24 Q No. That's okay.

25 A Okay.

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1 Q I just want to know if it says when they were filed.

2 A No. It just says that we reprepared and filed  
3 Enrique's tax -- Enrique Rodriguez tax returns for '99, '01  
4 and '04.

5 Q Okay.

6 A But it doesn't say when those were filed.

7 Q Right. And you have a tax return that's dated 2004,  
8 do you not?

9 A I do.

10 Q I mean, for the year 2004?

11 A Yes.

12 Q And when is it signed?

13 A You know, clearly, November of '09. And I can't  
14 make out whether that's a five or an eight. And I think we  
15 discussed a little bit of that, that those handwritten numbers  
16 were hard to read.

17 Q Okay. So it's November '09. Correct? I mean, of  
18 2009?

19 A Yes. November of 2009.

20 Q And you have a tax return for 2001. Is that  
21 correct?

22 A I do.

23 Q And when was it -- what was the date on it?

24 A Well, there's -- let me look a little farther. I'm  
25 looking at the first two pages. The tax preparer signed it

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1           A     You know, I misspoke. I have some other documents  
2 that relate to income, that are backup for the tax returns. I  
3 do not have, you know, any other documents such as from the  
4 Social Security Administration or, you know, that show how  
5 that income was reported.

6           Q     And I'm assuming you haven't gotten any additional  
7 documents to back up the tax returns since I took your  
8 deposition a month ago. Correct?

9           A     No. Other than the ones that we've discussed in my  
10 file, that are closing statements on houses, that type of  
11 thing. No.

12          Q     Yeah. Let me just talk about dates and make sure  
13 this is clear. I took your deposition a month ago, and you  
14 had certain financial information.

15          A     That's correct.

16          Q     And you haven't received anything new since then.  
17 Correct?

18          A     Other than the letter from the tax preparer, you  
19 know. No.

20          Q     The letter from the tax preparer doesn't have any  
21 financial information in it, does it?

22          A     It does not.

23          Q     Okay. And you took a look at the information that  
24 was provided for in the tax return. Correct?

25          A     I did.

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# **EXHIBIT L**



DeVINNEY & DINNEEN CAREER and VOCATIONAL ECONOMIC SERVICES, LTD.

Terrance B. Dinneen, M.S., C.R.C., C.R.E.  
Lawrence J. Deneen, Ph.D., C.R.C.  
Carol A. Dinneen, M.S.

October 21, 2008

Re:            *Name*            :        *Enrique Rodriguez*  
                  *DOI*                :        *11/22/2004*  
                  *DOB*                :        *07/15/1963*

**MEDICAL RECORD ANALYSIS/LIFE CARE PLAN**  
**For**  
**(HENRY) ENRIQUE RODRIGUEZ**

**INTRODUCTION**

This file was referred to DeVinney & Dinneen on September 17, 2008. Referral was to assist in identifying and projecting current and future medical care needs relative to Mr. Rodriguez's injury and resultant disabilities. This document also serves to assist in determining the extent to which Mr. Rodriguez has incurred handicapping conditions secondary to his accident on November 22, 2004, in which he suffered injuries to his left knee, lumbar spine, neck, obesity related to knee injury per Dr. Shah, subsequent sleep apnea, and left knee with diagnosis of complex regional pain syndrome (CRPS). I met with him in his home on October 6, 2008. We have also reviewed the following records:

1. MRI billing and reporting from Open MRI of Inland Valley
2. Report from Mary Ann Shannon, MD 2005
3. Records Las Vegas Neurosurgery, Orthopedics & Rehab
4. El Rancho Physical Therapy reporting and billing
5. Center for Diseases and Surgery of the Spine
6. Records of John Thalgott, MD
7. Matt Smith Physical Therapy
8. Report Nevada Imaging Center 1/28/06
9. Reporting Pain Institute of Nevada, Dr. Walter Kidwell
10. Report Dr. Margaret Goodman March 8, 2007
11. Spring Valley Hospital Records 11/22/04
12. Records John G. Nork 12/6/04
13. Billing for Dr. J. Nork
14. Reporting The Wellness Group 6/20/2007 QME

**EXHIBIT**   L

15. Billing Integrated Healthcare -- Dr. Joseph Nicola
16. Strehlow Radiology Consulting 11-9-05
17. Vision Radiology Consulting
18. Louis Mortillaro, PhD billing and reporting
19. Billing Dr. G. Martinez
20. Wilshire Surgery Center billing and reporting Dr. Miller
21. Beverly Tower Wilshire Advanced Imaging
22. Mountain Diagnostics
23. Medical District Surgery Center
24. Lab Corp reporting
25. Quality Respiratory Solutions billing
26. Dr. Treyzon's reporting
27. Medical Associates Southern Nevada billing
28. Primary Care Consultants billing
29. Reports Russell Shah, MD Neurologist
30. Records Advanced Urgent Care, Dr. Koka, D.O.
31. North Valley Medical Supply billing records
32. Billing Dr. Robert Gutierrez
33. Billing Pacific American Medical Service
34. Cal Hand Surgery and Ortho -- Dr. Miller correspondence/billing/reports
35. Foot & Ankle Surgical Group -- Douglas Stacey DPM
36. Crovetti Orthopaedic Sports Medicine
37. Nevada ENT Center billing
38. Nevada Sleep Diagnostics billing and report
39. Dr. William Simpson reporting and billing
40. Billing IV League
41. Billing Homecare Advantage

In the development of this Life Care Plan we were also asked to calculate the Present Value of the Plan.

Present value is the amount of money necessary today to fund the items in the Life Care Plan that will occur in the future. In calculating present value we take into consideration how the cost of a good or service will increase in future years. These are referred to as growth rates. The growth rates for each item or service are indicated on the enclosed tables.

In calculating present value we also take into consideration interest that is earned from a financial institution. While a growth rate increases the cost of an item in future years, the discount rate subtracts a value to allow for interest that could be earned. The discount rates used in this case were 5, 10 and 30 year United States Treasuries. These discount rates were used because they reflect a very stable and safe investment vehicle.

There are items in the Life Care Plan that are occurring in the next 12 months. These are stated at their current cost. Also, there are other items where it is not known when they will occur. These items are also stated at their current costs.

The goal of this Life Care Plan is to provide the care that will maintain/increase Mr. Rodriguez's medical stability, quality of life and prevent potential complications (noted in Table O). The plan provides for all aspects of his care in order to promote and maintain independence and to prevent complications.

### **BRIEF HISTORY/CURRENT STATUS**

Mr. Rodriguez was in the Palms Casino watching a football game. At half time the staff threw out prizes, a woman came from behind him and hit him causing his knee to hyperextend and he fell. She hit him on the "medial" side with his knee extended in the standing position. The knee immediately was swollen and painful. He injured his head, back, neck, left knee and right hand at the time of the fall. Approximately 2 hours after the accident, he was taken to Spring Valley Hospital Emergency Room by ambulance and was seen by the ER physician who prescribed immobilizer, crutches, lortab and Motrin and he was to follow up with an orthopedist.

On December 6, 2004 he returned and was seen by Dr. John G. Nork in Las Vegas, NV. At the time of the first visit, Dr. Nork felt it may be a contusion and recommended therapy, Darvocet N-100, Parafon Forte and return in 4 weeks.

The MRI was performed on January 28, 2005. The MRI demonstrated no evidence of acute internal derangement. After seeing a chiropractor and undergoing therapy, he experienced persistent pain and was referred to Dr. William Simpson, MD in Wildomar, California. The evaluation was performed on February 1, 2005 with a follow up examination on February 15, 2005. He recommended continuation of conservative treatment and an additional MRI performed on a high field MRI scanner if his symptoms persisted. On the 15<sup>th</sup>, the doctor recommended Mr. Rodriguez undergo arthroscopic surgery. Dr. Simpson did relate all symptoms to the accident of November 22, 2004.

On March 28, 2005, Mr. Rodriguez was seen at Las Vegas Neurosurgery, Orthopaedics & Rehabilitation by Dr. Mary Ann Shannon. He complained of a pain level of 7-9 on a scale of 10. He also complained of multiple symptoms including low energy level, depression, anger, sexual dysfunction, inability to concentrate, impatience, bad attitude, stress, sleep problems, worry, being unsocial, loss of self esteem and other relationship difficulties and mood changes. He denied strange thoughts, panic attacks, suicidal thoughts, alcohol abuse and phobias. Dr. Shannon noted an increased "Q" angle with mild/trace patellar crepitation. There was marked lateral and medial joint line pain with 1+ synovitis. The new MRI revealed a lateral meniscus tear, anterior cruciate ligament strain and injury to the patellofemoral joint with lateral patellar compression syndrome. Her recommendations included meniscal repair, patellar chondroplasty, lateral retinaculum release and debridement. She also provided a cost estimate of these procedures. The total was \$19,600 but did not take into account post operative medications. It did take into account post operative therapy, surgical center fees and her physician fees.

Mr. Rodriguez was unable to get authorization for the surgery in April and finally, on August 31, 2005 and September 1, 2005 he underwent a Presurgical Psychological Evaluation from Dr. Louis F. Mortillaro, PhD. His diagnoses included:

Axis I: (307.89) Pain Disorder due to his Medical Condition with Psychological Factors;  
(293.83) Mood Disorder due to his Medical Condition with Mixed Features of  
Anxiety and Depression;  
AxisII:( 799.9) Diagnosis deferred  
Axis III: Unable to return to work, insufficient and inadequate finances  
AxisV: Current GAF (50)  
Highest GAF Past Year (60) (GAF – Global Assessment of Functioning)  
(See attached GAF scale)

All of the AXIS I diagnoses were deemed to have arisen out of the injury of November 22, 2004. Dr. Mortillaro recommended the following:

1. "Mr. Rodriguez is an appropriate candidate for participating in individual pain and stress management counseling. It is opined that he will need 20-30 sessions of such services at an average cost of \$175/session.
2. He is appropriate candidate for receipt of biofeedback therapy at an average cost of \$135/session.
3. He will need a psychotropic medication evaluation to assess the necessity for a number of different types of medications that will treat his mood disorder and help him better manage his pain and suffering."

He attended therapy at Rancho Physical Therapy following the surgery on October 14, 2005. He was seen on November 8, 2005 by Dr. Joseph R. Nicola, D.C. for lumbar, thoracic and cervical pain following the accident. He stated he had the pain since the accident but the knee pain was so overwhelming that he did not pursue care for the spinal pain. He has noted increased cervical and lumbar spine pain. He continued on crutches which was exacerbating the pain from the original accident. He rated the pain at 7/10. Dr. Nicola stated "The prognosis, at this time, for a full recovery is guarded due to the extent of Mr. Rodriguez's injuries." Chiropractic care was recommended including physical medicine modalities, CMT, neuromuscular reeducation, therapeutic exercises and myofascial release technique.

He continued with Ranch Physical Therapy into 2006 for his knee but little improvement was made. He also started therapy with Matt Smith Physical Therapy in Las Vegas on February 22, 2006 for his low back, facet pain and neck pain. The initial evaluation notes that "this patient is disabled". Mr. Rodriguez was moderately limited in the lumbar spine with forward flexion at 65%, extension at 0%, side bending left 20%, and right 15% or normal. Rehabilitation Potential was regarded as "Good."

Mr. Rodriguez underwent a sleep apnea evaluation on February 2, 2006. The study was positive and he was placed on CPAP and began treatment for his sleep apnea.

During 2005 and 2006, Mr. Rodriguez underwent psychological counseling and treatment with Dr. Louis Mortillaro. On January 11, 2006, at his 9<sup>th</sup> visit, he rated his pain as 7/10, depression 7/10, frustration 7/10 and speaking about the accident caused him increased stress. He continued on a weekly basis in January, February and into June. In June he rated his pain as 7-8/10, depression 7/10, anxiety 4-5/10 and frustration 6/10. Dr. Mortillaro noted that he was making expected progress and was

compliant with treatment process. Dr. Mortillaro noted on his July 27, 2006 visit, that Mr. Rodriguez had been diagnosed with complex regional pain syndrome in the left leg/foot. In early November of 2006 he expressed concern regarding his health and failure of the conservative treatment. He continued to see him and the November 28, 2006 visit indicates that the patient was preparing for a discogram in California. He was very concerned with how painful the procedure would be. This was discussed at his appointment.

Medications on March 2006 included:

Prozac  
Buspar  
Vicoden  
Elavil  
Vicoprofen  
Zoloft  
Valium  
Levenox  
Advair  
Singulair  
Albuterol

These were listed in his pre surgical questionnaire. Dr. John Thalgot evaluated Mr. Rodriguez on March 7, 2006. He confirmed abnormal nerve studies over the upper extremities suggesting "bilateral C5-6 radiculopathies as evidenced by abnormalities seen on segmental dermatomal evoked potential studies. Abnormal median sensory studies consistent with possible right median and ulnar nerve involvement at the wrist, possibly consistent with entrapment." Dr. Thalgot recommended an EMG at a later date of symptoms persisted.

On March 20, 2006 he was seen by Dr. Walter Kidwell and referred by Dr. John Thalgot. Dr. Kidwell evaluated him and reviewed the studies. His impression was as follows:

1. Internal derangement, left knee, status post surgery by Dr. Shannon.
2. Neck pain, right upper extremity radicular symptoms, and preexisting degenerative spondylosis with stenosis. Suspect traumatically-induced discogenic pain/interval disc disruption with secondary spasm and myofascial pain syndrome.
3. Low back pain with left lower extremity radicular symptoms, history of multilevel degenerative spondylosis. Suspect traumatically-induced internal disc disruption/discogenic pain.
4. The patient's symptoms have persisted for well over a year despite conservative therapy. He denies a history of preexisting pain problems, and therefore, to a reasonable degree of medical certainty it appears the patient's presenting complaints are a result of the trauma that the patient received on October [sic] 2004." (DOI: November 22, 2004).

He recommended spinal injection therapy. First recommendation was epidural injections of the neck and low back, two each once a week. Follow up was to be with Dr. Thalgot after injections were complete. He did state that "additional injections maybe appropriate dependent upon response." The injections were performed with only mild relief. He was returned to Dr. Kidwell by Dr. Thalgot on June 29, 2006 for Selective Nerve Root Blocks (SNRBs). His complaints were pain in the neck and some left upper extremity symptoms. He also complained of continued low back pain radiating to his left lower extremity down to the toes. Stage Selective Nerve Root Blocks were recommended first bilateral C7 plus bilateral L5 injections. It is noted that Mr. Rodriguez had seen Dr. Montillaro and methadone was recommended as the primary pain medication. Dr. Kidwell recommended that Mr. Rodriguez have a pain physician in his hometown of Riverside, California follow the medications.

Mr. Rodriguez again had surgery of the left knee recommended by Dr. Jacob Tauber, MD and he underwent a pre operative history and physical on April 21, 2006. He remained in the brace.

Mr. Rodriguez continued with Matt Smith Physical Therapy in Las Vegas, Nevada and was seen in follow up for his left knee, cervical and lumbar spine. His physicians were listed as Dr. Tauber and Dr. Thalgot.

Dr. Kidwell performed the SNRBs and noted no change in symptoms after C7, L4 or L5 blocks. Dr. Kidwell saw the patient back on August 7, 2006 at which time he noted that Mr. Rodriguez had not improved and was undergoing an EMG with Dr. Russell Shah. Dr. Shah was initially seeing him to rule out complex regional pain syndrome and would be doing the EMG.

He was seen by Dr. Russell J. Shah, MD a neurologist in Henderson, Nevada on August 9, 2006. Complaints included constant left knee pain, swelling and pain involving the left ankle area. The EMG/NCS was considered abnormal with mild to moderate right carpal tunnel, abnormal lower extremity study with mild right L5 motor denervating radiculopathy. Dr. Shah determined that "the patient's symptoms are progressive. He will need repeat testing in 9 months as progress is very likely."

Dr. Shah saw Mr. Rodriguez in follow up on August 18, 2006 at which time he indicated that Mr. Rodriguez required the following:

1. Second opinion left knee...;
2. Continue sleep apnea treatment with CPAP machine;
3. Consider gastric bypass consultation for extreme obesity secondary to left knee injury – he gained apparently 80 lbs. He is likely a candidate for surgery as his life expectancy is likely decreased. He tells me that his genes are good and family members live long in the lineage."
4. Spine surgery lumbar eventually after left knee as his right leg radicular complaints will progressively worsen as he is not getting his left knee problem solved;

5. Wrist splints for now for carpal tunnel syndrome with every 12 month f/u EDX-EMG/NCV to evaluate for progression. He will need CTSR surgery bilaterally as again he is still worsening.
6. Full medical evaluate per PTP – Dr. Koka for heart, cholesterol evaluation as his weight gain is going to predispose him to hypertension, high cholesterol, depression and diabetes. These are likely short, medium and long term derivative complications of prolonged disability and weight gain.”

On August 26, 2006, he was seen by Dr. Robert C. Gutierrez to evaluate his left wrist and right hand numbness of 2 years duration since his fall. The MRI noted “a small tear or perforation in volar 1/3 of SL ligament, synovitis ulnar, ECU tendenosis, nerve test: cervical radicular mild to moderate CTS.” Dr. Gutierrez recommended an injection for CTS which was performed.

On November 14, 2006 Mr. Rodriguez was evaluated at UCLA by Dr. Michael Ferrante at the UCLA Pain Management Center. An additional complaint of tinnitus is noted in the reporting. In the review of systems Dr. Ferrante noted fatigue, weight gain, eye problems, loss of balance, and other additional complaints over his entire body. Recommendations included possible CRPS of the left lower extremity (ankle and knee). He noted if pain continued he would recommend additional bone scans for definitive diagnosis. He also suggested that the patient undergo lumbar sympathetic blocks, trial of clonidine patches and Neurontin as well as bilateral foot and leg x-rays in order to contrast possible osteoporosis in the left lower extremity and foot in comparison to the right. He also stated “I believe the gentleman may have carpal tunnel syndrome and should be evaluated for splints as well as injections. Surgery may be warranted.” He indicates with regard to the tinnitus is “likely that this is due to the injuries sustained on 11/22/04. Audiometry with vestibular studies would be a preliminary step towards its management as well as determining its etiology.” He noted that he was on maintenance psychological therapy with Dr. Mortillaro. In regard to the spine, he notes “the patient denies any recent pre-accident history of neck or back pain. This would definitely favor a direct causation to the accident of November 2004. I understand that he has received a number of injections with little relief of symptoms. I would suggest that he be referred to the Spine Institute at UCLA for evaluations and recommendations.” Dr. Ferrante requested psychological clearance for a discogram as well.

Mr. Rodriguez continued with therapy and other modalities through 2006. He was seen by Dr. Lawrence R. Miller, MD on March 7, 2007 in Beverly Hills, California at the Wilshire Surgical Center. He was referred to Dr. Miller by Dr. Tauber. Mr. Rodriguez complained of left lower extremity pain. Pain was noted to be 9/10 on a constant basis. He also complained of lumbar spine pain at a level 9/10. He complained of neck pain bilaterally which increased with activity. He had left hand and wrist pain consistent with dorsal compartment of the first finger, increased with activity. He complained of right hand numbness and reported symptoms of depression, sleep disturbance and posttraumatic stress. His medications were listed as Elavil, morphine, Vicodin, baclofen, lyrica, buspar, valium, Prozac, albuterol, advair and singulair. His final diagnoses were:

1. Left lower extremity complex regional pain syndrome;
2. Chronic pain syndrome with depression, posttraumatic stress, weight gain and sleep disturbance;
3. Left knee internal derangement
  - a. Status post arthroscopy x2 with residuals;
4. Left de Quervain's tenosynovitis;
5. Left wrist internal derangement;
6. Upper extremity entrapment neuropathy
  - a. Rule out right carpal tunnel;
  - b. Rule out left cubital tunnel;
7. Cervical myofascial pain;
8. Cervical disc disease; and
9. Lumbar disc disease.

Dr. Miller provides rationale for his diagnosis indicating that Mr. Rodriguez meets 5- of the 6 criteria. Definitive diagnosis only requires 4 of 6 of these. This physician recommended physical therapy and lumbar sympathetic blocks with ongoing pain psychology treatment and support with cognitive behavior therapy as indicated. Surgery was not an option at this juncture per the doctor due to the CRPS. His plan indicated:

1. Authorization for lumbar sympathetic blocks (LSBs);
2. Authorization for further physiotherapy to be provided in association with the LSBs;
3. Manual desensitization;
4. MS Contin 30 mg by mouth three times/day renewed;
5. Added Topamax 25 mg at bedtime and increase to a target of 100-150mg. He noted as Topamax is increased the Lyrica and Elavil should be weaned;
6. Quinine sulfate added for nocturnal spasm;
7. Analgesics, adjuvants, including baclofen, Vicodin, Buspar and Prozac renewed.

This doctor noted "In summary, this patient has had a tragic injury with diffuse areas of orthopedic injury. He has developed a chronic pain syndrome with severe depression, sleep disturbance, weight gain. Pain syndrome has been complicated by severe left lower extremity CRPS. Sympathetic ganglion blocks will be performed, but if he does not respond to treatment as outlined above, patient will be considered a candidate for spinal cord stimulator."

Dr. Robert Gutierrez injected the thumb and it was successful. He did not recommend follow up on May 23, 2007 for the thumb unless symptoms returned.

Dr. Miller performed a left lumbar sympathetic ganglion block on April 18, 2007. He was also treated for a recurrent ingrown toenail of the left big toe on June 12, 2007. Dr. Russell Shah saw him on September 4, 2007 and concluded that Mr. Rodriguez suffered from right lumbar radiculopathy, right carpal tunnel regional abnormality, left knee pain, mild clonic movements, intermittent Valium, MRI results unremarkable for pathology of migraine or trauma, most likely for headaches, significant pain and stress induced restless leg syndrome, follow up in 4 months, continue with wrist splints, continue CPAP for sleep apnea, follow up with Dr. Miller, follow up with Dr. Schifini for spinal cord

stimulator for left lower extremity pain, rule out orthopedic pathology as cause for knee pain prior to stimulator placement.

The final reporting is from Dr. Michael Crovetti who evaluated Mr. Rodriguez on May 12, 2008. He was referred by Dr. Schifini for evaluation. Dr. Crovetti opined that Mr. Rodriguez was a candidate for a spinal cord stimulator. He noted that the pain complaints in the knee do not correlate with his history. He did not recommend any further knee surgeries at that time.

There are no further records at this time. Receipt of additional records and/or information could require a revision of the Life Care Plan. This plan is currently based on the above records and the October 6, 2008 Interview with Mr. Rodriguez.

### **INTERVIEW HENRY RODRIGUEZ**

Mr. Rodriguez has severe knee pain – he indicated if he could “cry” all day he would. He also has neck and back pain. He has a ligament in his left hand which is injured from using the cane. He is unable to have surgery due to the CRPS in his left knee. His right hand is always abnormal and he has no grip – he has been diagnosed with carpal tunnel – again no surgery due to the CRPS. They also have diagnosed him as having cervical radiculopathy complicating the diagnosis of the right hand. The pain in the neck is an 8-9 and never goes away.

His lower back also has pain. He has no symptoms in the thoracic spine. The MRI showed changes and he has pain “most” of the time. He has difficulty getting out of bed but the adjustable bed was prescribed by one of his physicians and is in place in the home. He was unable to remember which doctor ordered to bed due to the number of physicians involved in his care. He has swelling in the left ankle. He had to have surgery on his left toenail for ingrown toenail. This has been attributed to the CRPS. He is more susceptible to fungus on the left foot. He therefore requires care for these ingrown toenails every other year or more. He sees his Podiatrist, Dr. Stacey, for this service.

Mr. Rodriguez reports he is unable to help with the household activities to any degree whatsoever. He is very upset that he no longer can help his wife clean, do any type of yard work or assist with any chores including cleaning, cooking and/or maintenance around the home.

Mr. Rodriguez indicates he sees multiple physicians and provided their names, specialties and addresses as we went through his current treatment. He also provided a list of his medications and has promised to send, via email, a list showing their current cost. He will provide costs on the CPAP and CPAP supplies as well. He uses this for his sleep apnea which has developed in relation to the weight gain which accompanied the knee injury and development of CRPS. Dr. Shah and Dr. Koka have related this directly to the injury. His weight gain was excessive, almost 80-90 lbs in a relatively short period of time.

He and his wife both indicated that he has been prescribed physical therapy and is attending therapy for his shoulder, knee and spine. It is helping. He does pool, exercise, electrical stimulation and cold packs for therapy. He was prescribed therapy for the shoulder by Dr. Shah and is undergoing ongoing therapy per Dr. Thalgott initially. His current facility is Kelly Hopkins Physical Therapy. He had utilized both Matt Smith and Rancho Physical Therapy but is no longer using these facilities. He did indicate that he is receiving the same therapies.

Mr. Rodriguez indicated that Dr. Koka, Dr. Shah and Dr. Thalgott have all recommended he be seen by a nutritionist. He has not been able to do this as of yet. He does have a significant weight gain he must address.

Mr. Rodriguez is having blood drawn annually for general health panel, liver studies and does a urinalysis to monitor the medication in his system. At least, he assumes this is why he is undergoing these tests to follow up on all the medications he has had to take. His wife confirmed this.

I toured his home. He does have grab bars in the bathroom. This home, however, is temporary and he will require similar equipment when he relocates. His home is actually in Riverside, California but all of his doctors are now in Las Vegas so he has found a temporary residence. His wife indicated that she actually washes his hair and helps him with his showers. She is concerned as the doctors have recommended a shower chair but they do not have one at this time. Dr. Koka had recommended this as well as Dr. Thalgott. He is in the process of getting the prescription written again – this is a safety issue and I spoke with him in length about safety issues and falling in the bathroom. He agreed that he was unsteady and will follow up with his doctors. They do have an adjustable bed in the bedroom so he can change position safely and with less pain. He indicated that doctors have told him that if the CRPS remains as it is at this time, he will have definite mobility issues as he ages and may require a scooter. Thus far, he is able to ambulate with a cane, crutches and/or the walker.

He uses bilateral wrist braces for the upper extremity problems described above. He states that he wears his knee brace except when he is in the home. Mrs. Rodriguez must do all of the household duties and also, notes that she assists him with all activities of daily living. She estimates her time at 4.5 hours/day. It is possible she may have to work to bring in income in which case, he would require this additional assistance at home.

Dr. Shah has indicated that Mr. Rodriguez may require a total knee replacement. However, currently with the CRPS, no surgery can be performed. A spinal stimulator has also been recommended and the trial completed. He is waiting to have this finished as it did lessen the pain. Dr. Koka, Dr. Shah and Dr. Thalgott have all recommended weight loss and gastric bypass. They attribute the weight gain to the knee injury and subsequent CRPS. Mr. Rodriguez indicated he gets blocks for the pain and he has been told he will need additional ones in the future. He also has been told he will need additional epidural injections for the cervical spine.

Mr. Rodriguez states he cries "a lot" and feels "useless". He feels like Mrs. Rodriguez is his hands and feet and that she has been over burdened. She does all of the work around the home. He indicates his memory is scattered and she had to take over finances as well. He is very upset that he is unable to contribute to his household. He would like to get going with the additional recommended treatment – spinal stimulator – and hopefully this will help him to be able to do more in his life. He is on multiple medications for his depression and he feels these do help him.

### **PAST MEDICAL HISTORY**

ER admission records indicate a past history of asthma and an appendectomy.

### **DIAGNOSES – ATTRIBUTED TO ACCIDENT November 22, 2004**

Based on the above reporting and doctors' opinions they have included the following diagnoses and related them to the accident of November 22, 2004.

1. Left knee meniscal tear with subsequent instability and development of Complex Regional Pain Syndrome.
2. Lumbar and cervical spine strain/sprain with development of myofascial pain syndrome;
3. Chronic pain syndrome with depression, post traumatic stress, weight gain and sleep disturbance with diagnosis of sleep apnea and morbid obesity;
4. Tinnitus;
5. Left wrist internal derangement, upper extremity entrapment neuropathy, rule out right carpal tunnel syndrome, left cubital tunnel syndrome and de Quervain's tenosynovitis;
6. Cervical myofascial pain.
7. Development of pain in the shoulder from overuse of cane on the right side. Now being treated by Dr. Shah.

### **FUNCTIONAL CAPABILITIES**

Mr. Rodriguez describes his abilities as follows. These abilities are also supported by reporting from Dr. Miller, Dr. Montillaro, Dr. Ferrante, Dr. Kidwell, Dr. Shah, Dr. Koka and Dr. Gutierrez as well as additional physicians whose records are reviewed above.

#### **Eating, Grooming, Bathing, Dressing**

Mr. Rodriguez is able to perform grooming activities of daily living and is assisted by his wife with dressing and showering. She also assists him with cooking meals, laundry and household cleaning – he is unable to do any of these activities without significant help.

#### **Bowel and Bladder Management**

Mr. Rodriguez suffers from constipation which the doctors have attributed to the amount of medication he is taking. He has difficulty urinating as well. The doctors are unsure

what is causing this and have recommended he see an Urologist. He has followed up with Dr. Koka for this who is considering referral.

### **Walking/Standing/Sitting/Muscles and Bones**

He can walk for 5-10 minutes and sit for a short period of time. He can drive to his therapy and makes a stop if he needs to get up or change positions. He can drive 30-45 minutes then must stop. He lifts under 10 lbs. He has constant pain in the knee with all of these activities.

### **Skin and Soft Tissue**

Mr. Rodriguez has swelling, heat and loss of hair on the left ankle. This is due to the CRPS. He does have some skin breakdown where he wears the brace but he now takes it off and on when he is at home and this has improved.

### **Upper Extremity Use**

As noted above, Mr. Rodriguez has cubital tunnel syndrome in his left upper extremity. He has also developed shoulder problems on the right related to the use of the cane and he is receiving therapy at this time. His right hand is numb with tingling which is attributed to both carpal tunnel syndrome and cervical radiculopathy. He has been prescribed and wears bilateral braces on his wrists.

### **Lower Extremity Use**

Mr. Rodriguez uses a cane and a brace on the left injured knee. He is able to ambulate around the home without these. His home has no carpeting and smooth floors.

### **Visual Deficits**

None reported.

### **Cognitive Deficits**

He states he has a loss of memory and believes it is due to pain and depression. He did hit at the time of injury his head but has not been diagnosed with a head injury.

### **Body Weight**

Mr. Rodriguez has been diagnosed with morbid obesity which led to his sleep apnea. He gained over 90 lbs since the accident. Prior to the accident he went to the gym and was extremely active. Pictures provided showed him to be in excellent shape. He is unable to perform any type of outdoor or athletic activity due to CRPS, bilateral wrist, right shoulder, lumbar and cervical spine injuries.

## **Fine Motor Skills**

He has numbness and tingling and no grip or fine motor ability in his right hand.

## **Psychological Functioning**

Mr. Rodriguez is very tearful when discussing the accident. He states he can sleep up to 12-18 hour. He naps during the day and also worries because he is unable to do anything. He has been diagnosed with severe depression. He naps up to 3 hours during the day even if he sleeps 12 hours or more during the night.

## **LIFE EXPECTANCY**

Mr. Rodriguez was injured on November 22, 2004 at the time of injury he was 41.36 years of age. His life expectancy was 78.04 years at the time of injury. At the time of this report October 21, 2008 he is 45.27 years of age with a remaining life expectancy of 32.77 years.

## **LIFE CARE PLAN TABLES**

The following are the narrative explanations for Tables A through O. Each table addresses a specific category of current and/or future need. If complications develop and/or as accelerated aging alters Mr. Rodriguez's medical condition and functional status and/or new information is provided this may result in the need for revision of this plan. Costs provided on the tables reflect current pricing obtained through interviews with suppliers, facilities, pharmacies and other health care providers, either telephonically, in person or via the internet. This life care plan does not include any incident-related costs incurred by Mr. Rodriguez prior to the completion of this report. The final figures may change if the treatment plan changes as a reflection of a change in his current condition. This document is not a certified or bonded estimate. It is intended only to provide a gross estimate of the cost for projected services for the educational benefits of all interested parties. A revision will be required when additional medical records are received.

### **A. Projected Evaluations**

Mr. Rodriguez will require ongoing evaluations by Dr. Gutierrez, **Orthopedist**, for thumb injections and to follow upper extremity problems. This is estimated as 4x/year at this time. He has seen him more frequently in the past. He should have an In-home **Physical Therapy Evaluation** now and an additional 3 times in the future to assess what adaptive equipment will improve his independence including any items which would assist him in performing activities of daily living. He indicates he has been referred to a **Surgeon**, Dr. Vader, to place the spinal stimulator. Dr. Vader will need to see him a total of approximately 6 times before and after the surgery. He will then be followed by Dr. Thalgot, Dr. Shah and Dr. Koka. Finally, he experiences ingrown toenails on an infrequent basis and he must see Dr. Stacey, his **Podiatrist**, approximately every other year.

The doctor indicated that this will be an ongoing problem related to the fungus developed due to CRPS.

**B. Routine Medical Care**

Mr. Rodriguez requires the care of a **Spinal Orthopedist**, Dr. Elkanich, to follow his cervical and lumbar spine. He sees him 2x/year and will continue to do so. He will also continue to see Dr. Thalgott, **Pain Management** physician, who follows his spine and neck, does the epidurals and will follow him for the spinal stimulator. He sees him 6x/year. He requires the care of his **Internal Medicine** physician, Dr. Koka, who monitors and prescribes all of the medications in concert with the other consultants. This doctor monitors his general health, liver etc. in relation to these medications. He sees him 12x/year. Dr. Koka also follows the weight gain. He will require additional care on an ongoing basis with Dr. Gutierrez as indicated in Table A. He requires the care of Dr. Russell Shah, **Neurologist**, whom he sees 6x/year to follow the upper extremity problems. He is seen by his **ENT**, Dr. Kim, for the sleep apnea. Finally, he will continue to see a **Pain Psychologist**, Dr. Mortillaro, for maintenance therapy related to his CRPS and chronic pain and depression.

**C. Projected Therapeutic Modalities**

Dr. Shah has recently added a prescription for **Physical Therapy**. He requires aquatic exercises as well as electrical stimulation and heat/cold packs from Kelly Hopkins Physical Therapy. They are treating the right shoulder, cervical spine, lumbar spine and his knee. He should also be evaluated and followed by a **Nutritionist**. He indicates that several doctors have recommended this including Dr. Shah and Dr. Koka.

**D. Diagnostic Testing**

Mr. Rodriguez indicated during the conversation that different doctors have continued to recommend additional diagnostic studies. Dr. Koka has recommended and performs annual **Liver Studies, HGB/HCT and Urinalysis** to assist in monitoring his kidney and liver function due to the amount of medication he is taking and due to his obesity. Mr. Rodriguez has a reduced ability to fight disease and should receive a **Flu Shot** on an annual basis. This is included to age 65 as it would be required at that time by general health standards. He will require additional **MRI/CT of the lumbar spine, cervical spine and left knee**. The timing of these has been almost every other year to each year and the doctors have not indicated this will change.

**E. Aids for Independent Function**

Mr. Rodriguez requires the following equipment which has been prescribed by Drs. Koka, Thalgott, Gutierrez, Miller, and Shah as well as additional doctors in the records. The following is either in the home or has been prescribed:

1. **Grab Bars;**
2. **Additional Aids for Independent Function per the PT Eval In the home;**
3. **Cane;**
4. **CPAP with humidifier;**
5. **Filter for CPAP;**
6. **CPAP Supplies including mask, tubing, nose clamp and sterile water;**
7. **Heavy duty walker;**
8. **Cervical collar;**
9. **Bilateral hand braces and trigger thumb brace;**
10. **Regular crutches;**
11. **Deluxe Shower Bench with Back; and**
12. **Hand Held Shower.**

He will require a heavy duty shower bench, cane and walker due to his weight. These items are for safety and independence and are discussed above.

#### **F. Wheelchairs, Accessories and Maintenance**

Mr. Rodriguez does not use a wheelchair. He will require a **Mobility Scooter** when he reaches approximately age 60-65 as his knees, spine and hands will not be able to continue to support him safely. This could occur sooner if his weight is not addressed. This would also include **maintenance, tires, battery and battery charger.**

#### **G. Prosthetics and Orthotics**

Mr. Rodriguez has been prescribed **bilateral wrist braces** by Dr. Shah, a **trigger thumb brace** by Dr. Shah and the **knee brace** by various doctors but most recently by Dr. Shah who is treating his CRPS.

#### **H. Home Furnishings and Accessories**

Dr. Thalgott has prescribed an **Double Adjustable Bed** for Mr. Rodriguez so he can change position and safely get up and out of bed independently.

#### **I. Drug Supplies and Needs**

Mr. Rodriguez provided me a list of his current medications. He indicated that he does not anticipate them changing in the future but this will also depend on the effectiveness of the spinal stimulator. He takes the following (related to the accident):

1. **Valium 10 mg as needed (approximately 80/yr)**
2. **Albuterol inhaler (pre accident)**
3. **Hydrocodone 7.5 mg/750mg 3x/day**
4. **Morphine 30 mg 3x/day**

5. Effexor XR 37.5mg 1x/day
6. Topamax 100 mg 2x/day
7. Lovastatin 20 mg 1x/day
8. Cyclobenzaprine 10 mg 1x/day
9. Doc-Q-Lace 100 mg 3x/day
10. Enulose Syrup 30 gm 2x/day
11. Singulair 10 mg 1x/day (pre accident)
12. Advair Disk 250/50 2x/day (pre accident)
13. Mupirocin 22gm 2% 2x/day
14. Viagra 100 mg as needed (estimate 90/year)

**J. Home Care**

Mr. Rodriguez will also require a Home Health Assistant for approximately 4.5 hours/day. Mrs. Rodriguez indicates she spends at least this amount of time and if she goes to work he will need assistance with bathing, dressing and other complex activities of daily living requiring balance and flexibility.

**K. Future Surgeries**

Mr. Rodriguez has been told he will require a **Spinal Stimulator** implanted by Dr. Vader. This was recommended by Dr. Thalgott and other physicians. He has undergone the trial and is awaiting permanent placement. He may require, after the CRPS is under control, a **Total Knee Replacement** for his left knee which has degenerative changes. Dr. Shah has recommended a **Gastric Bypass** which should help the obesity and sleep apnea. This is life threatening per Dr. Shah at this time. He has also received, and Dr. Elkanich has indicated will receive in the future, **cervical epidural injections**. Finally, he will require additional **lumbar sympatheic ganglion blocks** to get the CRPS under control. It is possible he will also require procedures for his shoulder and wrists, but at this juncture, these have not been recommended as necessary, only discussed by his different doctors.

**L. Recreational/Leisure Needs**

No specific recommendations have been made in this category.

**M. Architectural Modifications**

Mr. Rodriguez will require grab bars in any home he lives in but at this time there are no other specific architectural modifications he will require.

**N. Transportation**

Mr. Rodriguez will require **Mileage** to and from the appointments in this Life Care Plan. Using Map Quest, I have estimated this at approximately 500 miles each year at the IRS rate of \$.58/mile. This figure could change if he requires

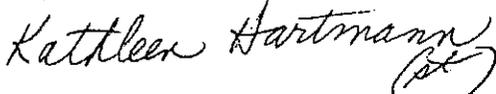
care outside of Las Vegas, Nevada or if the IRS rate changes. No other items are included on this table.

**O. Potential Complications**

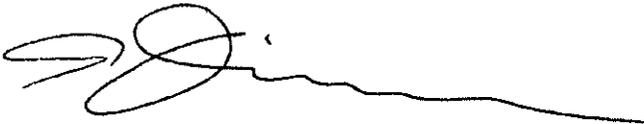
There are multiple complications to his many disabilities. This table is for information purposes only as there is no predictability to these conditions. The amount listed is a range provided by benchmarks and literature for the conditions listed. These complications could include **Risk for Falls, Depression with Risk for Suicide, Arthritic and Degenerative Changes accelerated by obesity and CRPS and Shoulder Degeneration with the need for Surgery.** These are listed or considered as medically possible not medically probable.

**(PLEASE SEE TABLES FOR COST ANALYSIS)**

Respectfully Submitted:



Kathleen R. Hartmann, RN, BSN, CCM



Terrance Dinneen, M.S., C.R.C.  
Certified Earnings Analyst #032  
Certified In Rehabilitation Economist #0022  
Certified Rehabilitation Counselor #20325

TD/st



**Life Care Plan Summary  
for  
Enrique Rodriguez**

**SUMMARY OF COSTS**

		<b><u>COSTS</u></b>	<b><u>PRESENT VALUE</u></b>
A. Projected Evaluations		\$ 73,043	\$ 61,690
B. Routine Medical Care	Low	\$ 259,765	\$ 215,005
	High	\$ 268,345	\$ 221,999
C. Projected Therapeutic Modalities		\$ 208,080	\$ 206,649
D. Diagnostic Testing		\$ 19,615	\$ 18,142
E. Medical Supplies/DME		\$ 35,539	\$ 32,185
F. Wheelchair Needs and Maintenance		\$ 8,244	\$ 5,057
G. Prosthetics~Orthotic and DME		\$ 25,420	\$ 18,779
H. Home Furnishings and Accessories		\$ 12,454	\$ 8,633
I. Drug and Supply Needs		\$ 340,448	\$ 252,314
J. Home Care		\$ 966,191	\$ 767,059
K. Future Medical Care & Surgeries	Low	\$ 442,340	\$ 442,340
	High	\$ 522,340	\$ 522,340
L. Leisure Time and Rec Equip		\$ -	\$ -
M. Architectural Renovation		\$ -	\$ -
N. Transportation		\$ 9,503	\$ 6,856
O. Potential Complications	Low	\$ 3,000	\$ 3,000
	High	\$ 325,000	\$ 325,000
<b>Total Including Complications</b>		<b>\$ 2,403,642</b>	<b>\$ 2,037,709</b>
		to	to
		<b>\$ 2,814,222</b>	<b>\$ 2,446,703</b>

**LIFE CARE PLAN  
TABLE A**

**Kathleen Hartmann, RN, BSN, CCM**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**A. PROJECTED EVALUATIONS**

Evaluation	Age/Year at Which Initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
Orthopedist Dr. Gutierrez	2008	2012	4x/yr Injections at the same	Cost for CPT 99203, 20605, 20526, J1030, J2001, A4550 \$1,296 Specialized Report 99080 \$80	22,016	21,886 <sup>3,11</sup>	For trigger thumb gets injections Per billing provided by Dr. Gutierrez and current schedule of visits
32.77 yrs*	2013	Lifetime	24 additional estimated		33,024	25,065 <sup>3,11</sup>	
Physical Therapy Evaluation	2008	Lifetime	4x/lifetime	Cost for CPT 97001 \$275/eval	1,100	930 <sup>3,11</sup>	To determine add'l adaptive equipment needs in living environment
32.77 yrs* Surgeon Dr. Vader	2008	Lifetime	6 additional with spinal stimulator placement	CPT 99245 \$600/visit for eval See Table K for surgical consults/bx	3,600	2,961 <sup>3,11</sup>	
32.77 yrs*							
Podiatrist for ingrown nails	2009	Lifetime	Every other year	CPT11730 - \$160 11750 - \$565 J3490 - \$ 7.50 99212 - \$50 \$782.50	13,303	10,849 <sup>3,11</sup>	Dr. Stacey - Ingrown toenails every other year visits - due to CRPS per Dr. Miller, Dr. Shah and Dr. Stacey
31.77 yrs*							
<b>TOTAL COST \$ 73,043</b>						<b>\$61,690</b>	

\* See narrative for Life Expectancy for explanation of this figure - 32.77 yrs.  
 \*\* Unit cost based on usual and customary in Las Vegas, NV and Riverside, CA - if billing available used that pricing if not called similar or same specialties and asked for pricing.

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.6%
- 2 MED CARE SERVICES 3.9%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.9%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%
- 8 COULD NOT BE STATED IN PRESENT VALUE 11 DISCOUNT RATES: 5 year = 3.71%;
- 9 CONSUMER PRICE INDEX (CORE) 2.4% 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE B**

*Kathleen Hartmann, RN, BSN, CCM*

CLIENT NAME: Enrique Rodriguez  
D.O.B : 07/15/1963  
D.O.I : 11/22/2004  
DATE PREPARED: 10/10/2008

**B. Routine Medical Care**

Evaluation	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
Dr. Elkanich Ortho Spine for neck 32.77 yrs*	2008	Lifetime	1-2x/yr - needs to go October until surgery neck which is unknown	99215 - \$260 Per visit does not include procedure \$260 - \$520/yr	8,580-17,160	6,994 - 13,988 <sup>3,11</sup>	Dr. Brian Lemper as needed for facet blocks or rhizotomies
Dr. Thalgot for Spine and neck 32.77 yrs*	2008	Lifetime	6x/year	99215 - \$260 Per visit does not include procedure \$260 - \$1,560/yr	51,220	41,796 <sup>3,11</sup>	Dr. Brian Lemper as needed for facet blocks or rhizotomies
Internal Med/GP Dr. Koka 32.77 yrs*	2008	Lifetime	1x/month (prior to accident 1x/yr visits)	CPT 99214 - \$239/visit \$2,629/yr	86,040	70,253 <sup>3,11</sup>	Followed by Dr. Koka for medication and for his obesity and general health needs
Orthopedist Dr. Gutierrez 32.77 yrs*	2008	Lifetime	See Table A	See Table A	See Table A	See Table A	Dr. Gutierrez see Table A
Neurologist Dr. Russell Shah 32.77 yrs*	2008	Lifetime	6x/year	CPT 99245 or 99214 with 99080 \$400/visit \$2,400/yr	78,800	64,302 <sup>3,11</sup>	Neurologist seeing him for his hands and other problems

Evaluation	Age/Year at which Initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
ENT for Sleep Apnea Dr. Kim Nevada ENT (702) 838-9710 32.77	2008	Lifetime	2x/year	CPT 99213 - \$185 /visit \$370 /yr	12,025	9,835 <sup>3,11</sup>	Sleep apnea diagnosed due to excessive weight gain with knee and spinal injuries per Dr. Shah and Thalgott
Pain Psychologist Dr. L. Mortillaro 32.77	2008 2013	2012 Lifetime	2x/month for maintenance 36 add'l estimate	CPT 99213 - \$175/visit \$ 4,200/yr	16,800 6,300	16,701 <sup>3,11</sup> 5,124 <sup>3,11</sup>	Per Dr. Mortillaro may require for lifetime but until pain under control it is necessary

TOTAL COST \$ 259,765-268,345 \$215,505-221,999

\* See narrative for life expectancy (Section VI). Life expectancy - 32.77 yrs.  
 \*\* Unit cost based on billing or usual and customary in Las Vegas, NV and Riverside, CA - If no billing available will require revision with receipt of actual billing.

- GROWTH RATES:
- 1 MED CARE COMMODITIES 2.8%
  - 2 MED CARE SERVICES 3.9%
  - 3 PROFESSIONAL SERVICES 3.3%
  - 4 HOSPITAL RELATED 6.9%
  - 5 TOTAL MEDICAL CPI 3.3%
  - 6 EMPLOYMENT COST INDEX 3.1%
  - 7 OCCURRING IN NEXT 12 MONTHS 3.3%
  - 8 COULD NOT BE STATED IN PRESENT VALUE 3.71%
  - 9 CONSUMER PRICE INDEX (CORE) 2.4%
  - 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%
  - 11 DISCOUNT RATES: 5 year = 3.71%, 10 year = 4.22%, 30 year = 4.77%

LIFE CARE PLAN  
TABLE C

CLIENT NAME: Enrique Rodriguez  
D.O.B : 07/15/1963  
D.O.I : 11/22/2004  
DATE PREPARED: 10/10/2008

Kathleen Hartmann, RN, BSN,CCM

C. PROJECTED THERAPEUTIC MODALITIES

Modality	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
Physical Therapy 32.77 yrs*	2008	2012	3x/week pool and manual therapy	\$210/pool \$45/exercise \$25/elec stim \$25/cold packs \$305/visit \$47,580/yr	190,320	189,194 <sup>3,11</sup>	Russell Shah, MD neurologist Rx for rt shoulder, neck, back, knee therapy at this time – also recommended by Dr. Thalgot.
Matt Smith PT now Kelly Hopkins	2013	Lifetime	Unknown -- estimate 48 addt'l visits		14,640	14,353 <sup>3,11</sup>	
Nutritionist until weight loss complete 32.77 yrs*	2008	2012	1x/month	CPT – 97803 \$65/visit	3,120	3,102 <sup>3,11</sup>	Dr. Shah has recommended bypass will require nutritional counseling before and after
<b>Total Cost \$ 208,080</b>					<b>\$ 206,649</b>		

\* See Life Expectancy in narrative – 32.77 yrs.  
\*\* Costs calculated from billing provided and when no billing available called MDs and/or same speciality practices in the Las Vegas, NV Geographic area.

GROWTH RATES:  
1 MED CARE COMMODITIES 2.8% 4 HOSPITAL RELATED 6.8% 7 OCCURRING IN NEXT 12 MONTHS 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%  
2 MED CARE SERVICES 3.8% 5 TOTAL MEDICAL CPI 3.3% 8 COULD NOT BE STATED IN PRESENT VALUE 11 DISCOUNT RATES: 5 year = 3.71%  
3 PROFESSIONAL SERVICES 3.3% 6 EMPLOYMENT COST INDEX 3.1% 9 CONSUMER PRICE INDEX (CORE) 2.4% 10 year = 4.22%; 30 year = 4.77%

LIFE CARE PLAN  
TABLE D

Kathleen Hartmann, RN, BSN, CCM

CLIENT NAME: Enrique Rodriguez  
D.O.B : 07/15/1963  
D.O.I : 11/22/2004  
DATE PREPARED: 10/10/2008

D. DIAGNOSTIC TESTING

Testing**	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
MRI/CT of lumbar spine			4 addt'l	CPT - \$1,800	7,200	6,578 <sup>2,11</sup>	To monitor degeneration of the spine and need for additional intervention as well as the knee
MRI/CT of cervical spine	2009	Lifetime	4 addt'l	CPT - \$1,800	7,200	6,578 <sup>2,11</sup>	
MRI/CT left knee 32.77 yrs*			2 addt'l with replacement	CPT 73721 - \$1,430	2,860	2,860 <sup>8,11</sup>	
Urinalysis 32.77 yrs*	2008	2028 to age 65	1x/year additional	CPT 81001 - \$32/test	672	630 <sup>2,11</sup>	For general health and monitor health
HGB/CBC 32.77 yrs*	2008	2028 to age 65	1 addt'l/year	CPTs 85025 - \$27.15 85016 - \$12.60 \$39.75/yr	835	783 <sup>2,11</sup>	For general health and monitor health
Liver Studies 32.77 yrs*	2008	2028 to age 65	1 addt'l/year	CPTs 80076 \$20.37/test	428	401 <sup>2,11</sup>	For general health and monitor health

Testing**	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
Flu Shot	2008	2028 to age 65	1 year	\$20/shot	420	312 <sup>1,11</sup>	For general health and monitor health
32.77 yrs*							

TOTAL COST \$ 19,615 \$ 18,142

\* See Life Expectancy Narrative -- 32.77 yrs

\*\* Cost from billings and from similar or same provider in the Las Vegas, NV, geographic area.

GROWTH RATES:

- 1 MED CARE COMMODITIES 2.6%
- 2 MED CARE SERVICES 3.6%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.8%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 CONSUMER PRICE INDEX (CORE) 2.4%
- 9 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

DISCOUNT RATES:

- 5 year = 3.71%
- 10 year = 4.22%
- 30 year = 4.77%

LIFE CARE PLAN  
TABLE E

Kathleen Hartmann, RN, BSN, CCM

CLIENT NAME: Enrique Rodriguez  
D.O.B : 07/15/1963  
D.O.I : 11/22/2004  
DATE PREPARED: 10/10/2008

E. DURABLE MEDICAL EQUIPMENT

Equipment	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Vendor
WingIt Grab Bars 30.77 yrs*	2010	Lifetime	3 add'l sets if moves	12" - \$46.99 18" - \$54.99 \$101.98	306	243 <sup>1,11</sup>	Heavy duty holds over 300 lbs <a href="http://www.sammonspreston.com">www.sammonspreston.com</a>
Additional aids for Independent Function 32.77 yrs*	2008	Lifetime	1 every 3 years Total of 11	\$250/yr	2,750	2,073 <sup>1,11</sup>	To be determined by PT evaluation (see Table A)
Cane 32.77 yrs*	2008	Lifetime	1 every 3 yrs (11)	\$21.00	231	174 <sup>1,11</sup>	<a href="http://www.spinlife.com">www.spinlife.com</a> Prescribed by Dr. Miller and Gutierrez
CPAP with humidifier Filter for CPAP 32.77 yrs*	2011 2008	2013 2013	1 every 5 yrs. (6) monthly	\$1757.80 \$9.00 or \$108/yr	1,758 540	1,600 <sup>1,11</sup> 529 <sup>1,11</sup>	To be determined by PT evaluation (see Table A)
CPAP Supplies mask and tubing Nose clamp sterile water 32.77 yrs*	2008 2014	2013 Lifetime	Monthly unknown	\$196.46 mask \$66.38 headgear \$47.44 pillows \$68.50 tubing \$378.78/month \$4,545.36/yr	22,727 unknown	22,245 <sup>1,11</sup> To be determined	Recommended by Dr. Koka and will need this until he loses weight and possibly after if sleep apnea remains after wt loss unknown Nevada Sleep Diagnostics and Quality Respiratory Solutions

Equipment	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Vendor
Heavy Duty Walker (375 lbs) 32.77 yrs*	2008	Lifetime	Every other year (1.7)	\$219	3,723	2,756 <sup>1,11</sup>	www.spinlife.com Prescribed by Dr. Shah and is used intermittently
Cervical collar 31.77 yrs*	2009	Lifetime	1 every 3 years (1.1 additional)	\$32.95/collar	363	273 <sup>1,11</sup>	North Valley Med Supply Uses a couple times of week for tiredness in neck replace every other year prescribed by Dr. Thalgott
Bilateral hand braces Trigger finger brace 32.77 yrs*	2008	Lifetime	Replace both annually	\$14.95 each \$29.90/pair	987	730 <sup>1,11</sup>	North Valley Med Supply Prescribed by Dr. Gutierrez still uses when he goes out or pain increases unable to have surgery at this time
Regular crutches 32.77 yrs*	2010	Lifetime	Every other year	\$40.70/pair	651	472 <sup>1,11</sup>	Prescribed originally by Nork, then Miller www.spinlife.com
Deluxe Shower Bench with Back (300 lbs) 32.77 yrs*	2010	Lifetime	Every 2 yrs	\$70.00/chair	1,120	811 <sup>1,11</sup>	Dr. Koka and others due to instability in left leg and risk of falls www.spinlife.com
Invacare Hand held shower 32.77 yrs*	2010	Lifetime	Every other year	\$24.00	384	278 <sup>1,11</sup>	Dr. Koka and others due to instability in left leg and risk of falls www.spinlife.com

**TOTAL COST \$ 35,539 \$ 32,185**

\* For life expectancy see narrative in Life Care Plan - 32.77 yrs.  
 \*\*Billing as noted in the vendor column. No actual billing received as of yet - will require revision upon receipt.

**GROWTH RATES:**

1 MED CARE COMMODITIES	2.8%	5 TOTAL MEDICAL CPI	3.3%	9 CONSUMER PRICE INDEX (CORE)	2.4%
2 MED CARE SERVICES	3.8%	6 EMPLOYMENT COST INDEX	3.1%	10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS)	3.3%
3 PROFESSIONAL SERVICES	3.3%	7 OCCURRING IN NEXT 12 MONTHS			
4 HOSPITAL RELATED	6.9%	8 COULD NOT BE STATED IN PRESENT VALUE			

**1.1 DISCOUNT RATES:**

6 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

LIFE CARE PLAN  
TABLE F

CLIENT NAME: Enrique Rodriguez  
D.O.B : 07/15/1963  
D.O.I : 11/22/2004  
DATE PREPARED: 10/10/2008

Kathleen Hartmann, RN, BSN, CCM

F. WHEELCHAIR NEEDS/ACCESSORIES AND MAINTENANCE

Equipment	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost*	Total Cost	Present Value	Vendor
Trailblazer 4 wheel scooter Maintenance			Every 6 yrs (2)	\$1,997	3,994	2,473 <sup>1,11</sup>	<a href="http://www.planetmobility.com">www.planetmobility.com</a>
2 - 12 Volt U1 32 AH Batteries	Age 65	Lifetime	Annual (13) Every 2 yrs (6)	\$120/each \$129.00/pair	1,560 774	1,029 <sup>6,11</sup> 428 <sup>9,11</sup>	<a href="http://www.planetmobility.com">www.planetmobility.com</a>
Battery Charger			1 every 3 yrs (4)	\$351.00	1,404	825 <sup>1,11</sup>	<a href="http://www.planetmobility.com">www.planetmobility.com</a>
Flat Free Tires			2 sets/3 yrs (8)	\$64/set	512	301 <sup>1,11</sup>	<a href="http://www.planetmobility.com">www.planetmobility.com</a>
12.77 yrs**							
<b>TOTAL</b>					<b>\$ 8,244</b>	<b>\$ 5,057</b>	

\* For life expectancy see narrative in Life Care Plan - 32.77 yrs.  
\*\* Pricing as noted in the vendor column.

GROWTH RATES:

- 1 MED CARE COMMODITIES 2.6%
- 2 MED CARE SERVICES 3.9%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.9%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 COULD NOT BE STATED IN PRESENT VALUE
- 9 CONSUMER PRICE INDEX (CORE) 2.4%
- 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

11 DISCOUNT RATES:

5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE G**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**Kathleen Hartmann, RN, BSN, CCM**

**G. PROSTHETICS AND ORTHOTICS**

Equipment	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost	Total Cost	Present Value	Recommended by
Eagle Knee brace 31.77 yrs*	2009	Lifetime	2 yrs total of 16	L-1858 \$1,495 A9901 \$93.75 \$1,588.75/brace	25,420	18,779 <sup>1,11</sup>	Dr. Gutierrez Pricing based on billing from provider
Bilateral Wrist Braces lace up 32.77 yrs*	2008	Lifetime	See Table E	See Table E	See Table E	See Table E	Dr. Gutierrez Pricing based on billing from provider

**TOTAL COST \$ 25,420 \$ 18,779**

\* For life expectancy see narrative in Life Care Plan - 32.77 yrs.

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.6%
- 2 MED CARE SERVICES 3.9%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.8%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 COULD NOT BE STATED IN PRESENT VALUE
- 9 CONSUMER PRICE INDEX (CORE) 2.4%
- 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

**11 DISCOUNT RATES:**

- 5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE H**

**Kathleen Hartmann, RN, BSN, CCM**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**H. HOME FURNISHINGS/ACCESSORIES**

Furnishing	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
Dr. Thalgott prescribed an Adjustable Bed 32.77 yrs*	2019	Lifetime	Every 15 yrs for total of 2 addt <sup>1</sup>	\$3,899 bed \$1,299 mattress \$429 Remote \$600 delivery/setup \$8,109.27/bed	11,254 1,200	7,735 <sup>1,11</sup> 898 <sup>6,11</sup>	Dr. Thalgott first bed purchased 10/1/06 has replacement in 10-12 years - Invoice from North Valley Medical Supply
<b>TOTAL COST \$ 12,454</b>					<b>\$ 8,633</b>		

\* For life expectancy see narrative in Life Care Plan - 32.77 yrs.  
 \*\*Telephoned North Valley Medical Supply and they provided estimate of replacement at 10-15 years.

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.6%
- 2 MED CARE SERVICES 3.9%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.9%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 CONSUMER PRICE INDEX (CORE) 2.4%
- 9 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

**11. DISCOUNT RATES:**

5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE I**

**Kathleen Hartmann, RN, BSN, CCM**

**CLIENT NAME: Enrique Rodriguez**  
**D.O.B : 07/15/1963**  
**D.O.I : 11/22/2004**  
**DATE PREPARED: 10/10/2008**

**I. DRUG & SUPPLY NEEDS**

Drug/Drug Supply**	Purpose	Cost/Unit** Cost/per year	Total Cost	Present Value	Vendor/Recommendation
Vallium 10mg As needed 32.77 yrs*	Anti anxiety	\$390.21/100 Rarely takes these (80/yr) \$312.17/yr	10,230	7,619 <sup>1,11</sup>	Using name brand generic is less expensive and not always as effective <b>Current prescription</b> <a href="http://www.costco.com">www.costco.com</a>
Albuterol Inhaler As needed 32.77 yrs*	Shortness of breath Pre acc	Pre accident medication	0	N/A	<b>Current prescription</b>
Hydrocodone 7.5 mg/750mg 3x/day 32.77 yrs*	Pain	\$41.99/90 #1095/yr \$511/yr	16,741	12,408 <sup>1,11</sup>	<b>Current prescription</b> Walgreen's billing
Morphine 30 mg 3x/day 32.77 yrs*	Pain	\$117.59/90 #1095/yr \$1,430.68	46,883	34,749 <sup>1,11</sup>	<b>Current prescription</b> <a href="http://www.drugstores.com">www.drugstores.com</a>
Effexor XR 37.5 mg 32.77 yrs*	Anxiety and depression	\$251.99/60 of 75 mg 1/2 ea day #183/yr \$769/yr	25,186	18,667 <sup>1,11</sup>	<b>Current prescription</b> <a href="http://www.costco.com">www.costco.com</a>

Drug/Drug Supply**	Purpose	Cost/Unit** Cost/per year	Total Cost	Present Value	Vendor/Recommendation
Topamax 100mg 2x/day 32.77 yrs*	headaches	\$403.99/60 #730/yr \$4,915/yr	161,071	119,381 <sup>1,11</sup>	Dr. Shah by Dr. Koka Current prescription <a href="http://www.costco.com">www.costco.com</a>
Lovastatin 20mg 1x/day 32.77 yrs*	High Cholesterol	\$29.99/30 #365/yr \$365/yr	11,957	8,862 <sup>1,11</sup>	Dr. Koka Current prescription <a href="http://www.costco.com">www.costco.com</a>
Cyclobenzaprine 10mg 1x/day 32.77 yrs*	Muscle Relaxant	\$16.99/30 #365/yr \$207/yr	6,774	5,021 <sup>1,11</sup>	Current prescription <a href="http://www.costco.com">www.costco.com</a>
Doc-Q-Lace 100mg 3x/day 32.77 yrs*	Constipation	\$469/30 3x365 #1095/yr \$171/yr	5,610	4,158 <sup>1,11</sup>	Current prescription <a href="http://www.drugstore.com">www.drugstore.com</a>
Enulose Syrup 30gm 2x/day 32.77 yrs*	Constipation	\$17.19/bottle 1/month \$206/yr	6,760	10,157 <sup>1,11</sup>	Current prescription <a href="http://www.netcarepharmacies.com">www.netcarepharmacies.com</a>
Singulair 10 mg 1x/day 32.77 yrs*	Shortness of breath	Pre-accident medication	0	N/A	Current prescription <a href="http://www.costco.com">www.costco.com</a>
Advair Disk 250/50 2x/day 32.77 yrs*	Shortness of breath	Pre-accident medication	0	N/A	Current prescription <a href="http://www.costco.com">www.costco.com</a>
Mupirocin 22gm 2% 2x/day 32.77 yrs*	Topical antibiotic cream	\$21.64/tube #1 tube/mo \$259.68/yr	8,510	6,307 <sup>1,11</sup>	Current prescription <a href="http://www.costco.com">www.costco.com</a>

Drug/Drug Supply**	Purpose	Cost/Unit** Cost/ per year	Total Cost	Present Value	Vendor/Recommendation
Viagra 100 mg prn 32.77 yrs*	Sexual dysfunction	\$413.53/30 #90/yr \$1,240.59	40,654	30,132 <sup>1,11</sup>	Refills used to Estimate usage Current prescription <a href="http://www.costco.com">www.costco.com</a>

**TOTAL COST \$ 340,488 \$ 252,314**

\* See Life expectancy in the narrative portion - 32.77 yrs  
 \*\* Drugs and dosages based on last reporting and information provided by last reporting - awaiting additional information and this will require a revision of this table at that time if pricing significantly different. Utilized Costco and other pricing as indicated. Mr. Rodriguez will be providing Walgreens pricing at a later date if possible.

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.6%
- 2 MED CARE SERVICES 3.8%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.8%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 COULD NOT BE STATED IN PRESENT VALUE
- 9 CONSUMER PRICE INDEX (CORE) 2.4%
- 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

**DISCOUNT RATES:**

- 5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE J**

**Kathleen Hartmann, RN, BSN, CCM**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**J. HOME CARE**

Home Care Services Recommended	Year at which initiated	Year at which suspended *	Frequency	Purpose	Cost per Year*	Total Cost	Present Value
Home Health Assistant	2008	Lifetime	4.5 hrs/day with hair/bathing	Assist with ADLs	\$18/hour \$29,484	966,191	767,059 <sup>6,11</sup>
<b>32.77 yrs*</b>						<b>TOTAL \$966,191</b>	<b>\$ 767,059</b>

\* See Life Expectancy in narrative - 32.77 yrs yrs.  
 \*\* Pricing per Coram and or Gentiva in the Las Vegas, NV area. Household services determined by Mr. Dinneen.

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.8%
- 2 MED CARE SERVICES 3.8%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.8%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 COULD NOT BE STATED IN PRESENT VALUE
- 9 CONSUMER PRICE INDEX (CORE) 2.4%
- 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

**11. DISCOUNT RATES:**

5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

LIFE CARE PLAN  
TABLE K

Kathleen Hartmann, RN, BSN, CCM

CLIENT NAME: Enrique Rodriguez  
D.O.B : 07/15/1963  
D.O.I : 11/22/2004  
DATE PREPARED: 10/10/2008

K. FUTURE MEDICAL CARE AND SURGERIES

Recommendations	Year at which initiated	Year at which suspended	Frequency	Purpose	Unit Cost**	Total Cost	Present Value
Left Total Knee replacement Dr. Shah 32.77 yrs*	Unknown Due to CRPS	Lifetime	1 or 2x in lifetime	Will require during lifetime to replace left knee damaged in accident	80,000	80,000- 160,000	80,000 - 160,000 <sup>a</sup>
Spinal Stimulator had trial July 14 <sup>th</sup> helped 32.77 yrs*	2008	2009	Permanent to be placed by Dr. Vader	Pain control and control of symptoms of chronic pain disorder Trial completed	Perm - \$96,145(2) Elec - \$10,310 (5) Battery \$4,000 (8) Remove - \$9,320(2)**	192,290 51,550 32,000 18,640	192,290 <sup>7</sup> 51,550 <sup>7</sup> 32,000 <sup>7</sup> 18,640 <sup>7</sup>
Gastric Bypass 32.77 yrs*	Unknown	Lifetime	1x/lifetime	Obesity - cost includes surgeon fees, anesthesia, 3 day stay and assistant as well as f/u	\$17,400	17,400	17,400 <sup>a</sup>
Lumbar Sympathetic Ganglion Blocks 32.77 yrs*	Unknown	Lifetime	Estimate 10 add'l in lifetime per reporting	CRPS - left knee pain	\$1,470/block	14,700	14,700 <sup>a</sup>

Recommendations	Year at which initiated	Year at which suspended	Frequency	Purpose	Unit Cost**	Total Cost	Present Value
Epidural - cervical Injections 32.77 yrs*	2008	Lifetime	Estimate 12 add'l in lifetime per reporting	Pain reduction for cervical pain recommended by multiple physicians	\$2,725/injection \$255/MD eval \$2,980/injection	35,760	35,760 <sup>11</sup>
<b>TOTAL COST</b>						<b>\$ 422,340- 522,340</b>	<b>\$442,340- 522,340</b>

\* See narrative for life expectancy - 32.77 yrs.  
 \*\* Pricing based on facilities in Las Vegas, NV and Riverside, CA . When billing available , pricing based on billing.  
 \*\*\* PERMANENT IMPLANTATION

Other costs to consider would include additional psychological counseling, medications for depression and other side effects of the chronic pain, pain from implantation and side effects of the procedures. These cannot be calculated.

GROWTH RATES:

- 1 MED CARE COMMODITIES 2.6% 5 TOTAL MEDICAL CPI 3.3% 9 CONSUMER PRICE INDEX (CORE) 2.4%
- 2 MED CARE SERVICES 3.9% 6 EMPLOYMENT COST INDEX 3.1% 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%
- 3 PROFESSIONAL SERVICES 3.3% 7 OCCURRING IN NEXT 12 MONTHS
- 4 HOSPITAL RELATED 6.9% 8 COULD NOT BE STATED IN PRESENT VALUE

11 DISCOUNT RATES:

- 5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE L**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**Kathleen Hartmann, RN, BSN, CCM**

**L. LEISURE TIME/RECREATIONAL EQUIPMENT/SCHOOL**

Equipment	Year Initiated	Frequency	Unit Cost	Total Cost
None recommended	n/a	n/a	n/a	0

**TOTAL COST \$ 0**

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.8%
- 2 MED CARE SERVICES 3.9%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.9%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 COULD NOT BE STATED IN PRESENT VALUE
- 9 CONSUMER PRICE INDEX (CORE) 2.4%
- 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

**DISCOUNT RATES:**

- 5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE M**

**Kathleen Hartmann, RN, BSN, CCM**

**CLIENT NAME: Enrique Rodriguez  
D.O.B : 07/15/1963  
D.O.I : 11/22/2004  
DATE PREPARED: 10/10/2008**

**M. ARCHITECTURAL RENOVATION**

Item	Age/Year Initiated	Frequency	Total Cost
None recommended	n/a	n/a	0

**TOTAL COST \$ 0**

**LIFE CARE PLAN  
TABLE N**

**Kathleen Hartmann, RN, BSN, CCM**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**N. TRANSPORTATION**

Recommendations	Year at which initiated	Year at which suspended	Unit Cost	Total Cost	Present Value	Recommended by
Mileage** 32.77 yrs*	2008	Lifetime	\$.58/mile Average 500 miles/yr \$290/yr	9,503	6,856 <sup>9,11</sup>	Additional required visits per this Life Care Plan will require revision if plan revised

**TOTAL COST \$ 9,503 \$ 6,856**

\* See narrative for Life Expectancy - 32.77 yrs  
 \*\* Factored into the mileage are all appointments if she moves from facility. Map Quest used to calculate mileage to different appointments.  
 Utilizing current IRS rate.

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.6%
- 2 MED CARE SERVICES 3.9%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.9%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 COULD NOT BE STATED IN PRESENT VALUE
- 9 CONSUMER PRICE INDEX (CORE) 2.4%
- 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

**11. DISCOUNT RATES:**

5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE O**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**Kathleen Hartmann, RN, BSN, CCM**

**O. POTENTIAL COMPLICATIONS**

Complication	Estimated Costs*	Present Value
Risk for Falls	500 -- 50,000	500-50,000 <sup>8</sup>
Depression with Risk of Suicide	500 -- 150,000	500-150,000 <sup>8</sup>
Arthritic/Degenerative Changes accelerated by Obesity	1,000 -- 65,000	1,000-65,000 <sup>8</sup>
Degenerative Shoulder Changes Requiring Treatment and Surgery	1,000 -- 60,000	1,000-60,000 <sup>8</sup>
<b>TOTAL COST \$ 3,000 -- 325,000</b>		<b>\$ 3,000-325,000</b>

\*No predictive value, provided for information purposes only.

- GROWTH RATES:**  
1 MED CARE COMMODITIES 2.8% 5 TOTAL MEDICAL CPI 3.3% 9 CONSUMER PRICE INDEX (CORE) 2.4%  
2 MED CARE SERVICES 3.8% 6 EMPLOYMENT COST INDEX 3.1% 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%  
3 PROFESSIONAL SERVICES 3.3% 7 OCCURRING IN NEXT 12 MONTHS  
4 HOSPITAL RELATED 6.8% 8 COULD NOT BE STATED IN PRESENT VALUE

**DISCOUNT RATES:**  
5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

# **EXHIBIT M**

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DISTRICT COURT  
CLARK COUNTY, NEVADA

*Alan S. Quinn*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ,	)	
	)	
Plaintiff,	)	CASE NO. A-531538
	)	
v.	)	DEPT. X
	)	
FIESTA PALMS LLC,	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MONDAY, NOVEMBER 8, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. WALTER KIDWELL

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

CLERK OF THE COURT

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EXHIBIT M

1 THE COURT: Very well.

2 BY MR. BAKER:

3 Q Have all of the opinions you've been given just now  
4 to a reasonable degree of medical probability?

5 A Yes.

6 Q Thank you.

7 [Pause]

8 THE COURT: Mr. Ward.

9 MR. WARD: Thank you, Your Honor.

10 THE COURT: Whenever you're ready.

11 [Pause]

12 CROSS-EXAMINATION

13 BY MR. WARD:

14 Q Good morning, Dr. Kidwell.

15 A Good morning, sir.

16 Q Now do you know who Dr. Thalgott is?

17 A Yes, I do.

18 Q Who's Dr. Thalgott?

19 A He's an orthopedic spine surgeon.

20 Q He's an orthopedic spine surgeon.

21 A That's correct.

22 Q And now, do you ever refer patients to Dr. Thalgott?

23 A Yes, I do.

24 Q You do. Why do you refer them to Dr. Thalgott?

25 A Because he's an excellent spine surgeon.

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1 Q And do you rely on him to make a diagnosis as to  
2 when surgery is appropriate?

3 A Yes, many times. Yes.

4 Q Well, if you -- what I'm asking -- and perhaps my  
5 question wasn't a very good one. If you had a patient who you  
6 had a question about whether they needed back surgery, and you  
7 referred him to -- him or her to Dr. Thalgott, you would  
8 expect Dr. Thalgott to do an independent evaluation.

9 A That's correct.

10 Q You wouldn't expect that you would make a  
11 determination of what kind of surgery would be performed and  
12 then just ask Dr. Thalgott to perform that?

13 A Oh, no. He's -- what surgery would need to be done  
14 would be strictly his call.

15 Q Okay. So --

16 A In my role, I have a pretty good feel for who might  
17 be surgical, but ultimately, the decision to do surgery is up  
18 to the surgeon.

19 Q Right. And when Dr. Thalgott does surgery and does  
20 it under some sort of an anesthetic, does he often have an  
21 anesthesiologist?

22 A Well, I would hope so.

23 Q Okay. He wouldn't do that himself?

24 A No.

25 Q He wouldn't make that call?

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1 A Yes.

2 Q Okay. Would you explain to the Judge why that is?

3 A Well, the knee is the primary pain component. Once  
4 you treat that, you see what's left, number one. Number two,  
5 the spinal cord stimulator now can cover back pain and leg  
6 pain. That's new technology. Two years ago you couldn't make  
7 that statement. Spinal cord stimulator wouldn't treat leg  
8 pain.

9 Usually in the context of a failure back surgery  
10 syndrome, but RSD is certainly an indication for it as well.  
11 But now the technology exists that with a tripole technology,  
12 we can cover back pain from about L-1 on down pretty reliably.

13 Q And Dr. Schifini testified that he actually put a  
14 lead to his back on the temporary spinal cord stimulator.

15 A Right.

16 Q And that that didn't help his back pain except  
17 transiently. Did you understand that?

18 A I didn't know that, but whether I did or not is  
19 irrelevant because that was done more than two years ago if I  
20 recall.

21 Q Correct. Now you've stated that you know  
22 Dr. Thalgott, is that right?

23 A That's correct.

24 Q And he's a good surgeon?

25 A He's a great surgeon.

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1 Q And you've transferred patients back and forth with  
2 him?

3 A Yes.

4 Q Would Dr. Thalgott ever recommend surgery on a  
5 person awaiting a spinal cord stimulator for his knee that  
6 he's unable to get?

7 MR. WARD: Object, no foundation for this. We don't know  
8 what Dr. Thalgott has to say about this. This is speculative.

9 THE COURT: Mr. Baker.

10 MR. BAKER: He said he understands Dr. Thalgott. They  
11 refer patients back and forth. He's had experience with  
12 patients with Dr. Thalgott and he's aware for the standards  
13 for prescribing surgery and recommending surgery in patients.

14 MR. WARD: Your Honor, this witness said on  
15 cross-examination that he didn't know what was in  
16 Dr. Thalgott's mind and that he couldn't even interpret  
17 Dr. Thalgott's suspicions in his medical records. So, how he  
18 could possibly offer this kind of an opinion is without  
19 foundation.

20 THE COURT: Well, let me ask you this, Mr. Baker. The  
21 way you phrased your question, it was a general one. Does it  
22 apply to specifically the Plaintiff?

23 MR. BAKER: Huh-uh, general.

24 THE COURT: General question?

25 MR. BAKER: Yeah, but I can restate the question.

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1 THE COURT: Well, let's have you restate it then as it  
2 applies to Plaintiff.

3 BY MR. BAKER:

4 Q Would it be acceptable to recommend surgery for  
5 Enrique Rodriguez on his back when he is still suffering from  
6 an untreated RSD on his knee?

7 A I have not seen Dr. Thalgott do that, so I don't  
8 think so.

9 Q Okay. And it's nothing that you would recommend?

10 A Uh-uh.

11 Q And because you will continue to have the postural  
12 changes, is that correct?

13 A Correct.

14 Q And will you explain to the Judge, is there a cycle  
15 associated with the back pain and the postural changes, the  
16 limping and the use of assistive devices?

17 A When his pain is bad, I would anticipate that he  
18 would have an altered gait, altered posture, and that would  
19 adversely affect his back.

20 Q And we've heard testimony in this Court as well  
21 about the fact that if back surgery was done before his knee  
22 was repaired, he would likely rip out that back surgery due to  
23 the continued postural changes. Do you have an opinion with  
24 respect to that?

25 MR. WARD: Objection, leading, argumentative.

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1 THE WITNESS: that would --

2 THE COURT: Overruled.

3 THE WITNESS: Oh.

4 THE COURT: You can answer the question, sir.

5 THE WITNESS: That would put asymmetric stress on the  
6 back and could, if you fused one level, it would probably  
7 accelerate adjacent segment breakdown.

8 BY MR. BAKER:

9 Q Another thing too, since Dr. Thalgott's reports,  
10 it's been three years, is that right?

11 A Correct.

12 Q Could you explain to a reasonable degree of medical  
13 probability to the Judge what's been occurring with respect to  
14 Enrique's back and neck as a result of continued postural  
15 changes?

16 A My suspicion is that it would continue to hurt and  
17 possibly get worse --

18 MR. WARD: Object.

19 THE WITNESS: -- mechanically.

20 MR. WARD: Move to strike. There's no foundation that  
21 this doctor knows what's been going on. In fact, the  
22 foundation is specifically to the contrary. He began his  
23 answer with, "My suspicion." It calls for speculation and no  
24 foundation.

25 THE COURT: Sustain the objection.

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1 BY MR. BAKER:

2 Q Doctor, in patients that you've treated who have  
3 continued to have postural changes over time, could you please  
4 explain to the Judge they cycle that they get into with  
5 respect to their pain complaints?

6 MR. WARD: Relevance unless it relates to this patient.

7 MR. BAKER: Well, he's a human being like any other human  
8 being, isn't he?

9 THE COURT: Overrule the objection.

10 THE WITNESS: As I said, my suspicion is most patients I  
11 would expect, I would anticipate would go on to have further  
12 pain as a result of their altered gait and posture.

13 BY MR. BAKER:

14 Q And does the altered gait and posture help the  
15 condition or does it hinder and hurt the condition?

16 A It hurts the condition. It makes it worse.

17 Q In what way?

18 A Continued asymmetric stress on the structure  
19 involved.

20 Q Thank you, Doctor.

21 MR. BAKER: No further questions, Your Honor.

22 BY MR. BAKER:

23 Q And is your opinion with respect to that last  
24 question to a reasonable degree of medical probability?

25 A Yes, sir, it is.

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1 MR. BAKER: Thanks to my team. I appreciate it.

2 THE COURT: Okay, Mr. Ward. Any follow-up?

3 MR. WARD: Yes, Your Honor.

4 RE-CROSS-EXAMINATION

5 BY MR. WARD:

6 Q Doctor, the diagnosis you made on this patient is  
7 what, that he has some internal nerve fibers growing in his  
8 disc?

9 A No, the definition was internal disc disruption.

10 Q And you think that's what's causing the problem?

11 A Most likely, yes.

12 Q Okay. You haven't seen anything like that from  
13 Dr. Thalgott with respect to this patient, have you?

14 A Didn't he in one of his notes say this is discogenic  
15 pain?

16 Q I don't know. Did he?

17 A I saw it.

18 Q Did -- but you're suggesting that he's a surgical  
19 candidate, isn't that right?

20 A I'm suggesting he's a potential surgical candidate.

21 Q And Dr. Thalgott says unequivocally that he's not a  
22 surgical candidate, isn't that true?

23 A At that point and time, yes.

24 Q Well, at that point and time. You haven't seen this  
25 patient for how many years?

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1 A Three or four years.

2 Q And so all of the treatment that you're testifying  
3 to about occurring tot his patient and what he had got and  
4 what he needed in the last three-and-a-half years has all been  
5 since the very last time you saw this patient, is that true?

6 A True, but what you should be asking me is why do I  
7 think he's a potential surgical candidate. That's what we're  
8 not asking here.

9 Q But I'm not asking you that because you're an  
10 anesthesiologist. You're no spine surgeon. So you don't do  
11 spine surgeries, do you?

12 A Correct, but I --

13 Q Okay.

14 A -- send people to surgeons for surgery.

15 Q And you send people to spine surgeons to do  
16 evaluations and offer opinions?

17 A Well, I would think you'd want to know why I'm  
18 saying what I'm saying.

19 Q Isn't it true that you send them to spine surgeons  
20 to offer opinions?

21 A Correct.

22 Q And you expect them to look at the patient and  
23 evaluate them?

24 A Remember, Dr. Thalgott sent the patient to me, but  
25 I'll take them.

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1 Q Okay, so he sent the patient to you. Did he send  
2 this patient to you to tell him whether he should be doing  
3 surgery?

4 A No.

5 Q Okay. Thank you.

6 THE COURT: Mr. Baker?

7 FURTHER REDIRECT EXAMINATION

8 BY MR. BAKER:

9 Q So, why? So, why?

10 MR. WARD: Did he see it's the scope of the direct or the  
11 recross?

12 MR. BAKER: It's exactly the whole point of the recross,  
13 Your Honor.

14 THE COURT: I think the question is appropriate, but I'll  
15 ask you to narrow the focus some.

16 BY MR. BAKER:

17 Q Did you want to respond to the question why do you  
18 believe he's going to require a lumbar surgery?

19 A Yes, I mean I think that's the crux of the whole  
20 thing, why.

21 Q Give it to us.

22 A A surgeon will say they're not a surgical candidate  
23 at this point and time. He doesn't feel he's appropriate for  
24 surgery at this point and time. There is incomplete data,  
25 simply incomplete data.

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1           The hypothesis is that he has internal disc  
2 disruption in the lumbar spine. There are two basic  
3 structures that cause this kind of pain in the low back, discs  
4 and facet joints. Neither one of them have been explored as  
5 far as a potential pain generator.

6           The symptoms are most consistent with discogenic  
7 pain. It could be facet pain, but most consistently with  
8 discogenic or perhaps both. The way to prove or disprove the  
9 hypothesis is to do a discogram.

10          Q    And we talked about the fact that -- or you spoke  
11 about the fact that we don't want to cause pain, that your  
12 lumbar epidural injections aren't painful. Tell her about a  
13 discogram.

14          A    A discogram is very painful. It's the worst  
15 procedure I do on people. We don't take it lightly. You take  
16 a patient, you put needles in all the discs you are going to  
17 test, and under pressure you'll inject x-ray contrast to  
18 stretch the disc. If the disc is torn or causing discogenic  
19 pain, it hurts -- excuse my French -- it hurts like hell.  
20 It's extremely painful.

21                I've seen patients with Post-Traumatic Stress  
22 Disorder have discograms. It's something we don't take  
23 lightly and there are techniques to blunt the pain of it.

24          Q    And isn't actually the point of the discogram to re  
25 -- give me the word. It's called committing pain, but it's

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1 to --

2 A Reproduce.

3 Q -- reproduce --

4 A Reproduce the pain, identify the pain generator, and  
5 that's what this is all about is identifying the exact pain  
6 generator. You can look at an MRI and see multi level disc  
7 disease. You don't know what's hurting. You don't know which  
8 disc or which structure is actually causing that pain. And  
9 that's the purpose of these procedures, to determine exactly  
10 which structure would require surgery if surgery was an  
11 option.

12 Dr. Thalgott doesn't have any more information than  
13 I do. He's an excellent surgeon and I understand him  
14 completely. At that point and time, he's not a surgical  
15 candidate. He also has the specter of his knee problem, not a  
16 surgical candidate.

17 However, let's say he didn't have a knee problem and  
18 I did a discogram showing that he had maybe one or two levels  
19 positive. I guarantee he'd be a surgical candidate. And  
20 based by multiple reputable spine surgeons in this town.

21 Q And he --

22 A Now, I am not a spine surgeon. I admit it, but I  
23 sure work with them a lot.

24 Q And can I ask you to turn --

25 MR. WARD: Wait, I want to voice an objection. I object

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1 to the last response and I move to strike on the basis that  
2 it's speculative. He's talking about things that Dr. Thalgott  
3 might have done or would have done. Dr. Thalgott has not been  
4 here to testify. Dr. Thalgott hasn't seen the patient for  
5 several years. This gentleman hasn't seen the patient for  
6 several years. It is all speculative.

7 MR. BAKER: He's talking about the course of treatment  
8 that someone with a diagnosis of internal disc disruption.  
9 That's a recognize diagnosis within the community, a diagnosis  
10 he deals with all the time. He has a tremendous experience of  
11 individuals who are diagnosed with internal disc disruption.

12 He set the foundation, the fact that they ruled out  
13 a radicular component. He's testified to a reasonable degree  
14 of medical probability that the pain is discogenic rather than  
15 neurogenic and testified to a reasonable degree of probability  
16 that there's an internal disc disruption. There's a complete  
17 foundation for that question.

18 THE COURT: Any final thoughts, Mr. Ward?

19 MR. WARD: I won't waste the Court's time by repeating  
20 what I just said, Your Honor.

21 THE COURT: Objection is noted for the record.  
22 Overruled.

23 BY MR. BAKER:

24 Q Doctor, could you please turn to Exhibit 39, page  
25 19?

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# **EXHIBIT N**

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DISTRICT COURT  
CLARK COUNTY, NEVADA

*Archer Norris*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
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Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

WEDNESDAY, NOVEMBER 3, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF FORREST P. FRANKLIN

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
Benson, Bertoldo & Baker

For the Defendant: KENNETH C. WARD, ESQ.  
Archer Norris

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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**EXHIBIT N**

1 felt comfortable about, something that you knew something  
2 about?

3 A I did.

4 Q Okay. And what were you asked -- well, first of  
5 all, when were you hired; do you remember?

6 A I want to say the second quarter of this year I  
7 produced the report on the 19th of August. So that seems  
8 right.

9 Q Okay. And what were you asked to do?

10 A To develop, unless I already had one, and render an  
11 opinion with respect to the standard of care as it relates to  
12 throwing objects, memorabilia, promotional articles into  
13 crowds.

14 Q Okay. Now the concept of throwing articles,  
15 memorabilia, whatever, into crowds, is that something that you  
16 were familiar with?

17 A I have been all my security career, yes, sir.

18 Q Okay. And, I mean, you didn't say: Oh, my  
19 goodness, I've never heard of anybody doing this?

20 A Let me do it another way. I never -- I've hardly  
21 ever heard of anybody not doing it.

22 Q Okay. And so in terms of what it was you did to  
23 prepare for this case, to prepare to give an opinion and write  
24 your report, what did you do?

25 A I reviewed some documentation, some depositions that

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1 your firm had taken. I looked at a document security manual  
2 from Palms, and I formed an opinion.

3 Q Okay. And after you formed an opinion did you  
4 prepare a report?

5 A I did, it's here as Exhibit 69.

6 Q Okay. And what opinion did you come to?

7 A That throwing memorabilia as a promotional effort  
8 into crowds is not a substandard protocol.

9 Q Okay. And are you familiar with other places that  
10 throw items into crowds?

11 A I am. In fact I've initiated processes where we've  
12 thrown items into many crowds, both in the philanthropic  
13 operations, as well as completely secure venues.

14 Q Okay. And with respect to organizations that you  
15 belong to, do you belong to any large organizations?

16 A I belong to ASIS International, which has 83,000  
17 members, of which as many as 30 to 50,000 attend an annual  
18 conference.

19 Q And have you attended the annual conference?

20 A Almost every year, with very few exceptions.

21 Q And that's a security group?

22 A It is a security group.

23 Q And do they throw items, promotional items into the  
24 audience at the conference?

25 A We do that two ways: the conference is a series of

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1 breakout sessions for educational purpose. It has a series of  
2 keynote speakers like Colin Powell, and Sully, the guy that  
3 crashed the plane into -- into the Hudson River. Somebody  
4 always of repute. And they had exhibits, and the exhibits  
5 there are, I think there were 1100 exhibitors almost every  
6 year.

7 They, the exhibitors, regularly throw packages of  
8 mints, hand sanitizer, young ladies from Stanley a couple of  
9 years ago threw small basketballs. The Canadian contingent in  
10 fact has Canada Night, which is a sort of adjunct breakout,  
11 threw hockey pucks, real life hard hockey pucks into the  
12 crowd.

13 So, yes. And that's impressive to me because this  
14 is the largest security organization on the planet, so clearly  
15 there's no standard that they reached.

16 Q Okay. And have you seen the Palms area where this  
17 incident occurred?

18 A Yes, sir, I have.

19 Q And was there anything about the Palms area where  
20 this occurred that you thought would preclude the tossing of  
21 promotional items to people that were there?

22 A Well, in fairness, given the time that I saw it,  
23 which is several years after the event, unless there were some  
24 drastic architectural or structural changes, I saw nothing  
25 that would have --

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1 Now she expected the security guards to tell them to  
2 stop throwing promotion items; is that right?

3 A That's what I just heard, yes.

4 Q And you read in her deposition too, that that's  
5 because throwing promotional items in the sports bar of a  
6 hotel created a foreseeable danger to people in that room?

7 A That's what she said

8 MR. BAKER: Thank you. No further questions, Your Honor.

9 THE COURT: Very well. Mr. Ward?

10 MR. WARD: Yes, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. WARD:

13 Q Mr. Franklin, if all of those things that Mr. Baker  
14 just said to you were true, then that suggests that someone  
15 violated the rules; is that correct?

16 A Yes.

17 Q Okay. With respect to the safety, is it your  
18 opinion as a security expert and a crowd control expert that  
19 it is unsafe to throw things into crowds?

20 A It's my opinion it's not unsafe to throw things into  
21 crowds.

22 Q So do you see any evidence that anyone  
23 conscientiously disregarded the safety of people?

24 A No, I don't.

25 Q And do you agree, you heard the testimony of Ms.

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# **EXHIBIT O**

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TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

*Allen D. Blum*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 9, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. THOMAS CARGILL

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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EXHIBIT

1 objection, Your Honor.

2 THE COURT: I don't --

3 MR. BAKER: Dr. Cargill's report put out two bases that  
4 he was critical of Terry Dinneen. One was that he continued  
5 to project a future income based upon a housing market that  
6 has changed and a burst bubble, and the second was that the  
7 discounting rates that he used were today's discounting rates  
8 instead of some other type of thing.

9 He never, ever mentions the information that was  
10 relied on, has no criticism of the information relied on, and  
11 in no way reflects that that information makes it -- any way  
12 impacts the ability for Mr. Dinneen to calculate the wage  
13 loss.

14 THE COURT: Sustain the objection.

15 BY MR. WARD:

16 Q Dr. Cargill, when you -- you first heard this report  
17 of August 17, 2010, is that correct?

18 A Well, I prepared two reports.

19 Q Okay.

20 A The August report and then as a supplemental report  
21 in October.

22 MR. BAKER: I don't have a supplemental report. Did you  
23 say August report?

24 THE WITNESS: Yes, August 17, 2010 was my original report  
25 and then I provided a supplemental report on October 5th.

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1 BY MR. WARD:

2 Q Dr. Cargill, let me ask you about your report at the  
3 bottom of page 2, the report that titles, "Estimate of Lost  
4 Compensation." Do you see that?

5 A Yes, I do.

6 Q Now, in your report, you note that Mr. Dinneen has  
7 made some opinions based upon the market, is that correct?

8 A Yes.

9 Q And what he's done is he has averaged the earnings  
10 over the period of 1999 to the year 2004, is that correct?

11 A Well, that was my understanding what he did.

12 Q Okay.

13 A But that's not what he actually did.

14 Q Okay. But that was your understanding at the time?

15 A Yes.

16 Q And you used -- and then he used that as an estimate  
17 of pre-incident future earnings, correct?

18 A Correct.

19 Q And do you think that is appropriate?

20 A Well, no, I did not.

21 Q Right. And in your report, you say what? What's  
22 your criticism of that?

23 A Well, I said that it is inappropriate to average  
24 earnings over the period from 1999 to 2004 and use the average  
25 as an estimate of pre-incident future earnings.

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1 an averaging technique that Mr. Dinneen utilized and spoke to,  
2 this Court has now three times sustained my objection with  
3 respect to that line of questioning.

4 THE COURT: Well, I'd sustain the objection as previously  
5 sustained.

6 BY MR. WARD:

7 Q The reason why you can't use 2004 data in the same  
8 way as other data is because it's influenced by the bubble in  
9 the housing market. Is that true?

10 A That is correct. And when I make the statement  
11 about the average, I'm talking about '99, 2000, 2001. That  
12 was not a bubble period. It is inappropriate to claim.

13 MR. BAKER: Your Honor, this is five times now.

14 THE WITNESS: Can I finish answering the question?

15 THE COURT: Well, there's nothing in his report at all  
16 that addressed the issue of averaging as I understand it.

17 MR. BAKER: He says that it is inappropriate to average  
18 in the context of the bursting housing market, in the bursting  
19 bubble. Now he's speaking about the methodology of averaging  
20 as being inappropriate.

21 If he wants to talk about the bursting, the Court  
22 understands my objection.

23 THE COURT: I do. Please proceed, Mr. Ward.

24 MR. WARD: Yes.

25 ///

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1 Q You also had problems with Mr. Dinneen's discounting  
2 rate?

3 A Yes.

4 Q Could you -- and you're using a historical rate?

5 A No.

6 Q What rate did you use?

7 A I'm using a rate that is based on economic theory,  
8 economic evidence, what the U.S. Congressional Budget Office  
9 uses.

10 Q Give me a number.

11 A Would you please let me finish?

12 THE COURT: Yeah, I think you should. Mr. Baker --

13 MR. BAKER: Sorry, Your Honor.

14 THE COURT: -- you keep firing questions. He can't  
15 finish his answer before you fire another one.

16 MR. BAKER: There was caffeine in the cough drop.

17 THE WITNESS: What the trustees of the Social Security  
18 Administration use, and they use a real interest rate of 3  
19 percent. So, whatever inflation rate you assume, the discount  
20 rate automatically is determined.

21 If you assume a 1 percent inflation rate, then the  
22 discount rate is 4 percent. If you assume a 2 percent  
23 inflation rate, then the discount is 5 percent. It's the  
24 ratio that's important. So I use a real interest rate of 3  
25 percent, which is based on economic theory, economic evidence.

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1 But we're -- economists are very, very confident  
2 that that real interest rate ranges between 2 and 4 and 3 is a  
3 good average. And that's what pretty much everybody uses.

4 Q And is that a conservative number?

5 A I don't know if I'd call it conservative. You could  
6 certainly make an argument that it could be a little higher,  
7 but I think for a long run real return on government  
8 securities, 3 percent is -- a real return of 3 percent would  
9 be acceptable to almost anybody that really knows the  
10 financial system.

11 Q Thank you.

12 A And the problem in focusing on current interest  
13 rates is very low.

14 MR. BAKER: Your Honor. That's all right.

15 THE WITNESS: But if you go out and buy a bunch of bonds  
16 at low interest rates, you're going to have a capital loss in  
17 a couple of years because as interest rates rise and everybody  
18 projects that they're going to rise, the value of bonds will  
19 fall. That's why you can't use current interest rates. It's  
20 economic nonsense.

21 MR. WARD: Thank you, Doctor.

22 THE WITNESS: Okay.

23 MR. BAKER: No questions, Your Honor.

24 THE COURT: No follow-up, Mr. Baker?

25 MR. BAKER: No follow-up, Your Honor.

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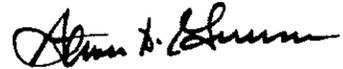
1 **NOTC**

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17 Facsimile: 702.474.7237

18 Attorneys for Defendant  
19 FIESTA PALMS, LLC, a Nevada Limited Liability  
20 Company, d/b/a THE PALMS CASINO RESORT

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CLERK OF THE COURT

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23 DISTRICT COURT  
24 CLARK COUNTY, NEVADA

25 ENRIQUE RODRIGUEZ,  
26  
27 Plaintiff,  
28  
29 v.

30 FIESTA PALMS, LLC, a Nevada Limited  
31 Liability Company, d/b/a THE PALMS  
32 CASINO RESORT, et al. ,  
33  
34 Defendants.

Case No. A531538

**DEFENDANT FIESTA PALMS, LLC'S  
NOTICE OF MOTION AND MOTION  
FOR NEW TRIAL**

Dept: X  
Hearing Date:  
Hearing Time:  
Hearing Dept:

35 COMES NOW defendant FIESTA PALMS, LLC, a Nevada Limited Liability Company,  
36 d/b/a/ THE PALMS CASINO RESORT ("the Palms" or "Defendant") by and through its counsel  
37 of record, Marsha L. Stephenson, Esq., of the law firm of STEPHENSON & DICKINSON, P.C.,  
38 and Kenneth C. Ward, Esq., of the law firm of ARCHER NORRIS, and hereby file the following  
39 Defendants' Notice of Motion and Motion for New Trial.

40 **PLEASE TAKE NOTICE** that on the 5 th day of May, 2011, at the hour of

41 ZA126/1108917-1

DEFENDANT FIESTA PALMS, LLC'S NOTICE OF MOTION AND MOTION FOR NEW TRIAL

In Chambers

1 \_\_\_\_\_, or as soon thereafter as counsel can be heard, Defendant will bring the foregoing  
2 motion on for hearing before the Honorable <sup>Jessie</sup> Walsh in Department X of the Eighth  
3 Judicial District Court, at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, NV 89155.

4 This Motion is made and based on the Notice of Motion, Memorandum of Points and  
5 Authorities, Declaration of Kenneth C. Ward in Support of Motion ("Ward Decl.") and exhibits  
6 thereto, [all of which are annexed hereto], all pleadings and papers on file in this action, and any  
7 and all further argument and evidence in support hereof that the Court may hear and receive.

8 This Motion is based on the fact that there were several irregularities that led to an unjust  
9 verdict against the Palms. First, the prevailing party, plaintiff Enrique Rodriguez ("Plaintiff"),  
10 and his counsel, engaged in misconduct that materially prejudiced the Palms by producing  
11 documents at trial for the first time, which prevented the Palms from being able to review the  
12 documents and prepare for the documents prior to trial. Second, the court committed error in  
13 permitting the Plaintiff to have four medical treaters testify on behalf of 25 treaters, and in subject  
14 areas in which they are not qualified. Third, the body of evidence the Palms produced at trial  
15 demonstrated that Plaintiff's evidence was insufficient to justify the verdict, and finally, the Court  
16 was in error when it granted Plaintiff's motion to strike the Palms' experts' opinions.

17 As will be unveiled in the moving papers, these facts, issues and circumstances all  
18 combined to deny the Palms a fair trial. These defects can only be remedied by the granting of  
19 new trial.

20 Dated: March 22, 2011

ARCHER NORRIS  


\_\_\_\_\_  
Kenneth C. Ward (Bar No. 6530)  
Keith R. Gillette (Bar No. 11140)

Attorneys for Defendant FIESTA PALMS,  
LLC, a Nevada Limited Liability Company,  
d/b/a/ THE PALMS CASINO RESORT

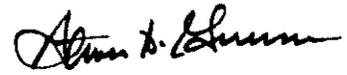


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Attorneys for Defendant FIESTA PALMS, LLC, a  
Nevada Limited Liability Company, d/b/a/ THE  
PALMS CASINO RESORT

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ,  
Plaintiffs,

v.

FIESTA PALMS, LLC, a Nevada Limited  
Liability Company, d/b/a/ The Palms  
Casino Resort, et al.,  
Defendants.

Case No. A531538

Dept: X

**DEFENDANT FIESTA PALMS, LLC'S  
REPLY MEMORANDUM/OPPOSITION  
TO PLAINTIFF'S MEMORANDUM RE:  
PRE-JUDGMENT INTEREST**

Defendant FIESTA PALMS, LLC dba THE PALMS CASINO RESORT hereby submits  
this Memorandum in Reply to Plaintiff's Memorandum Re: Pre-Judgment Interest.

**I. THE CORRECT PREJUDGMENT INTEREST RATE IS 5.25 PERCENT, NOT  
10.25 PERCENT AS SUGGESTED BY PLAINTIFF**

Plaintiff's memorandum on pre-judgment interest incorrectly calculates claimed pre-  
judgment interest on Plaintiff's past damages, claiming a liquidated amount totaling \$829,960.20.

ZA126/1113669-1

FIESTA PALMS, LLC'S REPLY MEMO/OPPOSITION TO PLAINTIFF'S MEMO  
RE: PRE-JUDGMENT INTEREST

1 Plaintiff came to this amount using a 10.25 percent interest rate for the 1,548 days from the date  
2 of service of Plaintiff's complaint until the date judgment was entered. Plaintiff's memorandum  
3 fails to articulate the assumptions relied upon in identifying the claimed interest rate at 8.25 per  
4 cent.

5 In any event, plaintiff's calculation is incorrect. *Nevada Revised Statute* section 17.130  
6 governs the calculation of pre-judgment interest:

7 1. In all judgments and decrees, rendered by any court of justice, for any  
8 debt, damages or costs, and in all executions issued thereon, the amount must be  
9 computed, as near as may be, in dollars and cents, rejecting smaller fractions, and  
10 no judgment, or other proceedings, may be considered erroneous for that  
omission.

11 2. When no rate of interest is provided by contract or otherwise by law, or  
12 specified in the judgment, **the judgment draws interest from the time of**  
13 **service of the summons and complaint until satisfied**, except for any amount  
14 representing future damages, which draws interest only from the time of the entry  
15 of the judgment until satisfied, **at a rate equal to the prime rate at the largest**  
16 **bank in Nevada as ascertained by the Commissioner of Financial**  
17 **Institutions on January 1 or July 1, as the case may be, immediately**  
18 **preceding the date of judgment, plus 2 percent.** The rate must be adjusted  
19 accordingly on each January 1 and July 1 thereafter until the judgment is  
20 satisfied. (Emphasis supplied.)

21 The statute clearly states that the appropriate interest rate is the Commissioner of  
22 Financial Institutions ("CFI") prime rate immediately preceding the date of judgment, plus 2  
23 percent. This prejudgment interest rate must be calculated at the single rate in effect on the date  
24 when judgment is entered. *Kerala Props., Inc. v. Familian* (2006) 122 Nev. 601, 603. Where an  
25 interest rate is provided by statute, as is the case here, the court may not vary the interest rate  
26 outside of the statutory rate. *Lee v. Ball* (2005) 122 Nev. 391, 395-96; *Gibellini v. Klindt* (1994)  
27 110 Nev. 1201, 1208.

28 Judgment was entered in this case on March 9, 2011. The CFI prime interest rate for the  
period immediately preceding the date of entry of judgment is 3.25 percent. (The table containing  
prime interest rate data, attached to plaintiff's Memorandum, is also attached to this Reply as

1 Exhibit A.) The prime interest rate plus the additional 2 percent required by NRS 17.130 totals  
2 5.25 percent, *not* Plaintiff's inflated 10.25 percent.

3 Accordingly, the prejudgment interest, as applied to plaintiff's past damages, is properly  
4 calculated using the 5.25 percent interest rate for the 1,548 days between time of service of  
5 process of Plaintiff's complaint and the date of entry of judgment. In its verdict, The Court  
6 identified past damages to include the following:

Description	Amount
Past Medical Expenses	376,773.38
Past Pain & Suffering	1,243,350.00
Past Lost Income	289,111.00
Total	1,909,234.38

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12 To the extent that this Court is inclined to award prejudgment interest on those damage  
13 elements representing past damages, defendant submits this amount totals \$425,105.42.

14  
15 **II. CONCLUSION**

16 In light of the allowable interest rate in effect on the date of entry of judgment, Defendant  
17 FIESTA PALMS, LLC dba THE PALMS CASINO RESORT respectfully asserts that, to the  
18 extent this Court is inclined to award prejudgment interest on aspects of plaintiff's damages, the  
19 proper amount of prejudgment interest for Plaintiff's past damages totals \$425,105.42.

20 Dated: March 30, 2011

ARCHER NORRIS

21  
22  
23 Kenneth C. Ward (Bar No. 6530)  
24 Keith R. Gillette (Bar No. 11140)  
25 A Professional Law Corporation  
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28 Walnut Creek, California 94596-3728

Attorneys for Defendant FIESTA PALMS,  
LLC, a Nevada Limited Liability Company,  
d/b/a/ THE PALMS CASINO RESORT

1 CERTIFICATE OF SERVICE

2 **Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC**  
3 **Court and Action No: District Court, Clark County, Nevada Action No. A531538**

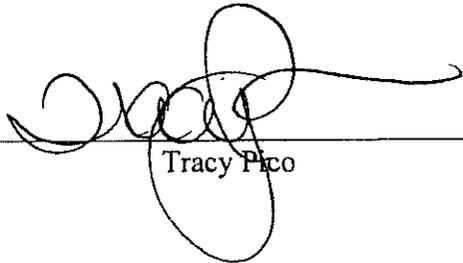
4 I, Tracy Pico, certify that I am over the age of eighteen years and not a party to this action  
5 or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035, Walnut  
6 Creek, California 94596-3728. On April 1, 2011, I caused the following document(s) to be  
7 served: **DEFENDANT FIESTA PALMS, LLC's REPLY MEMORANDUM/OPPOSITION**  
8 **TO PLAINTIFF'S MEMORANDUM RE: PRE-JUDGMENT INTEREST**

9  by placing a true copy of the document(s) listed above, enclosed in a sealed envelope,  
10 addressed as set forth below, for collection and mailing on the date and at the business  
11 address shown above following our ordinary business practices. I am readily familiar  
12 with this business' practice for collection and processing of correspondence for  
13 mailing with the United States Postal Service. On the same day that a sealed envelope  
14 is placed for collection and mailing, it is deposited in the ordinary course of business  
15 with the United States Postal Service with postage fully prepaid.

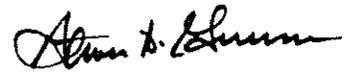
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18 Enrique Rodriguez

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16 Fax: 702.384.6568  
17 Co-Counsel for Defendant  
18 Fiesta Palms, LLC a Nevada Limited  
19 Liability Company, d/b/a The Palms  
20 Casino Resort

21 I declare under penalty of perjury that the foregoing is true and correct. Executed on April  
22 1, 2011, at Walnut Creek, California.

23   
24 \_\_\_\_\_  
25 Tracy Pico  
26  
27  
28





CLERK OF THE COURT

1 STEVEN M. BAKER  
2 Nevada Bar No. 4522  
3 BENSON, BERTOLDO, BAKER & CARTER  
4 7408 W. Sahara Avenue  
5 Las Vegas, Nevada 89117  
6 Telephone : (702) 228-2600  
7 Facsimile : (702) 228-2333  
8 Attorneys for Plaintiff

9  
10 **DISTRICT COURT**  
11 **CLARK COUNTY, NEVADA**

12 \* \* \*

13 ENRIQUE RODRIGUEZ, an individual,  
14 Plaintiff,

CASE NO: A531538

DEPT NO: 10

15 vs.

16 FIESTA PALMS, L.L.C., a Nevada Limited  
17 Liability Company, d/baa/a PALMS CASINO  
18 RESORT, BRANDY L. BEAVERS,  
19 individually, DOES 1 through X, inclusive,  
20 and ROE BUSINESS ENTITIES 1 through X,  
21 inclusive,

22 Defendants.

23 **AMENDED MEMORANDUM RE: PRE-JUDGMENT INTEREST**

24 Plaintiff ENRIQUE RODRIGUEZ by and through his attorney, STEVEN M.  
25 BAKER, ESQ., of the law firm of BENSON, BERTOLDO, BAKER & CARTER, hereby  
26 submits the following memorandum regarding pre-judgment interest:

27 **I.**

28 **The Plaintiff is Entitled to Pre-Judgment**

**Interest Under NRS 17.130**

**NRS 17.130 Computation of amount of judgment; interest.**

1. In all judgments and decrees, rendered by any court of justice, for any debt, damages or costs, and in all executions issued thereon, the amount must be computed, as near as may be, in dollars and cents,



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rejecting smaller fractions, and no judgment, or other proceedings, may be considered erroneous for that omission.

2. When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied, at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

Service of process was accomplished on December 11, 2006. The verdict was rendered on March 9, 2011 and filed on March 14, 2011. Pre-judgment interest on the total past damages amount of \$1,909,234.38 is computed at the Legal Judgment Interest Rate of 5.25% (3.25% +2) based on the prime rate at the largest bank in Nevada posted January 1, 2011 **from the date of service of process until fully satisfied**, such interest in the amount of FOUR HUNDRED TWENTY SEVEN THOUSAND TWENTY SEVEN AND 71/100 DOLLARS (\$427,027.00) as of April 4, 2011 and accruing at a rate of TWO HUNDRED SEVENTY FOUR AND 62/100 DOLLARS (\$274.62) per diem thereafter

Future special damages and future general damages total \$4,142,355.00. Post-Judgment Interest on Future Damages shall accrue at the Legal Judgment Interest Rate beginning March 9, 2011, as adjusted January 1 and July 1 annually, until fully satisfied.

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I.

CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests that Judgment be entered and pre-judgment interest be included pursuant to NRS 17.130.

DATED this 5<sup>th</sup> day of April, 2011.

**BENSON BERTOLDO, BAKER & CARTER, CHTD.**

By: 

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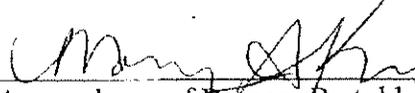
CERTIFICATE OF SERVICE

I hereby certify that on the 5<sup>th</sup> day of April, 2011, I served a copy of the foregoing AMENDED MEMORANDUM RE: PRE-JUDGMENT INTEREST via First Class, U.S. Mail, postage thereon fully prepaid to the following interested parties:

Kenneth C. Ward, Esq. Co-Counsel for Fiesta Palms  
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CLERK OF THE COURT

1 STEVEN M. BAKER  
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8 Attorneys for Plaintiff

6 DISTRICT COURT  
7 CLARK COUNTY, NEVADA

8 \* \* \*

9 ENRIQUE RODRIGUEZ, an individual,  
10  
11 Plaintiff,

CASE NO: A531538

DEPT NO: 10

12 vs.

13 FIESTA PALMS, L.L.C., a Nevada Limited  
14 Liability Company, d/baa/a PALMS CASINO  
15 RESORT, BRANDY L. BEAVERS,  
16 individually, DOES 1 through X, inclusive,  
17 and ROE BUSINESS ENTITIES I through X,  
18 inclusive,

HEARING DATE: N/A  
HEARING TIME: N/A

19 Defendants.

20 OPPOSITION TO DEFENDANT FIESTA PALMS, L.L.C., D/B/A  
21 THE PALMS CASINO'S MOTION TO TAX [SIC] COSTS

22 I. Introduction

23 Plaintiff seeks an order denying Defendant's Motion to Retax Costs. Plaintiff's timely  
24 filed Memorandum of Costs and Disbursements clearly sets forth an itemization of the costs,  
25 and as this Honorable Court is aware, having presided over a trial of 2 ½ weeks, the asserted  
26 costs are clearly reasonable and necessary.

27 Plaintiff has complied with the relevant statutes and Nevada law in setting forth an  
28 itemization of costs which are both actual and reasonable.





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As with virtually every other pleading, argument, representation and accusation they have filed, asserted and presented throughout this case, Defendant's instant Motion lacks merit, and is itself "haphazard."

**II. Statement of Facts**

This is a premises liability matter that occurred November 22, 2004 at the Palms Sports Bar/Sports Book. Plaintiff ENRIQUE RODRIGUEZ was an invited guest to watch a football game. During half-time, agents, employees and/or assigns of the Palms (hereinafter known as the "PALMS GIRLS") were participating in a promotion wherein they were throwing souvenirs to Sports Bar/Sports Book patrons while blindfolded.

In response to the Palms Girl, Brandy Beavers, throwing souvenirs in the Sports Bar/Sports Book while blind-folded, a customer within the Sports Bar/Sports Book dove for a thrown souvenir and hit Mr. Rodriguez's extended and stationary left knee. Mr. Rodriguez then struck the person next to him, hitting the left side of his head, then falling down, thereby sustaining extensive injuries and damages.

On or about November 15, 2006, Plaintiff filed the Complaint against Fiesta Palms L.L.C. Fiesta Palms, L.L.C. filed its Answer on April 23, 2007. The Joint Case Conference Report was filed on October 29, 2007 and the parties began discovery pursuant to Nevada Rule of Civil Procedure 26. On or about May 8, 2009, Plaintiff filed his motion for leave to amend Complaint to include Defendant BRANDY BEAVERS.

BRANDY L. BEAVERS, Defendant herein, was duly served with a copy of the Amended Summons and Amended Complaint on the day 11<sup>th</sup> day of January, 2010. The default of Defendant BRANDY L. BEAVERS for failing to answer or otherwise plead to Plaintiff's Amended Complaint was entered by this Honorable Court on February 25, 2010.



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A bench trial commenced in this matter on October 25, 2010 and this Honorable Court issued a verdict on March 9, 2011 for the Plaintiff and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS in the amount of \$6,051,589.38.

**III. Legal Argument**

**A. Plaintiff is Prevailing Party and Costs are Mandated**

NRS 18.020, governing the award of costs to a prevailing party, sets forth, in pertinent part, as follows:

Costs **must be allowed of course** to the prevailing party against any adverse party against whom judgment is rendered, in the following cases:

\*\*

**3. In an action for the recovery of money or damages, where the plaintiff seeks to recover more than \$2,500.**

Plaintiff was clearly the “prevailing party,” as evidenced by the Verdict in excess of \$6,000,000, in an action where he sought to recover more than \$2,500.

Accordingly, costs are mandated. N.R.S. 18.020(3). *Schwartz v. Estate of Greenspun*, 1994, 881 P.2d 638, 110 Nev. 1042; *Campbell v. Campbell*, 1985, 705 P.2d 154, 101 Nev. 380.

Although an award of costs is mandated in this case, it is conceded that the trial court still retains discretion when determining the reasonableness of the individual costs to be awarded. *U.S. Design & Const. Corp. v. International Broth. of Elec. Workers*, 2002, 50 P.3d 170, 118 Nev. 458.

Further, the determination of which expenses are allowable as costs is within sound discretion of trial court. N.R.S. 18.020, subd. 3. *Bergmann v. Boyce*, 1993, 856 P.2d 560, 109 Nev. 670.



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Additionally, Nevada law requires consideration of Plaintiff's "total win," in this case a verdict in excess of \$6,000,000, in awarding costs, **not as a basis for reducing them.** *Coker Equipment Co., Inc. v. Wittig*, 2010, 366 Fed.Appx. 729, 2010 WL 547532, Unreported.

Lastly, district court's award of attorney fees and costs will not be disturbed on appeal unless the district court abused its discretion in making the award. *Parodi v. Budetti*, 115 Nev. 236, 240, 984 P.2d 172, 174 (1999).

Accordingly, it is clear that costs are mandated, and Plaintiff submits that each of the costs set forth in his Memorandum are actual and reasonable, and therefore recoverable.

**B. Plaintiff's Costs are Actual and Reasonable**

Rather than a reasonable estimate or calculation, as suggested by the Defense, Plaintiff's costs are actual and reasonable, and therefore, mandated in their entirety. NRS 18.005; *Gibellini v. Klindt*, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994).

**1. E-Filing Retainer**

Challenging a cost of \$27.50 demonstrates the desperate lengths to which Defense counsel in this case will go.

Regardless, the petty argument is flawed, as the E-Filing Retainer is deemed a "necessary disbursement" within the statute permitting a prevailing party to recover costs and necessary disbursements. N.R.S. 18.010; NRCP 26(a, d, e), 30, 35. *Maxwell v. Amaral*, 1963, 383 P.2d 365, 79 Nev. 323.

Alternatively, it is deemed "reasonable and necessary expense incurred in connection with the action."<sup>1</sup>

Either way, \$27.50 is an actual and reasonable cost.

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<sup>1</sup> NRS 18.005(17).



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2. Fees for Witnesses

Defendant's argument relative to *witness fees* is really simply focused on the Expert Fees.

NRS 18.005(5) governing expert fees, states as follows:

5. Reasonable fees of not more than five expert witnesses in an amount of not more than \$1,500 for each witness, **unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.**

First of all, the amount of expert witness fees in each case is a matter within the sound discretion of the trial judge and will not be disturbed unless found to be manifestly erroneous. *Arnold v. Mt. Wheeler Power*, 101 Nev. 612, 616, 707 P.2d 1137, 1139 (1985).

Secondly, this Honorable Court is permitted to allow a larger fee if the circumstances warrant such.

Plaintiff submits, and the record reflects and supports, that a larger fee for experts in this case is clearly warranted and justified.

As this Court will recall, the Defendant did not conduct a single deposition of any of Plaintiff's various medical providers. As such, Plaintiff was required to call several providers, some of whom, due to the trial schedule, were required to present and testify over the course of two (2) days. Moreover, Dr. Tauber resides in California and was required to travel to Nevada for his testimony, while Terry Dinneen resides in Reno and was required to travel to Las Vegas on two (2) separate days.

Each of the providers' testimony was necessary given the causation dispute.

Relative to the economic expert fees of Steven T. Baker and Terry Dinneen, as this Court will recall, a significant economic loss was sustained, and based on the testimony and



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opinions of both, a significant economic award was included in the Verdict in favor of Plaintiff.

3. Trial Transcript Costs

As this Honorable Court will recall, both parties used the Trial Transcript during the evidentiary phase and closing arguments. The use of the transcript was instrumental in the preparation of trial testimony, since, as this Court will recall, the Defense chose not to depose a single medical provider in the case.

Therefore, Plaintiff submits that the cost of the Trial Transcript was both a “necessary disbursement”<sup>2</sup> and “reasonable and necessary expense incurred in connection with the action.”<sup>3</sup>

Lastly, this argument is rendered moot by the Defendant’s recently filed Motion for New Trial in which the Trial Transcripts are attached as Exhibits.

4. Telecopies, Photocopies, Long Distance Telephone Calls and Postage

Defendant’s challenge of the asserted costs associated with telecopies<sup>4</sup>, photocopies,<sup>5</sup> long distance telephone calls<sup>6</sup> and postage<sup>7</sup> is outright absurd.

Each of these costs is specifically addressed in NRS 18.005, and there is no justifiable opposition to the same.

This Court should be reminded that the Plaintiff resides in California, and received treatment in California, as well as Nevada. Clearly postage and long distance costs are appropriate.

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<sup>2</sup> NRS 18.010.  
<sup>3</sup> NRS 18.005(17).  
<sup>4</sup> NRS 18.005(11).  
<sup>5</sup> NRS 18.005(12).  
<sup>6</sup> NRS 18.005(13).  
<sup>7</sup> NRS 18.005(14).



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Defendant's only *real* argument is that Plaintiff's firm's expense for photocopies are routine and not recoverable. This Court only need to consider the reasonableness of the costs, as the statute specifically allows the costs.

Plaintiff would suggest that \$2,765.50 for a case where liability and causation were disputed, resulting in a 2 ½ week trial, is certainly reasonable.

5. Location of Brandy Beavers, Courier Service and Case Research

Costs associated with the location of Brandy Beavers, Courier Service and Case Research total \$5,011. These costs are reasonable and necessary, and warranted. NRS 18.005(17).

To argue that these costs are neither reasonable nor necessary is laughable.

Brandy Beavers was a party to the suit. Locating her for purposes of service was certainly necessary and the costs of \$200 are clearly reasonable.

Fees of \$671.04 associated with courier services is necessary, and Defendant is hard-pressed to provide any support, which they have not, to suggest said cost is unreasonable.

Lastly, costs associated with legal research are clearly appropriate and specifically addressed in the subject statute.<sup>8</sup> Plaintiff simply reiterates that this was a significantly contested liability and causation case, involving several substantial legal issues which arose prior to, during and after trial.

\$4,140.00 in legal research over the course of 3 + years of litigation, involving a premises liability claim where both liability and causation were disputed, is certainly reasonable. Moreover, the figure is the "actual" cost, and not an estimate or calculation.

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<sup>8</sup> NRS 18.005(17).



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C. Apportionment of \$200.00 Associated with Location of Brandy Beavers is Unwarranted

The suggestion that a \$200.00 cost is required to be apportioned is simply ridiculous. If this Court determines that the \$200.00 is actual and reasonable, Plaintiff is entitled to the cost.

Plaintiff submits that the cost associated with locating Brandy Beavers, a party to the case, was a "reasonable and necessary expense incurred in connection with the action."<sup>9</sup>

IV. Conclusion

Based on the foregoing, Plaintiff requests an Order denying Defendant's Motion to Retax, along with a determination that Plaintiff is entitled to costs in the total amount of \$149,146.18

DATED this 5<sup>th</sup> day of April, 2011.

BENSON BERTOLDO, BAKER & CARTER, CHTD.

By: 

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*Attorneys for Plaintiff*

<sup>9</sup>NRS 18.005(17).



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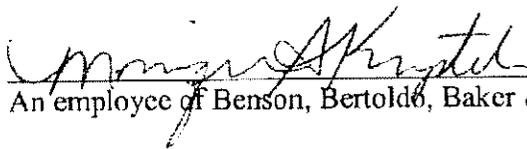
CERTIFICATE OF SERVICE

I hereby certify that on the 5<sup>th</sup> day of April, 2011, I served a copy of the foregoing OPPOSITION TO MOTION TO TAX [SIC] COSTS via 1<sup>st</sup> Class, U.S. Mail, postage thereon fully prepaid to the following:

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An employee of Benson, Bertoldo, Baker & Carter, Chtd.





*Allen D. Larson*  
CLERK OF THE COURT

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JUDGE  
STEVEN M. BAKER  
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Facsimile : (702) 228-2333  
Attorneys for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

CASE NO: A531538  
DEPT NO: 10

vs.

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/baa/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,  
Defendants.

JUDGMENT ON THE VERDICT

The above-entitled matter having come on for a bench trial on October 25, 2010 before the Honorable Jessie Walsh, District Court Judge, presiding. Plaintiff ENRIQUE RODRIGUEZ appeared in person with his counsel of record, STEVEN M. BAKER, ESQ. of the law firm of Benson Bertoldo Baker & Carter. Defendant FIESTA PALMS, L.L.C. appeared by and through its counsel of record, KENNETH C. WARD, ESQ. of the law firm of Archer Norris. Defendant BRANDY BEAVERS is in default and was not in attendance. Testimony was taken, evidence was offered, introduced and admitted. Counsel argued the merits of their cases.



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The Honorable Jessie Walsh rendered a verdict in favor of Plaintiff and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, as to claims concerning negligence arising from premises liability resulting in the injuries to ENRIQUE RODRIGUEZ in the amount of \$376,773.38 for past medical expenses; \$1,854,738.00 for future medical expenses; \$1,243,350.00 for past pain and suffering; \$1,865,025.00 for future pain and suffering; \$289,111.00 for past lost income; \$422,592.00 for future lost income, for a total judgment against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS of \$6,051,589.38.

The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C.	60%
Defendant BRANDY BEAVERS	40%

NOW, THEREFORE, judgment upon the verdict is hereby entered in favor of the Plaintiff ENRIQUE RODRIGUEZ and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff ENRIQUE RODRIGUEZ, shall have and recover against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, the sum of SIX MILLION, FIFTY-ONE THOUSAND, FIVE HUNDRED EIGHTY NINE AND 38/100 DOLLARS (\$6,051,589.38).

Pre-judgment interest shall accrue on past damages at the legal rate of 5.25% (3.25 prime + 2) on the amount of \$1,909,234.38 pursuant to NRS 17.130, from the date of service of the Summons and Complaint (12/11/2006) until fully satisfied, such interest in the amount of FOUR HUNDRED TWENTY SEVEN THOUSAND TWENTY SEVEN AND 71/100



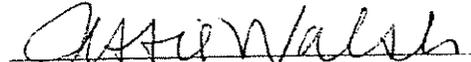
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DOLLARS (\$427,027.00) as of April 4, 2011 and accruing at a rate of TWO HUNDRED SEVENTY FOUR AND 62/100 DOLLARS (\$274.62) per diem thereafter.

Post-Judgment Interest shall accrue at the legal rate on future damages in the amount of \$4,142,355.00, until fully satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is entitled to his costs of \$149,146.<sup>18</sup> as the prevailing party under NRS 18.020 and NRS 18.010.

DATED this 11<sup>th</sup> day of Apr, 2011.

  
HONORABLE JESSIE WALSH  
District Court Judge

SUBMITTED BY:

 4/5/11  
STEVEN M. BAKER  
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BENSON, BERTOLDO, BAKER & CARTER  
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Attorneys for Plaintiff





1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. Introduction

3 The motion to tax is straightforward. The Plaintiff alleges—but does not establish in its  
4 memorandum of costs or opposition—that he is entitled to costs. The basic truth is that the Plaintiff  
5 has not submitted a *single* invoice, billing record, or declaration from any witness that demonstrates all  
6 of his claimed costs were actually incurred, reasonable, and necessary to this litigation. Such a  
7 showing is required under Nevada law. Instead, Plaintiff's tactic here appears to be "if you say it  
8 enough times, it will become fact." Simply saying he is entitled to recover costs does not make it so.

9 In short, Plaintiff cannot recover his costs because he failed to document and itemize each  
10 cost item and, as a result, it is impossible to determine if the costs were reasonable, necessary, and  
11 actually incurred.

12 II. Law and Argument

13 A. Plaintiff Has Not Met His Minimal Burden Of Simply Providing Justifying  
14 Documentation And, As A Result, He Is Not Entitled To Award Of Costs

15 Plaintiff is not entitled to recover his costs because he did not provide any evidence that  
16 supports his requested costs. The Plaintiff must show how the costs were necessary to and incurred  
17 in the action and provide sufficient justifying documentation and specific itemization to demonstrate  
18 the reasonableness and the accuracy of the costs claimed. (*Waddell v. L.V.R.V. Inc.*, 122 Nev. 15  
19 (2006).) Even if the Plaintiff had provided documentation, this alone is not enough. The Plaintiff  
20 must also substantiate the reason for such costs. (*Vill. Builders 96 v. U.S. Labs*, 121 Nev. 261, 277-78  
21 (2005)(requiring justifying documentation for *each individual item of costs*, and substantiating the reason  
22 for such costs, rather than merely providing documentation to support that the amount of the total  
23 costs is reasonable.)

24 Here, The Palms moved to tax all costs on the ground that the Plaintiff did not provide any  
25 documentation that justifies it is entitled to his claimed costs. The Plaintiff did not address this  
26 requirement in his opposition. Not a single document, invoice, or declaration from any expert has  
27 been submitted that demonstrates the costs incurred were actual, reasonable, and necessary. The  
28 Plaintiff could have submitted this documentation with its memorandum of costs or in support of its

1 opposition. Either the Plaintiff, for strategic reasons, is intentionally ignoring this requirement that  
2 he justify and substantiate his costs or the Plaintiff simply cannot show that his claimed costs were  
3 actually incurred, reasonable, and necessary.

4 Unfortunately, in the face of overwhelming deficiencies in its request for costs, Plaintiff goes  
5 further and claims his costs must be awarded—without supporting documentation—simply because  
6 a large verdict was entered in his favor. Again, the Plaintiff tries to make something true by saying it  
7 is so. It is academic that the Plaintiff must provide his billing records to support his costs. And  
8 Plaintiff had two opportunities to provide this documentation. He could have attached the billing  
9 records to his memorandum of costs or to his opposition. He failed to do so and, as a result, his  
10 request must be denied.

11 **B. Plaintiff's Request For E-Filing Fees and Trial Transcript Costs Are Not**  
12 **Recoverable Under Any Specific Statute Or Under The Guise That These Fees**  
13 **Are Reasonable And Necessary**

14 Responding to the fact that many of the claimed costs are not specifically recoverable under  
15 Nevada law, the Plaintiff attempts to dress up its costs in yet another set of clothes. In the  
16 memorandum of costs, Plaintiff contends many of these costs are specifically recoverable under the  
17 specific provisions in Nevada Revised Statute 18.005. Instead of disputing the fact that the cost  
18 statutes are strictly construed and cannot be enlarged, the Plaintiff attempts to shift these specific  
19 items, such as the trial transcript costs and e-filing retainer, to the catch all provision under NRS  
20 18.005(17). While Plaintiff says—without any authority—these costs are recoverable as reasonable  
21 and necessary expenses, he once again fails to include any documentation that demonstrates the fees  
22 were incurred and that they are reasonable and necessary to this litigation. Plaintiff's veiled attempt  
23 to now recover the costs under a different statutory provision is therefore not permissible.

24 **C. Plaintiff's Reasoning That \$114,201.36 In Fees For Fourteen Expert Witnesses**  
25 **Because Three Witnesses Were Necessary Is Faulty**

26 Plaintiff concedes that fees for eleven out of the fourteen expert witnesses are not  
27 recoverable. More specific, Defendant moved to tax the expert witness fees on the basis that twelve  
28 out of the fourteen listed witnesses exceeds the statutory cap for five witnesses at \$1,500 each. But  
29 Plaintiff simply opposed this argument on the basis that three witnesses were necessary: (1) Dr.

1 Tauber; (2) Terry Dinneen; and (3) Steven T. Baker. (*See* Opposition, Section III (B)(2).) Plaintiff did  
2 not substantiate why any of the fees for the remaining eleven expert witnesses were necessary for this  
3 litigation or that a larger fee was required. Since Plaintiff has not provided any reason or justification  
4 for the eleven other witnesses, an enhanced cost award is not appropriate.

5 Even more fatal to Plaintiff's request for expert witness fees is the fact that he did not attach  
6 a single invoice or declaration from any expert witness. Not one expert attached a declaration  
7 concerning the fees that he incurred in this case. Instead, Plaintiff's attorney offers several  
8 unsupported statements that Plaintiff had to spend an additional \$106,701.36 above the allowable or  
9 capped amount because "Defendant did not conduct a single deposition of any of Plaintiff's various  
10 medical providers, [which] this "testimony was necessary given the causation dispute" and "a  
11 significant economic loss was sustained." (Opposition, p. 5) Again Plaintiff attempts to manufacture  
12 a rule because he says so. Plaintiff does not cite a single authority that says a party is entitled to  
13 recover costs for expert witnesses larger than the statutory cap because a defendant did not depose  
14 Plaintiff's medical provider or causation is disputed.

15 Plaintiff has not made any showing justifying the expert witness costs. The showing or  
16 burden on the Plaintiff is minimal. He simply needs to submit his invoices that itemize the costs and  
17 provide declarations for the expert witnesses along with their invoices. Despite such a minimal  
18 showing, Plaintiff intentionally refuses to document his costs. Without this showing, it is impossible  
19 to determine if there is any duplicative billing, inappropriate fees, or otherwise non-recoverable costs.  
20 The costs associated with expert witnesses must therefore be denied or capped at the statutory  
21 permissible amount of \$7,500.

22 **D. Plaintiff Is Not Entitled To Recover Normal Out-Of-Pocket Expenses As**  
23 **Costs Because Such Costs Are Not Recoverable Under Nevada Law**

24 Plaintiff's costs for routine or standard overhead copies, phone calls, faxes, and postage must  
25 be denied. Plaintiff acknowledges that the telecopies, photocopies, postage, and telephone calls were  
26 routine. (*See* Opposition, Section III (B)(4).) But normal routine office overhead or standard out-of-  
27 pocket costs are not recoverable. (*Bergmann v. Boyce*, 109 Nev. 670, 681 (1993) (a normal out-of-  
28 pocket expense is generally not included in the taxable costs. "However, courts will award these fees

1 where the secretarial costs were **not** routine office overhead.”)(emphasis added.)

2 Plaintiff did not document or itemize a single copy, phone call, postage, or any facsimiles. To  
3 recover these costs, sufficient documentation justifying these costs must be provided. (*Berosini v.*  
4 *People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1353 (1998).) In *Berosini*, the court held that  
5 “[b]ecause of the lack of sufficient supporting documentation...the district court abused its  
6 discretion in awarding costs,” which included photocopies and long distance calls. (*Ibid.*) Notably, in  
7 *Berosini*, PETA provided *documentation of the date of each photocopy* and the total photocopying charge.  
8 Despite this specific documentation, the court still held that “PETA failed to provide sufficient  
9 justifying documentation” because the court was unable to “determine the reasonableness” of those  
10 costs based on that information alone. (*Ibid.*)

11 Here, Plaintiff has not provided any documentation. To recover his costs, however, the  
12 Plaintiff must not only document each cost but also explain why such an item is reasonable. Plaintiff  
13 has failed to document or demonstrate why routine or out-of-pocket expenses are recoverable. His  
14 request for these costs must therefore be denied.

15 **E. Any Costs For Brandy Beavers Is Not Recoverable**

16 Plaintiff contends it’s “laughable” that The Palms challenges the fees to locate Brandy  
17 Beavers. The only punch line here is the Plaintiff’s justification for this cost. The Plaintiff’s sole  
18 basis for recovering this cost is “Beavers was a party to the suit. Locating her for purposes of service  
19 was certainly necessary.” (Opposition, p.7) This statement fails to explain why The Palms must pay  
20 for the Plaintiff’s costs to pursue another defendant. Once again, Plaintiff does not cite a single  
21 authority or provide any invoices and declarations that would support an award that requires The  
22 Palms to pay the Plaintiff’s costs to pursue another defendant—Beavers.

23 **F. Plaintiff Did Not Demonstrate Apportionment Of The Costs Was Impossible**  
24 **And, As A Result, Any Award Must Be Apportioned**

25 All costs in this matter must be apportioned between The Palms and Beavers unless Plaintiff  
26 can demonstrate such apportionment is impossible. (*Mayfield v. Koroghi*, 184 P.3d; 2008 Nev.Lexis 36  
27 (2008).) Plaintiff did not rebut this argument. He simply contends that apportioning \$200 between  
28 The Palms and Beavers is “ridiculous.” Since Plaintiff cannot show that such an apportionment of

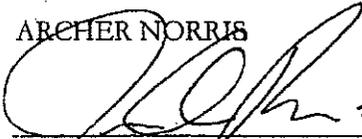
1 all the claimed costs is impossible, any costs awarded in this matter must be apportioned between  
2 The Palms and Beavers.

3 **III. Conclusion**

4 The Plaintiff attempts to dodge the requirements under Nevada law to recover an award of  
5 costs for \$149,146.18. Rather than provide justifying documentation that demonstrates he is entitled  
6 to a cost award, Plaintiff says he's entitled to his costs because he says so. While a court may rely on  
7 statements from counsel, these statements are not evidence. (*Babena v. Goodyear Tire & Rubber Co.*,  
8 (2010) 126 Nev. Adv. Rep. 57, 245 P.3d 1182, 1185 fn 1.) The lack of documentation or justification  
9 plucks from this Court and The Palms any opportunity to determine the method of calculating the  
10 costs and whether such sums are duplicative, improper, or not recoverable. Under Nevada law, a  
11 party is required to do more than simply file a memorandum of costs if he wants the Court to  
12 exercise its discretion and make an award of costs. This burden, however, is minimal. A party simply  
13 needs to provide sufficient documentation and justification that the costs are reasonable, necessary to  
14 the litigation, and were actually incurred. Despite this minimal burden, Plaintiff intentionally refused  
15 to provide any documentation that justifies an award of costs. Therefore, Plaintiff's request for costs  
16 should be denied.

17 Dated: April 13, 2011

18 ARCHER NORRIS

19  #9671 for  
20 Kenneth C. Ward (Bar No. 6530)  
21 Keith R. Gillette (Bar No. 11140)  
22 A Professional Law Corporation  
23 2033 North Main Street, Suite 800  
24 Walnut Creek, California 94596-3728

25 Attorneys for Defendant FIESTA PALMS,  
26 LLC, d/b/a/ THE PALMS CASINO  
27 RESORT  
28

1 CERTIFICATE OF SERVICE

2 **Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC**  
3 **Court and Action No: District Court, Clark County, Nevada Action No. A531538**

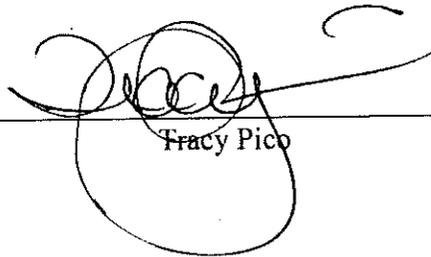
4 I, Tracy Pico, certify that I am over the age of eighteen years and not a party to this action  
5 or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035, Walnut  
6 Creek, California 94596-3728. On April 13, 2011, I caused the following document(s) to be  
7 served: **DEFENDANT FIESTA PALMS, LLC A NEVADA LIMITED LIABILITY  
8 COMPANY, D/B/A THE PALMS CASINO RESORTS' REPLY TO PLAINTIFF'S  
9 OPPOSITION TO THE MOTION TO TAX COSTS**

10  by placing a true copy of the document(s) listed above, enclosed in a sealed envelope,  
11 addressed as set forth below, for collection and mailing on the date and at the business  
12 address shown above following our ordinary business practices. I am readily familiar  
13 with this business' practice for collection and processing of correspondence for  
14 mailing with the United States Postal Service. On the same day that a sealed envelope  
15 is placed for collection and mailing, it is deposited in the ordinary course of business  
16 with the United States Postal Service with postage fully prepaid.

17 Steven M. Baker, Esq.  
18 Benson, Bertoldo, Baker & Carter  
19 7408 W. Sahara Avenue  
20 Las Vegas, NV 89117  
21 Phone: 702.228.2600  
22 Fax: 702.228.2333  
23 *Attorneys for Plaintiff*  
24 Enrique Rodriguez

25 Jeffery A. Bendavid, Esq.  
26 Moran Law Firm  
27 630 S. 4th Street  
28 Las Vegas, NV 89101  
Phone: 702.384.8424  
Fax: 702.384.6568  
Co-Counsel for Defendant  
Fiesta Palms, LLC a Nevada Limited  
Liability Company, d/b/a The Palms  
Casino Resort

17 I declare under penalty of perjury that the foregoing is true and correct. Executed on April  
18 13, 2011, at Walnut Creek, California.

19   
20 \_\_\_\_\_  
21 Tracy Pico



CLERK OF THE COURT

1 STEVEN M. BAKER  
2 Nevada Bar No. 4522  
3 BENSON, BERTOLDO, BAKER & CARTER  
4 7408 W. Sahara Avenue  
5 Las Vegas, Nevada 89117  
6 Telephone : (702) 228-2600  
7 Facsimile : (702) 228-2333  
8 Attorneys for Plaintiff

9  
10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

12 \* \* \*

13 ENRIQUE RODRIGUEZ, an individual,  
14 Plaintiff,

CASE NO: A531538

DEPT NO: 10

15 vs.

16 FIESTA PALMS, L.L.C., a Nevada Limited  
17 Liability Company, d/baa/a PALMS CASINO  
18 RESORT, BRANDY L. BEAVERS,  
19 individually, DOES 1 through X, inclusive,  
20 and ROE BUSINESS ENTITIES I through X,  
21 inclusive,

22 Defendants.

23 NOTICE OF ENTRY OF JUDGMENT  
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PLEASE TAKE NOTICE that a Judgment was entered in the above-captioned matter on the 12<sup>th</sup> day of April, 2011. A copy of said Judgment on the Verdict is attached hereto.

DATED this 15<sup>th</sup> day of April, 2011.

**BENSON BERTOLDO, BAKER & CARTER, CHTD.**

By:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No. 4522  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
(702) 228-2600 Telephone  
(702) 228-2333 Facsimile  
monique@bensonlawyers.com  
*Attorneys for Plaintiff*



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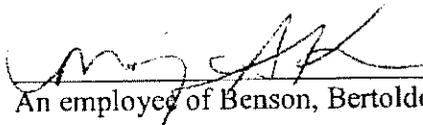
CERTIFICATE OF SERVICE

I hereby certify that on the 5<sup>th</sup> day of April, 2011, I served a copy of the Notice of Entry of Judgment via 1<sup>st</sup> Class, U.S. Mail, postage thereon fully prepaid to the following:

10676-05 Co-Counsel for Fiesta Palms  
Kenneth C. Ward, Esq.  
Archer Norris  
2033 North Main Street, Suite 800  
P.O. Box 8035  
Walnut Creek, California 94596  
925-930-6600 Telephone  
925-930-6620 Facsimile

10676-05 Attorneys for Fiesta Palms  
Jeffery A. Bendavid, Esq.  
Moran & Associates  
630 South Fourth Street  
Las Vegas, Nevada 89101  
702-384-8424 Telephone  
702-284-6568 Facsimile

10676-05 Co-Counsel for Fiesta Palms  
Marsha L. Stephenson, Esq.  
Stephenson & Dickinson  
2820 West Charleston Blvd., Suite 19  
Las Vegas, Nevada 89102  
474-7229 Telephone  
474-7237 Facsimile

  
An employee of Benson, Bertoldo, Baker & Carter, Chtd.

*Alma D. Quinn*  
CLERK OF THE COURT

ORIGINAL

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333



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JUDG  
STEVEN M. BAKER  
Nevada Bar No. 4522  
BENSON, BERTOLDO, BAKER & CARTER  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
Attorneys for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

CASE NO: A531538  
DEPT NO: 10

vs.

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/baa/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES I through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,

Defendants.

JUDGMENT ON THE VERDICT

The above-entitled matter having come on for a bench trial on October 25, 2010 before the Honorable Jessie Walsh, District Court Judge, presiding. Plaintiff ENRIQUE RODRIGUEZ appeared in person with his counsel of record, STEVEN M. BAKER, ESQ. of the law firm of Benson Bertoldo Baker & Carter. Defendant FIESTA PALMS, L.L.C. appeared by and through its counsel of record, KENNETH C. WARD, ESQ. of the law firm of Archer Norris. Defendant BRANDY BEAVERS is in default and was not in attendance. Testimony was taken, evidence was offered, introduced and admitted. Counsel argued the merits of their cases.



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The Honorable Jessie Walsh rendered a verdict in favor of Plaintiff and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, as to claims concerning negligence arising from premises liability resulting in the injuries to ENRIQUE RODRIGUEZ in the amount of \$376,773.38 for past medical expenses; \$1,854,738.00 for future medical expenses; \$1,243,350.00 for past pain and suffering; \$1,865,025.00 for future pain and suffering; \$289,111.00 for past lost income; \$422,592.00 for future lost income, for a total judgment against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS of \$6,051,589.38.

The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C.	60%
Defendant BRANDY BEAVERS	40%

NOW, THEREFORE, judgment upon the verdict is hereby entered in favor of the Plaintiff ENRIQUE RODRIGUEZ and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff ENRIQUE RODRIGUEZ, shall have and recover against Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS, jointly and severally, the sum of SIX MILLION, FIFTY-ONE THOUSAND, FIVE HUNDRED EIGHTY NINE AND 38/100 DOLLARS (\$6,051,589.38).

Pre-judgment interest shall accrue on past damages at the legal rate of 5.25% (3.25 prime + 2) on the amount of \$1,909,234.38 pursuant to NRS 17.130, from the date of service of the Summons and Complaint (12/11/2006) until fully satisfied, such interest in the amount of FOUR HUNDRED TWENTY SEVEN THOUSAND TWENTY SEVEN AND 71/100



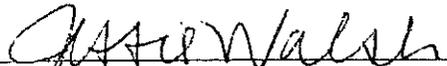
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DOLLARS (\$427,027.00) as of April 4, 2011 and accruing at a rate of TWO HUNDRED SEVENTY FOUR AND 62/100 DOLLARS (\$274.62) per diem thereafter.

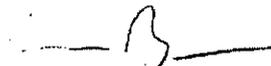
Post-Judgment Interest shall accrue at the legal rate on future damages in the amount of \$4,142,355.00, until fully satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is entitled to his costs of \$149,146.<sup>18</sup> as the prevailing party under NRS 18.020 and NRS 18.010.

DATED this 11<sup>th</sup> day of Apr, 2011.

  
HONORABLE JESSIE WALSH  
District Court Judge

SUBMITTED BY:

 4/5/11  
STEVEN M. BAKER  
Nevada Bar No. 4522  
BENSON, BERTOLDO, BAKER & CARTER  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
Attorneys for Plaintiff



CLERK OF THE COURT

*Original*

1 **FFCL**  
2 STEVEN M. BAKER  
3 Nevada Bar No. 4522  
4 BENSON, BERTOLDO, BAKER & CARTER  
5 7408 W. Sahara Avenue  
6 Las Vegas, Nevada 89117  
7 Telephone : (702) 228-2600  
8 Facsimile : (702) 228-2333  
9 Attorneys for Plaintiff

10 **DISTRICT COURT**  
11 **CLARK COUNTY, NEVADA**

12 \* \* \*

<p>10 ENRIQUE RODRIGUEZ, an individual,</p> <p>11 Plaintiff,</p> <p>12 vs.</p> <p>13 FIESTA PALMS, L.L.C., a Nevada Limited 14 Liability Company, d/baa/a PALMS CASINO 15 RESORT, BRANDY L. BEAVERS, 16 individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive,</p> <p>17 Defendants.</p>	<p>CASE NO: A531538</p> <p>DEPT NO: 10</p>
--	--

18 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**  
19 **IN SUPPORT OF VERDICT**

20 THIS MATTER HAVING COME ON FOR TRIAL before the bench, commencing  
21 on October 25, 2011, and a verdict being entered on March 14, 2011, this Honorable Court  
22 Finds and Concludes as follows:

23 1) Liability in favor of the Plaintiff in this matter was determined as consistent with the  
24 Findings of Fact and Conclusions of law granting Directed Verdict pursuant to NRCP 52  
25 entered in this matter on March 10, 2011.  
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2) The Court finds the testimony of Plaintiff's treating physicians, including, but not limited to Dr. Shifini, Dr. Mortillaro, Dr. Kidwell, Dr. Shaw, Dr. Shannon, and Dr. Tauber to be persuasive on the issue of the reasonableness, necessity and causation of past and future medical expenses to include, but not limited to, surgeries to Plaintiff's injured knee, carpal tunnel release, future knee replacement, a spinal cord stimulator and replacement of batteries with respect to the same, future lumbar fusion, cervical modalities, and other and further past and future medical services and expenses as elucidated at trial and, accordingly, and in this Court's discretion, awards as past medical expenses the amount of \$376,773.38 and future medical expenses in the amount of \$1,854,738.00.

3) Based upon the testimony of said treating physicians, the Plaintiff Enrique Rodriguez, and "before and after" lay witnesses who testified at the time of trial, the Court finds that Plaintiff Rodriguez suffered extensive, painful, disabling, and permanent injuries as a result of the subject incident which have detrimentally impacted his daily living and functioning and, consistent with that finding, and in this Courts discretion, awards as past pain and suffering the amount of \$1,243,350.00 and future pain and suffering in the amount of \$1,865,025.00.

4) The Court finds the testimony of Plaintiff's economist, Terrence Dineen, persuasive on the issue of Plaintiff's loss of economic opportunity, vocational disability, and loss of past and future earnings, finds and concludes the Plaintiff suffered significant detrimental impact to his ability to transact in the field of real-estate purchases, refurbishment, and sales due to his physical limitations resultant of the subject injury, finds that sufficient opportunity existed and exists in the repressed real estate market for Plaintiff to continue to profitably purchase, refurbish and sell real-estate absent said physical limitations, and is persuaded by and accepts the calculations of Mr. Dineen with respect to the same and, in this Court's discretion, awards



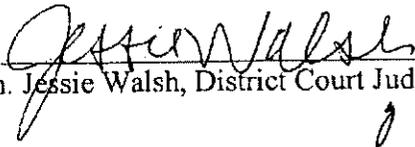
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past lost income in the amount of \$289,111.00 and future lost income in the amount of \$422,593.00.

5) As to the allocation of liability the Court finds liability against Defendant Fiesta Palms, LLC, as set forth in Finding and Conclusion #1, above, but finds that Defendant Beavers also failed to act in the manner of the average reasonable person under similar circumstances in a manner creating a foreseeable harm to patrons of the Palms by throwing promotional items into a crowded environment and in other and further manners as elucidated at the time of trial. The Court, in its discretion, therefore apportions liability at 60% to the Palms and 40% to Beavers, with no finding of comparative fault on the part of the Plaintiff.

WHEREFORE, this Court finds and concludes that a verdict be entered in said amounts as set forth on the stipulated Verdict form attached hereto as Exhibit #1.

Date: 19 Apr 2011

  
Hon. Jessie Walsh, District Court Judge

CLERK OF THE COURT

C. AL

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

**ENSON  
ERIKOLDO  
AKER  
& CARTER**  
ATTORNEYS AT LAW

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DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

CASE NO: A531538

DEPT NO: 10

vs.

TRIAL DATE: 10/25/10

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT; BRANDY BEAVERS; DOES 1  
through X, inclusive, and ROE BUSINESS  
ENTITIES I through X, inclusive,

Defendants.

VERDICT

The Honorable Jessie Walsh, presiding judge in the above-entitled action, hereby finds for  
Plaintiff ENRIQUE RODRIGUEZ as follows:

1. The Court finds against Defendant FIESTA PALMS, L.L.C.
2. The Court finds against Defendant BRANDY BEAVERS.

Yes / No

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3. The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C.	<u>        00        </u> %
Defendant BRANDY BEAVERS	<u>        40        </u> %

4. The total amount of the plaintiff's damages is divided as follows:

Past Medical Expenses	<u>\$ 376,773.78</u>
Future Medical Expenses	<u>\$1,854,738.</u>
Past Pain and Suffering	<u>\$1,243,350</u>
Future Pain and Suffering	<u>\$1,865,025.</u>
Past Lost Income	<u>\$ 289,111.</u>
Future Lost Income	<u>\$ 422,592.</u>

5. Further, the Court finds that Defendant Fiesta Palms, L.L.C. acted with conscious disregard of the rights or safety of others when it was aware of the probable dangerous consequences of its conduct and willfully and deliberately failed to avoid those consequences.

Yes/No

DATED this 1<sup>st</sup> day of Mar February, 2011.

Jessie Walsh  
HON. JESSIE WALSH, District Court Judge

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \*

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

\_\_\_\_\_ /

**APPELLANT'S APPENDIX**  
**VOLUME 2**

**ROBERT L. EISENBERG (Bar # 0950)**  
**Lemons, Grundy & Eisenberg**  
**6005 Plumas Street, Third Floor**  
**Reno, Nevada 89519**  
**775-786-6868**  
**Email: [rle@lge.net](mailto:rle@lge.net)**

**ATTORNEYS FOR APPELLANT**

CHRONO INDEX

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
1.	Complaint	11/15/06	1	1 - 10
2.	Defendant Fiesta Palm's LLC dba Casino Resorts Answer to Plaintiff's Complaint	04/23/07	1	11 - 19
3.	Plaintiff's 16.1 List of Documents and Witnesses	09/24/11	1	20 - 30
4.	Plaintiff's Fifth Supplemental Early Case Conference List of Documents and Witnesses	01/14/08	1	31 - 35
5.	Plaintiff's Sixth Supplemental Early Case Conference List of Documents and Witnesses	01/25/08	1	36 - 39
6.	Plaintiff's Seventh Supplemental Early Case Conference List of Documents and Witnesses	07/01/08	1	40 - 45
7.	Plaintiff's Eight Supplemental Early Case Conference List of Documents and Witnesses	07/25/08	1	46 - 50
8.	Plaintiff's Ninth Supplemental Early Case Conference List of Documents and Witnesses	10/13/08	1	51 - 55
9.	Plaintiff's Tenth Supplemental Early Case Conference List of Documents and Witnesses	10/30/08	1	56 - 60
10.	Demand for Jury Trial	4/14/09		61 - 63
11.	Plaintiff's Thirteenth Supplemental Early Case Conference List of Documents and Witnesses	5/01/09	1	64 - 68
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**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
16.	Motion to Compel Responses to Request for Production of Documents, to Compel Further Responses to Interrogatories; Request for Sanctions; and Motion to Compel Independent Medical Examinations of Plaintiff	07/28/10	1	126 - 134
17.	Plaintiff's Opposition to Defendant's Motion to Compel Responses to Request for Production of Documents, to Compel Further Responses to Interrogatories; Request for Sanctions; and Motion to Compel Independent Medical Examination of Plaintiff	08/09/10	1	135 - 137
18.	Plaintiff's Pre-Trial Memorandum	09/27/10	1	138 - 145
19.	Plaintiff's Motion to Strike	11/10/10	1	146 - 150
20.	Defendant The Palms' Opposition to Plaintiff's Motion to Strike	11/23/10	1	151 - 157
21.	Defendant Fiesta Palms, LLC Post-Trial Brief	11/24/10	1	158 - 187
22.	Plaintiff's Confidential Trial Brief	01/13/11	1	188 - 206
23.	Plaintiff's Opposition to Defendants' Motion for Mistrial	01/14/11	1	207 - 239
24.	Defendant Fiesta Palms, LLC's Motion for Mistrial, or, Alternatively, Motion to Strike Plaintiff's Confidential Pretrial and Trial Briefs on Ex Parte Application for Order Shortening Time; Order	01/20/11	1	240 - 248
25.	Reply in Support of the Palms' Motion for Mistrial, or, Alternatively, Motion to Strike Plaintiff's Confidential Pretrial and Trial Briefs	01/26/11	2	249 - 257
26.	Findings of Fact, Conclusions of Law, and Order [re: Motion for Mistrial]	03/10/11	2	258 - 261
27.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Strike Defendant's Post-Trial Brief]	03/10/11	2	262 - 264

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**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
28.	Findings of Fact, Conclusions of Law, and Order [re: Plaintiff's Rule 52 Motion on the Issue of Liability]	03/10/11	2	265 - 268a
29.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Strike Defendant's Experts]	03/10/11	2	269 - 272
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32.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, d/b/a The Palms Casino Resorts' Notice of Motion and Motion to Tax Costs	03/21/11	2	280 - 287
33.	Memorandum Re: Pre-Judgment Interest	03/22/11	2	288 - 292
34.	Defendant Fiesta Palms, LLC DBA The Palms Casino Resort's Memorandum of Points and Authorities in Support of its Motion for New Trial	03/25/11	2	293 - 324
35.	Declaration of Kenneth C. Ward in Support of Defendant Fiesta Palms, LLC's Motion for New Trial	03/25/11	2	325 - 411
36.	Declaration of Kenneth C. Ward (2nd) in Support of Defendant Fiesta Palms, LLC's Motion for New Trial	03/25/11	2	412 - 491
37.	Defendant Fiesta Palms, LLC DBA The Palms Casino Resort's Memorandum of Points and Authorities in Support of its Motion for New Trial	03/28/11	3	492 - 523
38.	Declaration of Kenneth C. Ward in Support of Defendant Fiesta Palms, LLC Motion for New Trial	03/28/11	3	524 - 686
39.	Defendant Fiesta Palms, LLC's Notice of Motion and Motion for New Trial	03/28/11	3	687 - 688

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**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
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42.	Opposition to Defendant Fiesta Palms, LLC., D/B/A The Palms Casino's Motion to Tax [sic] Costs	04/05/11	3	697 - 705
43.	Judgment on the Verdict	04/12/11	3	706 - 708
44.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, d/b/a/ The Palms Casino Resort's Reply to Plaintiff's Opposition to the Motion to Tax Costs	04/13/11	3	709 - 715
45.	Notice of Entry of Judgment	04/15/11	3	716 - 721
46.	Findings of Facts and Conclusions of Law in Support of Verdict	04/21/11	3	722 - 726
47.	Plaintiff's Opposition to Defendants' Motion for New Trial	04/22/11	4	727 - 820
48.	Notice of Motion and Motion to Amend Judgment on the Verdict	05/02/11	4	821 - 824
49.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, D/B/A The Palms Casino Resort's Reply to Plaintiff's Opposition to the Motion for New Trial	05/02/11	4	825 - 834
50.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Amend Judgment on Verdict]	09/19/11	4	835 - 837
51.	Findings of Fact, Conclusions of Law, and Order [re: Motion to Tax Costs]	09/19/11	4	838 - 840
52.	Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion for New Trial	09/29/11	4	841 - 854

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**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
53.	Plaintiff's Motion for Reconsideration of Order Granting Defendant's Motion to Retax Costs; Ex Parte Application for Order Shortening Time; Order	10/5/11	4 5	855 - 976 977- 1149
54.	Defendant Fiesta Palms, LLC, a Nevada Limited Liability Company, D/B/A The Palms Casino Resort's Opposition to Plaintiff's Motion for Reconsideration of Order to Retax Costs	10/14/11	5	1150 - 1191
55.	Plaintiff's Reply to Defendant's Opposition to Motion for Reconsideration of Order Granting Defendant's Motion to Retax Costs	10/18/11	5	1192 - 1195
56.	Notice of Motion and Motion to Amend the Order Denying Defendant's Motion for a New Trial	10/18/11	5	1196 - 1197
57.	Memorandum of Points and Authorities in Support of Motion to Amend the Order Denying Defendant's Motion for New Trial	10/18/11	5	1198 - 1203
58.	Affidavit of Keith R. Gillette in Support of Motion to Amend Order Denying Defendant's Motion for New Trial	10/18/11	5	1204 - 1224
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61.	Order	11/17/11	6	1271 - 1272
62.	Amended or Supplemental Notice of Appeal	12/13/11	6	1273 - 1278
63.	Amended Judgment on the Verdict	02/15/12	6	1279 - 1281
64.	Second Amended or Supplemental Notice of Appeal	03/13/12	6	1282 - 1314

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
<b><u>Trial Transcripts</u></b>				
65.	Partial Transcript- Bench Trial (Opening statements; Dr. Heaps)	10/25/10	7	1315 - 1404
66.	Partial Transcript- Bench Trial (Sheri Long)	10/25/10	8	1405 - 1431
67.	Partial Transcript- Bench Trial (Vikki Kooinga)	10/25/10	8	1432 - 1444
68.	Partial Transcript- Bench Trial Vol. 1 (Enrique Rodriguez)	10/26/10	8	1445 - 1579
69.	Partial Transcript- Bench Trial (Dr. Maryanne Shannon)	10/27/10	9	1580 - 1777
70.	Partial Transcript- Bench Trial Vol. 2 (Enrique Rodriguez)	10/27/10	9	1778 - 1810
71.	Partial Transcript- Bench Trial (Dr. Joseph Schifini)	10/28/10	10	1811 - 1892
72.	Partial Transcript- Bench Trial (Dr. Joseph Schifini)	11/1/10	10	1893 - 2037
73.	Partial Transcript- Bench Trial Vol. 1(Dr. Russell Shah)	11/1/10	11	2038 - 2191
74.	Partial Transcript- Bench Trial Vol. 3 (Enrique Rodriguez)	11/2/10	11	2192 - 2220
75.	Partial Transcript- Bench Trial Vol. 2 (Dr. Russell Shah)	11/2/10	12	2221 - 2339
76.	Partial Transcript- Bench Trial (Forrest P. Franklin)	11/3/10	12	2340 - 2375
77.	Partial Transcript- Bench Trial (Maria Perez)	11/3/10	12	2376 - 2393
78.	Partial Transcript- Bench Trial (Nicholas Tavaglione)	11/4/10	12	2394 - 2426
79.	Partial Transcript- Bench Trial (Terrance Dinneen)	11/4/10	13	2427 - 2543

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
80.	Partial Transcript- Bench Trial (Dr. George Becker)	11/5/10	13 14	2544 - 2676 2677 - 2742
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82.	Partial Transcript- Bench Trial (Dr. Walter Kidwell)	11/8/10	14	2778 - 2894
83.	Partial Transcript- Bench Trial (Dr. Louis Mortillaro)	11/9/10	15	2895 - 3004
84.	Partial Transcript- Bench Trial (Dr. Thomas Cargill)	11/9/10	15	3005 - 3061
85.	Partial Transcript- Bench Trial (Frank Sciulla)	11/9/10	15	3062 - 3073
86.	Partial Transcript- Bench Trial (Closing Arguments)	11/10/10	16	3074 - 3150
<b><u>Hearing Transcripts</u></b>				
87.	Defendant's Motion for Jury Trial	10/20/10	16	3151 - 3163
88.	Defendant's Motion for Mistrial, etc.	01/27/11	16	3164 - 3186
89.	Defendant's Motion for A New Trial, etc.	07/05/11	16	3187 - 3212

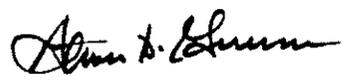
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01/26/2011 12:03:20 PM



CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

14 ENRIQUE RODRIGUEZ,  
15 Plaintiff,  
16 v.  
17 FIESTA PALMS, LLC, a Nevada Limited  
18 Liability Company, d/b/a THE PALMS  
19 CASINO RESORT, et al. ,  
20 Defendants.

Case No. A531538

**REPLY IN SUPPORT OF THE PALMS'  
MOTION FOR MISTRIAL, OR,  
ALTERNATIVELY, MOTION TO STRIKE  
PLAINTIFF'S CONFIDENTIAL  
PRETRIAL AND TRIAL BRIEFS**

Dept: X

22 **A. Plaintiff's failure to file and serve EDCR 7.27 memorandum and mistaken**  
23 **references to Nonexistent "Supplemental Confidential Bench Brief Re:**  
24 **Punitive Damages" drove Motion for Mistrial**

24 After discovering what appeared from its very title ("Supplemental Confidential Bench  
25 Brief Re: Punitive Damages") to be improper ex parte communications, the Palms filed a motion  
26 for a mistrial based on substantial irregularity in the proceedings. Plaintiff in his opposition to the  
27  
28

1 Palms' motion for a mistrial informs the Palms for the first time that he never submitted his  
2 "Plaintiff's Supplemental Confidential Bench Brief Re: Punitive Damages" to the Court.  
3 Plaintiff's references to the Supplemental Confidential Bench Brief in his Motion to Strike the  
4 Palms' Posttrial Brief were, we now learn, mistakes. It was those mistakes, though, that caused  
5 the Palms to believe plaintiff had attempted improper ex parte contacts with the Court and that  
6 compelled the Palms to file the instant motion to safeguard its due process rights.

7 Plaintiff argues that the Palms should have known that the "Plaintiff's Supplemental  
8 Confidential Bench Brief Re: Punitive Damages" was submitted after trial because it was signed  
9 on November 10, 2010, the date the parties rested, and because it is clearly drafted as an  
10 opposition<sup>2</sup> to the Palms' anticipated NRC 50 motion to dismiss punitive damages claims. To  
11 date, though, no one has ever seen this document. Plaintiff asserts that it was attached as an  
12 exhibit to plaintiff's Motion to Strike the Palms' Posttrial Brief, but this is not the case; that  
13 motion as filed with the Court and served on the Palms has no exhibits. Accordingly, there is no  
14 way the Palms could have known that brief was signed on November 10, 2010.

15 Plaintiff's conduct in making mistaken references to supplemental confidential briefing  
16 caused the Palms to be concerned for its due process rights. Plaintiff's own conduct caused the  
17 Palms to bring this motion for a mistrial, which motion plaintiff's counsel has taken every  
18 opportunity to remind this Court should greatly offend it. To offend the Court was not the Palms'  
19 intention at all, and indeed the Palms took pains to state that while plaintiff's own briefing  
20 reflected that plaintiff had attempted to engage in improper ex parte contacts with the Court, the  
21 Palms did not think the Court had engaged in any improper behavior itself. However, the tenor of  
22 counsel's opposition tends to indicate that the "damage" may already have been done. If that is  
23 the case, then the Palms respectfully requests that this Court grant its Motion for Mistrial.

24 **B. Plaintiff's EDCR 7.27 brief still untimely**

25 The fact remains that plaintiff failed to file and serve his EDCR 7.27 brief timely, and so  
26 that brief should be stricken. Under EDCR 7.27, the close of trial, November 10, 2010, was the

27 \_\_\_\_\_  
28 <sup>2</sup> If the Supplemental Confidential Bench Brief was intended to be plaintiff's opposition to the Palms' anticipated  
NRC 50 motion to dismiss the punitive damages claims, why not call it an opposition?

1 time for plaintiff to file and serve any pretrial confidential trial brief. However, plaintiff faxed it  
2 to the Palms' counsel on December 14, 2010, more than a month after the close of trial. Plaintiff  
3 did not properly serve any EDCR 7.27 brief until January 14, 2011.

4 Plaintiff tries to manufacture a controversy over the meaning of "close of trial" to excuse  
5 his failure to timely file the EDCR 7.27 brief. The Palms could not find any authority supporting  
6 plaintiff's argument that trial is "closed" only after a verdict is rendered. The *Olivero* case to  
7 which he cites indeed does find that a litigant's serving the EDCR 7.27 brief after the judge ruled  
8 and left the bench to be untimely, but the decision did not hinge on the verdict. The salient fact  
9 was not that the brief was served following the verdict, and there was actually no ruling on the  
10 definition of the phrase "close of trial." Plaintiff's citation to *Olivero* for that proposition is inapt.

11 The difference between the facts of *Olivero* and the situation before this Court is that in  
12 *Olivero*, the brief was submitted just a few minutes late--the judge had just left the bench. The  
13 court found the rule was violated, but that the violation was not material. Here, the brief was  
14 provided to the Palms by fax a month after the close of the evidence, and served more than two  
15 months late. The Palms submits that under *Olivero* this is a violation; the question for the Court  
16 is whether the violations material. The Palms submits that it is, because, had the briefing been  
17 submitted timely, the Palms might have decided to take actions which are now foreclosed to it.

#### 18 **C. Request for Sanctions**

19 Plaintiff requests sanctions for having to respond to the Palms "offensive and  
20 inappropriate motion." The request should be rejected, as plaintiff's own mistakes in referencing  
21 documents that had never been filed compelled the Palms to file the instant motion. Had plaintiff  
22 not made these mistakes, the Palms very likely would not have made the motion for mistrial.

#### 23 **D. Conclusion**

24 If plaintiff indeed did not lodge the "Supplemental Confidential Bench Brief Re: Punitive  
25 Damages", and if the Court never received it, then the Palms is unaware of any improper ex parte  
26 communications. The Palms likely never would have filed this motion but for plaintiff's mistakes  
27 in referencing that brief.

28 During trial, plaintiff never submitted any EDCR 7.27 memorandum. In posttrial

1 motions, plaintiff for the first time referenced what appeared to be multiple confidential bench  
2 briefs which had never been filed or served on the Palms. At that point, concerned that plaintiff  
3 had made numerous attempts at improper ex parte contact with this Court, the Palms filed this  
4 motion for a mistrial to preserve its due process rights. Now, after plaintiff's reply, plaintiff's  
5 references to confidential trial briefs and bench briefs were mistakes, and such briefs actually did  
6 not exist/were never filed/served/submitted to the Court. The Palms relied on the references  
7 made in plaintiff's briefing to be accurate., and regrets the confusion that has ensued because of  
8 plaintiff's mistakes.

9           Regardless, plaintiff's EDCR 7.27 brief, served well after the close of trial, was untimely  
10 and should be stricken.

11           Dated: January 24, 2010.

ARCHER NORRIS



---

Kenneth C. Ward  
Attorneys for Defendant  
FIESTA PALMS, LLC, a Nevada Limited  
Liability Company, d/b/a THE PALMS  
CASINO RESORT

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of ARCHER NORRIS and that on  
3 this day I caused to be served a true and correct copy of **DEFENDANT FIESTA PALMS'**  
4 **REPLY IN SUPPORT OF THE PALMS' MOTION FOR MISTRIAL, OR,**  
5 **ALTERNATIVELY, MOTION TO STRIKE PLAINTIFF'S CONFIDENTIAL PRETRIAL**  
6 **AND TRIAL BRIEFS** by:

- 7  U.S. Mail  
8  Facsimile Transmission & E-mail: monique@bensonlawyers.com  
9  Personal Service  
10  Messenger Service

11 addressed to the following:

12 Steven M. Baker, Esq.  
13 Benson, Bertoldo, Baker & Carter  
14 7408 W. Sahara Avenue  
15 Las Vegas, NV 89117  
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17 **Fax: 702.228.2333**  
18 *Attorneys for Plaintiff*  
19 Enrique Rodriguez

Jeffery A. Bendavid, Esq.  
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630 S. 4th Street  
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**Fax: 702.384.6568**  
Co-Counsel for Defendant  
Fiesta Palms, LLC a Nevada Limited  
Liability Company, d/b/a The Palms Casino  
Resort

20  
21 Dated this 26th day of January, 2011

22  
23   
24  
25  
26  
27  
28

**Pico, Tracy L**

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**From:** Pico, Tracy L  
**Sent:** Wednesday, January 26, 2011 12:05 PM  
**To:** 'Monique Krystek'  
**Subject:** Rodriguez v. Fiesta Palms

**Attachments:** PALMS\_20110126120218.pdf



PALMS\_2011  
120218.pdf (2)

Tracy Pico  
Assistant to Keith R. Gillette, Michael C. Osborne, Juliet R. Jonas and David M. Marchiano  
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TRANSMISSION VERIFICATION REPORT

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DATE, TIME	01/26 12:08
FAX NO. /NAME	17026714384
DURATION	00:00:59
PAGE(S)	07
RESULT	OK
MODE	STANDARD ECM



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**FACSIMILE TRANSMISSION**

**DATE:** January 26, 2011

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Lucas / Department X	702-671-4384	702-671-4389
Steven M. Baker, Esq.	702-228-2333	702-228-2600
Jeffrey A. Bendavid, Esq.	702-384-6568	702-384-8424

**FROM:** Tracy L. Pico                      **PHONE:** 925.952.5525  
**RE:** Rodriguez v. Fiesta Palms, LLC

<b>FILE NUMBER:</b>	ZA-126	
<b>NUMBER OF PAGES WITH COVER PAGE:</b>	6	<b>CASE NO.</b> A531538

**MESSAGE:**

Please find attached The Palms' Reply ISO Motion for Mistrial, or, Alternatively, Motion to

TRANSMISSION VERIFICATION REPORT

TIME : 01/26/2011 12:11  
 NAME :  
 FAX :  
 TEL :  
 SER.# : BROJ9J973326

DATE, TIME	01/26 12:10
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**FACSIMILE TRANSMISSION**

**DATE:** January 26, 2011

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NAME:	FAX NO.:	PHONE NO.:
Lucas / Department X	702-671-4384	702-671-4389
Steven M. Baker, Esq.	702-228-2333	702-228-2600
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**FROM:** Tracy L. Pico **PHONE:** 925.952.5525

**RE:** Rodriguez v. Fiesta Palms, LLC

FILE NUMBER:	ZA-126	
NUMBER OF PAGES WITH COVER PAGE:	6	CASE NO. A531538

**MESSAGE:**

Please find attached The Palms' Reply ISO Motion for Mistrial, or, Alternatively, Motion to

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TIME : 01/26/2011 12:14  
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 FAX :  
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 SER. # : BROJ9J973326

DATE, TIME 01/26 12:12  
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 DURATION 00:02:03  
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**FACSIMILE TRANSMISSION**

**DATE:** January 26, 2011

**TO:**

NAME:	FAX NO.:	PHONE NO.:
Lucas / Department X	702-671-4384	702-671-4389
Steven M. Baker, Esq.	702-228-2333	702-228-2600
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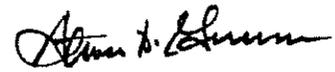
**FROM:** Tracy L. Pico                      **PHONE:** 925.952.5525  
**RE:** Rodriguez v. Fiesta Palms, LLC

<b>FILE NUMBER:</b>	ZA-126	
<b>NUMBER OF PAGES WITH COVER PAGE:</b>	6	<b>CASE NO.</b> A531538

**MESSAGE:**

Please find attached The Palms' Reply ISO Motion for Mistrial, or, Alternatively, Motion to Strike Plaintiff's Confidential Pretrial and Trial Briefs.



  
CLERK OF THE COURT

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

  
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9 Attorneys for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

10 ENRIQUE RODRIGUEZ, an individual,  
11 Plaintiff,  
12 vs.  
13 FIESTA PALMS, L.L.C., a Nevada Limited  
14 Liability Company, d/b/a PALMS CASINO  
15 RESORT, BRANDY L. BEAVERS,  
16 individually, DOES 1 through X, inclusive,  
17 and ROE BUSINESS ENTITIES I through X,  
18 inclusive,  
19 Defendants.

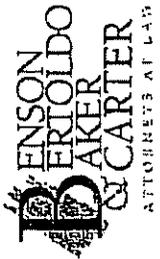
CASE NO: A531538  
DEPT NO: 10  
BENCH TRIAL DATE: 10/25/10  
HEARING DATE: 1/31/11

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

20 THIS MATTER having come on for hearing on January 31, 2011 with respect to  
21 Defendant's Motion for Mistrial, or in the Alternative, Motion to Strike Plaintiff's  
22 Confidential Trial Brief, before the Honorable Jessie Walsh, presiding, and the Court having  
23 considered the evidence and the arguments of counsel and taken the matter under advisement  
24 for further consideration, this Court finds and concludes as follows:

FINDINGS OF FACT

25  
26  
27 Subsequent to the close of evidence, Defendant filed a Motion for Mistrial, or in the  
28 Alternative, Motion to Strike Plaintiff's Confidential Brief.



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Defendant argued that Plaintiff served secret pre-trial and trial briefs and engaged in a systemic *ex parte* communication with the Court, rendering the trial unfair and impartial.

This matter was originally set for a Bench Trial to begin on October 4, 2010. Plaintiff, in accordance with EDCR 7.27, submitted his Confidential Trial brief to this Court on September 27, 2010. At no point during the evidentiary portion of the trial, or otherwise, did Plaintiff file or submit any additional *confidential* briefs.

Rather, in anticipation of Defendant bringing a Rule 52 Motion on the issue of Punitive Damages, Plaintiff's counsel prepared a "Supplemental Confidential Bench Brief Re: Punitive Damages (dated November 10, 2010, the date the parties rested) which detailed the trial testimony of Defendant's employees and security expert. It was Plaintiff's intention to file and serve the Supplemental Brief when the Defendant moved for Judgment on the issue of punitive damages. The Supplemental brief was *never submitted, served or filed*, because Defendant never argued, after the close of evidence but prior to the case being submitted for deliberation, that the punitive damage claim be dismissed.

After the close of evidence, Defendant filed and served a "Post-Trial Brief," which among other things, argued for the rejection of any punitive damages. Plaintiff inadvertently made reference to the Supplemental Confidential Brief Re: Punitive Damages, rather than reiterating the content of the same, in a Motion to Strike said "Post-Trial Brief". This was the first time such brief was referenced to the Court (in the context of Plaintiff's Motion to Strike), and it was never filed, submitted or provided in a confidential and/or *ex parte* manner as suggested by counsel.

The EDCR 7.27 Brief was filed and served by Plaintiff before a finding on the liability issue and verdict. Defendant did not object to, nor question, the propriety of any aspect of the Confidential Trial Brief filed in this matter.



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Counsel for Plaintiff filed with their Opposition to Motion for Mistrial affidavits stating under oath that no Supplemental Confidential Trial Briefs were submitted by them after the commencement of trial and that no *ex parte* communication with this Honorable occurred. This Court also finds that no Supplemental Confidential Trial Briefs were submitted or filed by the Plaintiff and that no *ex parte* communication with the Plaintiff occurred. At the hearing on Defendant's Motion for Mistrial, Counsel for Plaintiff requested an evidentiary hearing on the issue of *ex parte* communication should said contention not be abandoned by the Defendant. Counsel for Defendant, at that time, stated that Defendant was satisfied that no *ex parte* communication occurred.

CONCLUSIONS OF LAW

Plaintiff provided the Court with one, and only one, Confidential Trial Brief before the commencement of trial, which was served on Defendant on December 14, 2010, in accordance with EDCR 7.27.

Plaintiff provided the Court with no supplements thereto at any time during trial.

Plaintiff and his counsel did not engage in *ex parte* communication with the Court.

As no *ex parte* communication occurred between the Court and the Plaintiff, the Court was under no obligation to divulge the same.

As no *ex parte* communication occurred between the Court and the Plaintiff, no irregularities occurred with respect to said issue and Defendant's Due Process rights were not impacted.

Plaintiff's permissive Confidential Brief was submitted to the Court prior to the commencement of trial on October 25, 2010.

Plaintiff served his permissive Confidential Brief *before the close of trial*, on



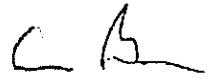
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December 14, 2010.

As the Court is still deliberating, and has yet to render a decision, service of Plaintiff's brief on December 14, 2010 was appropriate pursuant to EDCR 7.27.

DATED this 7<sup>th</sup> day of February, 2011.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiffs

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Mistrial is denied.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Alternative Motion to Strike Plaintiff's Confidential Brief is denied.

Date: 3/2/11   
DISTRICT COURT JUDGE



ORIGINAL

CLERK OF THE COURT

1 FFCL  
2 STEVEN M. BAKER  
3 Nevada Bar No. 4522  
4 BENSON, BERTOLDO, BAKER & CARTER  
5 7408 W. Sahara Avenue  
6 Las Vegas, Nevada 89117  
7 Telephone : (702) 228-2600  
8 Facsimile : (702) 228-2333  
9 Attorneys for Plaintiff

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 \* \* \*

10 ENRIQUE RODRIGUEZ, an individual,  
11 Plaintiff,

CASE NO: A531538

DEPT NO: 10

12 vs.

BENCH TRIAL DATE: 10/25/10

13 FIESTA PALMS, L.L.C., a Nevada Limited  
14 Liability Company, d/b/a PALMS CASINO  
15 RESORT, BRANDY L. BEAVERS,  
16 individually, DOES 1 through X, inclusive,  
17 and ROE BUSINESS ENTITIES 1 through X,  
18 inclusive,

HEARING DATE: 1/31/11

19 Defendants.

20 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

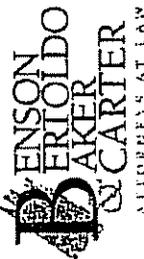
21 THIS MATTER having come on for hearing on January 31, 2011 with respect to  
22 Plaintiff's Motion to Strike Defendant's Post-Trial Brief before the Honorable Jessie Walsh,  
23 presiding, and the Court having considered the evidence and the arguments of counsel and  
24 taken the matter under advisement for further consideration,

25 FINDINGS OF FACT

26 Subsequent to the close of evidence and closing arguments, Defendant filed and served  
27 a "Post-Trial" brief which set forth the following five (5) "arguments:"

- 28 1. Tossing items at promotional events is within the industry standard of care;

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- 2. Defendant's internal policies do not raise the standard of care/legal duty owed to plaintiff;
- 3. Treating healthcare providers, who were neither designated per NRCP 26 as non-retained experts nor provided expert reports, may not offer expert opinions on aspects of plaintiff's condition outside the scope of their treatment of plaintiff.
- 4. Where a plaintiff "is" his business, he must offer more than speculation to bear his burden of proof on damages and lost profits; and
- 5. Punitive Damages are improper.

Defendant did not file any trial memoranda in accordance with EDCR 7.27, or request a Rule 52 Motion seeking judgment as a matter of law.

CONCLUSIONS OF LAW

Defendant's Brief was not filed prior to the commencement of trial.

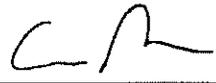
This Court did request to be briefed on any issues contained in Defendant's brief after the close of evidence.

Defendant, after the close of evidence, is not permitted to "brief" the Court on issues tried and presented.

The issues contained in Defendant's brief are not properly before the Court.

DATED this 7<sup>th</sup> day of February, 2011.

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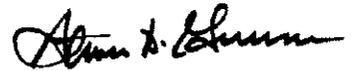
ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Strike Defendant's Post-Trial Brief is granted.

Date: 3/2/11

*Jessie Walsh*  
DISTRICT COURT JUDGE





CLERK OF THE COURT

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Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
Attorneys for Plaintiff

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
  
Plaintiff,  
  
vs.  
  
FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES 1 through X,  
inclusive,  
  
Defendants.

CASE NO: A531538  
DEPT NO: 10  
  
**BENCH TRIAL DATE: 10/25/10**  
**HEARING DATE: 1/31/11**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

THIS MATTER having come on for hearing on January 31, 2011 with respect to Plaintiff's Rule 52 (erroneously designated "Rule 50") Motion on the Issue of Liability before the Honorable Jessie Walsh, presiding, and the Court having considered the evidence and the arguments of counsel and taken the matter under advisement for further consideration, it is hereby found and concluded as follows:

**FINDINGS OF FACT**

During the course of this trial, Plaintiff established that, prior to the subject incident, Defendant was aware that promotional items were being thrown into crowds at events on the





1 premises; that Defendant knew this behavior was inappropriate because it was a safety issue  
2 and could foreseeably cause injury to an individual; that prior to the incident at bar, Defendant  
3 conducted a staff meeting where staff was instructed not to cause promotional items to be  
4 thrown into crowds because of said safety concerns; and that Defendant, despite this  
5 knowledge and awareness, constructed a “field goal” within the sports book for purposes of  
6 throwing promotional items at sporting events.  
7

8 Sheri Long, the Director of Marketing at The Palms, testified that she was aware that  
9 promotional items were thrown into crowds before the subject incident; this witness  
10 acknowledged this behavior was inappropriate because it constituted a safety issue which  
11 could foreseeably cause injury to an individual.  
12

13 In her testimony, Ms. Long specifically recalled holding a meeting, before the subject  
14 incident, and instructing her staff that items should not be thrown into crowds during  
15 promotional events.  
16

17 Ms. Long acknowledged that the injuries suffered by Plaintiff were exactly of the type  
18 she was concerned would occur if promotional items were thrown into crowds at promotional  
19 events.  
20

21 Ms. Long further testified that what occurred in this case is what she was trying to  
22 prevent when she conveyed to her staff that promotional items were not to be thrown into a  
23 crowd at an event.  
24

25 Vikki Kooinga, Risk Manager at The Palms, also testified that throwing items into a  
26 crowd could foreseeably cause injury to someone in the audience.  
27

28 Ms. Kooinga acknowledged that throwing promotional items into the crowd was  
inappropriate, wrong and beneath the standard of care for the hotel in protecting the safety of  
their patrons upon the premises.



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Lastly, Ms. Kooinga testified that she would have expected hotel Security to stop anyone from throwing items into the crowd.

Plaintiff was then injured when promotion items were thrown into the crowd at a promotional event.

**CONCLUSIONS OF LAW**

NRCP 52(c) states in pertinent part as follows:

If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence.

Liability has been conclusively established by the Plaintiff in this matter. The unequivocal testimony and undisputed facts establish liability and are as follows:

1. Defendant was aware promotional items were being thrown into crowds at events before the incident at bar;
2. Defendant conducted a staff meeting prior to the incident at bar where staff was instructed not to cause or permit promotional items to be thrown into crowds at events;
3. Defendant acknowledged that throwing promotional items into crowds was inappropriate;
4. Defendant acknowledged that throwing promotional items into crowds was a safety concern as it could foreseeably cause injury to an individual;
5. Defendant acknowledged that said foreseeable risk of injury was known by them prior to the incident at bar;
6. Despite this awareness, after said staff meeting, and with knowledge of said foreseeable risk of harm, Defendant constructed a goal post in the sports book for purposes of promotional items to be thrown;
7. Plaintiff was then injured as a direct and proximate result of throwing promotional items at an event upon Defendant's premises.



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Additionally, Defendant has conceded that there was a known safety procedure prohibiting promotional items from being thrown into the crowds.

Defendant's conceded that they violated this known safety procedure as related to the case at bar.

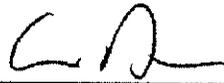
The known safety procedure was admissible as relevant to the issue of liability.

Defendant's policy and the breach thereof both aided this Court, as the finder of fact, in determining the issue of liability. No comparative liability was found on the part of the Plaintiff.

Therefore, this Honorable Court finds and adjudges liability against Defendant PALMS CASINO RESORT and in favor of the Plaintiff ENRIQUE RODRIGUEZ herein. These findings and conclusions are made and based upon the weight of the testimony and evidence aforesaid, and is reached independently of any other finding, ruling, or conclusion of the Court.

DATED this 7<sup>th</sup> day of February, 2011.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
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Attorneys for Plaintiff



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**ORDER**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Rule 52 (erroneously designated "Rule 50") Motion on the Issue of Liability is granted.

Date: 3/2/11

  
DISTRICT COURT JUDGE



CLERK OF THE COURT

1 FFCL  
2 STEVEN M. BAKER  
3 Nevada Bar No. 4522  
4 BENSON, BERTOLDO, BAKER & CARTER  
5 7408 W. Sahara Avenue  
6 Las Vegas, Nevada 89117  
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9 Attorneys for Plaintiff

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 \* \* \*

10 ENRIQUE RODRIGUEZ, an individual,  
11 Plaintiff,

CASE NO: A531538

DEPT NO: 10

12 vs.

BENCH TRIAL DATE: 10/25/10

13 FIESTA PALMS, L.L.C., a Nevada Limited  
14 Liability Company, d/b/a PALMS CASINO  
15 RESORT, BRANDY L. BEAVERS,  
16 individually, DOES 1 through X, inclusive,  
17 and ROE BUSINESS ENTITIES I through X,  
18 inclusive;

HEARING DATE: 1/31/11

19 Defendants.

20 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

21 THIS MATTER having come on for hearing on January 31, 2011 with respect to  
22 Plaintiff's Motion to Strike Defendant's Experts before the Honorable Jessie Walsh, presiding,  
23 and the Court having considered the evidence and the arguments of counsel and taken the  
24 matter under advisement for further consideration, this Honorable Court finds and concludes  
25 as follows:

26 FINDINGS OF FACT

27 Defendant presented two (2) experts in this trial, Dr. Thomas Cargill (Economist) and  
28 Forrest Franklin (Liability), neither of whom opined that their opinions were given to a

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**BENSON**  
**BERTOLDO**  
**BAKER**  
**& CARTER**  
ATTORNEYS AT LAW



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reasonable degree of professional probability as required under Nevada law.

Forrest Franklin, Defendant's liability expert, was retained to develop and render an opinion with respect to the standard of care as it relates to throwing objects, memorabilia, and promotional articles into crowds.

Mr. Franklin offered the following opinions:

1. Throwing memorabilia as a promotional effort into crowds is not a substandard protocol;
2. It is not unsafe to throw things into crowds; and
3. It is not below the standard of care to throw items into a crowd.

None of these opinions, however, were given to a reasonable degree of professional probability.

Dr. Cargill offered the following two (2) opinions at trial:

1. Plaintiff could not have made as much in the current financial market as he could have back in 2004 because the bubble burst in the housing market; and
2. Mr. Dineen's discount rates were inappropriate.

Neither of these opinions was given to a reasonable degree of professional probability.

#### CONCLUSIONS OF LAW

To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).



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Dr. Cargill and Mr. Franklin's testimony failed to satisfy the "assistance" requirement of NRS 50.275, in that neither expert provided opinions to a reasonable degree of professional probability.

Accordingly, their opinions did not rise to the level of "scientific knowledge" within the meaning of NRS 50.275.

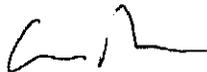
The opinions of Dr. Cargill and Mr. Franklin offered insufficient foundation for this court to take judicial notice of the scientific basis of those conclusions.

While counsel for the Defendant may have properly qualified said individuals as experts, the opinions rendered by the respective experts were speculative, as the court was not advised and the record does not reflect whether such opinions were made on the basis of "possibility" or some other standard lower than "a reasonable degree of professional probability."

Accordingly, the testimony of Cargil and Franklin did not satisfy the "assistance" requirement of NRS 50.275.

DATED this 7<sup>th</sup> day of ~~January~~<sup>February</sup>, 2011.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
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Attorneys for Plaintiff



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ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Strike Defendant's Experts Cargill and Franklin is granted.

Date: 3/2/11

*Jessie Walsh*  
DISTRICT COURT JUDGE



CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, an individual,

CASE NO: A531538

Plaintiff,

DEPT NO: 10

vs.

TRIAL DATE: 10/25/10

FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/b/a PALMS CASINO RESORT; BRANDY BEAVERS; DOES I through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive,

Defendants.

VERDICT

The Honorable Jessie Walsh, presiding judge in the above-entitled action, hereby finds for Plaintiff ENRIQUE RODRIGUEZ as follows:

1. The Court finds against Defendant FIESTA PALMS, L.L.C.
2. The Court finds against Defendant BRANDY BEAVERS.

Yes / No

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3. The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C. 60 %

Defendant BRANDY BEAVERS 40 %

4. The total amount of the plaintiff's damages is divided as follows:

Past Medical Expenses \$ 316,773.38

Future Medical Expenses \$ 1,854,758.

Past Pain and Suffering \$ 1,243,350

Future Pain and Suffering \$ 1,865,025.

Past Lost Income \$ 259,111.

Future Lost Income \$ 422,592.

5. Further, the Court finds that Defendant Fiesta Palms, L.L.C. acted with conscious disregard of the rights or safety of others when it was aware of the probable dangerous consequences of its conduct and willfully and deliberately failed to avoid those consequences.

Yes / No

DATED this 9<sup>th</sup> day of May, 2011.

Jessie Walsh  
HON. JESSIE WALSH, District Court Judge



CLERK OF THE COURT

1 STEVEN M. BAKER  
2 Nevada Bar No. 4522  
3 BENSON, BERTOLDO, BAKER & CARTER  
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8 Attorneys for Plaintiff

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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

CASE NO: A531538  
DEPT NO: 10

vs.

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/baa/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES 1 through X,  
inclusive,  
Defendants.

**PLAINTIFF'S MEMORANDUM OF COSTS AND  
DISBURSEMENTS PURSUANT TO NRS 18.020**

Cost Description	Amount
Clerk's Fees	268.00
E-Filing Retainer	27.50
Reporter's Fees for Depositions	3,958.66
Steve Ferrero	
Enrique Rodriguez	
Brandy Beavers	
Vicki Kooinga	
Kathleen Hartmann, R.N.	
Steven T. Baker, C.P.P.	
Sheri Long	
Frank Sciulla	
Terry Dinneen	
Fees for witnesses at trial, pretrial hearings and deposing witnesses	
Louis Mortillaro, Ph.D.	5,500.00

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Cost Description	Amount
Vicki Kooinga - trial	26.00
Sheri Long - trial	26.00
Terry Dinneen	12,931.00
Steven T. Baker, C.P.P./VTI Associates	3,400.00
Mary Ann Shannon, M.D.	10,000.00
Kathleen Hartmann, R.N.	500.00
Russell J. Shah, M.D.	16,000.00
Joseph Schifini, M.D.	15,450.00
Walter Kidwell, M.D.	5,000.00
Jacob Tauber, M.D.	13,200.00
Govind Koka, D.O.	2,500.00
<b>General Expert Witness Fees ("Professional Fees")</b>	
Consulting	17,228.55
Terry Dinneen	12,172.00
Witness Hotel Stays for Trial	267.81
<b>The fee of any sheriff or licensed process server for the delivery or service of any summons or subpoena used in the action</b>	1,352.74
<b>Compensation for the official reporter or reporter pro tempore</b>	630.00
Trial Transcript Cost (via A/V services)	12,397.50
<b>Telecopies (facsimiles)</b>	124.00
<b>Photocopies</b>	
Vendors and medical providers	7,252.15
Firm in-house expense	2,765.50
<b>Long Distance Telephone Calls</b>	195.91
<b>Postage</b>	361.82
<b>Reasonable costs for travel and lodging incurred taking depositions and conducting discovery</b>	
IME of Plaintiff in San Francisco (travel to/from Riverside, CA)	600.00
	CONTD.



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Cost Description	Amount
Any other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research	
Locate Brandy Beavers for service of process	200.00
Courier service	671.04
Case value research	4,140.00
<b>TOTAL COSTS DISBURSED</b>	<b>\$149,146.18</b>

DATED this 15<sup>th</sup> day of March, 2011.

BENSON BERTOLDO, BAKER & CARTER, CHTD.

By: 

STEVEN M. BAKER, ESQ.  
Nevada Bar No. 4522  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
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(702) 228-2333 Facsimile  
[monique@bensonlawyers.com](mailto:monique@bensonlawyers.com)  
*Attorneys for Plaintiff*





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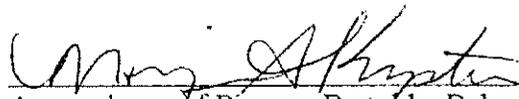
CERTIFICATE OF SERVICE

I hereby certify that on the 15<sup>th</sup> day of March, 2011, I served a copy of the foregoing document via 1<sup>st</sup> Class, U.S. Mail, postage thereon fully prepaid to the following:

10676-05 Co-Counsel for Fiesta Palms  
Kenneth C. Ward, Esq.  
Archer Norris  
2033 North Main Street, Suite 800  
P.O. Box 8035  
Walnut Creek, California 94596  
925-930-6600 Telephone  
925-930-6620 Facsimile

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10676-05 Co-Counsel for Fiesta Palms  
Marsha L. Stephenson, Esq.  
Stephenson & Dickinson  
2820 West Charleston Blvd., Suite 19  
Las Vegas, Nevada 89102  
474-7229 Telephone  
474-7237 Facsimile

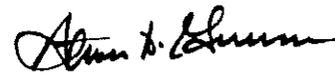
  
An employee of Benson, Bertoldo, Baker & Carter, Chtd.



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**MOT**  
Marsha L. Stephenson, Esq. (NV Bar No. 6130)  
STEPHENSON & DICKINSON, P.C.  
2820 West Charleston Blvd., Suite 19  
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Telephone: (702) 474-7229  
Facsimile: (702) 474-7237

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CLERK OF THE COURT

Kenneth C. Ward (Bar No. 6530)  
Keith R. Gillette (Bar No. 11140)  
ARCHER NORRIS  
A Professional Law Corporation  
2033 North Main Street, Suite 800  
PO Box 8035  
Walnut Creek, California 94596-3728  
Telephone: 925.930.6600  
Facsimile: 925.930.6620

Attorneys for Defendant FIESTA PALMS, LLC, a  
Nevada Limited Liability Company, d/b/a/ THE  
PALMS CASINO RESORT

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ,  
Plaintiffs,

v.

FIESTA PALMS, LLC, a Nevada Limited  
Liability Company, d/b/a/ The Palms  
Casino Resort, et al.,  
Defendants.

Case No. A531538  
Dept: 10

**DEFENDANT FIESTA PALMS, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY, d/b/a/ THE PALMS CASINO  
RESORTS' NOTICE OF MOTION AND  
MOTION TO TAX COSTS**

**MOTION TO TAX COSTS**

Defendant FIESTA PALMS, LLC d/b/a THE PALMS CASINO RESORT ("The Palms"),  
by and through its attorney of record Kenneth C. Ward K, Esq., Keith R. Gillette, and ARCHER  
NORRIS, moves to tax Plaintiff's Memorandum of Costs and Disbursements Pursuant to NRS  
18.020. This motion is made by virtue of NRS 18.005 and on the grounds that Plaintiff failed to  
itemize and document his claimed costs and, as a result, failed to demonstrate such costs are

1 reasonable and necessary. In addition, Plaintiff attempts to recover costs that are not recoverable  
2 under any statute or judicial and should therefore be disallowed.

3 This motion is further based upon the papers and pleading on file herein, the below Points  
4 and Authorities, and oral argument.

## 5 MEMORANDUM OF POINTS AND AUTHORITIES

### 6 I.

#### 7 Introduction

8 Defendant Fiesta Palms, LLC objects to Plaintiff's memorandum of costs on the grounds  
9 that Plaintiff failed to document, itemize, and justify its costs. It is impossible to determine if these  
10 expenses were reasonable and necessary without this information. In addition, Plaintiff also seeks  
11 recovery of costs that either exceed certain statutory limits or are not recoverable under Nevada law.  
12 Plaintiff's haphazard compilation of its costs without any support or justification is insufficient to  
13 award costs in the sum \$149,146.18.

### 14 II.

#### 15 Background

16 This is a personal injury action for damages stemming from accident that occurred at a  
17 Monday night football game promotion event at The Palms Race and Sports Book.

18 On March 9, 2011, the court returned a verdict against The Palms and Brandy Beavers.

19 Plaintiff filed and served its Memorandum of Costs on March 15, 2011. The memorandum is  
20 simply a diagram that contains virtually no detail. Plaintiff did not provide any supporting or  
21 itemized documentation or even attempt to demonstrate that these costs are reasonable and  
22 necessary. Based on the insufficient documentation, it is impossible to determine whether these  
23 costs are reasonable or necessary and, as a result, Plaintiff is not entitled to an award of its costs.

### 24 III.

#### 25 Legal Argument

##### 26 A. Legal Standard

27 While Nev.Rev.Stat. § 18.020 sets forth certain costs that are recoverable to a prevailing party  
28 as a matter of right, the district court still retains discretion in determining the reasonableness of the

1 amounts and the items of costs to be awarded. (*Schwartz v. Estate of Greenspan*, 110 Nev. 1042, 1050  
2 (1994).) This “discretion should be sparingly exercised when considering whether or not to allow  
3 expenses not specifically allowed by statute and precedent.” (*Bergmann v. Boyce*, 109 Nev. 670, 679  
4 (1993).) And the trial court should exercise restraint because “statutes permitting recovery of costs,  
5 being in derogation of the common law, must be strictly construed.” (*Ibid.*)

6 **B. The Plaintiff Is Not Entitled To An Award Of Costs Because He Failed To**  
7 **Demonstrate—Through Itemization Or Documentation—That His Costs Are**  
8 **Necessary And Reasonable**

9 The prevailing party must also show how the costs were necessary to and incurred in the  
10 action and provide sufficient justifying documentation and specific itemization to demonstrate the  
11 reasonableness and the accuracy of the costs claimed. (*Waddell v. L.V.R.V., Inc.*, 122 Nev. 15 (2006);  
12 *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348 (1998).) Simply filing a  
13 memorandum is not sufficient verification of the incurred costs. (*See Vill. Builders 96 v. U.S. Labs.*,  
14 121 Nev. 261, 277-78 (2005)(requiring justifying documentation for each individual item of costs and  
15 substantiating the reason for such costs rather than merely providing documentation to support that  
16 amount of the total costs is reasonable.)

17 Here, Plaintiff merely provided a generic breakdown of his costs. The memorandum did not  
18 contain the required itemization or documentation for each individual item. It is unclear what  
19 method of calculation, if any, was used by the Plaintiff to confirm that these costs were actually  
20 incurred for this matter, necessary, and reasonable. The itemized materials are necessary to make  
21 such a determination and any award of costs without this information is improper. (*Bobby Berosini,*  
22 *Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348 (1998).)

23 The Plaintiff must itemize and provide supporting documentation for each cost he seeks to  
24 recover. No such showing has been made. Therefore, Plaintiff’s cost in the sum of \$149, 146.18  
25 must be disallowed.

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1           C.     **The Plaintiff Seeks Costs That Are Not Recoverable Under Nevada Law And,**  
2                   **As A Result, These Costs Items Must Be Disallowed Even If Plaintiff Can**  
3                   **Document And Itemize These Impermissible Costs.**

4           Nevada Revised Statute, section 18.005 specifically provides what costs are recoverable.  
5           Litigation cost and attorney fee statutes are exceptions to the common law American Rule that every  
6           litigant pays his or her own fees. (*Dobron v. Bunch*, 215 P.3d 35, 41, 2009 Nev.LEXIS 58 (2009).)  
7           Restraint therefore must be exercised when awarding costs that are not allowed by statute or case  
8           law. (*Bergmann v. Boyce*, 109 Nev. 670, 679 (1993).) Even if Plaintiff properly itemizes and  
9           documents the following costs, these costs are still not recoverable under any statute or judicial  
10           opinion.

11           1.     **E-Filing Retainer**

12           Plaintiff seeks to recover \$27.50 for an “E-Filing Retainer.” This item is not expressly  
13           recoverable under Nev.Rev.Stat. § 18.005. The Plaintiff attempts to shoehorn this item into “Clerks’  
14           Fees.” To accomplish this result, Plaintiff attempts to impermissibly expand—without any  
15           support— “Clerks’ Fees” under section 18.005 to include e-filing fees or retainers. Such expansion is  
16           not permissible because cost statutes are strictly construed. Therefore, **\$27.50** should be disallowed.

17           2.     **Fees for Witnesses**

18           The Plaintiff lumps together under “fees for witness at trial, pretrial hearings and deposing  
19           witnesses” approximately fourteen witnesses. It appears that most of these witnesses, if not all, are  
20           experts based on the Plaintiff’s use of post nominal abbreviations. The Plaintiff conveniently ignored  
21           the cap set forth in Nevada Revised Statute § 18.005(5). Under this section, a party’s expert witness  
22           fees are limited to reasonable fees for “not more than five expert witnesses in an amount of not more  
23           than \$1,500 for each witness, unless the court allows a larger fee after determining that the  
24           circumstances surrounding the expert’s testimony were of such necessity as to require the larger fee.”  
(Nev.Rev.Stat. § 18.005(5).)

25           While the Plaintiff seeks expert witness fees in the sum of **\$114,201.36**, **his recovery is**  
26           **capped at \$7,500.** Almost all of the witnesses listed in the memorandum are at a sum well above the  
27           statutory cap of \$1,500. In fact, 12 out of the 14 witnesses are listed at sums well above that amount.

1 One witness—Terry Dinneen—is billed for twice in the memorandum at \$12,931 and \$12,172.

2 Finally, the Plaintiff has not made any showing that there are any circumstances that forced  
3 the Plaintiff to spend an additional **\$106,701.36** in expert witness fees. Therefore, **Plaintiff is**  
4 **statutorily limited to a recovery of \$7,500 in expert witness fees**, provided he can demonstrate  
5 these fees were reasonable and necessary for the proceedings.

6 **3. Trial Transcript Costs**

7 Plaintiff seeks to recover \$12,397.50 for a “Trial Transcript Cost.” This item is not expressly  
8 recoverable under Nev.Rev.Stat. § 18.005. This attempt to characterize transcript costs as  
9 “compensation for the official reporter or reporter pro tempore” impermissibly expands section  
10 18.005. Such an interpretation is contrary to established Nevada law, which provides cost recovery  
11 statutes must be strictly construed. Therefore, **\$12,397.50** should be disallowed.

12 **4. Telecopies, Photocopies, Long Distance Telephone Calls, and Postage**

13 Plaintiff seeks to recover costs for photocopies, telecopies, long distance phone charges, and  
14 postage. While these items are listed in Nev.Rev.Stat. § 18.005(12), normal out-of-pocket and routine  
15 overhead expenses are not recoverable as taxable costs. As noted above, Plaintiff did not provide  
16 any documentation or itemization of its costs. These costs were likely incurred as normal out-of-  
17 pocket expenses. The minimal description provided by Plaintiff further demonstrates that these  
18 costs are normal office expenses. For instance, Plaintiff acknowledges that \$2,765.50 of the  
19 photocopy expenses are “Firm in-house” costs. Such in-house or routine overhead expenses are not  
20 recoverable.

21 **D. Plaintiff Is Not Entitled To The Costs Under Nevada Revised Statute, Section**  
22 **18.005(17) Because These Costs Are Not Reasonable Or Necessary.**

23 Plaintiff seeks another \$5,011 in costs under Nev.Rev.Stat. 18.005(17). The court must  
24 construe NRS 18.005(17) narrowly and Plaintiff must justify that the expenses incurred under this  
25 section were reasonable and necessary. (*See Bergmann v. Boyce*, 109 Nev. 670, 679 (1993).) The *only*  
26 costs Plaintiff seeks to recover under this section are costs to locate Brandy Beavers, courier service,  
27 and case value research. Therefore, Plaintiff is not claiming that any other costs are recoverable  
28

1 under this section.

2 As demonstrated above, Plaintiff did not attach any documentation or provide a detailed  
3 itemization of the costs for the courier service, service of process, and case value research fees.  
4 Without this information, this Court cannot determine whether such expenses are reasonable and  
5 necessary to the proceedings. To recover fees under section 18.005(17), the Plaintiff must  
6 affirmatively show such costs were reasonable and necessary. Such a showing has not been made  
7 and, as a result, these costs should not be allowed.

8 **E. Before Any Costs Are Awarded, The Court Must First Attempt To Apportion**  
9 **The Costs.**

10 Before any award of costs is made, the district court must therefore attempt to apportion the  
11 costs or determine apportionment is impracticable. (*Mayfed v. Koroghli*, 184 P.3d 362; 2008 Nev.Lexis  
12 36 (2008).) Plaintiff has not made any showing that apportionment is impossible. The Palms is not  
13 responsible for any costs associated with locating co-defendant Brandy Beavers. These costs or any  
14 other costs related to the pursuit of claims against Beavers by Plaintiff are not recoverable against  
15 The Palms. Plaintiff has failed to demonstrate that such costs to pursue Beavers are necessary to the  
16 claims against The Palms. Therefore, this item along with other claimed costs must be apportioned  
17 between The Palms and Beavers.

18 **IV.**

19 **Conclusion**

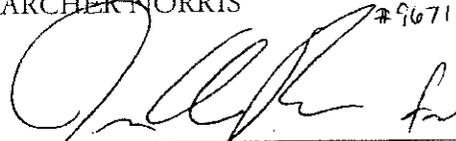
20 Plaintiff failed to show that the claimed costs are reasonable or necessary. Any costs that the  
21 Plaintiff may be entitled to must first be apportioned before any award can be entered in this matter.  
22 Even if Plaintiff can document and itemize these costs, many of the items are either statutorily  
23 capped or impermissible under Nevada law. Therefore, Plaintiff's costs must be disallowed or  
24 reduced to the statutorily permissible amounts upon a showing that these costs are actual, reasonable,  
25 and necessary.  
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Dated: March 21, 2011

ARCHER NORRIS

#9671



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Kenneth C. Ward (Bar No. 6530)  
Keith R. Gillette (Bar No. 11140)  
A Professional Law Corporation  
2033 North Main Street, Suite 800  
PO Box 8035  
Walnut Creek, California 94596-3728

Attorneys for Defendant FIESTA PALMS,  
LLC, a Nevada Limited Liability Company,  
d/b/a/ THE PALMS CASINO RESORT

1 CERTIFICATE OF SERVICE

2 **Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC**  
3 **Court and Action No: District Court, Clark County, Nevada Action No. A531538**

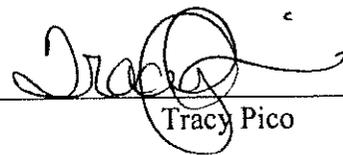
4 I, Tracy Pico, certify that I am over the age of eighteen years and not a party to this action  
5 or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035, Walnut  
6 Creek, California 94596-3728. On March 21, 2011, I caused the following document(s) to be  
7 served: **DEFENDANT FIESTA PALMS, LLC, A NEVADA LIMITED LIABILITY  
8 COMPANY, d/b/a/ THE PALMS CASINO RESORTS' NOTICE OF MOTION AND  
9 MOTION TO TAX COSTS**

10  by placing a true copy of the document(s) listed above, enclosed in a sealed envelope,  
11 addressed as set forth below, for collection and mailing on the date and at the business  
12 address shown above following our ordinary business practices. I am readily familiar  
13 with this business' practice for collection and processing of correspondence for  
14 mailing with the United States Postal Service. On the same day that a sealed envelope  
15 is placed for collection and mailing, it is deposited in the ordinary course of business  
16 with the United States Postal Service with postage fully prepaid.

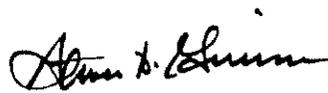
11 Steven M. Baker, Esq.  
12 Benson, Bertoldo, Baker & Carter  
13 7408 W. Sahara Avenue  
14 Las Vegas, NV 89117  
15 Phone: 702.228.2600  
16 Fax: 702.228.2333  
17 *Attorneys for Plaintiff*  
18 Enrique Rodriguez

11 Jeffery A. Bendavid, Esq.  
12 Moran Law Firm  
13 630 S. 4th Street  
14 Las Vegas, NV 89101  
15 Phone: 702.384.8424  
16 Fax: 702.384.6568  
17 Co-Counsel for Defendant  
18 Fiesta Palms, LLC a Nevada Limited  
19 Liability Company, d/b/a The Palms  
20 Casino Resort

21 I declare under penalty of perjury that the foregoing is true and correct. Executed on  
22 March 21, 2011, at Walnut Creek, California.

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Tracy Pico





CLERK OF THE COURT

1 STEVEN M. BAKER  
2 Nevada Bar No. 4522  
3 BENSON, BERTOLDO, BAKER & CARTER  
4 7408 W. Sahara Avenue  
5 Las Vegas, Nevada 89117  
6 Telephone : (702) 228-2600  
7 Facsimile : (702) 228-2333  
8 Attorneys for Plaintiff

9  
10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

12 \* \* \*

13 ENRIQUE RODRIGUEZ, an individual,  
14 Plaintiff,

CASE NO: A531538

DEPT NO: 10

15 vs.

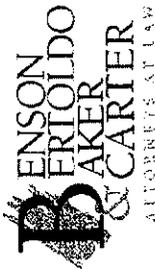
16 FIESTA PALMS, L.L.C., a Nevada Limited  
17 Liability Company, d/baa/a PALMS CASINO  
18 RESORT, BRANDY L. BEAVERS,  
19 individually, DOES I through X, inclusive,  
20 and ROE BUSINESS ENTITIES I through X,  
21 inclusive,

22 Defendants.

23 MEMORANDUM RE: PRE-JUDGMENT INTEREST

24 Plaintiff ENRIQUE RODRIGUEZ by and through his attorney, STEVEN M.  
25 BAKER, ESQ., of the law firm of BENSON, BERTOLDO, BAKER & CARTER, hereby  
26 submits the following memorandum regarding pre-judgment interest:  
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I.

The Plaintiff is Entitled to Pre-Judgment

Interest Under NRS 17.130

**NRS 17.130 Computation of amount of judgment; interest.**

1. In all judgments and decrees, rendered by any court of justice, for any debt, damages or costs, and in all executions issued thereon, the amount must be computed, as near as may be, in dollars and cents, rejecting smaller fractions, and no judgment, or other proceedings, may be considered erroneous for that omission.

2. When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied, at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

Service of process was accomplished on December 11, 2006. The verdict was rendered on March 9, 2011 and filed on March 14, 2011. Pre-judgment interest on the total past damages amount of \$1,909,234.38 was computed at 10.25% for 1,548 days totaling Eight Hundred Twenty Nine Thousand, Nine Hundred Sixty and 20/100 Dollars (\$829,960.20) in pre-judgment interest.

Future special damages and future general damages total \$4,142,355.00. Post-Judgment Interest on Future Damages shall accrue at the Legal Judgment Interest Rate beginning March 9, 2011, as adjusted January 1 and July 1 annually, until fully satisfied.

Both pre-judgment interest and post-judgment interest run concurrently until fully satisfied.



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II.

CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests that Judgment be entered and pre-judgment interest be included in the amount of Eight Hundred Twenty Nine Thousand, Nine Hundred Sixty and 20/100 Dollars (\$829,960.20).

DATED this 22<sup>nd</sup> day of March, 2011.

**BENSON BERTOLDO, BAKER & CARTER, CHTD.**

By: 

STEVEN M. BAKER, ESQ.  
Nevada Bar No. 4522  
7408 W. Sahara Avenue  
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[monique@bensonlawyers.com](mailto:monique@bensonlawyers.com)  
*Attorneys for Plaintiff*



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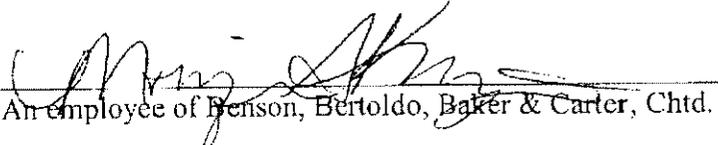
CERTIFICATE OF SERVICE

I hereby certify that on the 22<sup>nd</sup> day of March, 2011, I served a copy of the foregoing document via 1<sup>st</sup> Class, U.S. Mail, postage thereon fully prepaid to the following:

10676-05 Co-Counsel for Fiesta Palms  
Kenneth C. Ward, Esq.  
Archer Norris  
2033 North Main Street, Suite 800  
P.O. Box 8035  
Walnut Creek, California 94596  
925-930-6600 Telephone  
925-930-6620 Facsimile

10676-05 Attorneys for Fiesta Palms  
Jeffery A. Bendavid, Esq.  
Moran & Associates  
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Las Vegas, Nevada 89101  
702-384-8424 Telephone  
702-284-6568 Facsimile

10676-05 Co-Counsel for Fiesta Palms  
Marsha L. Stephenson, Esq.  
Stephenson & Dickinson  
2820 West Charleston Blvd., Suite 19  
Las Vegas, Nevada 89102  
474-7229 Telephone  
474-7237 Facsimile

  
An employee of Benson, Bertoldo, Baker & Carter, Chtd.

# PRIME INTEREST RATE

**NRS 99.040(1)** requires:

*"When there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1, or July 1, as the case may be, immediately preceding the date of the transaction, plus 2 percent, upon all money from the time it becomes due, . . . ."*

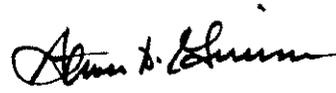
Following is the prime rate as ascertained by the Commissioner of Financial Institutions:

January 1, 2011	3.25%	July 1, 2011	
January 1, 2010	3.25%	July 1, 2010	3.25%
January 1, 2009	3.25%	July 1, 2009	3.25%
January 1, 2008	7.25%	July 1, 2008	5.00%
January 1, 2007	8.25%	July 1, 2007	8.25%
January 1, 2006	7.25%	July 1, 2006	8.25%
January 1, 2005	5.25%	July 1, 2005	6.25%
January 1, 2004	4.00%	July 1, 2004	4.25%
January 1, 2003	4.25%	July 1, 2003	4.00%
January 1, 2002	4.75%	July 1, 2002	4.75%
January 1, 2001	9.50%	July 1, 2001	6.75%
January 1, 2000	8.25%	July 1, 2000	9.50%
January 1, 1999	7.75%	July 1, 1999	7.75%
January 1, 1998	8.50%	July 1, 1998	8.50%
January 1, 1997	8.25%	July 1, 1997	8.50%
January 1, 1996	8.50%	July 1, 1996	8.25%
January 1, 1995	8.50%	July 1, 1995	9.00%
January 1, 1994	6.00%	July 1, 1994	7.25%
January 1, 1993	6.00%	July 1, 1993	6.00%
January 1, 1992	6.50%	July 1, 1992	6.50%
January 1, 1991	10.00%	July 1, 1991	8.50%
January 1, 1990	10.50%	July 1, 1990	10.00%
January 1, 1989	10.50%	July 1, 1989	11.00%
January 1, 1988	8.75%	July 1, 1988	9.00%
January 1, 1987	Not Available	July 1, 1987	8.25%

\* Attorney General Opinion No. 98-20:

*If clearly authorized by the creditor, a collection agency may collect whatever interest on a debt its creditor would be authorized to impose. A collection agency may not impose interest on any account or debt where the creditor has agreed not to impose interest or has otherwise indicated an intent not to collect interest. Simple interest may be imposed at the rate established in NRS 99.040 from the date the debt becomes due on any debt where there is no written contract fixing a different rate of interest, unless the account is an open or store accounts as discussed herein. In the case of open or store accounts, interest may be imposed or awarded only by a court of competent jurisdiction in an action over the debt.*



  
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**FIESTA PALMS, LLC**, a Nevada Limited Liability  
Company, d/b/a **THE PALMS CASINO RESORT**

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

**ENRIQUE RODRIGUEZ,**  
  
Plaintiff,  
  
v.  
  
**FIESTA PALMS, LLC**, a Nevada Limited  
Liability Company, d/b/a **THE PALMS**  
**CASINO RESORT**, et al. ,  
  
Defendants.

Case No. A531538  
  
**DEFENDANT FIESTA PALMS, LLC DBA**  
**THE PALMS CASINO RESORT'S**  
**MEMORANDUM OF POINTS &**  
**AUTHORITIES IN SUPPORT OF ITS**  
**MOTION FOR NEW TRIAL**  
  
Dept: X  
Hearing Date:  
Hearing Time:  
Hearing Dept:

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**I.  
INTRODUCTION**

The verdict in this case constitutes a serious miscarriage of justice. There were several irregularities that led to an unjust verdict against defendant FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a THE PALMS CASINO RESORT (“the Palms”). First, the prevailing party, plaintiff Enrique Rodriguez (“Plaintiff”), and his counsel, engaged in misconduct that materially prejudiced the Palms by producing documents at trial for the first time, which prevented the Palms from being able to review the documents and prepare for the documents prior to trial. Second, the court committed error in permitting the Plaintiff to have four medical treaters testify on behalf of 25 treaters, and in subject areas in which they are not qualified. Third, the body of evidence the Palms produced at trial demonstrated that Plaintiff’s evidence was insufficient to justify the verdict. Finally, the Court was in error when it granted Plaintiff’s motion to strike the Palms’ experts’ opinions.

As will be unveiled in these moving papers, these facts, issues and circumstances all combined to deny the Palms a fair trial. These defects can only be remedied by the granting of new trial.

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**II.  
FACTUAL BACKGROUND**

This case involves claims that on November 22, 2004, plaintiff Enrique Rodriguez (“Plaintiff”) was in the sports bar at The Palms Casino for the purposes of watching a football game, and during the game’s half-time, an unknown patron dove for a souvenir, thrown into the bar area by a blindfolded “Palms girl,” and struck the Plaintiff’s left knee. Plaintiff further alleges that he then struck another patron while falling and injured the left side of his head. Over the last five years, Plaintiff has been under the care of numerous medical providers with a diverse range of specialties.

On October 25, 2010, the bench trial began in the matter of *Enrique Rodriguez v. the Palms*, No. A531538, in the Eastern District of Nevada, Clark County, and concluded with the parties’ closing arguments on November 10, 2010. (See Declaration of Kenneth C. Ward (“Ward ZA126/1108905-1

1 Decl.”), filed in conjunction herewith, ¶ 2.) The Honorable Jessie Walsh returned the verdict in  
2 favor of Plaintiff on March 7, 2011, with Notice of Entry of Judgment served on the Palms on  
3 March 15, 2011. (Ex. A to the Ward Decl., ¶ 3.)

4 **A. Plaintiff’s Economist Expert’s Testimony.**

5 The Palms’ economist expert, Thomas Cargill, took the position that there was insufficient  
6 information from which to calculate a wage loss. Plaintiff’s own economist, Terrance Dinneen,  
7 testified that he met with the plaintiff in 2008 and asked for information with which to calculate  
8 his wage loss. (Deposition of Terrance Dinneen (“Dinneen Depo.”), attached as Exhibit B to the  
9 Ward Decl., 41:15-42:14, 30:2-20.) In response to Mr. Dinneen’s request, Plaintiff produced no  
10 social security information, but did produce three tax returns during the six-year period of 1999 to  
11 2004. (Dinneen Depo, 46:2-17, 56:17-20, 55:5-6, 73:23-74:10, Ex. B to Ward Decl.) Of those  
12 six years, there were three years without any returns at all.

13 To calculate past and future lost earnings, Plaintiff’s economist took the total income and  
14 averaged it over six years. (Dinneen Depo., 30:8-20, 75:22-76:15.) Approximately 70% of that  
15 income came from one year, 2004. (*Id.* at 75:22-76:15.) Oddly enough, the tax returns from  
16 2001 and 2004 were prepared and signed in 2009 after the economist had requested the  
17 information, and once litigation was underway. (Dinneen Depo., 39:24-42:4, Ex. B to the Ward  
18 Decl.) Mr. Dinneen stated that he did not know if they were filed or not filed, reporting that all  
19 he had was the tax returns, signed on various dates, such as 2009 for a 2004 tax return. (*Id.* at  
20 41:2-9.) Plaintiff testified from the witness stand that he gave his economist all of the back up  
21 information to support his income claim, and that he prepared and signed the 2004 tax return in  
22 2009 after the economist requested the information. (Ward Decl., ¶ 5.) However, at trial, Mr.  
23 Dinneen produced a letter from a person who allegedly prepared the returns saying that the  
24 returns had been filed; it was a one line letter from the tax preparer dated October 20, 2010.  
25 (Ward Decl., ¶ 6; November 4, 2010 Trial testimony, 71:20-73:19, 81:12-22, attached as Exhibit  
26 K to the Ward Decl.) Mr. Dinneen testified at trial that he never provided the document to the  
27 Palms. (*Id.*) This document was never provided to the Palms, even though Mr. Dinneen had  
28 purportedly provided his entire work file and that letter was not included. (Ward Decl., ¶ 6.)

1 **B. Plaintiff's Medical Treaters' Testimony.**

2 Plaintiff did not have any disclosed medical experts and none of his treaters (52 of them)  
3 prepared reports. In spite of this, the Court allowed treaters to testify about other treaters'  
4 findings, and those same treaters were also permitted to testify as to what they thought other  
5 treaters' opinions were or would be if they were aware of the patient's ongoing complaints.  
6 Additionally, two anesthesiologists were allowed to testify about back surgeries and knee  
7 replacements which had not been specified by the orthopedists.

8 There was a spine surgeon, Dr. Thalgott, who had at least six entries in his records that he  
9 would not do surgery on this plaintiff's back. (Ward Decl., ¶ 9.) Further, he had not seen the  
10 plaintiff in over three years. (*Id.*) In spite of that, the anesthesiologist, who also had not seen the  
11 plaintiff for over three years, testified that the plaintiff needed a multi-level back fusion and that  
12 he was quite certain that if Dr. Thalgott knew what had transpired with this plaintiff in the last  
13 three years, that Dr. Thalgott would change his mind and agree that surgery was necessary.  
14 (November 8, 2010 Trial Testimony, 91:21-95:20, 96:18-98:4, 98:17-101:22, Exhibit M to Ward  
15 Decl.)

16 Plaintiff's disclosed life care planner, Kathleen Hartmann, provided a life care plan calling  
17 for \$294,000 for all of the medical relating to a spinal stimulator. (Dinneen & Hartman initial  
18 expert report, Ex. L to the Ward Decl., ¶12.) Dr. Schifini, an anesthesiologist, was allowed to  
19 testify that these numbers were all wrong and the number was actually \$960,000. (*Id.*; Nov. 1,  
20 2010 Trial Testimony, 53:13-56:19, 122:17-25, Ex. J to the Ward Decl. ) The life care planner's  
21 numbers also did not include a figure for fusion and she included a range of \$80,000 to \$160,000  
22 for knee replacements. (*Id.*) Again, Dr. Schifini, the anesthesiologist, was able to testify that his  
23 back surgeries and knee replacements would be \$686,000. (*Id.*)

24 **C. Dr. Joseph Schifini's "New" Documents.**

25 The Palms subpoenaed all records from Plaintiff's treater, Dr. Joseph Schifini. (Ward  
26 Decl., ¶10.) The Palms only received approximately 21 pages from Dr. Schifini at that time.  
27 (*Id.*) However, at trial, Dr. Schifini was permitted to testify regarding approximately 117 pages  
28 of documents that the Palms were unaware of and the Palms were never been notified by Dr.

1 Schifini or Plaintiff's counsel that such documents existed. (Ward Decl., ¶ 11.) Plaintiff's failure  
2 to disclose the documents put the Palms at a great disadvantage in its cross-examination of Dr.  
3 Schifini, who provided critical testimony during the trial. (Ward Decl., ¶ 11.)

4 **D. The Plaintiff Moved to Strike the Palms' Experts' Testimony, and the Court  
5 Granted the Motion.**

6 Plaintiff filed his Motion to Strike Trial Testimony on approximately November 16, 2010.  
7 (See Ex. G to Ward Decl., ¶ 13.) Plaintiff's points and authorities essentially argued that the  
8 Palms' experts, Forrest Franklin and Thomas Cargill "did not establish a sufficient foundation  
9 since neither provided opinions to a reasonable degree of probability." (*Id.*) Plaintiff stipulated  
10 on the record that Mr. Franklin and Dr. Cargill are both qualified. (*Id.* at ¶ 14.) The Court granted  
11 the Motion to Strike on March 2, 2011. (Ex. H to the Ward Decl.).

12 **III.  
LEGAL ANALYSIS**

13 **A. The Court May Grant A New Trial.**

14 A new trial may be granted pursuant to N.R.C.P. 59(a) when an aggrieved party's  
15 substantial rights have been materially affected by any of the [grounds stated in the rule]."  
16 *Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1035-37; N.R.C.P. 59. Pursuant to N.R.C.P.  
17 Rule 59, a new trial may be granted to a party "for any of the following causes or grounds  
18 materially affecting the substantial rights of an aggrieved party":

19 (1) Irregularity in the proceedings of the court, jury, master, or  
20 adverse party, or any order of the court, or master, or abuse of  
21 discretion by which either party was prevented from having a fair  
22 trial;

23 (2) Misconduct of the jury or prevailing party;

24 (3) Accident or surprise which ordinary prudence could not have  
25 guarded against;

26 (4) Newly discovered evidence material for the party making the  
27 motion which the party could not, with reasonable diligence, have  
28 discovered and produced at the trial;

...

(7) Error in law occurring at the trial and objected to by the party  
making the motion. On a motion for a new trial in an action tried  
without a jury, the court may open the judgment if one has been

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1 entered, take additional testimony, amend findings of fact and  
2 conclusions of law or make new findings and conclusions, and  
direct the entry of a new judgment.

3 **B. Plaintiff Counsel's Blatant and Premeditated Act of Putting Evidence On that It**  
4 **Knew Defense Counsel Had No Knowledge of Constitutes Reprehensible Attorney**  
5 **Misconduct and is Grounds for this Court to Grant a New Trial.**

6 In this case, Plaintiff and Plaintiff's counsel engaged in misconduct by putting on  
7 evidence they knew the Palms was unaware of, which resulted in the Palms being surprised and  
8 unprepared for the evidence, such that a new trial is justified. N.R.C.P. Rule 59 provides that a  
9 court may grant a new trial for an irregularity in the proceedings by adverse counsel. A new trial  
10 based upon the prevailing party's misconduct does not require proof that the result would have  
11 been different in the first trial without such misconduct. *Barrett v. Baird*, 111 Nev. 1496, 908  
12 P.2d 689 (1995) (overruled on other grounds by *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970  
13 (2008).) "The 'surprise' contemplated by NRCP 59(a) must result from some fact, circumstance,  
14 or situation in which a party is placed unexpectedly, to his injury, without any default or  
15 negligence of his own, and which ordinary prudence could not have guarded against." *Havas v.*  
*Haupt*, 94 Nev. 591, 593 (1978).

16 It is well settled under Nevada law that attorney misconduct or the prevailing party's  
17 misconduct constitutes an irregularity in the proceedings that is grounds for a new trial. Although  
18 there are many instances of misconduct by Plaintiff and Plaintiff's counsel, two particular acts  
19 constitute misconduct that materially affected the Palms. First, Plaintiff withheld evidence  
20 regarding Plaintiff's tax returns. Although he never reported to Mr. Ward again, when Plaintiff's  
21 economist, Mr. Dinneen testified at trial, he had with him a letter from the person who allegedly  
22 prepared the returns saying that the returns had been filed. Mr. Dinneen based the majority of his  
23 wage loss claim opinions on Mr. Rodriguez's tax returns, which were admittedly prepared only  
24 after Mr. Dinneen had requested them to form his opinion for this litigation.

25 From this scant information, Mr. Dinneen projected a wage loss of almost a million  
26 dollars. Although Plaintiff claimed to have bought and sold hundreds of home as a real estate  
27 investor, there was no evidence to support this claim. It may be that he has bought and sold a few  
28 homes, but it is unlikely that he has been involved in this business to any great extent.

1 The Palms was also blindsided by one of Plaintiff's treating specialists, Dr. Schifini, who  
2 presented at trial approximately 100+ documents in support of his opinions—none of which had  
3 ever been provided to the Palms, and were not included in the 21+ documents Dr. Schifini  
4 produced in response to his document subpoena. Dr. Schifini was introduced as one of plaintiff's  
5 treating anesthesiologist/pain management specialists. Dr. Schifini testified that his first visit  
6 with plaintiff was in November 2007. (Oct. 28, 2010, Trial Testimony, 7:14-16, attached as  
7 Exhibit I.) He was well aware that he had over 120+ documents regarding Plaintiff's treatment,  
8 yet he only produced 21+ documents to the Palms prior to trial. It was only at trial that he (and  
9 arguably Plaintiff and Plaintiff's counsel) opted to "surprise" the Palms with 100+ documents that  
10 it had never seen before. This made it incredibly difficult for Defendant to continue to properly  
11 defend the case and cross-examine Dr. Schifini.

12 **C. The Court's Order Permitting Plaintiff to Introduce Evidence of Testimony of**  
13 **Unavailable Treaters Prejudiced the Palms' Right to a Fair Trial and is Grounds for**  
14 **Grant of a New Trial.**

15 Pursuant to N.R.C.P. Rule 59(a)(1), a Court may grant a new trial if there are "irregularity  
16 of the proceedings" or an "abuse of discretion" preventing a fair trial. In addition, Rule 59(a)(7)  
17 authorizes a new trial where an error of law occurred during trial and the moving party objected  
18 to that error during trial. See *Bass-Davis v. Davis*, 122 Nev. 442, 453, 134 P.3d 103, 110 (2006).

19 The Court permitted Plaintiff, over the vehement objections of the Palms' counsel, to  
20 introduce opinion testimony of Plaintiff's non-retained, non-disclosed expert treating doctors, Dr.  
21 Shannon, Schifini, Shaw and Kidwell. Plaintiff's failure to disclose these experts put the Palms  
22 in a quagmire, because the Palms never had notice of the testifying treaters' "expert" opinions  
23 until they were given at trial, and once the opinions were given, the Palms was not allowed to  
24 rebut them using its own properly designated expert Dr. Becker, since Dr. Becker had not  
25 included his rebuttal opinions in his written report. The Palms was severely prejudiced by  
26 Plaintiff's failure to disclose the identities of his testifying expert witnesses, and was further  
27 severely prejudiced by the Court's allowing those unidentified experts to testify.

28 Treating healthcare providers, who were neither designated per NRCP 26 as non-retained  
experts nor provided expert reports, may not offer expert opinions on aspects of Plaintiff's

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1 condition outside the scope of their treatment of plaintiff. As the Court saw throughout the  
 2 progress of the trial, Plaintiff did not have any retained medical experts. With regard to Plaintiff's  
 3 medical case, his counsel elicited testimony from only four treating healthcare providers, not from  
 4 all of Plaintiff's treaters. Plaintiff attempted to have these four treaters aggregate the opinions and  
 5 conclusions of the other 25+ treaters. The testimony by witness is represented in this chart:

Witness	Testified Regarding
Mary Ann Shannon / Las Vegas Neurosurgery	American Medical Response
Mary Ann Shannon / Las Vegas Neurosurgery	Nathan Heaps, M.D. (Spring Valley Hospital Medical Center)
Mary Ann Shannon / Las Vegas Neurosurgery	John G. Nork, M.D. (Associated Physicians)
Mary Ann Shannon / Las Vegas Neurosurgery	Eric Campbell, D.C. / William Simpson, M.D. (Wellness Group)
Mary Ann Shannon, Las Vegas Neurosurgery	Mary Ann Shannon (Las Vegas Neurosurgery)
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Joseph Nicola, D.C. (Integrated Health Care)
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Yakov Treyzon, M.D.
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Casiano Flaviano, M.D. (Family Wellness Center)
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Walter M. Kidwell, M.D. (Pain Institute of Nevada)
Russell J. Shah, M.D.	Rancho Physical Therapy
Russell J. Shah, M.D.	F. Michael Ferrante, M.D. (UCLA)
Russell J. Shah, M.D.	Lawrence Miller, M.D. (California Hand Surgery / Olympic Anesthesia)
Russell J. Shah, M.D.	Robert Gutierrez, M.D. (orthopedic surgeon)
Russell J. Shah, M.D.	Matt Smith Physical Therapy
Russell J. Shah, M.D.	Valley Rehabilitation
Russell J. Shah, M.D.	G. Michael Elkhanch, M.D. (Bone & Joint Institute)
Russell J. Shah, M.D.	Russell J. Shah, M.D.
Russell J. Shah, M.D.	Kelly Hawkins Physical Therapy
Joseph Schifini, M.D. / Las Vegas Surgery Center	F. Michael Ferrante, M.D. (UCLA)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Douglas S. Stacey, D.P.M. (Foot & Ankle Surgery Group)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Govind Koka, D.O. (Medical Associates of Southern Nevada / Primary Care Consultants)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Michael J. Crovetti, D.O. (Bone and Joint Institute)
Joseph Schifini, M.D. / Las Vegas Surgery Center	John Thalgott, M.D. (Center for Disease and Surgery of the Spine)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Joseph J. Schifini, M.D. (Las Vegas Surgery Center)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Lawrence Miller, M.D. (California Hand Surgery)

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Witness	Testified Regarding
Joseph Schifini, M.D. / Las Vegas Surgery Center	Thomas Vater, D.O. (VaterSpine)

Those four providers (Schifini, Shah, Kidwell and Shannon) offered their own “expert” opinions as to all of the other nontestifying, treating healthcare providers’ (such as orthopedic surgeons) opinions, conclusions, and courses of treatment, both past and future, as well as testifying that the non-testifying treaters’ bills and expenses were reasonable and necessary, and finally provided cost information for treatments outside the scope of their normal treatment or expertise.

A particularly striking example comes in the testimony of Dr. Schifini, one of Plaintiff’s treating anesthesiologist/pain management specialists. Dr. Schifini testified that his first visit with plaintiff was in November 2007. (Oct. 28 Trial Testimony, 7:14-16, Ex. J to the Ward Decl.) He testified he did not speak with Dr. Ferrante, a pain management specialist at UCLA who saw Rodriguez once in September or October 2006 and performed 1 1/2 hour IME at the specific request of his attorneys. (Nov. 1 Trial Testimony, 64:23-65:5, Ex. J to Ward Decl.; Trial Exh. 25, UCLA 000006). In short, Dr. Schifini had no connection whatsoever with Dr. Ferrante or Dr. Ferrante’s treatment of plaintiff. This notwithstanding, on questioning from Plaintiff’s counsel, Dr. Schifini testified as to Dr. Ferrante’s qualifications and background. (Nov. Trial Testimony, 10:3-11:8, Ex. I to Ward. Decl.) Dr. Schifini then proceeded to discuss in detail the opinions and conclusions that he believed that Dr. Ferrante would have reached had he followed Plaintiff’s treatment. (Nov. 1 Trial Testimony, 141:2-142:17, Ex. J to the Ward Decl.)

Dr. Schifini then began to discuss what he believed was Dr. Larry Miller’s treatment of Plaintiff as memorialized in his records. Dr. Miller, an anesthesiologist and pain management specialist in Los Angeles, last saw Plaintiff in May 2007, fully six months before Dr. Schifini’s first consult with plaintiff. Dr. Schifini did not refer Plaintiff to Dr. Miller. Dr. Miller did not refer Plaintiff to Dr. Schifini. The two doctors did not consult. Dr. Schifini knew nothing about Dr. Miller’s treatment except what was reflected in his records. Yet, Dr. Schifini testified that he agreed with Dr. Miller’s diagnosis, and that Dr. Miller’s treatments were medically necessary and related to the Palms injury, and the charges were reasonable. (Oct. 28 Trial Testimony, 22:4-

1 27:22, 44:20-9, Ex. I to Ward Decl.,)

2 Dr. Schifini next proceeded to give the same sort of expert testimony with regard to the  
3 treatment of plaintiff by Drs. Crovetti, Koka, Stacey, Vater, and Thalgott, all as memorialized in  
4 their records. (*Id.* at 28:6-30:12, 44:10-45:12, 45:14-48:10, 54:22-55:15, 64:13-65:20.)

5 Finally, and most significantly, Dr. Schifini proceeded to testify as to the specific costs of  
6 the proposed spinal cord stimulator that he opined to Dr. Ferrante would believe was necessary,  
7 had Dr. Ferrante actually treated plaintiff within the past several years. He specifically stated that  
8 the costs of lifetime surgeries, surgeons, replacement batteries, replacement electrodes, and office  
9 visits would total \$721,000. (Oct. 28, 2010 Trial Testimony, Ex. I to Ward Decl, 76:14-25.) This  
10 was an improper expert opinion, as no foundation was laid for it, nor was it disclosed previously,  
11 nor was Dr. Schifini disclosed as an expert. Moreover, Dr. Schifini's costings are some three  
12 times greater than Plaintiff's own expert lifecare planner Kathleen Hartman, R. N.'s estimates:

13

2.6.7.7. V15 Spinal Stimulator had trial July 14 <sup>th</sup> helped 32.77 yrs <sup>6</sup>	2008	2009	Permanent to be placed by Dr. Vater	Pain control and control of symptoms of chronic pain disorder Trial completed	Perm - \$86,145(2) Elec - \$10,310 (5) Batteries-4,000 (3) Remove - \$9,320(2)***	192,290 51,950 32,000 18,640	192,290 <sup>7</sup> 51,650 <sup>7</sup> 32,000 <sup>7</sup> 18,640 <sup>7</sup>
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16 (Dinneen & Hartman initial expert report, p. 17, attached as Exhibit L to the Ward Decl.)

17 By way of further example, Dr. Kidwell, one of plaintiff's treating anesthesiologists/pain  
18 specialists, testified that although he had never spoken with Dr. Thalgott (an orthopedic surgeon  
19 in Los Angeles who had not seen plaintiff for at least three years before the date of trial), and  
20 although Dr. Thalgott had written that plaintiff was not a surgical candidate, it was Dr. Kidwell's  
21 opinion that if Dr. Thalgott knew what had transpired between then and now, he would change  
22 his opinion. Dr. Kidwell testified not as to what he thought would be the course, but what he  
23 thought Dr. Thalgott, a non-testifying treating doctor, would prescribe. (November 8, 2010 Trial  
24 Testimony, 40:24-41:14, , Exhibit M to the Ward. Decl.) This is pure speculation.

25 Via this tactic, Plaintiff was able to offer into evidence the "expert opinions" of 28  
26 different healthcare providers through only four witnesses, subjecting only four witnesses to  
27 cross-examination on the "opinions" of 28 different providers as understood by the four testifying  
28 treaters. However, the law does not allow a treating provider, otherwise not disclosed as an

1 expert, to offer expert opinions as to the treatment that would be prescribed or recommended by  
2 another, non-testifying treater. The Court's considering this testimony in its verdict is error.

3 Plaintiff's entire medical case, a series of opinions of "experts by proxy" is improper  
4 under NRCP 16 and 26, is inadmissible hearsay, and is completely without foundation. Plaintiff  
5 did not demonstrate any foundation for any of the testifying treaters to offer the opinions they  
6 offered with regard to plaintiff's back surgery needs, what Plaintiff's MRIs showed, whether his  
7 knee surgeries were necessary, whether the non-testifying treaters' bills were reasonable, or the  
8 lifetime costs for plaintiff's proposed spinal cord stimulator, some \$723,000 as testified by Dr.  
9 Schifini of his trial testimony. These opinions and the other opinions like them should not have  
10 been considered by this Court in rendering its verdict in this case.

11 *Prabhu v. Levine (a.k.a. Franco) inapposite*

12 At a pretrial hearing on this issue, Plaintiff relied on *Prabhu v. Levine (a.k.a. Franco)*, 112  
13 Nev. 1538 (1996) in support of his argument that treating doctors can provide expert testimony  
14 regardless of whether they have been disclosed as expert witnesses or issued NRCP 26 reports.  
15 The Court allowed this testimony, over defendant's objection. The Court did, though, note the  
16 Palms' continuing hearsay and relevance objections regarding the use of testifying treaters to get  
17 into evidence the opinions of nontestifying treaters, as well as foundationless opinions on costs,  
18 future treatment and other relevant issues, as well as the Palms' objections on the basis that the  
19 experts were not disclosed as experts and did not issue reports per NRCP 16 and 26.

20 *Prabhu*, as the Court is aware, was a medical malpractice lawsuit. The manner in which  
21 the trial court allowed the treating doctor to provide expert testimony in that case is substantially  
22 different from the manner in which plaintiff was allowed to present "expert" testimony via  
23 treating physicians in this case. The Palms respectfully submits that the Court committed error by  
24 considering the non-disclosed "expert" testimony of plaintiff's treating physicians.

25 In *Prabhu*, the plaintiff Ms. Franco sued her doctor for medical malpractice. Ms. Franco's  
26 treating ophthalmologic surgeon Dr. Levine performed five surgeries on her to correct maladies  
27 caused by Dr. Prabhu's misdiagnoses. Dr. Levine did not testify at trial, but his deposition was  
28 read into the record, providing his opinions as to causation and standard of care, as well as Ms.

1 Franco's prognosis.

2 Prabhū's counsel made objection to Dr. Levine's testimony because he was not disclosed  
3 as an expert under NRCp 26 (no mention was made of expert reports), but was only identified as  
4 a treating physician. However, the decision reflects that Prabhū's counsel was unable to show  
5 prejudice at this technical failure because Prabhū's counsel deposed Dr. Levine and learned all of  
6 his opinions at deposition. Prabhū's counsel, then, had the opportunity to secure his own experts'  
7 opinions to counter Dr. Levine's. Accordingly, Prabhū's counsel could not show any surprise or  
8 prejudice at Levine's testimony at trial, especially considering that testimony was simply  
9 Levine's own deposition taken by Prabhū's own counsel. Under those circumstances, the Court  
10 found no abuse of discretion in allowing the testimony of the treating doctor on ultimate issues in  
11 the case.

12 The nature of Dr. Levine's testimony and treatment of plaintiff is different from the  
13 testimony—to which the Palms objected—that was offered by Drs. Shannon, Schifini, Shah and  
14 Kidwell. Unfortunately, defendants have been unable to locate any other Nevada decision  
15 discussing the exact issue confronting this Court on this point. Unlike Dr. Levine's testimony,  
16 though, where he offered expert opinions on issues learned within the scope of his own specific  
17 and detailed treatment of Ms. Franco, Mr. Rodriguez's testifying treating doctors as described  
18 above have offered opinions on ultimate issues such as causation based not on their own treating  
19 opinions, but on the opinions and records of other doctors, unrelated to their treatment of plaintiff.

20 This testimony is far broader than—and radically different from—the testimony offered  
21 by Dr. Levine in the *Prabhū* case, and should not be allowed.

22 1. *Two parts to valid expert disclosure*

23 Indeed, under the prevailing authorities, these providers cannot offer testimony at all other  
24 than as percipient witnesses (i.e., testimony outside the scope of their specific treatment of  
25 plaintiff) without having been disclosed as experts pursuant to NRCp 16(a)(2)(A) and NRCp 26.  
26 While the Supreme Court in *Prabhū* seemed to minimize plaintiff's failure to designate Levine as  
27 an expert, the fact is that defendant in that case was not prejudiced and so the trial court had not  
28 abused its discretion. In the case where prejudice is patent—as here—expert disclosures are

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1 crucially important in allowing a defendant to prepare its case.

2 Under Nevada law, there is a two-part disclosure requirement for expert witnesses.  
3 Nevada Rule of Civil Procedure 16.1(a) provides a party must disclose the identities of potential  
4 experts, and the disclosure must be accompanied by a written report prepared and signed by the  
5 witness. NRCP 16.1(a)(2)(A) and (B). Accordingly, for a witness to be allowed to offer expert  
6 testimony at trial, he must first be formally disclosed as such and, if specifically retained to  
7 provide expert testimony, he must generate a formal written report.

8 None of Mr. Rodriguez's testifying treating doctors were designated as experts. They  
9 were all identified in 16.1 disclosures as treating physicians and percipient witnesses, but none  
10 were disclosed in Plaintiff's expert disclosures as "non-retained" experts. This may seem like a  
11 technical distinction. After all, all of them were available for deposition, and, like in the *Levine*  
12 case, the Palms could have deposed all of them and learned their opinions. However, plaintiff  
13 had 30+ treating healthcare providers in this case. It is patently unfair and prejudicial to either  
14 require the Palms to have deposed every single one of them on the off chance that one might offer  
15 expert testimony, or for the Palms to have to wait until trial to find out which providers are going  
16 to offer expert testimony. Here, Plaintiff was required by NRCP 16.1 and 26 to have timely  
17 designated as experts the four treaters who testified at trial. Because he did not, the Palms was  
18 severely prejudiced in preparing its defense.

19 2. *NRCP 16 disclosure of treating healthcare provider as expert is mandatory.*

20 While so-called "non-retained experts" like treating healthcare providers may not  
21 necessarily be required to provide written reports under 16.1(a)(2)(B), they still must be timely  
22 and formally disclosed as experts under 16.1(a)(2)(A). The reason is the nature of their opinion  
23 testimony: Lay witnesses, those "not testifying as an expert," (NRS 50.265), may provide  
24 opinions rationally based on the perception of the witness (e.g., speed or height), only experts can  
25 provide opinions "based on scientific, technical, or other specialized knowledge," (NRS 50.275),  
26 which are by definition expert opinions.

27 The authorities are clear that a treating doctor, otherwise **not** retained for purposes of  
28 litigation, is nonetheless **still providing** expert testimony if the testimony consists of opinions

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1 based on "scientific, technical, or other specialized knowledge," regardless of whether those  
2 opinions were formed during the scope of interaction with a party prior to litigation. *Musser v.*  
3 *Gentiva Health Servs.*, 356 F.3d 751, 757, fn. 2 (7th Cir. 2004); *Cf. O'Conner v. Commonwealth*  
4 *Edison Co.*, 13 F.3d 1090, 1105 n.14 (7th Cir. 1994).<sup>1</sup> Accordingly, it is clear that while a  
5 treating physician may not necessarily be required to offer a written expert report, the treating  
6 physician/healthcare provider must always be disclosed as an expert if he/she is going to be called  
7 at trial to offer any testimony outside the bare facts of his/her treatment.

8 Plaintiff has argued that he did comply with all of the Court's disclosure rules with regard  
9 to percipient witnesses and accordingly the Palms has for years known the identities of all of  
10 Plaintiff's treating healthcare providers. He has argued that no prejudice will result from  
11 Plaintiff's "form over substance" failure to formally disclose the treating healthcare providers,  
12 previously disclosed as percipient witnesses, as experts under NRCP 16.1(a)(2)(A). This was,  
13 after all, essentially the ruling in *Prabhu*. However, and in addition to the specific prejudice to  
14 the Palms here discussed above, the authorities are clear that the federal rules and their NRCP  
15 counterpart demand this formal disclosure:

16 Formal disclosure of experts is not pointless. Knowing the identity  
17 of the opponent's expert witnesses allows a party to properly  
18 prepare for trial. Gentiva should not be made to assume that each  
19 witness disclosed by the Mussers could be an expert witness at trial.  
20 *Cf. Patel v. Gayes*, 984 F.2d 214, 217-18 (7th Cir. 1993) (affirming,  
21 under the pre-1993 Federal Rules of Civil Procedure, the exclusion  
22 of expert testimony as to duty of care from treating physicians when  
23 they were not disclosed as experts). The failure to disclose experts  
24 prejudiced Gentiva because there are countermeasures that could  
25 have been taken that are not applicable to fact witnesses, such as  
26 attempting to disqualify the expert testimony on grounds set forth in  
27 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125  
28 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), retaining rebuttal experts,  
and holding additional depositions to retrieve the information not  
available because of the absence of a report. In sum, we agree with  
the district court that even treating physicians and treating nurses  
must be designated as experts if they are to provide expert  
testimony.

*Musser, supra*, at 757 – 758 (emphasis added).

In this case, just as in *Musser*, Plaintiff sought to elicit expert opinion testimony from

<sup>1</sup> Treating physicians are not exempt from the disclosure and report requirements because "we do not distinguish the treating physician from other experts when the treating physician is offering expert testimony...."  
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1 treating healthcare providers including physicians, none of whom were formally designated as  
2 experts under the civil rules. The Palms never had the opportunity to depose any of plaintiff's  
3 treating providers as experts, as they were never designated as such.

4 This is an important distinction, as the court in *Musser* recognized. There are  
5 "countermeasures" that the Palms could have taken to address the treating providers' "expert"  
6 testimony, most significantly developing rebuttal expert testimony on the various providers'  
7 opinions as elicited in their depositions. The Palms could not do this here, as Plaintiff never  
8 designated which providers it would seek to elicit expert testimony from at trial. There is no  
9 Nevada authority on point unfortunately, but the federal authorities, including *Musser*, affirm that  
10 treating physicians must be disclosed as experts if they are to provide expert testimony.  
11 Defendant has been sorely prejudiced by Plaintiff's having elicited expert testimony from non-  
12 disclosed, non-retained experts at trial.

13 3. *A written report required where bases for opinions stray from the core of*  
14 *treatment*

15 The second part of the expert disclosure under Nevada law is the written report  
16 requirement. Of course, an expert witness specifically hired by counsel to provide testimony in  
17 litigation must also prepare a written report containing all of his opinions and conclusions as well  
18 as the factual bases therefor. NRCPP 16.1(a)(2)(B). A properly disclosed treating physician or  
19 healthcare provider may provide expert testimony without issuing an expert report, but only so  
20 long as the bases for her opinions are limited to her personal observations, diagnosis, and  
21 treatment of plaintiff. *Roberson v. Bair*, 242 F.R.D. 130, 134 (D.D.C. 2007).

22 However, and significantly for this case, an expert report is required when that treatment  
23 provider's testimony strays from the core of the physician's treatment. *Fielden v. CSX Transp.,*  
24 *Inc.*, 482 F.3d 866, 870 (6th Cir. 2007). See *Kirkham v. Societe Air Fr.*, 236 F.R.D. 9, 12 (D.D.C.  
25 2006) (written report requirement applies to opinions on causation, prognosis, and permanency.)  
26 By way of example, any opinion offered by a treating physician or healthcare provider (who has  
27 been otherwise properly disclosed) that is based on information contained in a report of a defense  
28 medical examination, an agreed medical examination for purposes of workers compensation, or

1 any other information outside of the scope of a treating physician's examination and treatment of  
2 plaintiff, is of a consulting nature, and the witness purporting to offer that opinion will be  
3 considered a consulting expert who is subject to the report requirement. *Shapardon v. West*  
4 *Beach Estates*, 172 F.R.D. 415, 417 (D. Haw. 1997).

5 Here, this is exactly the sort of opinion that Plaintiff's for testifying treaters offered. Their  
6 opinions were of a consulting nature, and were not formed solely within the scope of their  
7 treatment of Plaintiff. Many of the facts and opinions testified to by Dr. Shannon, Dr. Schifini,  
8 Dr. Kidwell and Dr. Shah were outside the scope of their treatment of Plaintiff, and were based  
9 on reviews of the other non-testifying treaters' records as well as defendants' own experts'  
10 reports—they criticized the Palms' own expert Dr. Becker. This is something a treating doctor  
11 would never normally do, and something that is the exclusive provenance of retained expert  
12 witnesses. Those select few treating healthcare providers aggregated the hearsay testimony of  
13 these nontestifying providers and offered previously non-disclosed expert opinions based thereon  
14 at trial. Such testimony is clearly inadmissible, and to admit it is an abuse of discretion and an  
15 error in law.

16 4. *Plaintiff's testifying treaters not qualified under Daubert to offer opinions on*  
17 *treatment/conclusions/opinions of nontestifying treaters.*

18 Assuming *arguendo* that Plaintiff's treating providers were properly disclosed, they still  
19 must be qualified to offer the opinions they seek to offer. The statute governing the admissibility  
20 of expert testimony in Nevada courts is NRS 50.275, which has been construed to track with  
21 Federal Rule of Evidence 702. *Hallmark v. Eldridge*, 189 P.3d 646, 650 (Nev. 2008). NRS  
22 50.275 states that

23 [i]f scientific, technical or other specialized knowledge will assist  
24 the trier of fact to understand the evidence or to determine a fact in  
25 issue, a witness qualified as an expert by special knowledge, skill,  
26 experience, training or education may testify to matters within the  
27 scope of such knowledge. *Id.*

28 Therefore, to qualify as an expert witness under NRS 50.275, the witness must satisfy  
three requirements:

- (1) he or she must be qualified in an area of 'scientific, technical or  
other specialized knowledge' (the qualification requirement); (2)

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1 his or her specialized knowledge must 'assist the trier of fact to  
2 understand the evidence or to determine a fact in issue' (the  
3 assistance requirement); and (3) his or her testimony must be  
4 limited 'to matters within the scope of [his or her specialized]  
5 knowledge' (the limited scope requirement). *Hallmark, supra*, 189  
6 P.3d at 650.

7 The determination of competency of an expert witness is largely within the discretion of  
8 the trial judge. *Walton v. Eighth Judicial Dist. Court ex rel. County of Clark*, 94 Nev. 690, 693  
9 (1978). Before a person can testify as an expert witness, the court must first determine whether  
10 that person is qualified in an area of scientific, technical, or other specialized knowledge. The  
11 court should consider the following non-exhaustive factors: (1) formal schooling and academic  
12 degrees, (2) licensure, (3) work/employment experience, and (4) practical experience and  
13 specialized training. *Hallmark, supra*, 189 P.3d at 650-51.

14 Second, once a witness is found to be qualified, the anticipated testimony must assist the  
15 trier of fact in understanding the evidence or determining a fact in issue. NRS 50.275.  
16 Testimony will only assist the trier of fact if it is both relevant and the product of reliable  
17 methodology. *Hallmark, supra*, 189 P.3d at 651. Nevada does not blindly follow *Daubert*, but  
18 does use the factors outlined in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), for  
19 guidance in determining whether an expert's testimony is based on reliable methodology. *Higgs*  
20 *v. State*, 222 P.3d 648, 657-58 (2010). Under *Daubert*, a judge may wish to consider whether the  
21 evidence at issue (1) has been tested, (2) has been subjected to peer review and publication, (3)  
22 has a known or potential error rate, and (4) has general or widespread acceptance. *Daubert*,  
23 *supra*, 509 U.S. at 593-94. However, application of the *Daubert* factors is not mechanical;  
24 Nevada judges are allowed to consider any other relevant factors. *Higgs, supra*, 222 P.3d at 657-  
25 58.

26 Finally, once a physician is qualified as an expert, he or she may testify to all matters  
27 within the scope of his or her knowledge, experience or training, subject to the court's discretion  
28 concerning whether the expert is truly qualified to render such testimony. *Fernandez v.*  
*Admirand*, 108 Nev. 963, 969 (1992). Mere designation as an expert in one area, though, does  
not give the witness a license to unconstrained testimony on all scientific, technical, or other

1 specialized matters. *Eagleston v. Guido*, 41 F.3d 865 (2d Cir. 1994) (holding that an expert  
2 sociologist could not testify as to criminology or domestic violence); *see also Lord v. State*, 107  
3 Nev. 28, 33 (a detective witness was not qualified to testify that a person’s injuries were caused  
4 by a fight despite the witness’ extensive law enforcement experience).

5 Notwithstanding that none of the testifying treaters were disclosed as experts, the  
6 testifying treaters themselves did not have the qualifications to opine on any and every medical  
7 issue in this case. For example, Dr. Kidwell, an anesthesiologist, is not qualified to offer credible  
8 expert testimony as to what treatment Dr. Thalgott, an orthopedic spine surgeon who had not seen  
9 plaintiff since 2008, would currently prescribe if he were to examine Plaintiff. In 2007 Dr.  
10 Thalgott wrote in his treatment record that Plaintiff was not a candidate for back surgery.  
11 However, at trial, Dr. Kidwell testified that, had Dr. Thalgott followed plaintiff’s treatment since  
12 2007, he would now recommend back surgery. There is simply no foundation for this “opinion”  
13 from Dr. Thalgott via Dr. Kidwell. Likewise, Dr. Schifini simply is not qualified to testify as to  
14 what Dr. Ferrante, a pain management specialist at UCLA who saw Plaintiff several years before,  
15 and with whom Dr. Schifini never consulted, would currently recommend for Plaintiff. These  
16 and the other “opinions” elicited by Plaintiff’s counsel are improper and should not have been  
17 admitted as evidence.

18 5. *Plaintiff’s selected few treaters’ aggregation of nontestifying providers’ opinions*  
19 *and records are inadmissible hearsay*

20 NRS 51.035 defines hearsay generally as a statement offered into evidence to prove the  
21 truth of the matter asserted. Hearsay is inadmissible except as otherwise provided by law. NRS  
22 51.065.

23 Testimony of one treating physician as to the collective opinion of a group of other  
24 physicians of different opinions and specialties who do not testify is inadmissible hearsay under  
25 NRS 50.285. *Estes v. State*, 122 Nev. 1123, 1140-41 (2006). In *Estes v. State*, in a proceeding to  
26 determine the defendant’s competency to stand trial, one of the defendant’s physicians—who had  
27 been properly disclosed as an expert—testified as to his mental illness. *Id.* at 1141. During this  
28 testimony, the physician voiced a “collective opinion” of the defendant’s competency on behalf

1 of herself and other mental health professionals who were currently treating plaintiff but who were  
2 not called to testify at the proceedings. *Id.* On review, the Supreme Court of Nevada held that  
3 such testimony constituted inadmissible hearsay. *Id.*

4 However, the Court noted that NRS 50.285 allows otherwise properly disclosed and  
5 qualified experts to base their opinions on facts or data not otherwise admissible, if that  
6 information is of a type reasonably relied on by experts in the field. *Id.* Therefore, the  
7 physician's reasonable reliance on the opinions of her colleagues in forming her own diagnosis  
8 was "marginally appropriate." *Id.*

9 Applying the rule in *Estes* to this case, since Plaintiff's treating healthcare providers were  
10 never disclosed as experts (*supra*, at pp. 1-5), they cannot be otherwise accepted as experts,  
11 regardless of their qualifications. Accordingly, such non-disclosed treating healthcare providers  
12 may not offer testimony based on hearsay, which they might otherwise do had they been properly  
13 qualified. As set out above, treating healthcare providers who *have been* disclosed as non-  
14 retained experts may testify *only* as to what is encompassed within their personal observations  
15 and treatment of the Plaintiff. Treating healthcare providers who *have not been* disclosed as non-  
16 retained experts *may not* testify as to any matters "based on scientific, technical or other  
17 specialized knowledge."

18 Here, Plaintiff did not disclose any treating physicians as experts, and so they must be  
19 precluded from offering any expert testimony on any matters "based on scientific, technical or  
20 other specialized knowledge." Regardless of disclosure, Plaintiff's selected few experts were  
21 never qualified to aggregate the records, observations and opinions of the non-testifying treaters.  
22 Finally, because plaintiff's treating healthcare providers were never disclosed, they may not rely  
23 on hearsay, which they otherwise might be allowed to do.

24 "The exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1)  
25 unless non-disclosure was justified or harmless." *Musser* at 758, citing *Finley v. Marathon Oil*  
26 *Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996). While defendant had the opportunity to depose the  
27 treaters during discovery, it never had the opportunity to depose them as experts because they  
28 were never disclosed as such. As discussed in *Musser*, this is a very important distinction, and

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1 plaintiff's failure to disclose prevented defendant from being able to prepare for trial, which has  
2 severely prejudiced the Palms.

3 Clearly, the Court considered some, if not all, of the inadmissible testimony in calculating  
4 its almost \$6 million verdict in this matter. This testimony should never have been admitted, and  
5 by permitting its admission, the Court made it difficult, if not impossible, for the Palms to  
6 effectively defend against Plaintiff's medical damages claims.

7 **D. The Body of Evidence that the Palms Presented at Trial Conclusively Demonstrates  
8 the Evidence was Insufficient to Justify the Verdict.**

9 N.R.C.P. Rule 59 authorizes new trials where the verdict is against law, or where the  
10 evidence is insufficient to justify the verdict. The general rule is that when there is substantial  
11 evidence to sustain the judgment, it will not be disturbed, but an exception to the general rule  
12 exists where, upon all the evidence, it is clear that a wrong conclusion has been reached. *Brechan*  
13 *v. Scott*, 92 Nev. 633, 555 P.2d 1230 (1976).

14 Plaintiff has the burden of proving the fact of damage and the amount of damages. *Mort*  
15 *Wallin v. Commercial Cabinet Co.*, 105 Nev. 855, 857 (Nev. 1989). Each item of damages must  
16 be "proven by a preponderance of the evidence." *Las Vegas-Tonopah-Reno Stage Lines v. Gray*  
17 *Line Tours*, 106 Nev. 283, 290 (Nev. 1990).

18 1. *Plaintiff Must Establish the Amount of Damages by Substantial Evidence.*

19 "[T]o justify a money judgment the amount ... must be proved," and "there must be  
20 substantial evidence as to the amount of damage, as the law does not permit arriving at such  
21 amount by conjecture[.]" *Cathcart v. Robison, Lyle, Belaustegui & Robb*, 106 Nev. 477, 480  
22 (Nev. 1990). "[T]o prove the right to damages without proving the amount, entitles a plaintiff to  
23 nominal damages only." *Id.* Thus, Plaintiff must prove the amount of damages to be awarded by  
24 substantial evidence. Any lesser standard opens the door to conjecture and unjust awards.

25 2. *Plaintiff Must Prove the Amount of Damages With Reasonable Certainty.*

26 Plaintiff must prove the "amount" of damages "to a reasonable certainty" that is "not  
27 arrived at by mere conjecture but through substantial evidence." *All Nite Garage v. A. A. A.*  
28 *Towing*, 85 Nev. 193, 199 (Nev. 1969). While the amount "need not be met with mathematical

1 exactitude,” and “some uncertainty in the amount is allowed,” there “must be an evidentiary basis  
2 for determining a *reasonably accurate amount* of damages.” *Mort Wallin*, 105 Nev. at 857. The  
3 Restatement (Second) of Torts permits the plaintiff to recover damages “if, and only if, he  
4 establishes by proof the extent of the harm and the amount of money representing adequate  
5 compensation with as much certainty as the nature of the tort and the circumstances permit.”  
6 Rest. (2d) Torts § 912.

7 Plaintiff must provide a reasonable method for determining the amount of damages.  
8 “[I]f ... a reasonable method for ascertaining the extent of damage is offered through testimony,”  
9 it will be “sufficient if the evidence adduced will permit the jury to make a fair and reasonable  
10 approximation.” *Bader v. Cerri*, 96 Nev. 352, 358 (Nev. 1980) (citation omitted) (overruled on  
11 other grounds, *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 608 (2000).)

12 In *Mort Wallin*, plaintiff sought damages for diminution in the value of a store caused by  
13 defendant’s breach of contract, put on evidence of the fact of diminution, but did not provide  
14 evidence of the value of the store had defendant performed as promised and its value as a result of  
15 its actual performance. 105 Nev. at 857. The Supreme Court held plaintiff “failed to carry its  
16 burden to reasonably establish the amount of the diminution in property value” and vacated the  
17 diminution-in-value damages award.

18 Under Nevada case law, if the evidence a plaintiff provides is not substantial and does not  
19 permit the fact-finder to determine the amount of damages with reasonable accuracy, he has not  
20 carried his burden. Rather, plaintiff must put on evidence of the amount of damages that permits  
21 the fact finder to make a reasonably accurate award of damages based on a reasonable method.

22 Plaintiff claims that he is a real estate investor/developer and has had his own real estate  
23 business for over fifteen years. Plaintiff claims lost earnings resulting from injuries he attributes  
24 to the subject accident. Because Plaintiff is in business for himself through his professional  
25 corporation, his lost earnings may be measured by the lost profits of his business. *Strauss v.*  
26 *Continental Airlines*, 67 S.W.3d 428, 437-438 (Tex. App. 2002).

27 3. *Plaintiff Cannot Prove that the Accident Caused Specified Losses.*

28 Proof that the accident caused Plaintiff specified losses is essential:

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20

1 There is no automatic award for loss of income due to partial  
2 disability. The disability must result in a loss of income for it to be  
3 compensable. In this case, the plaintiff is a professional, whose  
4 earnings depend upon his training and professional skills, **which**  
**are more mental than physical. Therefore, a curtailment of his**  
**physical activities does not necessarily translate into a**  
**diminution in his earning capacity.**

5 *Nobile v. New Orleans Public Service, Inc.*, 419 So.2d 35, 39 (La.  
6 App. 1982) (emphasis added).

7 The evidence here has shown that, similar to *Nobile*, Plaintiff's earnings from his real  
8 estate endeavors are the result more of his mental abilities and professional skills than physical  
9 capacities. Therefore, loss of earnings is not an inevitable result of physical injury. Plaintiff  
10 contends that, as a result of his injuries, he lost the ability to purchase and "flip" residential real  
11 estate, and thus lost profits. He must provide evidence that he lost business as a result of the  
12 injury, and not from other causes such as bad investments on his part or indeed the recent crash in  
13 the real estate market. For example, Plaintiff must provide evidence that he was unable to buy  
14 and sell real estate because of his injuries. He did not do so. Without such evidence, an award  
15 would be based on conjecture.

16 The *Strauss* case involved similarly insufficient evidence. There, an attorney sued the  
17 airline for lost profits caused by personal injuries suffered while boarding a flight. 67 S.W.3d at  
18 432, 433. After trial, the court granted defendant's motion for judgment notwithstanding the  
19 verdict on the jury's \$1 million award of lost past profits. *Id.* at 434. The attorney argued that he  
20 lost profits as a result of his injuries because he could no longer travel to a particular small town  
21 in Mississippi and thus solicit personal injury cases from that town's sympathetic population,  
22 made up of persons working in and related to the maritime offshore oil industry. 67 S.W.3d at  
23 439.

24 The *Strauss* plaintiff, however, did not provide what the court called the "**presumably**  
25 **available evidence**" of "**the numbers of cases he had represented [in that town] or the net**  
26 **earnings he made on each case prior to the injury.**" *Id.* (emphasis added). The court held, "**in**  
27 **the absence of additional available evidence, and the absence of any explanation as to why it**  
28 **was not provided,**" the evidence that was provided "is not sufficient." *Id.* (emphasis added). In

1 addition, the attorney did not attempt to “segregate the fees earned from similar cases [to those  
2 from that town] from fees earned from other types of cases,” with the result, “there is nothing  
3 from which a jury could determine the number of maritime cases from Kosciusko that Strauss  
4 might have obtained[.]” *Id.* The court held that the attorney did not demonstrate his damages “to  
5 the degree of proof to which they were susceptible.” *Id.*

6 Mr. Rodriguez’s proof of damages here was like the attorney in the *Strauss* case. The only  
7 evidence Plaintiff has produced to support his lost earnings claims are his individual tax returns  
8 from 1999, 2001 and 2004, none of which were completed in any of those years, e.g., the 2004  
9 tax return was signed in 2009. These three tax returns, none of which were completed  
10 contemporaneously, by themselves, are wholly insufficient to support Plaintiff’s \$400,000 per  
11 year lost earnings claim. Plaintiff failed to produce any other evidence in support of his lost  
12 earnings claim during discovery.

13 4. *Plaintiff Has Failed to Provide Substantial Evidence of Revenues and Expenses to*  
14 *Prove Lost Profits.*

15 To determine his lost earnings, Plaintiff may not rely on his business’s gross revenues.  
16 “Gross fees,” the *Strauss* court held, “are not an appropriate basis” for determining lost earnings.  
17 *Id.* at 440. He must provide evidence of “expenses.” *Id.* “Net earnings ... must include a  
18 deduction for expenses incurred[.]” such as “office expenses, court fees, copy costs and the  
19 myriad other expenses associated with a case[.]” *Id.* In *Strauss*, the attorney failed to provide  
20 such evidence, and the court held the evidence insufficient to support an award of lost profits. *Id.*  
21 at 442.

22 To prove lost profits, Plaintiff must have, in addition to proving that the accident caused  
23 him to lose opportunities and sales, provided evidence of the gross revenues the sales reasonably  
24 would have generated, his expenses for the sales and the expenses of his professional corporation  
25 allocable to those sales, and ultimately estimated net revenues. Plaintiff failed to produce any  
26 such evidence during discovery or at trial.

27 5. *Plaintiff Has Failed to Provide Evidence of Lost Earnings to Support an Award of*  
28 *Damages for Lost Earning Capacity.*

Nevada has not expressly recognized loss of earning capacity as a recoverable loss distinct  
2A126/1108905-1 22

1 from lost future earnings. Nevada cases addressing lost earning capacity treat it as the same as  
2 lost future earnings. e.g., *Silver State Disposal Co. v. Shelley*, 105 Nev. 309, 311-312, 774 P.2d  
3 1044, 1046 (1989) (“the jury was adequately instructed on the recovery for lost wages and future  
4 lost wages (reduced earning capacity)”).

5 Loss of earning capacity has been distinguished from loss of earnings. Loss of earnings is  
6 “actual loss of income due to an inability to perform a specific job a party held from the time of  
7 injury to the date of trial.” *Strauss*, 67 S.W.3d at 435; *Johnson v. International of United Bhd. of*  
8 *C. & J.*, 54 Nev. 332, 336 (1932) (“loss of what plaintiff would otherwise have earned in his  
9 calling, and has been deprived of earning by the wrongful act”). Loss of earning capacity is  
10 diminished “ability and fitness to work in gainful employment” caused by the accident. *Id.* at 435  
11 & n.2.

12 The issue of lost earning capacity is clearly presented when the injured plaintiff is a child  
13 who never held a job. *Id.* at 436. The distinction between lost earning capacity and lost future  
14 earnings largely disappears for injured plaintiffs, like Plaintiff, who has avowed a commitment to  
15 a particular profession. *Id.*

16 To recover for lost earning capacity, Plaintiff must have presented evidence that his  
17 earnings and earning capacity have been harmed by the accident. In *City of Fairbanks v. Nesbett*,  
18 432 P.2d 607, 617 (Alaska 1967), the Alaska Supreme Court held, in a case involving an attorney,  
19 “In determining the extent of impairment of an attorney’s earning capacity and the measurement  
20 of loss therefrom, we hold that there must be evidence presented to the jury concerning the extent  
21 of impairment.” The attorney did not place any evidence in the record of the effect of his ankle  
22 injury on his earning capacity. The court held, “it was error to submit this issue to the jury since  
23 they could only have speculated as to the extent of any impairment of appellee’s capacity to earn  
24 money and the resulting monetary loss therefrom.” *Id.*

25 As previously stated, the only evidence Plaintiff has produced in an effort to support his  
26 lost earnings claim are his individual tax returns from 1999, 2001 and 2004, which were created  
27 in response to his expert’s request for them, and during this litigation, and his own self-serving  
28 anecdotal testimony. Plaintiff testified he had a business, Mary Star Enterprises, which he

1 operated further to his real estate investments. He has produced no income/earnings records or  
2 profit and loss statements for this company. Plaintiff has failed to produce, other than these three  
3 individual tax returns, any evidence of his lost earnings. Indeed, his own expert, Terrance  
4 Dinneen, simply took a six-year average of the three tax returns provided (add the three incomes  
5 and divide by six). There is no evidence of lost earnings or profits.

6           6.       *Plaintiff Did Not Prove Lost Earnings or Lost Earnings Capacity.*

7           To recover lost earnings, and to prove that he has suffered a loss of earning capacity as a  
8 result of the accident, Plaintiff must have provided substantial evidence that the accident, and no  
9 other cause such as the crash in the real estate market, is the cause of lost earnings. Besides three  
10 years of tax returns, Plaintiff elected not to provide any of the other evidence he presumably has  
11 (or could have collected) all of which is necessary to make this showing.

12           Plaintiff claims to have had his own real estate business, Mary Star Enterprises, for over  
13 fifteen years. That business presumably has records, including business tax returns, profit and  
14 loss statements, and other indicia of legitimacy. Plaintiff certainly has information or access to  
15 information about key facts necessary to prove lost earnings and lost earning capacity. He knows  
16 or should know the number of sales he had for the 15 years preceding the subject accident. It was  
17 his business. He knows or should know his expenses attributed to such sales. He knows or has  
18 information about the revenues various types of sales generate. Plaintiff, however, failed to  
19 provide any such evidence at deposition or in discovery or at trial.

20           Plaintiff has not shown that his alleged injuries have had any effect on his ability to do the  
21 mental and professional work of a real estate flipper. On this record, Plaintiff has failed to  
22 provide substantial evidence in support of a reasonably certain an award of damages. Thus, it  
23 was against the law for the Court to award any lost earnings or loss of earning capacity in this  
24 case.

25       **E.       Finally, the Court Was in Error When It Granted Plaintiff's Motion to Strike the**  
26       **Palms' Experts' Opinions.**

27           Plaintiff filed a Motion to Strike Trial Testimony as to the Palms' experts, Mr. Franklin  
28 and Dr. Cargill, and against the Palms' opposition, the Court granted the Motion. The Palms

1 produced hospitality safety/security expert, Forrest Franklin as a witness at trial. Mr. Franklin  
2 testified that: (1) throwing memorabilia as a promotional effort into crowds is not a substandard  
3 protocol; (2) it is not unsafe to throw things into crowds; and (3) it is within the standard of care  
4 to throw promotional items into crowds. (November 3, 2010 Trial Testimony, 14: 6-8, 31: 17-21,  
5 33: 7-13, Exhibit N to the Ward Decl.)

6 Mr. Franklin addressed whether throwing promotional items into a crowd was within the  
7 standard of care in the casino/hospitality industry, and indeed opined that the activity was within  
8 the standard of care, notwithstanding the fact that the Palms had an internal procedure in place  
9 forbidding throwing items. Mr. Franklin's testimony was clearly relevant because his opinions  
10 made it more probable that the Palms did not act negligently in allowing items to be thrown. Mr.  
11 Franklin's testimony was thus helpful to the trier of fact.

12 In this case, Mr. Franklin's testimony was reliable per NRS 50.275, and *Daubert v.*  
13 *Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). As he testified, Mr. Franklin has had  
14 extensive experience as a security officer dealing with persons throwing objects into crowds.  
15 (November 3, 2010 Trial Testimony, 13: 14-21, Exhibit N to Ward Decl.) Before offering an  
16 opinion, he visited the area of the Palms where the accident occurred, reviewed the relevant  
17 deposition testimony and the Palms security manual. (*Id.*, 13:22-25; 15:16-18.) These "facts and  
18 data" are reliable and are sufficient bases upon which a qualified expert like Mr. Franklin may  
19 offer an opinion.

20 Dr. Cargill, an economist, testified as to Plaintiff's wage earning history and damages. He  
21 commented on the reports prepared by Plaintiff's expert Mr. Dinneen, and rebutted Mr.  
22 Dinneen's opinions. Dr. Cargill specifically testified that: (1) it was inappropriate to use an  
23 average of plaintiff's earnings over the period from 1999 to 2004 to predict future earnings; and  
24 (2) using current interest rates to calculate future wage loss is improper. (November 9, 2010 Trial  
25 Testimony, 22: 6-25, 55: 15-20, Exhibit O to the Ward Decl.)

26 Dr. Cargill offered two opinions, both of which survive the *Daubert* "relevancy and  
27 reliability" standard for admissibility of expert testimony. First, Dr. Cargill testified that  
28 plaintiff's projected future income was derived through a flawed method of calculation of past  
25

1 income. (*Id.* at 16: 4-8). He testified that averaging just three tax returns over a perhaps 6-year  
2 period does not accurately estimate past earnings and thus likewise is unreliable for forecasting  
3 future earnings. It was inappropriate to average these three tax returns (1999, 2001, 2004, all of  
4 which were prepared several years after the tax liabilities were incurred) in the context of an  
5 artificially inflated real estate bubble. (*Id.* at 29: 7-12.) This testimony makes a fact of  
6 consequence—whether Mr. Dinneen’s wage loss estimates are reliable—less probable than  
7 without the Cargill testimony. Therefore, the testimony is relevant and helpful to the trier of fact.

8         Second, Dr. Cargill offered the opinion that using current interest rates to project future  
9 lost income did not make economic sense because it did not take into account rates of inflation in  
10 the future. This testimony was relevant because it makes a fact of consequence, whether Mr.  
11 Dinneen’s computation of damages is accurate, less probable than without it. It is relevant to  
12 total damages and does “assist the trier of fact to understand the evidence or to determine a fact in  
13 issue.”

14         Dr. Cargill’s technique is also reliable and generally accepted in the field of forensic  
15 economics. Under *Daubert*, the Court must determine whether the reasoning and methodology  
16 underlying the proposed expert’s testimony is valid. In making this inquiry, *Daubert* offers four  
17 non-exclusive factors: (1) whether the concept has been tested, (2) whether the concept has been  
18 subject to peer review, (3) what the known rate of error is, and (4) whether the concept is  
19 generally accepted by the community. *Shaffer v. Amada Am., Inc.*, 335 F. Supp. 2d 992, 995  
20 (E.D. Mo. 2003), citing *Daubert*, 509 U.S. at 593-95.

21         Here, Dr. Cargill offers testimony based on sound, proven economic theory. In fact, Dr.  
22 Cargill performed his calculations by using a rate that is used by the U.S. Congressional Budget  
23 Office and the trustees of the Social Security Administration. (*Id.* at 48:17-18.) Thus, the  
24 technique utilized by Dr. Cargill has attained “widespread acceptance.” The evidence serves an  
25 important function in this case because it presents contrary evidence to Mr. Dinneen.

26         Accordingly, the Court should have denied, and not granted, Plaintiff’s motion to strike certain  
27 expert testimony because the evidence meets the “assistance” requirement of NRS 50.275, FRE

1 By erroneously granting Plaintiff's motion, the Court made it virtually impossible for the  
2 Palms to rebut Plaintiff's expert's opinions.

3  
4 **IV.**  
5 **CONCLUSION**

6 For all of the reasons set forth above, the Palms respectfully submits that the Court must  
7 vacate the verdict and order a new trial.

8 Dated: March 22, 2011

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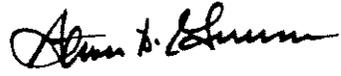
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12 Kenneth C. Ward  
13 Keith R. Gillette  
14 Attorneys for Defendant  
15 FIESTA PALMS, LLC, a Nevada Limited  
16 Liability Company, d/b/a THE PALMS  
17 CASINO RESORT  
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18 Attorneys for Defendant  
19 FIESTA PALMS, LLC, a Nevada Limited Liability  
20 Compay, d/b/a THE PALMS CASINO RESORT

DISTRICT COURT  
CLARK COUNTY, NEVADA

21 ENRIQUE RODRIGUEZ,  
22  
23 Plaintiff,  
24  
25 v.  
26 FIESTA PALMS, LLC, a Nevada Limited  
27 Liability Company, d/b/a THE PALMS  
28 CASINO RESORT, et al. ,  
Defendants.

Case No. A531538

**DECLARATION OF KENNETH C. WARD  
IN SUPPORT OF DEFENDANT FIESTA  
PALMS, LLC'S MOTION FOR NEW  
TRIAL**

Dept: X  
Hearing Date:  
Hearing Time:  
Hearing Dept:

I, Kenneth C. Ward, declare as follows:

1. I am a shareholder with the law firm of Archer Norris, counsel of record for Defendant FIESTA PALMS, LLC, a Nevada Limited Liability Compay, d/b/a THE PALMS CASINO RESORT. I have personal knowledge of the facts stated in this affidavit and if called as a witness at trial, could and would competently testify thereto. I have reviewed the Memorandum of Points and Authorities in Support of this motion, and incorporate by reference the facts alleged

1 therein.

2 2. I served as co-counsel for FIESTA PALMS, LLC, a Nevada Limited Liability  
3 Compay, d/b/a THE PALMS CASINO RESORT (“the Palms”) in the trial of this matter with  
4 Marsha Stephenson of Stephenson & Dickinson. We began the bench trial on October 25, 2010  
5 of the matter of *Enrique Rodriguez v. the Palms*, No. A531538, in the Eastern Judicial District of  
6 Clark County, Nevada, and trial concluded with the parties’ closing arguments on November 10,  
7 2010.

8 3. The Honorable Jessie Walsh returned a verdict in favor of plaintiff Enrique  
9 Rodriguez on March 7, 2011, with Notice of Entry of Judgment served on the Palms on March  
10 15, 2011. A true and correct copy of the March 7, 2011 verdict is attached hereto as **Exhibit A**.

11 4. I took the deposition of Terrance Dinneen on September 9, 2010. Mr. Dinneen  
12 stated that he provided his entire work file and there were no letters regarding the filing status of  
13 plaintiff Enrique Rodriguez’s tax returns. A true and correct copy of the September 9, 2010  
14 Deposition of Terrence Dinneen is attached hereto as **Exhibit B**.

15 5. Plaintiff testified from the witness stand at trial that he gave Mr. Dinneen all of the  
16 backup information to support his income claim, and that he prepared and signed the 2004 tax  
17 return in 2009 after the economist requested the information.

18 6. At trial, while I questioned Mr. Dinneen on cross-examination, Mr. Dinneen  
19 produced a letter from a person who allegedly prepared the returns saying that the returns had  
20 been filed; it was a one line letter from the tax preparer dated October 20, 2010. Mr. Dinneen  
21 testified at trial that he never provided the document to the Palms. This document was never  
22 provided to the Palms, even though Mr. Dinneen had purportedly provided his entire work file  
23 and that letter was not included.

24 7. Plaintiff did not disclose any medical experts. Attached hereto as **Exhibit C** is a  
25 true and correct copy of Plaintiff’s Expert Disclosure, and attached hereto as **Exhibit D** is a true  
26 and correct copy of Plaintiff’s Supplement Expert Disclosure.

27 8. Plaintiff also listed all of his witnesses at trial in his Pre-Trial Memorandum, but  
28 did not designate any medical treatment providers as experts. Attached hereto as **Exhibit E** is a

1 true and correct copy of Plaintiff's Pre-Trial Memorandum.

2 9. Dr. Thalgott was a treatment provider for Plaintiff who was a spine surgeon who  
3 had at least six entries in his records that he would not do surgery on this plaintiff's back. In  
4 addition, his reports indicated that he had not seen Plaintiff in over three years. In spite of this,  
5 the anesthesiologist, who had also not seen the Plaintiff for over three years, testified at trial that  
6 the Plaintiff needed a multi-level back fusion and that he was quite certain if Dr. Thalgott knew  
7 what had transpired with this Plaintiff in the last three years, Dr. Thalgott would change his mind  
8 and agree that surgery was necessary.

9 10. My office subpoenaed all records from Plaintiff's treater, Dr. Joseph Schifini, and  
10 received approximately 21 pages from Dr. Schifini at that time. True and correct copies of the  
11 first and last consecutively bates numbered pages of Dr. Schifini's document production are  
12 attached hereto as **Exhibit F**.

13 11. However, at trial, Dr. Schifini was permitted to testify regarding approximately  
14 117 pages of documents that the Palms were unaware of and the Palms were never been notified  
15 by Dr. Schifini or Plaintiff's counsel that such documents existed. Plaintiff's failure to disclose  
16 the documents put the Palms at a great disadvantage in its cross-examination of Dr. Schifini, who  
17 provided critical testimony during the trial.

18 12. Plaintiff's life care planner, Kathleen Hartmann, provided a life care plan calling  
19 for \$294,000 for all of the medical relating to a spinal stimulator. Dr. Schifini, an  
20 anesthesiologist, was allowed to testify that these numbers were all wrong and the number was  
21 actually \$960,000. Ms. Hartmann's numbers did not include a figure for fusion and she included  
22 a range of \$80,000 to \$160,000 for knee replacements. Again, Dr. Schifini, the anesthesiologist,  
23 was able to testify that his back surgeries and knee replacements would be \$686,000.

24 13. Plaintiff filed a Motion to Strike Trial Testimony on approximately November 16,  
25 2010. Plaintiff's points and authorities essentially argued that the Palms' experts, Forrest  
26 Franklin and Thomas Cargill "did not establish a sufficient foundation since neither provided  
27 opinions to a reasonable degree of probability." A true and correct copy of Plaintiff's Motion to  
28 Strike Trial Testimony is attached hereto as **Exhibit G**, and the Court's Order granting it is

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attached Exhibit **H**.

14. Plaintiff stipulated on the record that Mr. Franklin and Dr. Cargill are both qualified.

15. Attached hereto as **Exhibit I** are true and correct copies of excerpts of the Reporter's Transcript of Proceedings of October 28, 2010.

16. Attached hereto as **Exhibit J** are true and correct copies of excerpts of the Reporter's Transcript of Proceedings of November 1, 2010.

17. Attached hereto as **Exhibit K** are true and correct copies of excerpts of the Reporter's Transcript of Proceedings of November 4, 2010.

18. Attached hereto as **Exhibit L** is a true and correct copy of the Dinneen & Hartman initial expert report.

19. Attached hereto as **Exhibit M** are true and correct copies of excerpts of the Reporter's Transcript of Proceedings of November 8, 2010.

20. Attached hereto as **Exhibit N** are true and correct copies of excerpts of the Reporter's Transcript of Proceedings of November 3, 2010.

21. Attached hereto as **Exhibit O** are true and correct copies of excerpts of the Reporter's Transcript of Proceedings of November 9, 2010.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct. This declaration is executed on March 22, 2011 at Walnut Creek, California.

  
\_\_\_\_\_  
Kenneth C. Ward (NV Bar No. 6530)

# **EXHIBIT A**

C. AL

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DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

CASE NO: A531538  
DEPT NO: 10

vs.

TRIAL DATE: 10/25/10

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT; BRANDY BEAVERS; DOES 1  
through X, inclusive, and ROE BUSINESS  
ENTITIES I through X, inclusive,  
Defendants.

VERDICT

The Honorable Jessie Walsh, presiding judge in the above-entitled action, hereby finds for  
Plaintiff ENRIQUE RODRIGUEZ as follows:

1. The Court finds against Defendant FIESTA PALMS, L.L.C.
2. The Court finds against Defendant BRANDY BEAVERS.

Yes / No

///

///

EXHIBIT A

Rodriguez v. Fiesta Palms, L.L.C., et al.  
Case No. A531538  
Page 1 of 2

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

**BENSON**  
**ERIKOLDO**  
**BAKER**  
**& CARTER**  
ATTORNEYS AT LAW



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3. The Court finds the percentage of fault between Defendants as follows:

Defendant FIESTA PALMS, L.L.C. 60 %

Defendant BRANDY BEAVERS 40 %

4. The total amount of the plaintiff's damages is divided as follows:

Past Medical Expenses \$ 376,773.38

Future Medical Expenses \$ 1,854,738.

Past Pain and Suffering \$ 1,243,350.

Future Pain and Suffering \$ 1,165,025.

Past Lost Income \$ 289,111.

Future Lost Income \$ 422,592.

5. Further, the Court finds that Defendant Fiesta Palms, L.L.C. acted with conscious disregard of the rights or safety of others when it was aware of the probable dangerous consequences of its conduct and willfully and deliberately failed to avoid those consequences.

Yes / No

DATED this 1<sup>st</sup> day of Mar, 2011.

Jessie Walsh  
HON. JESSIE WALSH, District Court Judge

# **EXHIBIT B**

Case No. A531538

Department No. X

DISTRICT COURT  
CLARK COUNTY, NEVADA

-oOo-

ENRIQUE RODRIGUEZ,

Plaintiff,

vs.

FIESTA PALMS, et al.,

Defendants.

\_\_\_\_\_ /

DEPOSITION OF  
TERRANCE B. DINNEEN  
SEPTEMBER 29, 2010  
RENO, NEVADA

LST JOB NO.: 127683

**EXHIBIT B**

1 BY MR. WARD:

2 Q I understand you're going to continue that  
3 out but that was the day you happened to do the  
4 calculation?

5 A Those were the past losses at the time I did  
6 them.

7 Q And so when you did that calculation you  
8 calculated the number of days, weeks, months,  
9 whatever, years, that were involved in that and you  
10 multiplied that times a certain number?

11 A Correct.

12 Q Where did you get the number that you  
13 multiplied it by?

14 A I looked at his earnings from his tax returns  
15 from 1999, to 2004, and I took an average of those  
16 earnings during that period.

17 And that was, it's mentioned in my report, I  
18 think it's approximately 47 or \$46,000, and I used  
19 that figure as the baseline earnings figure.

20 It's on page five of my report.

21 Q Okay. Now, what was Mr. Rodriguez doing in  
22 the year 1999 for employment?

23 MR. BAKER: I'm sorry. That cut out.

24 Can you read the question back to me?

25 MR. WARD: I'll state it again.

1 A I think in 2004, was the last transaction.

2 Yes.

3 That's where he starts the loss. 1-1-2005.

4 Q When in 2004 did he sell his last house?

5 A I don't know if I have the transactional data  
6 on that or not. Seems like I have some material on  
7 that in the 2004 year.

8 There is a 9-7 of '04 statement that looks  
9 like a distribution of funds in 2004.

10 I believe that to be the latest one that I  
11 have.

12 I also have some transactional statements in  
13 January of '04.

14 But September of '04 is the last transaction  
15 statement I have.

16 Q Is it your belief he sold a house in  
17 September of 2004?

18 A Around that period. Yes.

19 Q When did he buy that house?

20 A I don't know if I can tell that from the  
21 transactional statement or not.

22 No. Just the sales date. I don't know the  
23 date that he bought that house.

24 Q When did he file that tax return for 2004?

25 A I don't know when it was filed.

1 Q When was it signed?

2 A Looks like 11-3 of either '07 or '09. I  
3 would say it's '09.

4 But that's when it was signed.

5 Q Okay. And do you know when a tax return that  
6 was for the year 2004, if it was timely filed, when it  
7 would be timely filed?

8 A Well, you'd anticipate early 2005, for most  
9 of us.

10 And I don't have any information as to the  
11 delay in filing these returns. They were provided to  
12 me as tax returns and I took them as provided.

13 Q So if we are correct that this was signed  
14 November 3 2009 --

15 Well, let me strike that. Let me --

16 A I'm sorry. No. That one was 2009. I was  
17 just looking. I thought I flipped to the same one.

18 But the '01 was filed in '04.

19 So it looks like all of these were filed --

20 I was just looking for any other dates to see  
21 when the rest of them were filed.

22 Q Sure. And I want to ask you and give you an  
23 opportunity to clarify. I want to ask you another  
24 question here relating to what you just said. I want  
25 to give you an opportunity to make sure that you

1 stated it correctly.

2 Is it true that you don't know when any of  
3 these tax returns were filed?

4 A That's true. I don't.

5 I just have the signature dates.

6 Q Right. Is it true that you don't know  
7 whether any of these tax returns were even filed?

8 A All I have is the return.

9 I don't know if they were filed or not filed.

10 Q Okay. And the return that you have for at  
11 least 2004, is dated some four plus years after the  
12 year that it would have been filed had it been filed  
13 timely?

14 A Yes.

15 Q Now, when you met with Mr. Rodriguez in  
16 October of 2008, did you ask him for information?

17 A I don't remember if I asked him or his  
18 attorney.

19 But I did ask them to supply me with earnings  
20 information.

21 Q Did you tell them what kind of earnings  
22 information you wanted?

23 A Yes.

24 Q What did you tell them you wanted?

25 A Normally if somebody is employed we like

1 W-2's or Social Security reports of earnings.

2 With self-employed people often times tax  
3 returns. Some times Social Security reports that  
4 would provide us with what their earnings were.

5 Q The reason I take it that you would like --

6 Did you say W-2's? Is that what you said?

7 Or did I say that myself?

8 A No. I said W-2's.

9 Q Okay. So you like to get a W --

10 If someone is employed by another company,  
11 party, whatever, someone has an employer, you'd like  
12 to have the W-2?

13 A W-2's or Social Security reports are always  
14 our first choice.

15 Q Let's start with the W-2.

16 That's one of your first choices?

17 A Yes.

18 Q Why?

19 A The W-2's itself will show the gross earnings  
20 that were paid to the employee by the employer in box  
21 5 and it's helpful information to determine what the  
22 person actually earned.

23 Q Is there also a certain reliable factor?

24 A Yes.

25 Q Because it comes from someone other than the

1 A Yes.

2 Q Okay. When you looked at the report for Mr.  
3 Rodriguez about the self employment taxes that he had  
4 paid, the alternative to Social Security, what did you  
5 find?

6 A Well, all I had was the tax returns for those  
7 years. I don't have a report of anything from the  
8 Social Security Administration. I just have the  
9 report of earnings from the tax returns and then some  
10 transactional records from the transactions that  
11 supported the figures that were in his return. That's  
12 all I have.

13 I don't have any W-2's. I don't have a  
14 Social Security report.

15 I just have some of the transactional  
16 material that shows the income and then the 1040's for  
17 1999, through 2004, that are in my file.

18 Q So you don't have any confirming information  
19 that any of this information is accurate?

20 A Is accurate?

21 Q Yeah.

22 The information included in the -- in those  
23 tax returns, don't they include a portion for self  
24 employment tax?

25 A Well, they include a portion for self

1 Can I go back and check that whole thing?

2 Q Sure.

3 A Also, it's poorly stated, incorrectly stated,  
4 in my report.

5 The returns that I have were the '99 return,  
6 the 2001 return and the 2004 return.

7 What I did was I assigned zero income to the  
8 year 2000, zero income to the years 2001, 2002 --

9 Not 2001. Sorry.

10 Zero for 2000.

11 I used the 2001 return to represent the  
12 income earned in 2000.

13 Zero income in 2003.

14 Zero income in 2004. Because --

15 Zero income in 2002.

16 Zero income in 2003.

17 And then used the 2004 income.

18 I hope that makes sense.

19 The '99, the '01, and the '04, where I used  
20 the actual figures.

21 In the intervening years I used zero as  
22 income for those years seeing that I did not have the  
23 return.

24 The report doesn't read that way but that is  
25 what I did.

1 A Yeah.

2 He told me that he did not have all of his  
3 documentation.

4 So I did follow up and ask if there was any  
5 more of the underlying documentation and he said no.

6 Q So he didn't have all of his documentation?

7 A That's correct.

8 Q He didn't have all of his tax returns?

9 A That's correct, too.

10 Q He didn't have all of his Social Security  
11 statements?

12 A Yes. That's correct.

13 Q In fact, he didn't have any.

14 A He didn't have any Social Security  
15 statements.

16 Q So did you ask to get that information? Did  
17 you tell him how he can get that information?

18 A I usually do tell them.

19 I don't have an independent recollection of  
20 it.

21 But I was told this is what information was  
22 available.

23 Q So you don't know whether you told him that  
24 it's relatively easy to find out what his self  
25 employment income basis is?

1           A    Like I said, I don't have an independent  
2   recollection.

3                    I can tell you I usually do run through with  
4   a person we like to see tax returns, W-2's, Social  
5   Security information.

6                    And ultimately I said this is -- ultimately  
7   what I got was this was all that was available.

8           Q    Irrespective of what you told him you didn't  
9   get any more than what you have got here today?

10          A    That's correct.

11          Q    And what was his income from the year 1998?

12          A    I don't have anything prior to 1999.

13          Q    Did you ask him what he was doing in 1998?

14          A    Usually I try to get five years before.

15                    But this is what -- This is what I have.

16                    I don't have anything --

17                    The oldest I have is 1999, five years before  
18   the accident.

19          Q    Did you ask him what he was doing in 1998?

20          A    I'm sorry. I misunderstood your question. I  
21   thought you were talking about documentation.

22                    I know he was from the period of time in the  
23   1990's, up through 2004, he was involved in the buying  
24   and selling of houses.

25                    There was no other work activity other than

1 the foster parenting activity that he did.

2 I didn't have any records from that so I did  
3 not include anything from that.

4 Q The market for buying and selling houses  
5 since 2004, has that been pretty good where Mr.  
6 Rodriguez lived and bought and sold houses?

7 A Well, from 2004, till about mid 2007, the  
8 market was very active.

9 Starting, of course, in 2007, is where the  
10 decline in houses began and then accelerated through  
11 today depending upon who's statistics you look at.

12 So the market up through '07, was good. The  
13 declining market that we're in now started two and a  
14 half years ago and continues.

15 Q And the information that you've seen suggests  
16 to you that from the day of Mr. Rodriguez' accident,  
17 the accident we're talking about that is the subject  
18 matter of this lawsuit, that from that day forward  
19 he's been unable to maintain any of these activities  
20 on any sort of sustainable basis?

21 A That's correct.

22 Q Now, aside from your assessment of his  
23 returns and your assessment here in the year 2004, the  
24 \$208,000 that you have for that year, is substantially  
25 all of, not all but it's like three-quarters of, his

1 income loss, isn't it, based on that?

2 A Three-quarters of the income loss?

3 Well, I think I already answered that  
4 earlier. I used the average over that six years.  
5 Because I felt using --

6 There are definitions of earning capacity  
7 that would say the 2008 would be a reasonable figure  
8 to use, assuming that the underlying tax returns are  
9 an accurate reflection of his work activity.

10 However, I felt assessing his earning  
11 capacity given the information I had, it was better to  
12 use an average.

13 The 2008 certainly would be the heaviest  
14 weight in that average. But I also used zero in three  
15 years as well.

16 Q Let me ask you this: If you had someone who  
17 had a full-time job and was working 50 weeks out of  
18 the year, it would be -- the year before the loss  
19 might well be the most accurate year for their losses;  
20 is that correct?

21 A Not always.

22 You have to look at what the person brings to  
23 the table in terms of their earning capacity.

24 Somebody can have an exceptionally good year.  
25 As in this case 2008 is the highest that we have any

# **EXHIBIT C**



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**SUPP**  
STEVEN M. BAKER, ESQ.  
Nevada Bar No. 4522  
Benson, Bertoldo, Baker & Carter  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
(702) 228-2600  
Attorneys for Plaintiff

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

ENRIQUE RODRIGUEZ, an individual, )  
 ) CASE NO: A531538  
 ) DEPT. NO: X  
10 Plaintiffs )  
vs. )  
11 )  
12 FIESTA PALMS, L.L.C., a Nevada Limited Liability )  
Company, d/b/a PALMS CASINO RESORT; )  
13 DOES I through X, inclusive; and ROE BUSINESS )  
ENTITIES I through X, inclusive, )  
14 )  
Defendants. )

**PLAINTIFF'S EXPERT DISCLOSURE**

COMES NOW, Plaintiff, Enrique Rodriguez, by and through his attorney of record,  
Steven M. Baker, Esq., of the law firm of Benson, Bertoldo, Baker & Carter, and pursuant to  
Nevada Rules of Civil Procedure herein submits the following expert witness as follows:

**EXPERT WITNESSES**

1. Terrance Dinneen, M.S., C.R.C., C.R.E.  
Kathleen Hartmann, RN, BSN, CCM  
Devinney & Dinneen  
445 Apple Street, Suite 102  
Reno, Nevada 89502  
775-825-5558 Telephone

It is anticipated that Mr. Dinneen will provide expert testimony consistent with his report,  
a copy of which is attached hereto. A copy of Mr. Dinneen's curriculum vitae and fee schedule

**EXHIBIT C**



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is also attached.

Plaintiff reserves the right to call any and all experts designated by other parties in this case to render expert testimony. This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.

Plaintiff reserves the right to call any and all witnesses necessary for impeachment or rebuttal purposes.

Plaintiff reserves the right to supplement this list of expert witnesses as discovery continues and as new information becomes available.

DATED this 29 day of October, 2008.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of October, 2008, a true and correct copy of the foregoing PLAINTIFF'S EXPERT WITNESS DISCLOSURE was mailed in a sealed envelope by U.S. Mail, postage prepaid to the following addressees:

10676-05  
Jeffery A. Bendavid, Esq.  
Moran & Associates  
630 S. Fourth St.  
Las Vegas, NV 89101  
Attorneys for Defendant Fiesta Palms, LLC  
384-8424 Telephone  
384-6568 Facsimile

10676-05  
Kenneth C. Ward, Esq.  
Archer Norris  
2033 North Main Street, Suite 800  
P.O. Box 8035  
Walnut Creek, CA 94596  
Co-Counsel for Fiesta Palms  
925-930-6600 Telephone  
925-930-6620 Facsimile

*S. Anderson*

\_\_\_\_\_  
An Employee of Benson, Bertoldo, Baker & Carter

# **EXHIBIT D**



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SUPP  
STEVEN M. BAKER, ESQ.  
Nevada Bar No. 4522  
Benson, Bertoldo, Baker & Carter  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
(702) 228-2600  
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, an individual,	)	CASE NO: A531538
	)	DEPT. NO: X
Plaintiffs	)	
vs.	)	
	)	
FIESTA PALMS, L.L.C., a Nevada Limited Liability	)	
Company, d/b/a PALMS CASINO RESORT;	)	
DOES I through X, inclusive; and ROE BUSINESS	)	
ENTITIES I through X, inclusive,	)	
Defendants.	)	

PLAINTIFF'S SECOND SUPPLEMENTAL EXPERT DISCLOSURE

COMES NOW, Plaintiff, Enrique Rodriguez, by and through his attorney of record, Steven M. Baker, Esq., of the law firm of Benson, Bertoldo, Baker & Carter, and pursuant to Nevada Rules of Civil Procedure herein submits the following supplemental expert witness indicated in **bold** as follows:

EXPERT WITNESSES

1. Terrance Dinneen, M.S., C.R.C., C.R.E.  
Kathleen Hartmann, RN, BSN, CCM  
Devinney & Dinneen  
445 Apple Street, Suite 102  
Reno, Nevada 89502  
775-825-5558 Telephone

It is anticipated that Mr. Dinneen will provide expert testimony consistent with his

EXHIBIT D



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vocational and economical report, a copy of which is attached hereto. A copy of Mr. Dinneen's curriculum vitae and fee schedule is also attached.

- 2. Firooz Mashood, M.D.  
734 East Sahara Avenue  
Las Vegas, NV 89104

Dr. Mashood is anticipated to testify regarding the reasonable and necessary treatment of Mr. Rodriguez for injuries sustained resultant of the subject fall as well as prognosis and anticipated future treatment. Dr. Mashood will further testify regarding reasonable and customary charges for past and future treatment of Plaintiff. It is anticipated that Dr. Mashood will provide expert testimony consistent with his report, to be supplemented upon receipt, along with a copy of Dr. Mashood's curriculum vitae and fee schedule.

- 3. Steven T. Baker, C.P.P., P.S.P., P.C.I.  
VTI Associates  
Post Office Box 60536  
Boulder City, NV 89001  
(702) 647-5372

Mr. Baker is anticipated to testify regarding security protocol and safety measures of the Palms Resort and Casino at the time of the Incident at issue. He will further testify that Palms Management knew or should have known of the dangerous condition created in the Sports Book's Monday Night Football promotion and that injury to patrons and employees was possible. A copy of Mr. Baker's report, curriculum vitae and fee schedule are attached.

Plaintiff reserves the right to call any and all experts designated by other parties in this case to render expert testimony. This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.

Plaintiff reserves the right to call any and all witnesses necessary for impeachment or



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rebuttal purposes.

Plaintiff reserves the right to supplement this list of expert witnesses as discovery continues and as new information becomes available.

DATED this 21<sup>st</sup> day of June, 2010.

BENSON, BERTOLDO, BAKER & CARTER

BY: \_\_\_\_\_

  
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff

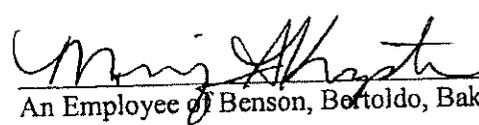


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21<sup>st</sup> day of June, 2010, a true and correct copy of the foregoing PLAINTIFF'S SECOND SUPPLEMENTAL EXPERT WITNESS DISCLOSURE was mailed in a sealed envelope by U.S. Mail, postage prepaid to the following addressees:

10676-05 Jeffery A. Bendavid, Esq. Moran & Associates 630 S. Fourth St. Las Vegas, NV 89101 Attorneys for Defendant Fiesta Palms	384-8424 Telephone 384-6568 Facsimile
10676-05 Keith Gillette, Esq. Archer Norris 2033 North Main Street, Suite 800 P.O. Box 8035 Walnut Creek, California 94596 Co-counsel for Fiesta Palms	925-930-6600 Telephone 925-930-6620 Facsimile
10676-05 Marsha L. Stephenson, Esq. Stephenson & Dickinson 2820 West Charleston Blvd., Suite 19 Las Vegas, Nevada 89102 Co-counsel for Fiesta Palms	474-7229 Telephone 474-7237 Facsimile

  
An Employee of Benson, Bertoldo, Baker & Carter

# **EXHIBIT E**



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STEVEN M. BAKER  
Nevada Bar No. 4522  
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7408 W. Sahara Avenue  
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Facsimile : (702) 228-2333  
e-mail : [monique@bensonlawyers.com](mailto:monique@bensonlawyers.com)  
Attorneys for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
  
Plaintiff,  
  
vs.  
  
FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,  
  
Defendants.

CASE NO: A531538  
DEPT NO: 10  
  
BENCH TRIAL DATE: 10/25/10

PLAINTIFF'S PRE-TRIAL MEMORANDUM

Plaintiff, ENRIQUE RODRIGUEZ, by and through his attorney of record, STEVEN M. BAKER, ESQ. of the law firm of BENSON, BERTOLDO, BAKER & CARTER, hereby submits his Pre-Trial Memorandum pursuant to EDCR Rule 2.68.

I.

STATEMENT OF FACTS

This action arises from personal injuries suffered by the Plaintiff on November 22, 2004 o the premises of Fiesta Palms, L.L.C., d/b/a Palms Casino Resort. At said time, Plaintiff was a patron at the Palms and was in attendance at a promotional Monday Night Football party sponsored by the Defendant. At half-time, promotional objects were thrown into the crowd,

EXHIBIT E



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causing a patron to rush for the item, contacting the Plaintiff on the side of his knee, resulting in multiple injuries to Plaintiff.

II.

LIST OF ALL CLAIMS FOR RELIEF

Plaintiff makes the following claims for relief: Negligence; Negligent Employee Hiring, Training, Retention and Supervision; and Punitive Damages.

III.

AFFIRMATIVE DEFENSES

A. FIESTA PALMS, L.L.C. :

1. Defendant FIESTA PALMS, LLC, allege twelve affirmative defenses:
2. Failure to state a claim;
3. Estoppel;
4. Laches;
5. Plaintiff has not suffered any injuries;
6. Plaintiff failed to mitigate his damages;
7. Unclean hands;
8. By virtue of acts, deeds, conduct and/or failure or omission to act under the circumstances, Plaintiff waived his right to assert claim;
9. Damages in whole or in part result of Plaintiff's actions;
10. Defendant had no control, right, duty or obligation to control;
11. Lack of standing;
12. Deny allegations and require strict proof of allegations;



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13. Superseding or intervening causes;
14. Claims barred; injuries not caused by any improper or unwarranted action by Defendant.

**B. BRANDY BEAVERS – Default Issued**

**IV.**

**CLAIMS OR DEFENSES TO BE ABANDONED**

None.

**V.**

**PROPOSED AMENDMENTS TO THE PLEADINGS**

None.

**B. DOCUMENTS**

1. Incident Report (FP0118-124) – produced by Defendant
2. Palms Security Policy Manual – produced by Defendant
3. Medical records and billing statement from Spring Valley Hospital (SVMC 0000001-11)
4. Medical records and billing statement from Desert Radiologists (Desert Radiologist 0000001-2)
5. Medical records and billing statement from Shadow Emergency Physicians (Shadow Emergency 0000001-4)
6. Medical records and billing statement from Associated Physicians (Associated Physicians 0000001-16)
7. Medical records and billing statement from Open MRI of Inland Valley (OPEN MRI 0000001-4)
8. Medical records and billing statement from Wellness Group (Wellness Center 0000001-14)
9. Medical records and billing statement from Vision Radiology (Vision Radiology Consultants 0000001-3)
10. Medical records and billing statement from VQ Ortho Care (VQ Orthocare 0000001-6)
11. Medical records and billing statement from IV League Pharmacy (IV League 0000001-22)



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12. Medical records and billing statement from Valley Hospital Medical Center (VHMC 0000001-61)
13. Medical records and billing statement from Strehlow Radiology (Strehlow 0000001-2)
14. Medical records and billing statement from Insight Mountain Diagnostics (INSIGHT 0000001-24)
15. Medical records and billing statement from Rancho Physical Therapy (Rancho P.T. 0000001-302)
16. Medical records and billing statement from Las Vegas Neurosurgery, Orthopedics & Rehabilitation (LVNORA 0000001-24)
17. Medical records and billing statement from Integrated Health Care (Integrated 0000001-33)
18. Medical records and billing statement from NV Sleep Diagnostics (NV Sleep 0000001-20)
19. Medical records and billing statement from Village East Drugs (Village East Drugs 0000001-11)
20. Medical records and billing statement from Medical District Surgery Center (Medical District Surgery Center 0000001-79)
21. Medical records and billing statement from Beverly Tower Wilshire Advanced Imaging (Beverly Tower Imaging 0000001-3)
22. Pharmacy Record from Safeway Pharmacy (Safeway 0000001)
23. Medical records and billing statement from Jacob Tauber, M.D. and George Graf, M.D. (Dr. Tauber 0000001-28)
24. Medical records and billing statement from Yakov Treyzon, M.D. (Treyzon, M.D. 0000001-9)
25. Medical records and billing statement from F. Michael Ferrante, M.D. (UCLA 0000001-6)
26. Medical records and billing statement from Quality Respiratory Solutions/King Medical Supply (Quality Resp. Solu. 0000001-24)
27. Medical records and billing statement from Casiano Flaviano, M.D., Family Wellness Center (Family Wellness 0000001-3)
28. Medical records and billing statement from Walter Kidwell, M.D., Pain Institute of Nevada (Kidwell 0000001-22)
29. Medical records and billing statement from Olympia Anesthesia (Olympic 0000001-10)
30. Medical records and billing statement from Wilshire Surgicenter (Wilshire Surgicenter 0000001-121; Wilshire 0000001-3)
31. Daniel Kim, D.O., Nevada Ear, Nose & Throat
32. Medical records and billing statement from Douglas S. Stacey, D.P.M., Foot & Ankle Surgical Group (Dr. Stacey, D.P.M. 0000001-5)
33. Medical records and billing statement from North Valley Medical Supply (0000001-6)
34. Medical records and billing statement from Nevada Imaging Centers/Lake Mead Radiology (Lake Mead Rad. 0000001-18)



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- 35. Medical records and billing statement from Robert Gutierrez, M.D. ( Robert Gutierrez, M.D. 0000001-59)
- 36. Craig Jorgenson, M.D., Govind Koka, D.O., Advanced Urgent Care (Advanced Urgent Care 0000001- 2)
- 37. Medical records and billing statement from Govind Koka, D.O., Medical Associates of Southern Nevada/Primary Care Consultants (Primary Care Consultants KOKA 0000001-330)
- 38. Medical records and billing statement from Michael J. Crovetti, D.O., Bone & Joint Institute (Crovetti 0000001-38)
- 39. Medical records and billing statement from John Thalgott, M.D., Center for Disease and Surgery of the Spine (CDSS 0000001-72)
- 40. Medical records and billing statement from Las Vegas Surgery Center (LV Survery Center 0000001-10)
- 41. Medical records and billing statement from Joseph J. Schifini, M.D. (Schifini 0000001-19)
- 42. Medical records and billing statement from Lawrence Miller, M.D., Cal Hand Surgery (Cal. Hand 0000001-86)
- 43. Medical records and billing statement from Matt Smith Physical Therapy (Dr. Matt Smith 0000001-143; Valley Rehab. 0000001- 180)
- 44. Medical records and billing statement from Centennial Upright MRI (Centennial Upright MRI 0000001-12)
- 45. Billing statement from G. Michael Elkhanich, M.D., Bone & Joint Institute (Elkhanich 000001-2)
- 46. Pharmacy Statement from Walgreen's Pharmacy (Walgreens 0000001-75)
- 47. Medical records and billing statement from Thomas Vater, D.O. (Dr. Vater 0000001-18)
- 48. Medical records and billing statement from Russell J. Shah, M.D. (Shah 0000001-88)
- 49. Medical records and billing statement from Kelly Hawkins Physical Therapy/ Chynoweth, Hill & Leavitt (KHPT 0000001-44)
- 50. Medical records and billing statement from Louis F. Mortillaro, Ph.D. & Associates (Mortillaro 0000001-243)
- 51. Medical records and billing statement from Quest Diagnostics (Quest Diagnostics 0000001-15)
- 52. 1999 Tax Records (W-2 1999 0000001-8)
- 53. 2001 Tax Records (W-2 2001 0000001-8)
- 54. 2004 Tax Records (W-2 2004 0000001-10)
- 55. Medical bills from Total Wellness Clinic (Total Wellness 000001-8) – *Records will be supplemented upon receipt*
- 56. Expert Report of Terrence Dinneen (provided previously)
- 57. Expert Report of Steven T. Baker (provided previously)
- 58. List of Past Medical Expenses (Plaintiff's Computation of Damages)
- 59. Any exhibits designated by Defendants, and/or items produced pursuant to NRCF 16.1.



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- 60. Any and all disclosures by Plaintiff and Defendants
- 61. Any and all responsive documents to Requests for Production of Documents

**DEMONSTRATIVE EXHIBITS TO BE USED AT TRIAL**

- 1. Pain Stimulator
- 2. CPAP Machine
- 3. Cane
- 4. Model of Knee
- 5. Poster of R.S.D. explanation

**VII.**

**OBJECTIONS TO OTHER PARTY'S EXHIBITS**

Plaintiff and Defendants have met pursuant to EDCR Rule 2.67 and have agreed that they each reserve the right to object to the other side's exhibits after they have been fully identified and produced.

**A. WITNESSES EXPECTED TO TESTIFY**

- 1. Enrique Rodriguez
- 2. Maria Perez
- 3. Joaquin Mendoza
- 4. Ron Merkerson
- 5. Steve Ferrero
- 6. Vikki Kooinga
- 7. Sherri Long
- 8. Frank Schiula
- 9. Joseph Schifini, M.D.
- 10. Mary Ann Shannon, M.D.
- 11. Russell Shah, M.D.
- 12. Thomas Vater, M.D.
- 13. Terrance Dinneen, M.S., C.R.C., C.R.E., Expert Witness
- 14. Steven T. Baker, C.P.P., P.S.P., P.C.I., Expert Witness
- 15. Nick Tavaglione
- 16. Rich Ramirez
- 17. Dell Roberts
- 18. Any and all witnesses previously disclosed by either Plaintiff of Defendant.



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IX.

ISSUES OF LAW

Joint & Several Liability  
Default against Brandy Beavers

X.

ESTIMATE OF TIME REQUIRED FOR TRIAL

It is estimated that this trial will take 7 – 10 Court days.

DATED this 27<sup>th</sup> day of September, 2010.

BENSON, BERTOLDO, BAKER & CARTER

STEVEN M. BAKER, ESQ.  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
(702) 228-2600  
Attorney for Plaintiff



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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and EDCR 7.26, I hereby certify that on the 27<sup>th</sup> day of Sept, 2010, I served the above and foregoing PLAINTIFF'S PRE-TRIAL MEMORANDUM, on all parties to this action by 1<sup>st</sup> Class, U.S. Mail, postage thereon fully prepaid addressed as follows:

10676-05  
Kenneth C. Ward, Esq.  
Archer Norris  
2033 North Main Street, Suite 800  
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Walnut Creek, California 94596  
925-930-6600 Telephone  
925-930-6620 Facsimile

Co-Counsel for Fiesta Palms

10676-05  
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474-7229 Telephone  
474-7237 Facsimile

Co-Counsel for Fiesta Palms

  
An employee of:  
BENSON, BERTOLDO, BAKER & CARTER

# **EXHIBIT F**

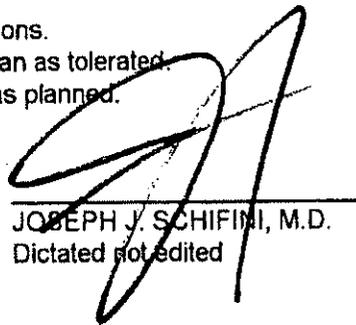


**PAGE THREE**

The patient was taken to the recovery room in stable condition. In the recovery room, he was given instruction by myself and the Medtronic representative on the care and use of this spinal cord stimulator. The patient understands that he will call my office with any questions and will be reevaluated for lead removal on July 18, 2008.

**PLAN:**

1. The patient is to follow up in my office on July 18, 2008, for reevaluation and possible lead removal.
2. No heavy lifting, bending, twisting or working overhead.
3. No showering, swimming or bathing.
4. The patient is to call the office with questions.
5. Continue current medication regimen, wean as tolerated.
6. The patient is to follow up with Dr. Koka as planned.



JOSEPH J. SCHIFINI, M.D.  
Dictated not edited

JJS/bjs

DOT: 07/14/08

cc: Govind Koka, D.O., Fax 492-6368

**PATIENT: RODRIGUEZ, ENRIQUE J.**  
**CONF#:**  
**PHYSICIAN: JOSEPH J. SCHIFINI, M.D.**

**DATE OF DICTATION: 07/14/08**  
**DATE OF PROCEDURE: 07/14/08**  
**TRANSCRIBER: bjs**

JOSEPH J SCHIFINI MD-00021

# **EXHIBIT G**



1 STEVEN M. BAKER  
Nevada Bar No. 4522  
2 BENSON, BERTOLDO, BAKER & CARTER  
7408 W. Sahara Avenue  
3 Las Vegas, Nevada 89117  
Telephone : (702) 228-2600  
4 Facsimile : (702) 228-2333  
Attorneys for Plaintiff

6  
7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 \* \* \*

10 ENRIQUE RODRIGUEZ, an individual,	CASE NO: A531538
11 Plaintiff,	DEPT NO: 10
12 vs.	
13 FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/b/a PALMS CASINO RESORT, BRANDY L. BEAVERS, 14 individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES I through X, 15 inclusive,	HEARING DATE: HEARING TIME:
16 Defendants.	

17 PLAINTIFF'S MOTION TO STRIKE

18 COMES NOW, Plaintiff ENRIQUE RODRIGUEZ, by and through his attorney of  
19 record, STEVEN M. BAKER, ESQ., of the law firm of BENSON, BERTOLDO BAKER &  
20 CARTER, CHTD., and hereby files his Motion to Strike.

21  
22 This Motion is made and based on the pleadings and papers on file herein, the  
23 following Points and Authorities and any oral argument that may be presented.

24 I. Introduction

25 Defendant presented two (2) experts in this trial<sup>1</sup>, neither of whom opined that their  
26 opinions were given to a reasonable degree of professional probability as required under  
27

28 <sup>1</sup> Dr. Thomas Cargill (Economist) and Forrest Franklin (Liability).



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Nevada law.<sup>2</sup>

Accordingly, Plaintiff is seeking an Order to Strike Dr. Cargill's testimony in its entirety, as well as an Order to Strike Mr. Franklin's opinions relative to standard of care and dangerous activity.

**II. Statement of Facts**

**A. Forrest Franklin**

Forrest Franklin, Defendant's liability expert, was retained to develop, and render an opinion with respect to the standard of care as it relates to throwing objects, memorabilia, promotional articles into crowds.<sup>3</sup>

Mr. Franklin offered the following opinions:

1. That throwing memorabilia as a promotional effort into crowds is not a substandard protocol;<sup>4</sup>
2. That it is not unsafe to throw things into crowds;<sup>5</sup> and
3. That it is not below the standard of care to throw items into a crowd.<sup>6</sup>

None of these opinions, however, were given to a reasonable degree of professional probability. Moreover, they are in contradiction to the testimony of Ms. Long and Ms. Kooinga, as well as the legal theory of assumption of duty.

**B. Dr. Thomas Cargill**

Dr. Cargill offered the following two (2) opinions at trial:

1. That Plaintiff could not have made as much in the current financial market that he could have back in 2004 because the bubble burst;<sup>7</sup> and

<sup>2</sup> NRS 50.275; Hallmark v. Eldridge, 189 P 3d 646 (Nev. Jul 24, 2008) (NO. 46722)  
<sup>3</sup> See Exhibit "1," Trial Transcript of Franklin, 13: 9-13.  
<sup>4</sup> Id., at 14: 6-8.  
<sup>5</sup> Id., at 31: 17-21.  
<sup>6</sup> Id., at 33: 7-9.  
<sup>7</sup> See Exhibit "2," Trial Testimony of Cargill, 43: 5-25.



1           2. Mr. Dineen's discount rates were inappropriate.<sup>8</sup>  
2           Neither of these opinions were given to a reasonable degree of economic probability.

3           **III. Legal Argument**

4           The statute governing the admissibility of expert testimony in Nevada district courts is  
5           NRS 50.275, which, as construed by the Nevada Supreme Court<sup>9</sup>, tracks Federal Rule of  
6           Evidence (FRE) 702.<sup>10</sup>

7           NRS 50.275 states:

8           "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to  
9           understand the evidence or to determine a fact in issue, a witness qualified as an expert  
10          by special knowledge, skill, experience, training or education may testify to matters  
11          within the scope of such knowledge."

12          To testify as an expert witness under NRS 50.275, the witness must satisfy the  
13          following three requirements: (1) he or she must be qualified in an area of "scientific,  
14          technical or other specialized knowledge" (the qualification requirement); (2) his or her  
15          specialized knowledge must "assist the trier of fact to understand the evidence or to determine  
16          a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to  
17          matters within the scope of [his or her specialized] knowledge" (the limited scope  
18          requirement).

19          \_\_\_\_\_  
20          <sup>8</sup> Id., at 48: 1-3.

21          <sup>9</sup> See, e.g., Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1482, 970 P.2d 98, 107-08 (1998),  
22          overruled in part on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 270-71, 21 P.3d 11,  
23          14-15 (2001); Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 242, 955 P.2d 661, 667 (1998);  
Fernandez v. Admirand, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992); Wright v. Las Vegas  
Hacienda, 102 Nev. 261, 262-63, 720 P.2d 696, 697 (1986).

24          <sup>10</sup> FRE 702 states:

25          If scientific, technical, or other specialized knowledge will assist the trier of fact to  
26          understand the evidence or to determine a fact in issue, a witness qualified as an expert  
27          by knowledge, skill, experience, training, or education, may testify thereto in the form  
28          of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data,  
(2) the testimony is the product of reliable principles and methods, and (3) the witness  
has applied the principles and methods reliably to the facts of the case.



1 Plaintiff is not challenging the “qualification requirement” relative to either Dr. Cargill  
2 or Mr. Franklin.

3 However, Plaintiff submits that both Dr. Cargill and Mr. Franklin’s testimony failed to  
4 satisfy the “assistance” requirement of NRS 50.275, in that neither expert provided opinions  
5 to a reasonable degree of professional, or in the case of Dr. Cargill, economic, probability.

6 Accordingly, their opinions do not rise to the level of “scientific knowledge” within  
7 the meaning of Hallmark<sup>11</sup>, Daubert, NRS 50.275 and Federal Rule 702. Daubert, 509 U.S. at  
8 589-90, 113 S.Ct. at 2795 (declaring expert scientific testimony grounded only in speculation  
9 or conjecture to be inadmissible under Rule 702).

10 Nevada law requires expert opinions to be given to a reasonable degree of medical,  
11 professional and/or economic probability.<sup>12</sup> The opinions of Dr. Cargill and Mr. Franklin  
12 offered insufficient foundation for this court to take judicial notice of the scientific basis of  
13 those conclusions.<sup>13</sup>

14 In United Exposition Service Co. v. SJS, the Nevada Supreme Court concluded that  
15 an “award of compensation cannot be based solely upon possibilities and speculative  
16 testimony.”<sup>14</sup> In that case, which involved the payment of workers' compensation benefits  
17 after an industrial injury, the Nevada Supreme Court held that “physician[s] must state to a  
18 degree of reasonable medical probability that the condition in question was caused by the  
19 industrial injury, or sufficient facts must be shown so that the trier of fact can make the  
20 reasonable conclusion that the condition was caused by the industrial injury.”<sup>15</sup> The  
21 speculative nature of an opinion that an injury possibly could have been a precipitating factor  
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25 <sup>11</sup> Hallmark v. Eldridge, 189 P.3d 646 (Nev. Jul 24, 2008) (NO. 46722)

26 <sup>12</sup> See NRS 50.275; Hallmark v. Eldridge, 189 P.3d 646 (Nev. Jul 24, 2008) (NO. 46722)

27 <sup>13</sup> Id.

28 <sup>14</sup> 109 Nev. 421, 424, 851 P.2d 423, 425 (1993).

<sup>15</sup> Id. at 424-25, 851 P.2d at 425.



1 was insufficient to support a finding of causation; specifically, the court stated, "A possibility  
2 is not the same as a probability."<sup>16</sup>

3 Nevada Federal Courts<sup>17</sup>, interpreting Nevada law, have also held that Daubert's  
4 "gatekeeping" obligation, requiring inquiry into both relevance and reliability, applies not  
5 only to "scientific" testimony, but to all expert testimony.

6  
7 While counsel for the Defendant may have properly laid a foundation for their  
8 testimony, neither expert established a sufficient foundation in this case, since neither  
9 provided opinions to a reasonable degree of probability.

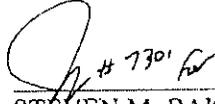
10 Accordingly, their testimony did not satisfy the "assistance" requirement of NRS  
11 50.275.

12 **IV. Conclusion**

13 Based on the failure to provide opinions to a reasonable degree of professional and/or  
14 economic probability, Plaintiff respectfully requests for an Order to Strike the Opinions of Dr.  
15 Cargill and Forrest Franklin.  
16

17 Dated this 16 day of Nov, 2010.

18 BENSON, BERTOLDO, BAKER & CARTER

19   
20 \_\_\_\_\_  
21 STEVEN M. BAKER, ESQ.  
22 Nevada Bar No. 4522  
23 7408 West Sahara Avenue  
24 Las Vegas, Nevada 89117  
25 (702) 228-2600  
26 Attorneys for Plaintiff  
27

28 <sup>16</sup> Id. at 425, 851 P.2d at 425.

<sup>17</sup> Culbertson v. Freightliner Corp. 50 F.Supp.2d 998D Nev., 1999. March 23, 1999

# **EXHIBIT H**

*Alvin J. Shuman*  
CLERK OF THE COURT

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

**B**ENSON  
ERIKOLDO  
BAKER  
& CARTER  
ATTORNEYS AT LAW

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**FFCL**  
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Facsimile : (702) 228-2333  
Attorneys for Plaintiff

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,  
vs.  
FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES 1 through X,  
inclusive,  
Defendants.

CASE NO: A531538  
DEPT NO: 10

**BENCH TRIAL DATE: 10/25/10  
HEARING DATE: 1/31/11**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

THIS MATTER having come on for hearing on January 31, 2011 with respect to Plaintiff's Motion to Strike Defendant's Experts before the Honorable Jessie Walsh, presiding, and the Court having considered the evidence and the arguments of counsel and taken the matter under advisement for further consideration, this Honorable Court finds and concludes as follows:

**FINDINGS OF FACT**

Defendant presented two (2) experts in this trial, Dr. Thomas Cargill (Economist) and Forrest Franklin (Liability), neither of whom opined that their opinions were given to a

**EXHIBIT H**

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333



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reasonable degree of professional probability as required under Nevada law.

Forrest Franklin, Defendant's liability expert, was retained to develop and render an opinion with respect to the standard of care as it relates to throwing objects, memorabilia, and promotional articles into crowds.

Mr. Franklin offered the following opinions:

1. Throwing memorabilia as a promotional effort into crowds is not a substandard protocol;
2. It is not unsafe to throw things into crowds; and
3. It is not below the standard of care to throw items into a crowd.

None of these opinions, however, were given to a reasonable degree of professional probability.

Dr. Cargill offered the following two (2) opinions at trial:

1. Plaintiff could not have made as much in the current financial market as he could have back in 2004 because the bubble burst in the housing market; and
2. Mr. Dineen's discount rates were inappropriate.

Neither of these opinions was given to a reasonable degree of professional probability.

**CONCLUSIONS OF LAW**

To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333



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Dr. Cargill and Mr. Franklin's testimony failed to satisfy the "assistance" requirement of NRS 50.275, in that neither expert provided opinions to a reasonable degree of professional probability.

Accordingly, their opinions did not rise to the level of "scientific knowledge" within the meaning of NRS 50.275.

The opinions of Dr. Cargill and Mr. Franklin offered insufficient foundation for this court to take judicial notice of the scientific basis of those conclusions.

While counsel for the Defendant may have properly qualified said individuals as experts, the opinions rendered by the respective experts were speculative, as the court was not advised and the record does not reflect whether such opinions were made on the basis of "possibility" or some other standard lower than "a reasonable degree of professional probability."

Accordingly, the testimony of Cargil and Franklin did not satisfy the "assistance" requirement of NRS 50.275.

DATED this 7<sup>th</sup> day of ~~January~~<sup>February</sup>, 2011.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
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Attorneys for Plaintiff

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**ORDER**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Strike Defendant's Experts Cargill and Franklin is granted.

Date: 3/2/11

*Jessie Nalson*  
DISTRICT COURT JUDGE

# **EXHIBIT I**

**ORIGINAL** 1

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DISTRICT COURT  
CLARK COUNTY, NEVADA

*Alan D. Shuman*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 28, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. JOSEPH SCHIFINI

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
Benson, Bertoldo & Baker

For the Defendant: KENNETH C. WARD, ESQ.  
Archer \* Norris

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EXHIBIT I

1 with one of the Palms girls or something that was occurring,  
2 where I've seen a couple different accounts of -- whether or  
3 not they were throwing something into the crowd, whether it  
4 was a water bottle wrapped with a t-shirt, or some sort of  
5 promotional item that was being thrown into the crowd by a  
6 girl who was blindfolded and being spun around and she was  
7 meant to throw these things out into the crowd. During the --  
8 one of the tosses of the items, one of the items was coming  
9 towards Mr. Rodriguez and another patron of the casino dove  
10 for the item, the promotional item, striking Mr. Rodriguez in  
11 the area of his knee. And based on the contact with his knee,  
12 he became unstable and fell into the gentleman who was  
13 standing next to him.

14 Q And when was the first time that you saw Mr.  
15 Rodriguez?

16 A The first consultation was November 26, 2007.

17 Q And I would refer you to a Bates number, but as  
18 we've talked about, I've brought the non-Bates stamped  
19 documents. However, someone from my office is coming down.  
20 And if they get in quick enough, perhaps we can do something  
21 about that. And your last visit was November 26th, 2007?

22 A That is correct.

23 Q And are you referring to -- well, that's really  
24 strange because mine is Bates stamped.

25 THE COURT: Kept the good stuff for yourself, did

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1 A Yes. Oh, Exhibit 20 -- all right. I thought you  
2 meant 25 of what we have. Okay. I'm there.

3 Q Did Dr. Ferrente do an examination of Mr. Rodriguez?

4 A Yes. It appears he did an examination on November  
5 14th, 2006.

6 Q And as Chairman of the Department of Pain Management  
7 at UCLA, to your knowledge he studied RSD causal to a complex  
8 regional pain syndrome and a variety of neurologically  
9 mediated pathologies?

10 A Yes, that --

11 MR. WARD: Object; hearsay.

12 THE WITNESS: Dr. --

13 MR. BAKER: It's not a statement, Your Honor.

14 THE COURT: Mr. Ward, what was that?

15 MR. WARD: Hearsay. This witness is going to testify as  
16 to qualifications. And presumably he's going to testify as to  
17 qualifications and presumably he's going to testify as to  
18 findings, and I think it's all hearsay.

19 MR. BAKER: Your Honor, we dealt with that issue  
20 yesterday when I gave you the problem case and the remainder  
21 of the cases in yesterday, your ruling was that the doctors  
22 were allowed to refer to information that they had reviewed.

23 He's been qualified as an expert, under the Omastat  
24 [phonetic] case that I handed you yesterday. Not Omastat,  
25 that was -- but you know the one I'm talking about. But

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1 yesterday you've already ruled on the same issue.

2 MR. WARD: And I don't believe the case says that, but I  
3 will -- I'm not going to argue it anymore, and I'll simply  
4 note my objection.

5 MR. BAKER: A continuing objection is stipulated to, Your  
6 Honor.

7 THE COURT: Very well, noted for the record. Please  
8 proceed.

9 BY MR. BAKER:

10 Q If you go to page five of Exhibit 25, would you  
11 discuss with the Court what Dr. Ferrente's [phonetic] was of  
12 Enrique Rodriguez?

13 A Dr. Ferrente, during that visit, said it is possible  
14 that the patient has complex regional pain syndrome, or  
15 regional sympathetic dystrophy. However, his physical  
16 examination is more consistent with a chronic knee pain of a  
17 mechanical nature. Furthermore, we don't have sufficient  
18 objective information for which to make a definitive  
19 diagnosis.

20 He goes onto say that if the pain continues or  
21 worsens, he suggests that the patient undergoes bone scans,  
22 lumbar sympathetic blocks, trial of clonidine patches and  
23 neurontin, all of which are geared towards dealing with nerve-  
24 type pain or neurogenic pain of a nature consistent with  
25 complex regional pain syndrome.

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1 Q And if you'll turn to page 11 --

2 A Yes.

3 Q -- did Dr. Miller come to a diagnostic impression  
4 with respect to Mr. Rodriguez?

5 A Yes. On page 11, it's noted that Dr. Lawrence  
6 Miller felt that Mr. Rodriguez was suffering from complex  
7 regional pain syndrome of the left lower extremity.

8 Q And if you'll turn to page 22, what were Dr.  
9 Miller's examination findings?

10 A Dr. Miller noted temperature and color changes,  
11 edema or swelling, atrophic changes in the hair and nail  
12 growth patterns, impaired motor function, so stiffness in the  
13 joint, and then hyperpathia or allodynia, which is the painful  
14 sensation of touch, and then pseudo-motor changes, which  
15 involve changes of vascular supply or sweating. So you may  
16 notice that a hand is very sweaty, versus the other hand is  
17 not. That's an unusual finding. That's the findings that he  
18 diagnosed with him, which led him to believe that the  
19 diagnosis of complex regional pain syndrome existed in Mr.  
20 Rodriguez.

21 Q Now, this was a clinical diagnosis. Is that fair to  
22 say?

23 A Yes.

24 Q And do you agree with that diagnosis based upon  
25 those six findings?

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1 A Yes.

2 Q But then, he was sent out for a diagnostic  
3 examination. Is that true?

4 A The diagnostic examination was the lumbar  
5 sympathetic blocks that we discussed before.

6 Q When were they conducted? If you'll go to 27 --

7 A Okay. It looks like the first one was April 18th,  
8 2007.

9 Q The second?

10 A And the second one appears to be -- well, I think  
11 March 14th, 2007 was the first one. April 18th, 2007 was the  
12 second one.

13 Q And was it reasonable, necessary and causally  
14 related to the injuries Enrique sustained at the Palms, to  
15 conduct those sympathetic blocks?

16 A Absolutely.

17 Q And with respect to the examination?

18 A Yes.

19 Q And are those your opinions to a reasonable degree  
20 of probability?

21 A Medical probability, yes.

22 Q Thank you. What was the result in the sympathetic  
23 blocks?

24 A With both injections, Mr. Rodriguez noted complete  
25 relief of his symptoms in his left lower extremity, indicating

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1 a significant sympathetic component to his pain, indicating  
2 that his presumptive diagnosis of complex regional pain  
3 syndrome, or RSD, was correct.

4 Q And so, it was diagnostic for our stay?

5 A Yes.

6 Q And do you agree with that opinion --

7 A Yes.

8 Q -- to a reasonable degree of medical probability?

9 A Yes.

10 Q And what was Dr. Miller's bill in this case? If you  
11 can, turn to 4208.

12 MR. BAKER: I'm still having that problem, Your Honor.

13 THE COURT: Me, too, Mr. Baker.

14 BY MR. BAKER:

15 Q Page eight?

16 A It looks like \$1,470.11.

17 Q And were those bills reasonable, necessary and  
18 causally related to the subject incident --

19 A Yes.

20 Q -- to a reasonable degree of medical probability?

21 A Yes.

22 MR. BAKER: Move to admit 42, Your Honor.

23 THE COURT: Any objection to 42, Mr. Ward?

24 MR. WARD: Hearsay, Your Honor.

25 THE COURT: Okay. As on the Court's previous ruling, the

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1 objection is overruled. The item is admitted, 42.

2 (Plaintiff's Exhibit 42 Received)

3 BY MR. BAKER:

4 Q Now, where was the sympathetic blocks conducted?

5 A They were conducted at a UCLA-affiliated surgery  
6 center called the Wilshire Surgery Center, Incorporated, in  
7 Beverly Hills, California.

8 Q That's Wilshire Surgical Center?

9 A Yes.

10 Q Would you turn to Exhibit 30, please? You might  
11 want to leave that on the ground near your feet.

12 A Okay.

13 Q I assume this is a surgery you wouldn't want to do  
14 in a kitchen or something of the sort?

15 A No. It's not. Because of the potential  
16 complications with this procedure, you want to do this at a  
17 facility that you can deal with complications.

18 Q Was it reasonable, necessary and causally related to  
19 the Palms incident, to do these lumbar sympathetic blocks at a  
20 surgical center?

21 A Yes.

22 Q And particular, at Wilshire?

23 A Yes.

24 Q And that's your opinion to a reasonable degree of  
25 medical probability?

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1 A Yes.

2 Q And if you'll turn to pages 399 and 300 [sic] --

3 A Which exhibit?

4 Q -- of Exhibit number 30 --

5 A Were there that many pages in number 30?

6 Q Yeah. It's the last two pages before 31. You're  
7 not seeing it?

8 A No. I've got 121 -- okay. All right. It's under  
9 the Defendant's supplements. Okay. I'm sorry. Yes. I'm  
10 there now.

11 Q And the record will note to thank the Defendants for  
12 supplementing the bill. You're familiar with customary  
13 charges for surgical centers?

14 A I am. Yes.

15 Q And for the first block, would you state to the  
16 Court what the amount charged for the block was?

17 A The first block --

18 Q Which would be on 299? Are you not seeing it?

19 A No. Yeah. There's a surgery that was performed on  
20 04/21/06. The balance there was \$17,991. And then, the  
21 next --

22 Q And you would presume that that's a charge for the  
23 surgery performed on the 18th?

24 A Yes.

25 Q And was that charge reasonable, necessary and

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1 causally related to the injury at the Palms?

2 A Yes.

3 Q And is that your opinion to a reasonable degree of  
4 medical probability?

5 A Yes.

6 Q And with respect to the second block --

7 A The second block was -- the charges were \$8,260.

8 Q And we -- actually, what's confusing you and why  
9 you're looking at me funny is, we have those in reverse order,  
10 don't we?

11 A Yes.

12 Q So at the page 300, it's the first block. Is that  
13 right?

14 A Yes.

15 Q And the charge for that is how much?

16 A \$8,260. And the second one is \$17,991.

17 Q And were both of those charges reasonable, necessary  
18 and causally related to the subject accident?

19 A Yes.

20 Q And is that your opinion to a reasonable degree of  
21 probability?

22 A Yes.

23 MR. BAKER: Move to admit 30, Your Honor.

24 THE COURT: Any objection to 30?

25 MR. WARD: Just hearsay, Your Honor.

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1 THE COURT: Noted for the record.

2 MR. WARD: And the lack of foundation.

3 THE COURT: Noted for the record. 30 will be admitted.

4 [Plaintiff's Exhibit 30 Received]

5 BY MR. BAKER:

6 Q Now, are you aware that the patient was also sent to  
7 see Dr. Cravetti [phonetic]?

8 A Yes. An orthopedic surgeon. Yes.

9 Q And Dr. Cravetti is an orthopedic surgeon in the  
10 area?

11 A Yes. In Las Vegas.

12 Q Do you know who referred him to Dr. Cravetti?

13 A I believe he was originally referred to Dr. Cravetti  
14 by either Dr. Coca [phonetic] or myself. I don't know the --  
15 I can't remember the exact timing.

16 Q But you were working with Dr. Coca in attempting to  
17 get Enrique back to health at this time, weren't you?

18 A Yes.

19 Q Okay. And what was the purpose for sending Enrique  
20 to Dr. Cravetti?

21 A It was the same concern that Dr. Ferrente had, that  
22 I had. I evaluated Mr. Rodriguez as to whether or not he had  
23 any mechanical component to his knee pain, that was  
24 contributing or maintaining the CRPS or the RSD-type syndrome.

25 So --

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1 Q Would you explain what you mean by that?

2 A Well, yeah. I would --

3 Q Were you worried if it --

4 A I was just about to.

5 Q I'll be quiet. I'm going to go sit.

6 A Essentially, if you have something that's constantly  
7 irritating a particular area or nerve, unless you address the  
8 original problem, you're not going to get rid of the secondary  
9 problem, which is the RSD or the CRPS. So if there's an  
10 ongoing knee issue in the patient, or other issues that are  
11 going on, in this particular case the knee issue, unless you  
12 verify that there's no problem with the knee that can be  
13 corrected, you're treating sort of symptoms, if you will, or  
14 secondary problems, but you're ignoring the first problem.

15 And you'll never get rid of the secondary problem  
16 unless you address the first one. So the purpose of going to  
17 Dr. Cravetti as an orthopedic specialist was to determine --  
18 is there anything else surgically that needed to be addressed  
19 in the knee? Or are we now dealing with a knee that was  
20 relatively stable, from a surgical point of view, you know,  
21 short of a knee replacement, and now we're dealing with the  
22 secondary problem, which becomes in a sense, the primary  
23 problem. Because you've surgically corrected the primary  
24 problem.

25 You've kind of gotten rid of that one essentially.

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1 Now, you're dealing with the remainder of the issues. So the  
2 secondary problem is now the primary issue. So we wanted Dr.  
3 Cravetti to evaluate Mr. Rodriguez to make sure that we could  
4 address everything, that we've checked all the boxes before we  
5 just start looking to correct the pain with other modalities,  
6 such as this spinal cord stimulator that I'm sure we'll talk  
7 about in the near future.

8 Q Now, with respect to you working with Dr. Coca, what  
9 was your joint effort?

10 A Well, I mean, our joint effort was to confirm a  
11 diagnosis, come up with a treatment plan, and without input  
12 from an orthopedic surgeon, that treatment plan was  
13 incomplete.

14 Q And give me a second to find the exhibit for  
15 Dr. Coca. Would you turn to Exhibit 36, please?

16 A Okay.

17 MR. WARD: What number was that?

18 THE WITNESS: 36.

19 MR. BAKER: No. I'll do that at a later time. Let's  
20 keep going to your treatment.

21 THE WITNESS: Okay.

22 BY MR. BAKER:

23 Q When was the first time that you saw Enrique  
24 Rodriguez?

25 A November 26th, 2007.

1     Rodriquez that believed it, including Dr. Furante, the  
2     chairman at UCLA, whom I've heard lecture. I've read articles  
3     he's written. So I mean, he's very well known and recognized.  
4     If he didn't believe that the diagnosis was likely, I would  
5     have had reason to question it. But not only did I look at  
6     other doctors who documented very adequately that this is a  
7     complex reasonable pain syndrome, I had my own opportunity to  
8     evaluate and treat Mr. Rodriquez. And I came to a similar  
9     conclusion.

10         Q     Before we move on to your treatment course, would  
11     you turn to Exhibit 38. You spoke to me, did you not, about  
12     Dr. Cravetti [phonetic]?

13         A     Yes, I did.

14         Q     And you informed us you wanted to make sure there  
15     was no mechanical component associated with his pain?

16         A     Yes, that was my concern.

17         Q     And you've reviewed the bills of Dr. Cravetti?

18         A     I have.

19         Q     Was Dr. Cravetti's examination reasonable and  
20     necessary and causally related?

21         A     Yes.

22         Q     To a reasonable degree of medical probability?

23         A     Yes.

24         Q     I'll give you a few seconds to open up your --  
25     that's okay. That's what I was doing earlier.

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1 A I am at 38.

2 Q And the billing amount was \$700 as set forth on  
3 Cravetti 1?

4 A That is correct.

5 Q Is that bill reasonable and necessary and causally  
6 related to the subject to a reasonable degree of medical  
7 probability?

8 A Yes.

9 MR. BAKER: I move to admit 38, Your Honor.

10 THE COURT: Any objection?

11 MR. WARD: Hearsay, Your Honor. Lack of foundation.

12 THE COURT: Noted for the record. Overruled.

13 BY MR. BAKER:

14 Q And you're aware at the same time he was seeing Dr.  
15 Thowgott [phonetic]. Is that true?

16 A Yes. Dr. Thowgott is an orthopedic spine surgeon.

17 Q And would you turn to Exhibit Number 39, please.

18 THE COURT: When you moved for admission of 38, was it  
19 just for this one page?

20 MR. BAKER: It's for -- yeah.

21 THE COURT: The one page, 000001?

22 MR. BAKER: Is that all there is?

23 THE COURT: Well, there's a whole lot of pages behind it.

24 MR. BAKER: No. No. No. I move for the admission of  
25 the entirety of the Exhibit 38.

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1 THE COURT: I'm just going to --

2 BY MR. BAKER:

3 Q You've reviewed the entirety of Exhibit 38?

4 A Yes, I have.

5 Q And that's sets forth his examination and treatment,  
6 prognosis, diagnosis, and treatment course?

7 A Yes.

8 Q And that was reasonable, necessary and causally  
9 related to a reasonable degree of medical probability?

10 A Yes.

11 Q And the bill as well?

12 A Yes.

13 Q To a reasonable degree of medical probability?

14 A Yes.

15 MR. BAKER: Move to admit 38, Your Honor.

16 MR. WARD: Objection. Hearsay. Foundation.

17 THE COURT: Noted for the record. 38 will be admitted.

18 [Plaintiff's Exhibit 38 Received]

19 BY MR. BAKER:

20 Q And at the same time he was treating with  
21 Dr. Thowgott. Is that right?

22 A That is correct.

23 Q When you were seeing Enrique, was he not only  
24 complaining of the RSD related pain to his knee, but also  
25 cervical lumbar and other pains?

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1 A Yes, he was.

2 Q And was Dr. Thowgott seeing him for all of those  
3 issues?

4 A He was, yes.

5 Q And you've reviewed the file of Dr. Thowgott?

6 A I have.

7 Q And if you'll turn to Page 8, Dr. Thowgott comments  
8 on Dr. Miller's treatment in California, is that right?

9 A That is correct.

10 Q And does Page 8 of Exhibit Number 40 -- 39, does Dr.  
11 Thowgott believe -- state his belief that an RSD diagnosis is  
12 reasonable?

13 A Yes.

14 Q Okay. And was Dr. Thowgott's treatment of Henry  
15 reasonable, necessary, and causally related to the subject --

16 A Yes.

17 Q To a reasonable degree of probability?

18 A Yes. Medical probability, yes.

19 Q Of medical probability? Thank you. And if you turn  
20 to Page 3, does that set forth Dr. Thowgott's bill? 3 of  
21 38 -- 39.

22 A Yes. \$4,154.50.

23 Q Is that bill reasonable, necessary and causally  
24 related to subject event?

25 A Yes, it was.

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1 Q To a reasonable degree of medical probability?  
2 A Yes.  
3 MR. BAKER: Move to admit the entirety of 39, Your Honor.  
4 THE COURT: Same objection, Mr. Ward?  
5 MR. WARD: Yes, Your Honor.  
6 THE COURT: Same ruling noted for the record.  
7 MR. WARD: I'm not surprised, of course. Lest you're not  
8 surprised.  
9 THE COURT: No. 39 will be admitted.  
10 MR. BAKER: I'd be surprised in a bad way.  
11 [Plaintiff's Exhibit 39 Received]  
12 BY MR. BAKER:  
13 Q Dr. Schifini, did you set Enrique on a treatment  
14 course?  
15 A I did.  
16 Q What did that treatment course include?  
17 A We talked to Mr. Rodriguez about -- kind of the  
18 risks, the benefits, the options and the alternatives, as is  
19 usual during my consultations. So we kind of go over  
20 different things after I evaluate the patient and the records  
21 that we look at. But the specific recommendations for him  
22 following that office visit was to repeat the lumbar  
23 sympathetic block. The repeating of the block was just for my  
24 own satisfaction that we're repeating the block. We're sort  
25 of checking things again in a different way. Other than Dr.

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1 other peripheral nerve kind of issue affecting that lower  
2 extremity, which can also maintain this diagnosis of CRPS or  
3 RSD.

4 So essentially what I did was rule out the diagnosis  
5 of sympathetically maintained pain. And I think in my  
6 dictation, there's sort of error because, again, during this  
7 timeframe was the transition between the terms and nobody had  
8 really said, everybody we're all using this term now versus  
9 this one. So what this should have said is really more we've  
10 -- you know, his RSD component of this was successfully  
11 treated rather than the RSD in the CRPS or the complex regions  
12 pain syndrome. So I think I misstate something in my record  
13 there from December 6th, 2007.

14 Q But you were still communicating with Dr. Cocha?

15 A Yes.

16 Q And if you could turn to Exhibit 37. I'm looking on  
17 the -- are you looking --

18 A Oh, I'm sorry. I thought you said Page 37. So  
19 Exhibit 37.

20 Q Right.

21 A Okay.

22 Q Is Exhibit 37 Dr. Cocha's records and bills?

23 A Yes, it is.

24 Q And was the treatment by Dr. Cocha reasonable,  
25 necessary and causally related to the subject incident to a

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1 reasonable degree of medical probability?

2 A Yes.

3 Q And could you tell me what Dr. Cocha's bill was?

4 A It appears Dr. Cocha's bill -- final bill was  
5 \$3,389.60.

6 Q And is that bill reasonable, necessary and causally  
7 related to the subject incident to a reasonable degree of  
8 medical probability?

9 A Yes.

10 Q And that's your opinion to a reasonable degree of  
11 medical probability?

12 A Yes.

13 MR. BAKER: Move to admit the entirety of 37, Your Honor.

14 MR. WARD: Foundation, hearsay, Your Honor.

15 THE COURT: Noted for the record. 37 will be admitted.

16 [Plaintiff's Exhibit 37 Received]

17 BY MR. BAKER:

18 Q What was your plan for Enrique now that the  
19 sympathetic aspect of his -- well, before I ask you that, did  
20 you believe he was still suffering from a neurologically  
21 mediated pain syndrome?

22 A Yes.

23 Q Even if the sympathetic component of it had been  
24 successfully treated?

25 A Yeah. Again, that's, as I've described, that's just

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1 A No.

2 Q And is it fair to say by this time he had been  
3 through two knee surgeries, three lumbar sympathetic blocks,  
4 and an implantation of a stimulator into his system?

5 A Yes. I mean, at best, he had some temporary relief  
6 during the first two lumbar sympathetic blocks. But that was  
7 a few hours. This was for four days, which gave him quite a  
8 bit of home.

9 Q The hound is out, the hunt is on. Right?

10 A Yes.

11 Q And did you send Henry to any physicians to discuss  
12 a permanent spine stimulator?

13 A Yes. He was seen by Dr. Thomas Votter [phonetic],  
14 who's an orthopedic spine surgeon.

15 MR. BAKER: Rob, what's Votter's -- you around?

16 MR. CARDENAS: What's that?

17 MR. BAKER: What's Votter's exhibit number?

18 MR. CARDENAS: It's 48.

19 MR. BAKER: Thank you.

20 BY MR. BAKER:

21 Q Would you turn to Exhibit 48, quickly. It's just  
22 Dr. Votter, his records.

23 A Okay.

24 Q Does 48 contain the examination and treatment  
25 performed upon Enrique Rodriguez from Dr. Votter --

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1 A Yes.

2 Q -- upon your referral?

3 A Yes.

4 Q And was that examination reasonable, necessary and  
5 causally related to the subject accident to a reasonable  
6 degree of medical probability?

7 A Yes.

8 Q What's Dr. Votter's bill?

9 A \$330.

10 Q That sounds pretty reasonable. Is that reasonable,  
11 necessary, and causally related to the subject incident?

12 A Yes.

13 Q To a reasonable degree of probability?

14 A Yes -- medical probability, yes.

15 Q Medical probability. Thank you.

16 MR. BAKER: Your Honor, move to admit 48.

17 MR. WARD: Foundation, hearsay, Your Honor.

18 THE COURT: Noted for the record.

19 MR. BAKER: Admitted, Your Honor?

20 THE COURT: 48 will be admitted.

21 [Plaintiff's Exhibit 48 Received]

22 BY MR. BAKER:

23 Q How does this permanent spinal cord stimulator  
24 differ from the temporary spinal cord stimulator other than  
25 obviously being permanent?

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1 programming changes. And the nice thing about having a  
2 computer is you can program it. Some of the programming Mr.  
3 Rodriquez can do on his own with the little computer. Some of  
4 it requires visits in my office to be done. Those are  
5 typically about a \$300 charge. The first year -- every year  
6 of the first year, so the -- of the four years, the first  
7 year, there's going to be three of those visits -- or excuse  
8 me, four of those visits. So you're talking about \$1200 each  
9 of the first years. And then additional years, that  
10 programming needs to be done once a year. So you're talking  
11 about an additional \$2100 every time the battery is changed  
12 for programming issues. So that's the other associated costs  
13 with this.

14 Q That would total?

15 A That's going to be \$21,000 times -- or excuse me,  
16 \$2100 times 10, so an additional \$21,000. I think those are  
17 all the costs. So I'm going to --

18 Q And that totals --

19 MR. BAKER: And we'll get the transcript and add it up,  
20 Your Honor, and make sure it's all consistent.

21 BY MR. BAKER:

22 Q -- \$721,000?

23 A That sounds about right over the lifetime --

24 Q 270 plus 160 plus 220 plus 50 plus 21,000.

25 A Yes.

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# **EXHIBIT J**

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DISTRICT COURT  
CLARK COUNTY, NEVADA

*Alan D. Quinn*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ,  
Plaintiff,  
v.  
FIESTA PALMS LLC,  
Defendant.

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MONDAY, NOVEMBER 1, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. JOSEPH SCHIFINI

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
Benson, Bertoldo & Baker

For the Defendant: KENNETH C. WARD, ESQ.  
Archer \* Norris

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EXHIBIT J

1 Q Could you project for the Court what the total value  
2 of the --

3 A Well, if we're using the present value and we're  
4 assuming the numbers are inverted, they're approximately  
5 \$11,000. Again, I would envision those would be decreased by  
6 75 percent as well, because much of the reason for the  
7 constipation is due to the use of the opiate type medicines,  
8 the hydrocodone and the morphine.

9 Q And that's your opinion to a reasonable degree of  
10 medical probability?

11 A Yes.

12 MR. BAKER: You have a objection?

13 MR. WARD: Yeah. I'd like to object for the record and  
14 move to strike. Your Honor, we've been given -- one of the  
15 experts that was disclosed in this case was a life care  
16 planner. And a life care plan was provided and the life care  
17 planner was deposed, and all of those questions were asked and  
18 answered.

19 Now we find out the life care planner's not going to be  
20 called and this treating physician is testifying as to  
21 expenses that are much higher than set forth in the life care  
22 plan. There's no point in disclosing experts at some point if  
23 you can just bring in everything that you want to any way you  
24 want to do it.

25 MR. BAKER: Your Honor, I --

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1 THE COURT: Mr. Baker?

2 MR. BAKER: I think that we have the right to put in  
3 futures through either a life care planner or through the  
4 physicians who are actually referring and prescribing the  
5 future treatment. And I think that it's typically preferred  
6 by the Court for the doctors to put in the evidence rather  
7 than to have the life care planner go through the medical  
8 records and pick the medical records and try to project  
9 expenses. And I believe that the life care planner would  
10 probably have drawn exactly the type of hearsay objection from  
11 Mr. Ward that we've been hearing through the whole trial.

12 This is a doctor testifying to medicines that have been  
13 prescribed to his patient, the future need for those medicines  
14 and the costs. And again, on the basis of the cases that  
15 we've given you, Gruber v. Levine [phonetic], the cases that  
16 we've cited to this Court for the wide discretion for him to  
17 speak, and the fact that he's actually a treating physician  
18 and not a retained expert. This is, respectfully, completely  
19 appropriate.

20 THE COURT: Any final thoughts, Mr. Ward?

21 MR. WARD: Yeah. I'll make it quick, Your Honor. I know  
22 Your Honor's tired of hearing this, but I feel the need to  
23 make the record because essentially here's the issue we have.  
24 When a life care planner comes in, the life care planner is  
25 given parameters about treatment. The life care planner

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1 doesn't say this person needs a back surgery, but they do go  
2 out and do things.

3       It's a -- to some extent it's a little bit like buying a  
4 car, say, you know, I went to this dealer and the car's this  
5 much and I went to this dealer and the car is this much, and I  
6 went to that dealer and the car is that much. And then when  
7 we take the life care planner's deposition, that's what we  
8 cross-examine him on. And essentially what we have instead is  
9 we have someone coming in and saying well, you know, off the  
10 top of my head, I just -- I'm not really sure what all those  
11 things cost, but I think it's a lot of money; and therefore, I  
12 think it's X dollars. And --

13       THE COURT: I think we're stuck with whatever the figures  
14 are in that exhibit. Is that an exhibit?

15       MR. BAKER: It's not an exhibit, Your Honor. And I'm  
16 actually asking him to testify not with respect to the  
17 exhibit, but whether what's put forward on it comports with  
18 his understanding as a treating physician and as a doctor of  
19 what these medicines would cost. And I believe I laid the  
20 foundation for that asking if he knew what these medicines  
21 cost in the community, if he was being prescribed these  
22 medicines currently, if those medicines were reasonable,  
23 necessary and causally related to the subject accident, and to  
24 what the future costs of it. If I don't want to call the life  
25 care planner and put it in through percipient witnesses, I

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1 believe that's completely appropriate.

2 THE COURT: Final thoughts?

3 MR. WARD: I would offer to voir dire their witness on  
4 this topic.

5 THE COURT: I think you're entitled to examine this  
6 witness as you have been doing, Mr. Baker, but I don't think  
7 he can speculate about some figures being inverted or anything  
8 like that. So --

9 MR. BAKER: Yeah. And actually, Your Honor --

10 THE COURT: -- to that extent --

11 MR. BAKER: -- I was going to -- I thought that his  
12 objection was going to be that. And I wasn't -- I was going  
13 to withdraw that testimony, because if he is speculating that  
14 they're inverted or there should be a one --

15 THE COURT: Right.

16 MR. BAKER: -- then that's not appropriate.

17 THE COURT: To that extent, Mr. Ward's objection is  
18 granted. Otherwise it's denied.

19 MR. BAKER: Okay.

20 BY MR. BAKER:

21 Q I asked you the question --

22 MR. BAKER: Thank you, Your Honor.

23 BY MR. BAKER:

24 Q I asked you the question about what his life would  
25 be like with the spinal cord stimulator. And let me ask you

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1 A Yes.

2 Q Okay. Now in 2008 we were four years post-accident?

3 A Yes.

4 Q And he had how many surgeries at that point?

5 A I think it was two surgeries on his left knees.

6 Q And how many doctors had he seen?

7 A I'd have to total them up, but approximately eight  
8 to ten.

9 Q Okay. And how many MRIs and arthrograms had he had?

10 A Several.

11 Q And how many times had he been to physical therapy?

12 A I don't know.

13 Q And that's your -- that's what you call conservative  
14 treatment?

15 A To the point where I was involved, yes, that -- I  
16 would consider that conservative treatment.

17 Q What do you call "non-conservative treatment"?

18 A Where we're implanting things in patients, like the  
19 spinal cord stimulator, things like that --

20 Q Oh.

21 A -- where we're talking about a major surgery on the  
22 spine.

23 Q Okay. Now, you never talked to Dr. Foranti, did  
24 you?

25 A I have talked to Dr. Foranti --

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1 Q About this case?

2 A -- but not in this particular circumstance.

3 Q Okay. So you haven't talked to Dr. Foranti about  
4 this case?

5 A No.

6 Q You haven't seen Dr. Foranti's notes about this  
7 case?

8 A Handwritten notes?

9 Q Notes?

10 A You're going to have to be a little more specific,  
11 because I've seen records from Dr. Foranti regarding the  
12 handwritten notes. I don't think those were made available to  
13 me.

14 Q You've seen a report, have you not?

15 A Yes.

16 Q You've seen more than that?

17 A I've seen what?

18 Q More than that --

19 A I think --

20 Q -- from Dr. Foranti?

21 A I think I've seen documentation, typed  
22 documentation. I'm not sure exactly what you're referring  
23 to.

24 MR. WARD: May I approach the witness, Your Honor?

25 THE COURT: Yes.

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1 Q Well, you did offer comments when you were on the  
2 stand just a few minutes ago.

3 A Not prior to this testimony today.

4 Q Okay. But you did offer comments about the life  
5 care plan from the witness stand today, correct?

6 A Specifically related to medications only.

7 Q And Thursday, you offered comments about the cost of  
8 a stimulator?

9 A Yes.

10 Q And you said \$22,000 a battery every four years..

11 A And that's wholesale costs to the surgery center.  
12 I'm not even including the markup that the surgery center or  
13 the hospital would charge to that. I didn't think that was  
14 necessary or helpful.

15 Q Okay. And the life care planner said \$4,000 a  
16 battery, correct?

17 A I am not sure exactly what she said. Again, I  
18 thought her life care plan was probably one of the worst life  
19 care plans I've ever seen. So, you know, it's one of those  
20 things where looking at the numbers that she quoted, I'm not  
21 sure who she actually spoke to, but I'm sure you had the  
22 opportunity to depose her and ask her these questions and I'm  
23 not sure exactly who she talked to or what her answer to that  
24 question was. But my answers sort of supersede hers. She's a  
25 nurse, I'm a doctor.

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1 BY MR. WARD:

2 Q What information do you have now to make a diagnosis  
3 that Dr. Foranti did not have at the time he wrote his report?

4 A I have the knowledge of the totality of the medical  
5 records. Dr. Foranti was dealing with his one piece of  
6 information and had not completed his thought yet. He wanted  
7 and requested additional diagnostic testing to be done which  
8 was ultimately performed by Dr. Miller. So he had not yet  
9 formulated all of his thoughts and if given an opportunity to  
10 review this, I am confident that Dr. Foranti would come to the  
11 same conclusions that I have.

12 MR. WARD: Move to strike as non-responsive.

13 THE COURT: Overruled.

14 BY MR. WARD:

15 Q How is it you know what Dr. Foranti would do? Have  
16 you talked to him?

17 A I have talked to him. Not in --

18 Q About this case?

19 A -- this case, no.

20 Q Then how is it you would know what he would do in  
21 this case?

22 A Because I'm a board certified anesthesiologist  
23 specializing in pain management just like Dr. Foranti and the  
24 information that he felt was valuable in the reference to the  
25 further diagnostic testing that he requested was ultimately

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1 done which helps me come to the diagnosis of complex regional  
2 pain syndrome in Mr. Rodriguez's case. So again Dr. Foranti  
3 did not have the opportunity to finish his thoughts because he  
4 -- there was an incomplete diagnostic workup.

5 Q Well, he suggested that there was insufficient  
6 objective information, correct?

7 A Yes.

8 Q And so he asked for a number of things.

9 A Yes.

10 Q One of those things that he asked for was a bone  
11 scan?

12 A Yes.

13 Q So you did a bone scan or you had a bone scan done?

14 A That's correct.

15 Q It was negative?

16 MR. BAKER: Your Honor, this is all asked and answered.

17 THE WITNESS: Yes.

18 THE COURT: It has been. Sustained.

19 MR. WARD: I wanted to go to the other areas, Your Honor.  
20 It is -- these are areas that he raised on redirect.

21 THE COURT: We covered the bone scan in your previous  
22 examination of this witness.

23 MR. WARD: I'm going to -- I was doing that as prefatory  
24 to go to the rest of the things in that sentence.

25 THE COURT: Well, then let's get to it.

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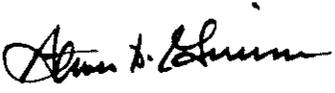
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Marsha L. Stephenson, (Bar No. 6150)  
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Telephone: 702.474.7229  
Facsimile: 702.474.7237

Attorneys for Defendant  
FIESTA PALMS, LLC, a Nevada Limited Liability  
Company, d/b/a THE PALMS CASINO RESORT

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ,  
  
Plaintiff,  
  
v.  
  
FIESTA PALMS, LLC, a Nevada Limited  
Liability Company, d/b/a THE PALMS  
CASINO RESORT, et al. ,  
  
Defendants.

Case No. A531538  
  
**DECLARATION OF KENNETH C. WARD  
IN SUPPORT OF DEFENDANT FIESTA  
PALMS, LLC'S MOTION FOR NEW  
TRIAL**  
  
Dept: X  
Hearing Date:  
Hearing Time:  
Hearing Dept:

I, Kenneth C. Ward, declare as follows:

1. I am a shareholder with the law firm of Archer Norris, counsel of record for Defendant FIESTA PALMS, LLC, a Nevada Limited Liability Company, d/b/a THE PALMS CASINO RESORT. I have personal knowledge of the facts stated in this affidavit and if called as a witness at trial, could and would competently testify thereto. I have reviewed the Memorandum of Points and Authorities in Support of this motion, and incorporate by reference the facts alleged

1 therein.

2 2. I served as co-counsel for FIESTA PALMS, LLC, a Nevada Limited Liability  
3 Compay, d/b/a THE PALMS CASINO RESORT (“the Palms”) in the trial of this matter with  
4 Marsha Stephenson of Stephenson & Dickinson. We began the bench trial on October 25, 2010  
5 of the matter of *Enrique Rodriguez v. the Palms*, No. A531538, in the Eastern Judicial District of  
6 Clark County, Nevada, and trial concluded with the parties’ closing arguments on November 10,  
7 2010.

8 3. The Honorable Jessie Walsh returned a verdict in favor of plaintiff Enrique  
9 Rodriguez on March 7, 2011, with Notice of Entry of Judgment served on the Palms on March  
10 15, 2011. A true and correct copy of the March 7, 2011 verdict is attached hereto as **Exhibit A**.

11 4. I took the deposition of Terrance Dinneen on September 9, 2010. Mr. Dinneen  
12 stated that he provided his entire work file and there were no letters regarding the filing status of  
13 plaintiff Enrique Rodriguez’s tax returns. A true and correct copy of the September 9, 2010  
14 Deposition of Terrence Dinneen is attached hereto as **Exhibit B**.

15 5. Plaintiff testified from the witness stand at trial that he gave Mr. Dinneen all of the  
16 backup information to support his income claim, and that he prepared and signed the 2004 tax  
17 return in 2009 after the economist requested the information.

18 6. At trial, while I questioned Mr. Dinneen on cross-examination, Mr. Dinneen  
19 produced a letter from a person who allegedly prepared the returns saying that the returns had  
20 been filed; it was a one line letter from the tax preparer dated October 20, 2010. Mr. Dinneen  
21 testified at trial that he never provided the document to the Palms. This document was never  
22 provided to the Palms, even though Mr. Dinneen had purportedly provided his entire work file  
23 and that letter was not included.

24 7. Plaintiff did not disclose any medical experts. Attached hereto as **Exhibit C** is a  
25 true and correct copy of Plaintiff’s Expert Disclosure, and attached hereto as **Exhibit D** is a true  
26 and correct copy of Plaintiff’s Supplement Expert Disclosure.

27 8. Plaintiff also listed all of his witnesses at trial in his Pre-Trial Memorandum, but  
28 did not designate any medical treatment providers as experts. Attached hereto as **Exhibit E** is a

1 true and correct copy of Plaintiff's Pre-Trial Memorandum.

2 9. Dr. Thalgott was a treatment provider for Plaintiff who was a spine surgeon who  
3 had at least six entries in his records that he would not do surgery on this plaintiff's back. In  
4 addition, his reports indicated that he had not seen Plaintiff in over three years. In spite of this,  
5 the anesthesiologist, who had also not seen the Plaintiff for over three years, testified at trial that  
6 the Plaintiff needed a multi-level back fusion and that he was quite certain if Dr. Thalgott knew  
7 what had transpired with this Plaintiff in the last three years, Dr. Thalgott would change his mind  
8 and agree that surgery was necessary.

9 10. My office subpoenaed all records from Plaintiff's treater, Dr. Joseph Schifini, and  
10 received approximately 21 pages from Dr. Schifini at that time. True and correct copies of the  
11 first and last consecutively bates numbered pages of Dr. Schifini's document production are  
12 attached hereto as **Exhibit F**.

13 11. However, at trial, Dr. Schifini was permitted to testify regarding approximately  
14 117 pages of documents that the Palms were unaware of and the Palms were never been notified  
15 by Dr. Schifini or Plaintiff's counsel that such documents existed. Plaintiff's failure to disclose  
16 the documents put the Palms at a great disadvantage in its cross-examination of Dr. Schifini, who  
17 provided critical testimony during the trial.

18 12. Plaintiff's life care planner, Kathleen Hartmann, provided a life care plan calling  
19 for \$294,000 for all of the medical relating to a spinal stimulator. Dr. Schifini, an  
20 anesthesiologist, was allowed to testify that these numbers were all wrong and the number was  
21 actually \$960,000. Ms. Hartmann's numbers did not include a figure for fusion and she included  
22 a range of \$80,000 to \$160,000 for knee replacements. Again, Dr. Schifini, the anesthesiologist,  
23 was able to testify that his back surgeries and knee replacements would be \$686,000.

24 13. Plaintiff filed a Motion to Strike Trial Testimony on approximately November 16,  
25 2010. Plaintiff's points and authorities essentially argued that the Palms' experts, Forrest  
26 Franklin and Thomas Cargill "did not establish a sufficient foundation since neither provided  
27 opinions to a reasonable degree of probability." A true and correct copy of Plaintiff's Motion to  
28 Strike Trial Testimony is attached hereto as **Exhibit G**, and the Court's Order granting it is

1 attached Exhibit H.

2 14. Plaintiff stipulated on the record that Mr. Franklin and Dr. Cargill are both  
3 qualified.

4 15. Attached hereto as **Exhibit I** are true and correct copies of excerpts of the  
5 Reporter's Transcript of Proceedings of October 28, 2010.

6 16. Attached hereto as **Exhibit J** are true and correct copies of excerpts of the  
7 Reporter's Transcript of Proceedings of November 1, 2010.

8 17. Attached hereto as **Exhibit K** are true and correct copies of excerpts of the  
9 Reporter's Transcript of Proceedings of November 4, 2010.

10 18. Attached hereto as **Exhibit L** is a true and correct copy of the Dinneen & Hartman  
11 initial expert report.

12 19. Attached hereto as **Exhibit M** are true and correct copies of excerpts of the  
13 Reporter's Transcript of Proceedings of November 8, 2010.

14 20. Attached hereto as **Exhibit N** are true and correct copies of excerpts of the  
15 Reporter's Transcript of Proceedings of November 3, 2010.

16 21. Attached hereto as **Exhibit O** are true and correct copies of excerpts of the  
17 Reporter's Transcript of Proceedings of November 9, 2010.

18

19 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing  
20 is true and correct. This declaration is executed on March 22, 2011 at Walnut Creek,  
21 California.

22

23

  
\_\_\_\_\_  
Kenneth C. Ward (NV Bar No. 6530)

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# **EXHIBIT K**

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DISTRICT COURT  
CLARK COUNTY, NEVADA

*Alan D. Lavin*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

THURSDAY, NOVEMBER 4, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF TERRANCE DINNEEN

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

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EXHIBIT k

1 Q 192?

2 A The 192 is the taxable income.

3 Q Okay.

4 A Okay.

5 Q And this first one, the gross income was income?

6 A That's business income.

7 Q Business income? Okay. So let's deal with the  
8 business income. Is it your opinion to a reasonable degree of  
9 professional probability that his business income, in the year  
10 2004, was \$208,000?

11 A If that's what's reported on the return, yes.

12 Q That's not my question. My question is, is it your  
13 opinion that that's what his income is, to a reasonable degree  
14 of professional responsibility?

15 A Sure. That's what the business income is.

16 Q Okay. When you say that's what the business income  
17 is, you used, in your direct examination, you used the term  
18 reported income?

19 A Yes.

20 Q Isn't it true that you don't know if any of this  
21 income was reported?

22 A I do know that it was reported.

23 Q Have you received additional information since I  
24 took your deposition --

25 A Yes.

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1 Q -- that you haven't told me about?

2 A I just received this. It's a letter dated October  
3 20th from the tax preparer, indicating that the returns were  
4 filed.

5 MR. WARD: Okay. I'd like to make that part of the  
6 record.

7 THE COURT: Do we need a copy of that, Mr. Dinneen?

8 THE WITNESS: I don't think we need to, Your Honor. You  
9 know, counsel provided it to me, so presumably, he has another  
10 copy. I can replace that in my file, just for expediency.

11 THE COURT: Very well.

12 MR. WARD: I'm sorry. But I'm not going to mark it?

13 THE COURT: Not?

14 MR. WARD: Not. Now --

15 THE COURT: I guess he's not going to move to admit it  
16 after all.

17 MR. WARD: I'm not going to move.

18 MR. BAKER: Okay.

19 BY MR. WARD:

20 Q Now, when your deposition was taken -- by the way,  
21 when does that say they were found?

22 A It doesn't. It just says -- it's short. I can read  
23 it.

24 Q No. That's okay.

25 A Okay.

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1 Q I just want to know if it says when they were filed.

2 A No. It just says that we reprepared and filed  
3 Enrique's tax -- Enrique Rodriguez tax returns for '99, '01  
4 and '04.

5 Q Okay.

6 A But it doesn't say when those were filed.

7 Q Right. And you have a tax return that's dated 2004,  
8 do you not?

9 A I do.

10 Q I mean, for the year 2004?

11 A Yes.

12 Q And when is it signed?

13 A You know, clearly, November of '09. And I can't  
14 make out whether that's a five or an eight. And I think we  
15 discussed a little bit of that, that those handwritten numbers  
16 were hard to read.

17 Q Okay. So it's November '09. Correct? I mean, of  
18 2009?

19 A Yes. November of 2009.

20 Q And you have a tax return for 2001. Is that  
21 correct?

22 A I do.

23 Q And when was it -- what was the date on it?

24 A Well, there's -- let me look a little farther. I'm  
25 looking at the first two pages. The tax preparer signed it

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1           A     You know, I misspoke. I have some other documents  
2 that relate to income, that are backup for the tax returns. I  
3 do not have, you know, any other documents such as from the  
4 Social Security Administration or, you know, that show how  
5 that income was reported.

6           Q     And I'm assuming you haven't gotten any additional  
7 documents to back up the tax returns since I took your  
8 deposition a month ago. Correct?

9           A     No. Other than the ones that we've discussed in my  
10 file, that are closing statements on houses, that type of  
11 thing. No.

12          Q     Yeah. Let me just talk about dates and make sure  
13 this is clear. I took your deposition a month ago, and you  
14 had certain financial information.

15          A     That's correct.

16          Q     And you haven't received anything new since then.  
17 Correct?

18          A     Other than the letter from the tax preparer, you  
19 know. No.

20          Q     The letter from the tax preparer doesn't have any  
21 financial information in it, does it?

22          A     It does not.

23          Q     Okay. And you took a look at the information that  
24 was provided for in the tax return. Correct?

25          A     I did.

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# **EXHIBIT L**



DeVINNEY & DINNEEN CAREER and VOCATIONAL ECONOMIC SERVICES, LTD.

Terrance B. Dinneen, M.S., C.R.C., C.R.E.  
Lawrence J. Deneen, Ph.D., C.R.C.  
Carol A. Dinneen, M.S.

October 21, 2008

Re:            *Name*            :            *Enrique Rodriguez*  
                  *DOI*                :            *11/22/2004*  
                  *DOB*                :            *07/15/1963*

**MEDICAL RECORD ANALYSIS/LIFE CARE PLAN**  
**For**  
**(HENRY) ENRIQUE RODRIGUEZ**

**INTRODUCTION**

This file was referred to DeVinney & Dinneen on September 17, 2008. Referral was to assist in identifying and projecting current and future medical care needs relative to Mr. Rodriguez's injury and resultant disabilities. This document also serves to assist in determining the extent to which Mr. Rodriguez has incurred handicapping conditions secondary to his accident on November 22, 2004, in which he suffered injuries to his left knee, lumbar spine, neck, obesity related to knee injury per Dr. Shah, subsequent sleep apnea, and left knee with diagnosis of complex regional pain syndrome (CRPS). I met with him in his home on October 6, 2008. We have also reviewed the following records:

1. MRI billing and reporting from Open MRI of Inland Valley
2. Report from Mary Ann Shannon, MD 2005
3. Records Las Vegas Neurosurgery, Orthopedics & Rehab
4. El Rancho Physical Therapy reporting and billing
5. Center for Diseases and Surgery of the Spine
6. Records of John Thalgott, MD
7. Matt Smith Physical Therapy
8. Report Nevada Imaging Center 1/28/06
9. Reporting Pain Institute of Nevada, Dr. Walter Kidwell
10. Report Dr. Margaret Goodman March 8, 2007
11. Spring Valley Hospital Records 11/22/04
12. Records John G. Nork 12/6/04
13. Billing for Dr. J. Nork
14. Reporting The Wellness Group 6/20/2007 QME

**EXHIBIT**   L

15. Billing Integrated Healthcare – Dr. Joseph Nicola
16. Strehlow Radiology Consulting 11-9-05
17. Vision Radiology Consulting
18. Louis Mortillaro, PhD billing and reporting
19. Billing Dr. G. Martinez
20. Wilshire Surgery Center billing and reporting Dr. Miller
21. Beverly Tower Wilshire Advanced Imaging
22. Mountain Diagnostics
23. Medical District Surgery Center
24. Lab Corp reporting
25. Quality Respiratory Solutions billing
26. Dr. Treyzon's reporting
27. Medical Associates Southern Nevada billing
28. Primary Care Consultants billing
29. Reports Russell Shah, MD Neurologist
30. Records Advanced Urgent Care, Dr. Koka, D.O.
31. North Valley Medical Supply billing records
32. Billing Dr. Robert Gutierrez
33. Billing Pacific American Medical Service
34. Cal Hand Surgery and Ortho – Dr. Miller correspondence/billing/reports
35. Foot & Ankle Surgical Group – Douglas Stacey DPM
36. Crovetti Orthopaedic Sports Medicine
37. Nevada ENT Center billing
38. Nevada Sleep Diagnostics billing and report
39. Dr. William Simpson reporting and billing
40. Billing IV League
41. Billing Homecare Advantage

In the development of this Life Care Plan we were also asked to calculate the Present Value of the Plan.

Present value is the amount of money necessary today to fund the items in the Life Care Plan that will occur in the future. In calculating present value we take into consideration how the cost of a good or service will increase in future years. These are referred to as growth rates. The growth rates for each item or service are indicated on the enclosed tables.

In calculating present value we also take into consideration interest that is earned from a financial institution. While a growth rate increases the cost of an item in future years, the discount rate subtracts a value to allow for interest that could be earned. The discount rates used in this case were 5, 10 and 30 year United States Treasuries. These discount rates were used because they reflect a very stable and safe investment vehicle.

There are items in the Life Care Plan that are occurring in the next 12 months. These are stated at their current cost. Also, there are other items where it is not known when they will occur. These items are also stated at their current costs.

The goal of this Life Care Plan is to provide the care that will maintain/increase Mr. Rodriguez's medical stability, quality of life and prevent potential complications (noted in Table O). The plan provides for all aspects of his care in order to promote and maintain independence and to prevent complications.

### **BRIEF HISTORY/CURRENT STATUS**

Mr. Rodriguez was in the Palms Casino watching a football game. At half time the staff threw out prizes, a woman came from behind him and hit him causing his knee to hyperextend and he fell. She hit him on the "medial" side with his knee extended in the standing position. The knee immediately was swollen and painful. He injured his head, back, neck, left knee and right hand at the time of the fall. Approximately 2 hours after the accident, he was taken to Spring Valley Hospital Emergency Room by ambulance and was seen by the ER physician who prescribed immobilizer, crutches, lortab and Motrin and he was to follow up with an orthopedist.

On December 6, 2004 he returned and was seen by Dr. John G. Nork in Las Vegas, NV. At the time of the first visit, Dr. Nork felt it may be a contusion and recommended therapy, Darvocet N-100, Parafon Forte and return in 4 weeks.

The MRI was performed on January 28, 2005. The MRI demonstrated no evidence of acute internal derangement. After seeing a chiropractor and undergoing therapy, he experienced persistent pain and was referred to Dr. William Simpson, MD in Wildomar, California. The evaluation was performed on February 1, 2005 with a follow up examination on February 15, 2005. He recommended continuation of conservative treatment and an additional MRI performed on a high field MRI scanner if his symptoms persisted. On the 15<sup>th</sup>, the doctor recommended Mr. Rodriguez undergo arthroscopic surgery. Dr. Simpson did relate all symptoms to the accident of November 22, 2004.

On March 28, 2005, Mr. Rodriguez was seen at Las Vegas Neurosurgery, Orthopaedics & Rehabilitation by Dr. Mary Ann Shannon. He complained of a pain level of 7-9 on a scale of 10. He also complained of multiple symptoms including low energy level, depression, anger, sexual dysfunction, inability to concentrate, impatience, bad attitude, stress, sleep problems, worry, being unsocial, loss of self esteem and other relationship difficulties and mood changes. He denied strange thoughts, panic attacks, suicidal thoughts, alcohol abuse and phobias. Dr. Shannon noted an increased "Q" angle with mild/trace patellar crepitation. There was marked lateral and medial joint line pain with 1+ synovitis. The new MRI revealed a lateral meniscus tear, anterior cruciate ligament strain and injury to the patellofemoral joint with lateral patellar compression syndrome. Her recommendations included meniscal repair, patellar chondroplasty, lateral retinaculum release and debridement. She also provided a cost estimate of these procedures. The total was \$19,600 but did not take into account post operative medications. It did take into account post operative therapy, surgical center fees and her physician fees.

Mr. Rodriguez was unable to get authorization for the surgery in April and finally, on August 31, 2005 and September 1, 2005 he underwent a Presurgical Psychological Evaluation from Dr. Louis F. Mortillaro, PhD. His diagnoses included:

Axis I: (307.89) Pain Disorder due to his Medical Condition with Psychological Factors;  
(293.83) Mood Disorder due to his Medical Condition with Mixed Features of  
Anxiety and Depression;  
AxisII:( 799.9) Diagnosis deferred  
Axis III: Unable to return to work, insufficient and inadequate finances  
AxisV: Current GAF (50)  
Highest GAF Past Year (60) (GAF – Global Assessment of Functioning)  
(See attached GAF scale)

All of the AXIS I diagnoses were deemed to have arisen out of the injury of November 22, 2004. Dr. Mortillaro recommended the following:

1. "Mr. Rodriguez is an appropriate candidate for participating in individual pain and stress management counseling. It is opined that he will need 20-30 sessions of such services at an average cost of \$175/session.
2. He is appropriate candidate for receipt of biofeedback therapy at an average cost of \$135/session.
3. He will need a psychotropic medication evaluation to assess the necessity for a number of different types of medications that will treat his mood disorder and help him better manage his pain and suffering."

He attended therapy at Rancho Physical Therapy following the surgery on October 14, 2005. He was seen on November 8, 2005 by Dr. Joseph R. Nicola, D.C. for lumbar, thoracic and cervical pain following the accident. He stated he had the pain since the accident but the knee pain was so overwhelming that he did not pursue care for the spinal pain. He has noted increased cervical and lumbar spine pain. He continued on crutches which was exacerbating the pain from the original accident. He rated the pain at 7/10. Dr. Nicola stated "The prognosis, at this time, for a full recovery is guarded due to the extent of Mr. Rodriguez's injuries." Chiropractic care was recommended including physical medicine modalities, CMT, neuromuscular reeducation, therapeutic exercises and myofascial release technique.

He continued with Ranch Physical Therapy into 2006 for his knee but little improvement was made. He also started therapy with Matt Smith Physical Therapy in Las Vegas on February 22, 2006 for his low back, facet pain and neck pain. The initial evaluation notes that "this patient is disabled". Mr. Rodriguez was moderately limited in the lumbar spine with forward flexion at 65%, extension at 0%, side bending left 20%, and right 15% or normal. Rehabilitation Potential was regarded as "Good."

Mr. Rodriguez underwent a sleep apnea evaluation on February 2, 2006. The study was positive and he was placed on CPAP and began treatment for his sleep apnea.

During 2005 and 2006, Mr. Rodriguez underwent psychological counseling and treatment with Dr. Louis Mortillaro. On January 11, 2006, at his 9<sup>th</sup> visit, he rated his pain as 7/10, depression 7/10, frustration 7/10 and speaking about the accident caused him increased stress. He continued on a weekly basis in January, February and into June. In June he rated his pain as 7-8/10, depression 7/10, anxiety 4-5/10 and frustration 6/10. Dr. Mortillaro noted that he was making expected progress and was

compliant with treatment process. Dr. Mortillaro noted on his July 27, 2006 visit, that Mr. Rodriguez had been diagnosed with complex regional pain syndrome in the left leg/foot. In early November of 2006 he expressed concern regarding his health and failure of the conservative treatment. He continued to see him and the November 28, 2006 visit indicates that the patient was preparing for a discogram in California. He was very concerned with how painful the procedure would be. This was discussed at his appointment.

Medications on March 2006 included:

Prozac  
Buspar  
Vicoden  
Elavil  
Vicoprofen  
Zoloft  
Valium  
Levenox  
Advair  
Singulair  
Albuterol

These were listed in his pre surgical questionnaire. Dr. John Thalgot evaluated Mr. Rodriguez on March 7, 2006. He confirmed abnormal nerve studies over the upper extremities suggesting "bilateral C5-6 radiculopathies as evidenced by abnormalities seen on segmental dermatomal evoked potential studies. Abnormal median sensory studies consistent with possible right median and ulnar nerve involvement at the wrist, possibly consistent with entrapment." Dr. Thalgot recommended an EMG at a later date of symptoms persisted.

On March 20, 2006 he was seen by Dr. Walter Kidwell and referred by Dr. John Thalgot. Dr. Kidwell evaluated him and reviewed the studies. His impression was as follows:

1. Internal derangement, left knee, status post surgery by Dr. Shannon.
2. Neck pain, right upper extremity radicular symptoms, and preexisting degenerative spondylosis with stenosis. Suspect traumatically-induced discogenic pain/interval disc disruption with secondary spasm and myofascial pain syndrome.
3. Low back pain with left lower extremity radicular symptoms, history of multilevel degenerative spondylosis. Suspect traumatically-induced internal disc disruption/discogenic pain.
4. The patient's symptoms have persisted for well over a year despite conservative therapy. He denies a history of preexisting pain problems, and therefore, to a reasonable degree of medical certainty it appears the patient's presenting complaints are a result of the trauma that the patient received on October [sic] 2004." (DOI: November 22, 2004).

He recommended spinal injection therapy. First recommendation was epidural injections of the neck and low back, two each once a week. Follow up was to be with Dr. Thalgot after injections were complete. He did state that "additional injections maybe appropriate dependent upon response." The injections were performed with only mild relief. He was returned to Dr. Kidwell by Dr. Thalgot on June 29, 2006 for Selective Nerve Root Blocks (SNRBs). His complaints were pain in the neck and some left upper extremity symptoms. He also complained of continued low back pain radiating to his left lower extremity down to the toes. Stage Selective Nerve Root Blocks were recommended first bilateral C7 plus bilateral L5 injections. It is noted that Mr. Rodriguez had seen Dr. Montillaro and methadone was recommended as the primary pain medication. Dr. Kidwell recommended that Mr. Rodriguez have a pain physician in his hometown of Riverside, California follow the medications.

Mr. Rodriguez again had surgery of the left knee recommended by Dr. Jacob Tauber, MD and he underwent a pre operative history and physical on April 21, 2006. He remained in the brace.

Mr. Rodriguez continued with Matt Smith Physical Therapy in Las Vegas, Nevada and was seen in follow up for his left knee, cervical and lumbar spine. His physicians were listed as Dr. Tauber and Dr. Thalgot.

Dr. Kidwell performed the SNRBs and noted no change in symptoms after C7, L4 or L5 blocks. Dr. Kidwell saw the patient back on August 7, 2006 at which time he noted that Mr. Rodriguez had not improved and was undergoing an EMG with Dr. Russell Shah. Dr. Shah was initially seeing him to rule out complex regional pain syndrome and would be doing the EMG.

He was seen by Dr. Russell J. Shah, MD a neurologist in Henderson, Nevada on August 9, 2006. Complaints included constant left knee pain, swelling and pain involving the left ankle area. The EMG/NCS was considered abnormal with mild to moderate right carpal tunnel, abnormal lower extremity study with mild right L5 motor denervating radiculopathy. Dr. Shah determined that "the patient's symptoms are progressive. He will need repeat testing in 9 months as progress is very likely."

Dr. Shah saw Mr. Rodriguez in follow up on August 18, 2006 at which time he indicated that Mr. Rodriguez required the following:

1. Second opinion left knee...;
2. Continue sleep apnea treatment with CPAP machine;
3. Consider gastric bypass consultation for extreme obesity secondary to left knee injury – he gained apparently 80 lbs. He is likely a candidate for surgery as his life expectancy is likely decreased. He tells me that his genes are good and family members live long in the lineage."
4. Spine surgery lumbar eventually after left knee as his right leg radicular complaints will progressively worsen as he is not getting his left knee problem solved;

5. Wrist splints for now for carpal tunnel syndrome with every 12 month f/u EDX-EMG/NCV to evaluate for progression. He will need CTSR surgery bilaterally as again he is still worsening.
6. Full medical evaluate per PTP – Dr. Koka for heart, cholesterol evaluation as his weight gain is going to predispose him to hypertension, high cholesterol, depression and diabetes. These are likely short, medium and long term derivative complications of prolonged disability and weight gain.”

On August 26, 2006, he was seen by Dr. Robert C. Gutierrez to evaluate his left wrist and right hand numbness of 2 years duration since his fall. The MRI noted “a small tear or perforation in volar 1/3 of SL ligament, synovitis ulnar, ECU tendenosis, nerve test: cervical radicular mild to moderate CTS.” Dr. Gutierrez recommended an injection for CTS which was performed.

On November 14, 2006 Mr. Rodriguez was evaluated at UCLA by Dr. Michael Ferrante at the UCLA Pain Management Center. An additional complaint of tinnitus is noted in the reporting. In the review of systems Dr. Ferrante noted fatigue, weight gain, eye problems, loss of balance, and other additional complaints over his entire body. Recommendations included possible CRPS of the left lower extremity (ankle and knee). He noted if pain continued he would recommend additional bone scans for definitive diagnosis. He also suggested that the patient undergo lumbar sympathetic blocks, trial of clonidine patches and Neurontin as well as bilateral foot and leg x-rays in order to contrast possible osteoporosis in the left lower extremity and foot in comparison to the right. He also stated “I believe the gentleman may have carpal tunnel syndrome and should be evaluated for splints as well as injections. Surgery may be warranted.” He indicates with regard to the tinnitus is “likely that this is due to the injuries sustained on 11/22/04. Audiometry with vestibular studies would be a preliminary step towards its management as well as determining its etiology.” He noted that he was on maintenance psychological therapy with Dr. Mortillaro. In regard to the spine, he notes “the patient denies any recent pre-accident history of neck or back pain. This would definitely favor a direct causation to the accident of November 2004. I understand that he has received a number of injections with little relief of symptoms. I would suggest that he be referred to the Spine Institute at UCLA for evaluations and recommendations.” Dr. Ferrante requested psychological clearance for a discogram as well.

Mr. Rodriguez continued with therapy and other modalities through 2006. He was seen by Dr. Lawrence R. Miller, MD on March 7, 2007 in Beverly Hills, California at the Wilshire Surgical Center. He was referred to Dr. Miller by Dr. Tauber. Mr. Rodriguez complained of left lower extremity pain. Pain was noted to be 9/10 on a constant basis. He also complained of lumbar spine pain at a level 9/10. He complained of neck pain bilaterally which increased with activity. He had left hand and wrist pain consistent with dorsal compartment of the first finger, increased with activity. He complained of right hand numbness and reported symptoms of depression, sleep disturbance and posttraumatic stress. His medications were listed as Elavil, morphine, Vicodin, baclofen, lyrica, buspar, valium, Prozac, albuterol, advair and singulair. His final diagnoses were:

1. Left lower extremity complex regional pain syndrome;
2. Chronic pain syndrome with depression, posttraumatic stress, weight gain and sleep disturbance;
3. Left knee internal derangement
  - a. Status post arthroscopy x2 with residuals;
4. Left de Quervain's tenosynovitis;
5. Left wrist internal derangement;
6. Upper extremity entrapment neuropathy
  - a. Rule out right carpal tunnel;
  - b. Rule out left cubital tunnel;
7. Cervical myofascial pain;
8. Cervical disc disease; and
9. Lumbar disc disease.

Dr. Miller provides rationale for his diagnosis indicating that Mr. Rodriguez meets 5- of the 6 criteria. Definitive diagnosis only requires 4 of 6 of these. This physician recommended physical therapy and lumbar sympathetic blocks with ongoing pain psychology treatment and support with cognitive behavior therapy as indicated. Surgery was not an option at this juncture per the doctor due to the CRPS. His plan indicated:

1. Authorization for lumbar sympathetic blocks (LSBs);
2. Authorization for further physiotherapy to be provided in association with the LSBs;
3. Manual desensitization;
4. MS Contin 30 mg by mouth three times/day renewed;
5. Added Topamax 25 mg at bedtime and increase to a target of 100-150mg. He noted as Topamax is increased the Lyrica and Elavil should be weaned;
6. Quinine sulfate added for nocturnal spasm;
7. Analgesics, adjuvants, including baclofen, Vicodin, Buspar and Prozac renewed.

This doctor noted "In summary, this patient has had a tragic injury with diffuse areas of orthopedic injury. He has developed a chronic pain syndrome with severe depression, sleep disturbance, weight gain. Pain syndrome has been complicated by severe left lower extremity CRPS. Sympathetic ganglion blocks will be performed, but if he does not respond to treatment as outlined above, patient will be considered a candidate for spinal cord stimulator."

Dr. Robert Gutierrez injected the thumb and it was successful. He did not recommend follow up on May 23, 2007 for the thumb unless symptoms returned.

Dr. Miller performed a left lumbar sympathetic ganglion block on April 18, 2007. He was also treated for a recurrent ingrown toenail of the left big toe on June 12, 2007. Dr. Russell Shah saw him on September 4, 2007 and concluded that Mr. Rodriguez suffered from right lumbar radiculopathy, right carpal tunnel regional abnormality, left knee pain, mild clonic movements, intermittent valium, MRI results unremarkable for pathology of migraine or trauma, most likely for headaches, significant pain and stress induced restless leg syndrome, follow up in 4 months, continue with wrist splints, continue CPAP for sleep apnea, follow up with Dr. Miller, follow up with Dr. Schifini for spinal cord

stimulator for left lower extremity pain, rule out orthopedic pathology as cause for knee pain prior to stimulator placement.

The final reporting is from Dr. Michael Crovetti who evaluated Mr. Rodriguez on May 12, 2008. He was referred by Dr. Schifini for evaluation. Dr. Crovetti opined that Mr. Rodriguez was a candidate for a spinal cord stimulator. He noted that the pain complaints in the knee do not correlate with his history. He did not recommend any further knee surgeries at that time.

There are no further records at this time. Receipt of additional records and/or information could require a revision of the Life Care Plan. This plan is currently based on the above records and the October 6, 2008 interview with Mr. Rodriguez.

### **INTERVIEW HENRY RODRIGUEZ**

Mr. Rodriguez has severe knee pain – he indicated if he could “cry” all day he would. He also has neck and back pain. He has a ligament in his left hand which is injured from using the cane. He is unable to have surgery due to the CRPS in his left knee. His right hand is always abnormal and he has no grip – he has been diagnosed with carpal tunnel – again no surgery due to the CRPS. They also have diagnosed him as having cervical radiculopathy complicating the diagnosis of the right hand. The pain in the neck is an 8-9 and never goes away.

His lower back also has pain. He has no symptoms in the thoracic spine. The MRI showed changes and he has pain “most” of the time. He has difficulty getting out of bed but the adjustable bed was prescribed by one of his physicians and is in place in the home. He was unable to remember which doctor ordered to bed due to the number of physicians involved in his care. He has swelling in the left ankle. He had to have surgery on his left toenail for ingrown toenail. This has been attributed to the CRPS. He is more susceptible to fungus on the left foot. He therefore requires care for these ingrown toenails every other year or more. He sees his Podiatrist, Dr. Stacey, for this service.

Mr. Rodriguez reports he is unable to help with the household activities to any degree whatsoever. He is very upset that he no longer can help his wife clean, do any type of yard work or assist with any chores including cleaning, cooking and/or maintenance around the home.

Mr. Rodriguez indicates he sees multiple physicians and provided their names, specialties and addresses as we went through his current treatment. He also provided a list of his medications and has promised to send, via email, a list showing their current cost. He will provide costs on the CPAP and CPAP supplies as well. He uses this for his sleep apnea which has developed in relation to the weight gain which accompanied the knee injury and development of CRPS. Dr. Shah and Dr. Koka have related this directly to the injury. His weight gain was excessive, almost 80-90 lbs in a relatively short period of time.

He and his wife both indicated that he has been prescribed physical therapy and is attending therapy for his shoulder, knee and spine. It is helping. He does pool, exercise, electrical stimulation and cold packs for therapy. He was prescribed therapy for the shoulder by Dr. Shah and is undergoing ongoing therapy per Dr. Thalgott initially. His current facility is Kelly Hopkins Physical Therapy. He had utilized both Matt Smith and Rancho Physical Therapy but is no longer using these facilities. He did indicate that he is receiving the same therapies.

Mr. Rodriguez indicated that Dr. Koka, Dr. Shah and Dr. Thalgott have all recommended he be seen by a nutritionist. He has not been able to do this as of yet. He does have a significant weight gain he must address.

Mr. Rodriguez is having blood drawn annually for general health panel, liver studies and does a urinalysis to monitor the medication in his system. At least, he assumes this is why he is undergoing these tests to follow up on all the medications he has had to take. His wife confirmed this.

I toured his home. He does have grab bars in the bathroom. This home, however, is temporary and he will require similar equipment when he relocates. His home is actually in Riverside, California but all of his doctors are now in Las Vegas so he has found a temporary residence. His wife indicated that she actually washes his hair and helps him with his showers. She is concerned as the doctors have recommended a shower chair but they do not have one at this time. Dr. Koka had recommended this as well as Dr. Thalgott. He is in the process of getting the prescription written again – this is a safety issue and I spoke with him in length about safety issues and falling in the bathroom. He agreed that he was unsteady and will follow up with his doctors. They do have an adjustable bed in the bedroom so he can change position safely and with less pain. He indicated that doctors have told him that if the CRPS remains as it is at this time, he will have definite mobility issues as he ages and may require a scooter. Thus far, he is able to ambulate with a cane, crutches and/or the walker.

He uses bilateral wrist braces for the upper extremity problems described above. He states that he wears his knee brace except when he is in the home. Mrs. Rodriguez must do all of the household duties and also, notes that she assists him with all activities of daily living. She estimates her time at 4.5 hours/day. It is possible she may have to work to bring in income in which case, he would require this additional assistance at home.

Dr. Shah has indicated that Mr. Rodriguez may require a total knee replacement. However, currently with the CRPS, no surgery can be performed. A spinal stimulator has also been recommended and the trial completed. He is waiting to have this finished as it did lessen the pain. Dr. Koka, Dr. Shah and Dr. Thalgott have all recommended weight loss and gastric bypass. They attribute the weight gain to the knee injury and subsequent CRPS. Mr. Rodriguez indicated he gets blocks for the pain and he has been told he will need additional ones in the future. He also has been told he will need additional epidural injections for the cervical spine.

Mr. Rodriguez states he cries "a lot" and feels "useless". He feels like Mrs. Rodriguez is his hands and feet and that she has been over burdened. She does all of the work around the home. He indicates his memory is scattered and she had to take over finances as well. He is very upset that he is unable to contribute to his household. He would like to get going with the additional recommended treatment – spinal stimulator – and hopefully this will help him to be able to do more in his life. He is on multiple medications for his depression and he feels these do help him.

### **PAST MEDICAL HISTORY**

ER admission records indicate a past history of asthma and an appendectomy.

### **DIAGNOSES – ATTRIBUTED TO ACCIDENT November 22, 2004**

Based on the above reporting and doctors' opinions they have included the following diagnoses and related them to the accident of November 22, 2004.

1. Left knee meniscal tear with subsequent instability and development of Complex Regional Pain Syndrome.
2. Lumbar and cervical spine strain/sprain with development of myofascial pain syndrome;
3. Chronic pain syndrome with depression, post traumatic stress, weight gain and sleep disturbance with diagnosis of sleep apnea and morbid obesity;
4. Tinnitus;
5. Left wrist internal derangement, upper extremity entrapment neuropathy, rule out right carpal tunnel syndrome, left cubital tunnel syndrome and de Quervain's tenosynovitis;
6. Cervical myofascial pain.
7. Development of pain in the shoulder from overuse of cane on the right side. Now being treated by Dr. Shah.

### **FUNCTIONAL CAPABILITIES**

Mr. Rodriguez describes his abilities as follows. These abilities are also supported by reporting from Dr. Miller, Dr. Montillaro, Dr. Ferrante, Dr. Kidwell, Dr. Shah, Dr. Koka and Dr. Gutierrez as well as additional physicians whose records are reviewed above.

#### **Eating, Grooming, Bathing, Dressing**

Mr. Rodriguez is able to perform grooming activities of daily living and is assisted by his wife with dressing and showering. She also assists him with cooking meals, laundry and household cleaning – he is unable to do any of these activities without significant help.

#### **Bowel and Bladder Management**

Mr. Rodriguez suffers from constipation which the doctors have attributed to the amount of medication he is taking. He has difficulty urinating as well. The doctors are unsure

what is causing this and have recommended he see an Urologist. He has followed up with Dr. Koka for this who is considering referral.

### **Walking/Standing/Sitting/Muscles and Bones**

He can walk for 5-10 minutes and sit for a short period of time. He can drive to his therapy and makes a stop if he needs to get up or change positions. He can drive 30-45 minutes then must stop. He lifts under 10 lbs. He has constant pain in the knee with all of these activities.

### **Skin and Soft Tissue**

Mr. Rodriguez has swelling, heat and loss of hair on the left ankle. This is due to the CRPS. He does have some skin breakdown where he wears the brace but he now takes it off and on when he is at home and this has improved.

### **Upper Extremity Use**

As noted above, Mr. Rodriguez has cubital tunnel syndrome in his left upper extremity. He has also developed shoulder problems on the right related to the use of the cane and he is receiving therapy at this time. His right hand is numb with tingling which is attributed to both carpal tunnel syndrome and cervical radiculopathy. He has been prescribed and wears bilateral braces on his wrists.

### **Lower Extremity Use**

Mr. Rodriguez uses a cane and a brace on the left injured knee. He is able to ambulate around the home without these. His home has no carpeting and smooth floors.

### **Visual Deficits**

None reported.

### **Cognitive Deficits**

He states he has a loss of memory and believes it is due to pain and depression. He did hit at the time of injury his head but has not been diagnosed with a head injury.

### **Body Weight**

Mr. Rodriguez has been diagnosed with morbid obesity which led to his sleep apnea. He gained over 90 lbs since the accident. Prior to the accident he went to the gym and was extremely active. Pictures provided showed him to be in excellent shape. He is unable to perform any type of outdoor or athletic activity due to CRPS, bilateral wrist, right shoulder, lumbar and cervical spine injuries.

### **Fine Motor Skills**

He has numbness and tingling and no grip or fine motor ability in his right hand.

### **Psychological Functioning**

Mr. Rodriguez is very tearful when discussing the accident. He states he can sleep up to 12-18 hour. He naps during the day and also worries because he is unable to do anything. He has been diagnosed with severe depression. He naps up to 3 hours during the day even if he sleeps 12 hours or more during the night.

### **LIFE EXPECTANCY**

Mr. Rodriguez was injured on November 22, 2004 at the time of injury he was 41.36 years of age. His life expectancy was 78.04 years at the time of injury. At the time of this report October 21, 2008 he is 45.27 years of age with a remaining life expectancy of 32.77 years.

### **LIFE CARE PLAN TABLES**

The following are the narrative explanations for Tables A through O. Each table addresses a specific category of current and/or future need. If complications develop and/or as accelerated aging alters Mr. Rodriguez's medical condition and functional status and/or new information is provided this may result in the need for revision of this plan. Costs provided on the tables reflect current pricing obtained through interviews with suppliers, facilities, pharmacies and other health care providers, either telephonically, in person or via the internet. This life care plan does not include any incident-related costs incurred by Mr. Rodriguez prior to the completion of this report. The final figures may change if the treatment plan changes as a reflection of a change in his current condition. This document is not a certified or bonded estimate. It is intended only to provide a gross estimate of the cost for projected services for the educational benefits of all interested parties. A revision will be required when additional medical records are received.

#### **A. Projected Evaluations**

Mr. Rodriguez will require ongoing evaluations by Dr. Gutierrez, **Orthopedist**, for thumb injections and to follow upper extremity problems. This is estimated as 4x/year at this time. He has seen him more frequently in the past. He should have an in-home **Physical Therapy Evaluation** now and an additional 3 times in the future to assess what adaptive equipment will improve his independence including any items which would assist him in performing activities of daily living. He indicates he has been referred to a **Surgeon**, Dr. Vader, to place the spinal stimulator. Dr. Vader will need to see him a total of approximately 6 times before and after the surgery. He will then be followed by Dr. Thalgot, Dr. Shah and Dr. Koka. Finally, he experiences ingrown toenails on an infrequent basis and he must see Dr. Stacey, his **Podiatrist**, approximately every other year.

The doctor indicated that this will be an ongoing problem related to the fungus developed due to CRPS.

#### **B. Routine Medical Care**

Mr. Rodriguez requires the care of a **Spinal Orthopedist**, Dr. Elkanich, to follow his cervical and lumbar spine. He sees him 2x/year and will continue to do so. He will also continue to see Dr. Thalgott, **Pain Management** physician, who follows his spine and neck, does the epidurals and will follow him for the spinal stimulator. He sees him 6x/year. He requires the care of his **Internal Medicine** physician, Dr. Koka, who monitors and prescribes all of the medications in concert with the other consultants. This doctor monitors his general health, liver etc. in relation to these medications. He sees him 12x/year. Dr. Koka also follows the weight gain. He will require additional care on an ongoing basis with Dr. Gutierrez as indicated in Table A. He requires the care of Dr. Russell Shah, **Neurologist**, whom he sees 6x/year to follow the upper extremity problems. He is seen by his **ENT**, Dr. Kim, for the sleep apnea. Finally, he will continue to see a **Pain Psychologist**, Dr. Mortillaro, for maintenance therapy related to his CRPS and chronic pain and depression.

#### **C. Projected Therapeutic Modalities**

Dr. Shah has recently added a prescription for **Physical Therapy**. He requires aquatic exercises as well as electrical stimulation and heat/cold packs from Kelly Hopkins Physical Therapy. They are treating the right shoulder, cervical spine, lumbar spine and his knee. He should also be evaluated and followed by a **Nutritionist**. He indicates that several doctors have recommended this including Dr. Shah and Dr. Koka.

#### **D. Diagnostic Testing**

Mr. Rodriguez indicated during the conversation that different doctors have continued to recommend additional diagnostic studies. Dr. Koka has recommended and performs annual **Liver Studies, HGB/HCT and Urinalysis** to assist in monitoring his kidney and liver function due to the amount of medication he is taking and due to his obesity. Mr. Rodriguez has a reduced ability to fight disease and should receive a **Flu Shot** on an annual basis. This is included to age 65 as it would be required at that time by general health standards. He will require additional **MRI/CT of the lumbar spine, cervical spine and left knee**. The timing of these has been almost every other year to each year and the doctors have not indicated this will change.

#### **E. Aids for Independent Function**

Mr. Rodriguez requires the following equipment which has been prescribed by Drs. Koka, Thalgott, Gutierrez, Miller, and Shah as well as additional doctors in the records. The following is either in the home or has been prescribed:

1. **Grab Bars;**
2. **Additional Aids for Independent Function per the PT Eval In the home;**
3. **Cane;**
4. **CPAP with humidifier;**
5. **Filter for CPAP;**
6. **CPAP Supplies including mask, tubing, nose clamp and sterile water;**
7. **Heavy duty walker;**
8. **Cervical collar;**
9. **Bilateral hand braces and trigger thumb brace;**
10. **Regular crutches;**
11. **Deluxe Shower Bench with Back; and**
12. **Hand Held Shower.**

He will require a heavy duty shower bench, cane and walker due to his weight. These items are for safety and independence and are discussed above.

#### **F. Wheelchairs, Accessories and Maintenance**

Mr. Rodriguez does not use a wheelchair. He will require a **Mobility Scooter** when he reaches approximately age 60-65 as his knees, spine and hands will not be able to continue to support him safely. This could occur sooner if his weight is not addressed. This would also include **maintenance, tires, battery and battery charger.**

#### **G. Prosthetics and Orthotics**

Mr. Rodriguez has been prescribed **bilateral wrist braces** by Dr. Shah, a **trigger thumb brace** by Dr. Shah and the **knee brace** by various doctors but most recently by Dr. Shah who is treating his CRPS.

#### **H. Home Furnishings and Accessories**

Dr. Thalgott has prescribed an **Double Adjustable Bed** for Mr. Rodriguez so he can change position and safely get up and out of bed independently.

#### **I. Drug Supplies and Needs**

Mr. Rodriguez provided me a list of his current medications. He indicated that he does not anticipate them changing in the future but this will also depend on the effectiveness of the spinal stimulator. He takes the following (related to the accident):

1. **Valium 10 mg as needed (approximately 80/yr)**
2. **Albuterol inhaler (pre accident)**
3. **Hydrocodone 7.5 mg/750mg 3x/day**
4. **Morphine 30 mg 3x/day**

5. Effexor XR 37.5mg 1x/day
6. Topamax 100 mg 2x/day
7. Lovastatin 20 mg 1x/day
8. Cyclobenzaprine 10 mg 1x/day
9. Doc-Q-Lace 100 mg 3x/day
10. Enulose Syrup 30 gm 2x/day
11. Singulair 10 mg 1x/day (pre accident)
12. Advair Disk 250/50 2x/day (pre accident)
13. Mupirocin 22gm 2% 2x/day
14. Viagra 100 mg as needed (estimate 90/year)

**J. Home Care**

Mr. Rodriguez will also require a Home Health Assistant for approximately 4.5 hours/day. Mrs. Rodriguez indicates she spends at least this amount of time and if she goes to work he will need assistance with bathing, dressing and other complex activities of daily living requiring balance and flexibility.

**K. Future Surgeries**

Mr. Rodriguez has been told he will require a **Spinal Stimulator** implanted by Dr. Vader. This was recommended by Dr. Thalgott and other physicians. He has undergone the trial and is awaiting permanent placement. He may require, after the CRPS is under control, a **Total Knee Replacement** for his left knee which has degenerative changes. Dr. Shah has recommended a **Gastric Bypass** which should help the obesity and sleep apnea. This is life threatening per Dr. Shah at this time. He has also received, and Dr. Elkanich has indicated will receive in the future, **cervical epidural injections**. Finally, he will require additional **lumbar sympatheic ganglion blocks** to get the CRPS under control. It is possible he will also require procedures for his shoulder and wrists, but at this juncture, these have not been recommended as necessary, only discussed by his different doctors.

**L. Recreational/Leisure Needs**

No specific recommendations have been made in this category.

**M. Architectural Modifications**

Mr. Rodriguez will require grab bars in any home he lives in but at this time there are no other specific architectural modifications he will require.

**N. Transportation**

Mr. Rodriguez will require **Mileage** to and from the appointments in this Life Care Plan. Using Map Quest, I have estimated this at approximately 500 miles each year at the IRS rate of \$.58/mile. This figure could change if he requires

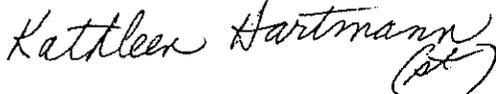
care outside of Las Vegas, Nevada or if the IRS rate changes. No other items are included on this table.

**O. Potential Complications**

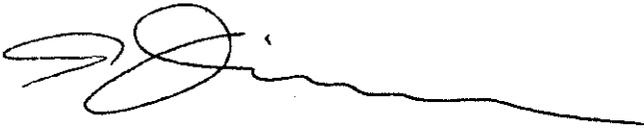
There are multiple complications to his many disabilities. This table is for information purposes only as there is no predictability to these conditions. The amount listed is a range provided by benchmarks and literature for the conditions listed. These complications could include **Risk for Falls, Depression with Risk for Suicide, Arthritic and Degenerative Changes accelerated by obesity and CRPS and Shoulder Degeneration with the need for Surgery.** These are listed or considered as medically possible not medically probable.

**(PLEASE SEE TABLES FOR COST ANALYSIS)**

Respectfully Submitted:



Kathleen R. Hartmann, RN, BSN, CCM



Terrance Dinneen, M.S., C.R.C.  
Certified Earnings Analyst #032  
Certified in Rehabilitation Economist #0022  
Certified Rehabilitation Counselor #20325

TD/st



**Life Care Plan Summary  
for  
Enrique Rodriguez**

**SUMMARY OF COSTS**

		<b><u>COSTS</u></b>	<b><u>PRESENT VALUE</u></b>
A. Projected Evaluations		\$ 73,043	\$ 61,690
B. Routine Medical Care	Low	\$ 259,765	\$ 215,005
	High	\$ 268,345	\$ 221,999
C. Projected Therapeutic Modalities		\$ 208,080	\$ 206,649
D. Diagnostic Testing		\$ 19,615	\$ 18,142
E. Medical Supplies/DME		\$ 35,539	\$ 32,185
F. Wheelchair Needs and Maintenance		\$ 8,244	\$ 5,057
G. Prosthetics~Orthotic and DME		\$ 25,420	\$ 18,779
H. Home Furnishings and Accessories		\$ 12,454	\$ 8,633
I. Drug and Supply Needs		\$ 340,448	\$ 252,314
J. Home Care		\$ 966,191	\$ 767,059
K. Future Medical Care & Surgeries	Low	\$ 442,340	\$ 442,340
	High	\$ 522,340	\$ 522,340
L. Leisure Time and Rec Equip		\$ -	\$ -
M. Architectural Renovation		\$ -	\$ -
N. Transportation		\$ 9,503	\$ 6,856
O. Potential Complications	Low	\$ 3,000	\$ 3,000
	High	\$ 325,000	\$ 325,000
<b>Total Including Complications</b>		<b>\$ 2,403,642</b>	<b>\$ 2,037,709</b>
		to	to
		<b>\$ 2,814,222</b>	<b>\$ 2,446,703</b>

**LIFE CARE PLAN  
TABLE A**

**Kathleen Hartmann, RN, BSN, CCM**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**A. PROJECTED EVALUATIONS**

Evaluation	Age/Year at Which Initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
Orthopedist Dr. Gutierrez	2008	2012	4x/yr Injections at the same	Cost for CPT 99203, 20605, 20526, J1030, J2001, A4550 \$1,296 Specialized Report 99080 \$80	22,016	21,886 <sup>3,11</sup>	For trigger thumb gets injections Per billing provided by Dr. Gutierrez and current schedule of visits
32.77 yrs*	2013	Lifetime	24 additional estimated		33,024	25,065 <sup>3,11</sup>	
Physical Therapy Evaluation	2008	Lifetime	4x/lifetime	Cost for CPT 97001 \$275/eval	1,100	930 <sup>3,11</sup>	To determine addt'l adaptive equipment needs in living environment
32.77 yrs*	2008	Lifetime	6 additional with spinal stimulator placement	CPT 99245 \$600/visit for eval See Table K for surgical consults/tx	3,600	2,961 <sup>3,11</sup>	
Surgeon Dr. Vader	2009	Lifetime	Every other year	CPT11730 - \$160 11750 - \$565 J3490 - \$ 7.50 99212 - \$50 \$782.50	13,303	10,849 <sup>3,11</sup>	Dr. Stacey -- ingrown toenails every other year visits -- due to CRPS per Dr. Miller, Dr. Shah and Dr. Stacey
31.77 yrs*							
<b>TOTAL COST \$ 73,043</b>						<b>\$61,690</b>	

\* See narrative for Life Expectancy for explanation of this figure - 32.77 yrs.

\*\* Unit cost based on usual and customary in Las Vegas, NV and Riverside, CA -- if billing available used that pricing if not called similar or same specialties and asked for pricing.

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.6%
- 2 MED CARE SERVICES 3.9%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.9%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%
- 8 COULD NOT BE STATED IN PRESENT VALUE 11 DISCOUNT RATES: 5 year = 3.71%;
- 9 CONSUMER PRICE INDEX (CORE) 2.4% 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE B**

*Kathleen Hartmann, RN, BSN, CCM*

CLIENT NAME: Enrique Rodriguez  
D.O.B : 07/15/1963  
D.O.I : 11/22/2004  
DATE PREPARED: 10/10/2008

**B. Routine Medical Care**

Evaluation	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
Dr. Elkanich Ortho Spine for neck 32.77 yrs*	2008	Lifetime	1-2x/yr - needs to go October until surgery neck which is unknown	99215 - \$260 Per visit does not include procedure \$260 - \$520/yr	8,580-17,160	6,994 - 13,988 <sup>3,11</sup>	Dr. Brian Lemper as needed for facet blocks or rhizotomies
Dr. Thalgot for Spine and neck 32.77 yrs*	2008	Lifetime	6x/year	99215 - \$260 Per visit does not include procedure \$260 - \$1,560/yr	51,220	41,796 <sup>3,11</sup>	Dr. Brian Lemper as needed for facet blocks or rhizotomies
Internal Med/GP Dr. Koka 32.77 yrs*	2008	Lifetime	1x/month (prior to accident 1x/yr visits)	CPT 99214 - \$239/visit \$2,629/yr	86,040	70,253 <sup>3,11</sup>	Followed by Dr. Koka for medication and for his obesity and general health needs
Orthopedist Dr. Gutierrez 32.77 yrs*	2008	Lifetime	See Table A	See Table A	See Table A	See Table A	Dr. Gutierrez see Table A
Neurologist Dr. Russell Shah 32.77 yrs*	2008	Lifetime	6x/year	CPT 99245 or 99214 with 99080 \$400/visit \$2,400/yr	78,800	64,302 <sup>3,11</sup>	Neurologist seeing him for his hands and other problems

Evaluation	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
ENT for Sleep Apnea Dr. Kim Nevada ENT (702) 838-9710 32.77	2008	Lifetime	2x/year	CPT 99213 - \$185 /visit \$370/yr	12,025	9,835 <sup>3,11</sup>	Sleep apnea diagnosed due to excessive weight gain with knee and spinal injuries per Dr. Shah and Thalgott
Pain Psychologist Dr. L. Mortillaro 32.77	2008 2013	2012 Lifetime	2x/month for maintenance 36 add't'l estimate	CPT 99213 - \$175/visit \$ 4,200/yr	16,800 6,300	16,701 <sup>3,11</sup> 5,124 <sup>3,11</sup>	Per Dr. Mortillaro may require for lifetime but until pain under control it is necessary

TOTAL COST \$ 259,765-268,345 \$215,505-221,999

\* See narrative for life expectancy (Section VI). Life expectancy - 32.77 yrs.  
 \*\* Unit cost based on billing or usual and customary in Las Vegas, NV and Riverside, CA - if no billing available will require revision with receipt of actual billing.

- GROWTH RATES:
- 1 MED CARE COMMODITIES 2.6%
  - 2 MED CARE SERVICES 3.9%
  - 3 PROFESSIONAL SERVICES 3.3%
  - 4 HOSPITAL RELATED 6.9%
  - 5 TOTAL MEDICAL CPI 3.3%
  - 6 EMPLOYMENT COST INDEX 3.1%
  - 7 OCCURRING IN NEXT 12 MONTHS 6.9%
  - 8 COULD NOT BE STATED IN PRESENT VALUE 3.3%
  - 9 CONSUMER PRICE INDEX (CORE) 3.1%
  - 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%
  - 11 DISCOUNT RATES: 5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE C**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**Kathleen Hartmann, RN, BSN,CCM**

**C. PROJECTED THERAPEUTIC MODALITIES**

Modality	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
Physical Therapy 32.77 yrs*	2008	2012	3x/week pool and manual therapy	\$210/pool \$45/exercise \$25/elec stim packs \$305/visit \$47,580/yr	190,320	189,194 <sup>3,11</sup>	Russell Shah, MD neurologist Rx for rt shoulder, neck, back, knee therapy at this time – also recommended by Dr. Thaitgott.
Matt Smith PT now Kelly Hopkins	2013	Lifetime	Unknown – estimate 48 add'l visits		14,640	14,353 <sup>3,11</sup>	
Nutritionist until weight loss complete 32.77 yrs*	2008	2012	1x/month	CPT – 97803 \$65/visit	3,120	3,102 <sup>3,11</sup>	Dr. Shah has recommended bypass will require nutritional counseling before and after
<b>Total Cost \$ 208,080</b>					<b>\$ 206,649</b>		

\* See Life Expectancy in narrative – 32.77 yrs.  
 \*\* Costs calculated from billing provided and when no billing available called MDs and/or same specialty practices in the Las Vegas, NV Geographic area.

**GROWTH RATES:**  
 1 MED CARE COMMODITIES 2.8% 4 HOSPITAL RELATED 6.8% 7 OCCURRING IN NEXT 12 MONTHS 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%  
 2 MED CARE SERVICES 3.8% 5 TOTAL MEDICAL CPI 3.3% 8 COULD NOT BE STATED IN PRESENT VALUE 11 DISCOUNT RATES: 5 year = 3.71%;  
 3 PROFESSIONAL SERVICES 3.3% 6 EMPLOYMENT COST INDEX 3.1% 9 CONSUMER PRICE INDEX (CORE) 2.4% 10 year = 4.22%; 30 year = 4.77%

LIFE CARE PLAN  
TABLE D

Kathleen Hartmann, RN, BSN, CCM

CLIENT NAME: Enrique Rodriguez  
D.O.B : 07/15/1963  
D.O.I : 11/22/2004  
DATE PREPARED: 10/10/2008

D. DIAGNOSTIC TESTING

Testing**	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
MRI/CT of lumbar spine			4 addt'l	CPT - \$1,800	7,200	6,578 <sup>2,11</sup>	To monitor degeneration of the spine and need for additional intervention as well as the knee
MRI/CT of cervical spine	2009	Lifetime	4 addt'l	CPT - \$1,800	7,200	6,578 <sup>2,11</sup>	
MRI/CT left knee 32.77 yrs*			2 addt'l with replacement	CPT 73721 - \$1,430	2,860	2,860 <sup>8,11</sup>	
Urinalysis 32.77 yrs*	2008	2028 to age 65	1x/year additional	CPT 81001 - \$32/test	672	630 <sup>2,11</sup>	For general health and monitor health
HGB/CBC 32.77 yrs*	2008	2028 to age 65	1 addt'l/year	CPTs 85025 - \$27.15 85016 - \$12.60 \$39.75/yr	835	783 <sup>2,11</sup>	For general health and monitor health
Liver Studies 32.77 yrs*	2008	2028 to age 65	1 addt'l/year	CPTs 80076 \$20.37/test	428	401 <sup>2,11</sup>	For general health and monitor health

Testing**	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
Flu Shot	2008	2028 to age 65	1 year	\$20/shot	420	312 <sup>1,11</sup>	For general health and monitor health
32.77 yrs*							
<b>TOTAL COST \$</b>					<b>19,615</b>	<b>\$ 18,142</b>	

\* See Life Expectancy Narrative – 32.77 yrs  
 \*\* Cost from billings and from similar or same provider in the Las Vegas, NV, geographic area.

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.8%
- 2 MED CARE SERVICES 3.5%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.8%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 COULD NOT BE STATED IN PRESENT VALUE
- 9 CONSUMER PRICE INDEX (CORE) 2.4%
- 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

**11. DISCOUNT RATES:**

5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE E**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**Kathleen Hartmann, RN, BSN, CCM**

**E. DURABLE MEDICAL EQUIPMENT**

Equipment	Age/Year at which Initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Vendor
Wingit Grab Bars 30.77 yrs*	2010	Lifetime	3 addtl sets if moves	12" - \$46.99 18" - \$54.99 \$101.98	306	243 <sup>1,11</sup>	Heavy duty holds over 300 lbs <a href="http://www.sammonspreston.com">www.sammonspreston.com</a>
Additional aids for Independent Function 32.77 yrs*	2008	Lifetime	1 every 3 years Total of 11	\$250/yr	2,750	2,073 <sup>1,11</sup>	To be determined by PT evaluation (see Table A)
Cane 32.77 yrs*	2008	Lifetime	1 every 3 yrs (11)	\$21.00	231	174 <sup>1,11</sup>	<a href="http://www.spinlife.com">www.spinlife.com</a> Prescribed by Dr. Miller and Gutierrez
CPAP with humidifier Filter for CPAP 32.77 yrs*	2011 2008	2013 2013	1 every 5 yrs. (6) monthly	\$1757.80 \$9.00 or \$108/yr	1,758 540	1,600 <sup>1,11</sup> 529 <sup>1,11</sup>	To be determined by PT evaluation (see Table A)
CPAP Supplies mask and tubing Nose clamp sterile water 32.77 yrs*	2008 2014	2013 Lifetime	Monthly unknown	\$196.46 mask \$66.38 headgear \$47.44 pillows \$68.50 tubing \$378.78/month \$4,545.36/yr	22,727 unknown	22,245 <sup>1,11</sup> To be determined	Recommended by Dr. Koka and will need this until he loses weight and possibly after if sleep apnea remains after wt loss unknown Nevada Sleep Diagnostics and Quality Respiratory Solutions

Equipment	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Vendor
Heavy Duty Walker (375 lbs) 32.77 yrs*	2008	Lifetime	Every other year (17)	\$219	3,723	2,756 <sup>1,11</sup>	www.spinlife.com Prescribed by Dr. Shah and is used intermittently
Cervical collar 31.77 yrs*	2009	Lifetime	1 every 3 years (11 additional)	\$32.95/collar	363	273 <sup>1,11</sup>	North Valley Med Supply Uses a couple times of week for tiredness in neck replace every other year prescribed by Dr. Thalgott
Bilateral hand braces Trigger finger brace 32.77 yrs*	2008	Lifetime	Replace both annually	\$14.95 each \$29.90/pair	987	730 <sup>1,11</sup>	North Valley Med Supply Prescribed by Dr. Gutierrez still uses when he goes out or pain increases unable to have surgery at this time
Regular crutches 32.77 yrs*	2010	Lifetime	Every other year	\$40.70/pair	651	472 <sup>1,11</sup>	Prescribed originally by Nork, then Miller www.spinlife.com
Deluxe Shower Bench with Back (300 lbs) 32.77 yrs*	2010	Lifetime	Every 2 yrs	\$70.00/chair	1,120	811 <sup>1,11</sup>	Dr. Koka and others due to instability in left leg and risk of falls www.spinlife.com
Invacare Hand held shower 32.77 yrs*	2010	Lifetime	Every other year	\$24.00	384	278 <sup>1,11</sup>	Dr. Koka and others due to instability in left leg and risk of falls www.spinlife.com

**TOTAL COST \$ 35,539      \$ 32,185**

\* For life expectancy see narrative in Life Care Plan - 32.77 yrs.

\*\*Billing as noted in the vendor column. No actual billing received as of yet - will require revision upon receipt.

**GROWTH RATES:**

1 MED CARE COMMODITIES	2.8%	5 TOTAL MEDICAL CPI	3.3%	9 CONSUMER PRICE INDEX (CORE)	2.4%
2 MED CARE SERVICES	3.8%	6 EMPLOYMENT COST INDEX	3.1%	10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS)	3.3%
3 PROFESSIONAL SERVICES	3.3%	7 OCCURRING IN NEXT 12 MONTHS			
4 HOSPITAL RELATED	6.9%	8 COULD NOT BE STATED IN PRESENT VALUE			

**11. DISCOUNT RATES:**

5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE F**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**Kathleen Hartmann, RN, BSN,CCM**

**F. WHEELCHAIR NEEDS/ACCESSORIES AND MAINTENANCE**

Equipment	Age/Year at which Initiated	Age/Year at which suspended	Frequency	Unit Cost*	Total Cost	Present Value	Vendor
Trailblazer 4 wheel scooter Maintenance			Every 6 yrs (2)	\$1,997	3,994	2,473 <sup>1,11</sup>	<a href="http://www.planetmobility.com">www.planetmobility.com</a>
2 - 12 Volt U1 32 AH Batteries	Age 65	Lifetime	Annual (13)	\$120/each	1,560	1,029 <sup>6,11</sup>	<a href="http://www.planetmobility.com">www.planetmobility.com</a>
Battery Charger			Every 2 yrs (6)	\$129.00/pair	774	428 <sup>9,11</sup>	<a href="http://www.planetmobility.com">www.planetmobility.com</a>
Flat Free Tires			1 every 3 yrs (4) 2 sets/3 yrs (8)	\$351.00	1,404	825 <sup>1,11</sup>	<a href="http://www.planetmobility.com">www.planetmobility.com</a>
12.77 yrs**				\$64/set	512	301 <sup>1,11</sup>	<a href="http://www.planetmobility.com">www.planetmobility.com</a>
<b>TOTAL</b>					<b>\$ 8,244</b>	<b>\$ 5,057</b>	

\* For life expectancy see narrative in Life Care Plan - 32.77 yrs.

\*\* Pricing as noted in the vendor column.

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.8%
- 2 MED CARE SERVICES 3.9%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.9%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 COULD NOT BE STATED IN PRESENT VALUE
- 9 CONSUMER PRICE INDEX (CORE) 2.4%
- 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

**11 DISCOUNT RATES:**

- 5 year = 3.71%, 10 year = 4.22%, 30 year = 4.77%

LIFE CARE PLAN  
TABLE G

CLIENT NAME: Enrique Rodriguez  
D.O.B : 07/15/1963  
D.O.I : 11/22/2004  
DATE PREPARED: 10/10/2008

Kathleen Hartmann, RN, BSN, CCM

G. PROSTHETICS AND ORTHOTICS

Equipment	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost	Total Cost	Present Value	Recommended by
Eagle Knee brace 31.77 yrs*	2009	Lifetime	2 yrs total of 16	L-1858 \$1,495 A9901 \$93.75 \$1,588.75/brace	25,420	18,779 <sup>11</sup>	Dr. Gutierrez Pricing based on billing from provider
Bilateral Wrist Braces lace up 32.77 yrs*	2008	Lifetime	See Table E	See Table E	See Table E	See Table E	Dr. Gutierrez Pricing based on billing from provider
<b>TOTAL COST \$ 25,420</b>					<b>\$ 18,779</b>		

\* For life expectancy see narrative in Life Care Plan -- 32.77 yrs.

GROWTH RATES:

- 1 MED CARE COMMODITIES 2.6%
- 2 MED CARE SERVICES 3.9%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.9%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 CONSUMER PRICE INDEX (CORE) 2.4%
- 9 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

11 DISCOUNT RATES:

- 5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE H**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**Kathleen Hartmann, RN, BSN,CCM**

**H. HOME FURNISHINGS/ACCESSORIES**

Furnishing	Age/Year at which initiated	Age/Year at which suspended	Frequency	Unit Cost**	Total Cost	Present Value	Recommended by
Dr. Thalgott prescribed an Adjustable Bed	2019	Lifetime	Every 15 yrs for total of 2 addt'l	\$3,899 bed \$1,299 mattress \$429 Remote \$600 delivery/setup \$8,109.27/bed	11,254	7,735 <sup>1,11</sup>	Dr. Thalgott first bed purchased 10/1/06 has replacement in 10-12 years - Invoice from North Valley Medical Supply
32.77 yrs*				1,200		898 <sup>6,11</sup>	
<b>TOTAL COST \$ 12,454</b>					<b>\$ 8,633</b>		

\* For life expectancy see narrative in Life Care Plan -- 32.77 yrs.  
 \*\*Telephoned North Valley Medical Supply and they provided estimate of replacement at 10-15 years.

- GROWTH RATES:**
- 1 MED CARE COMMODITIES 2.6%
  - 2 MED CARE SERVICES 3.9%
  - 3 PROFESSIONAL SERVICES 3.3%
  - 4 HOSPITAL RELATED 6.9%
  - 5 TOTAL MEDICAL CPI 3.3%
  - 6 EMPLOYMENT COST INDEX 3.1%
  - 7 OCCURRING IN NEXT 12 MONTHS
  - 8 CONSUMER PRICE INDEX (CORE) 2.4%
  - 9 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%
  - 10 COULD NOT BE STATED IN PRESENT VALUE

**11.DISCOUNT RATES:**  
 5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE I**

**Kathleen Hartmann, RN, BSN,CCM**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**I. DRUG & SUPPLY NEEDS**

Drug/Drug Supply**	Purpose	Cost/Unit** Cost/per year	Total Cost	Present Value	Vendor/Recommendation
Vallium 10mg As needed 32.77 yrs*	Anti anxiety	\$390.21/100 Rarely takes these (80/yr) \$312.17/yr	10,230	7,619 <sup>1,11</sup>	Using name brand generic Is less expensive and not always as effective <b>Current prescription</b> <a href="http://www.costco.com">www.costco.com</a>
Albuterol Inhaler As needed 32.77 yrs*	Shortness of breath Pre acc	Pre accident medication	0	N/A	<b>Current prescription</b>
Hydrocodone 7.5 mg/750mg 3x/day 32.77 yrs*	Pain	\$41.99/90 #1095/yr \$511/yr	16,741	12,408 <sup>1,11</sup>	<b>Current prescription</b> Walgreen's billing
Morphine 30 mg 3x/day 32.77 yrs*	Pain	\$117.59/90 #1095/yr \$1,430.68	46,883	34,749 <sup>1,11</sup>	<b>Current prescription</b> <a href="http://www.drugstore.com">www.drugstore.com</a>
Effexor XR 37.5 mg 32.77 yrs*	Anxiety and depression	\$251.99/60 of 75 mg 1/2 ea day #183/yr \$769/yr	25,186	18,667 <sup>1,11</sup>	<b>Current prescription</b> <a href="http://www.costco.com">www.costco.com</a>

Drug/Drug Supply**	Purpose	Cost/Unit** Cost/per year	Total Cost	Present Value	Vendor/Recommendation
Topamax 100mg 2x/day 32.77 yrs*	headaches	\$403.99/60 #730/yr \$4,915/yr	161,071	119,381 <sup>1,11</sup>	Dr. Shah by Dr. Koka Current prescription <a href="http://www.costco.com">www.costco.com</a>
Lovastatin 20mg 1x/day 32.77 yrs*	High Cholesterol	\$29.99/30 #365/yr \$365/yr	11,957	8,862 <sup>1,11</sup>	Dr. Koka Current prescription <a href="http://www.costco.com">www.costco.com</a>
Cyclobenzaprine 10mg 1x/day 32.77 yrs*	Muscle Relaxant	\$16.99/30 #365/yr \$207/yr	6,774	5,021 <sup>1,11</sup>	Current prescription <a href="http://www.costco.com">www.costco.com</a>
Doc-Q-Lace 100mg 3x/day 32.77 yrs*	Constipation	\$469/30 3x365 #1095/yr \$171/yr	5,610	4,158 <sup>1,11</sup>	Current prescription <a href="http://www.drugstore.com">www.drugstore.com</a>
Enulose Syrup 30gm 2x/day 32.77 yrs*	Constipation	\$17.19/bottle 1/month \$206/yr	6,760	10,157 <sup>1,11</sup>	Current prescription <a href="http://www.netcarepharmacies.com">www.netcarepharmacies.com</a>
Singulair 10 mg 1x/day 32.77 yrs*	Shortness of breath	Pre-accident medication	0	N/A	Current prescription <a href="http://www.costco.com">www.costco.com</a>
Advair Disk 250/50 2x/day 32.77 yrs*	Shortness of breath	Pre-accident medication	0	N/A	Current prescription <a href="http://www.costco.com">www.costco.com</a>
Mupirocin 22gm 2% 2x/day 32.77 yrs*	Topical antibiotic cream	\$21.64/tube #1 tube/mo \$259.68/yr	8,510	6,307 <sup>1,11</sup>	Current prescription <a href="http://www.costco.com">www.costco.com</a>

Drug/Drug Supply**	Purpose	Cost/Unit** Cost/per year	Total Cost	Present Value	Vendor/Recommendation
Viagra 100 mg prn 32.77 yrs*	Sexual dysfunction	\$413.53/30 #90/yr \$1,240.59	40,654	30,132 <sup>1,11</sup>	Refills used to Estimate usage Current prescription www.costco.com

**TOTAL COST \$ 340,488 \$ 252,314**

\* See Life expectancy in the narrative portion - 32.77 yrs  
 \*\* Drugs and dosages based on last reporting and information provided by last reporting - awaiting additional information and this will require a revision of this table at that time if pricing significantly different. Utilized Costco and other pricing as indicated. Mr. Rodriguez will be providing Walgreens pricing at a later date if possible.

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.6%
- 2 MED CARE SERVICES 3.9%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.9%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 COULD NOT BE STATED IN PRESENT VALUE
- 9 CONSUMER PRICE INDEX (CORE) 2.4%
- 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

**DISCOUNT RATES:**

- 6 year = 3.71%; 10 year = 4.22%;30 year = 4.77%

**LIFE CARE PLAN  
TABLE J**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**Kathleen Hartmann, RN, BSN, CCM**

**J. HOME CARE**

Home Care Services Recommended	Year at which initiated	Year at which suspended *	Frequency	Purpose	Cost per Year*	Total Cost	Present Value
Home Health Assistant 32.77 yrs*	2008	Lifetime	4.5 hrs/day with hair/bathing	Assist with ADLs	\$18/hour \$29,484	966,191	767,059 <sup>6,11</sup>
<b>TOTAL</b>						<b>\$966,191</b>	<b>\$ 767,059</b>

\* See Life Expectancy in narrative - 32.77 yrs.  
 \*\* Pricing per Coram and or Gentiva in the Las Vegas, NV area. Household services determined by Mr. Dinneen.

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.6%
- 2 MED CARE SERVICES 3.6%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.9%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 CONSUMER PRICE INDEX (CORE) 2.4%
- 9 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

**DISCOUNT RATES:**

- 5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

LIFE CARE PLAN  
TABLE K

CLIENT NAME: Enrique Rodriguez  
D.O.B : 07/15/1963  
D.O.I : 11/22/2004  
DATE PREPARED: 10/10/2008

Kathleen Hartmann, RN, BSN, CCM

K. FUTURE MEDICAL CARE AND SURGERIES

Recommendations	Year at which initiated	Year at which suspended	Frequency	Purpose	Unit Cost**	Total Cost	Present Value
Left Total Knee replacement Dr. Shah 32.77 yrs*	Unknown Due to CRPS	Lifetime	1 or 2x in lifetime	Will require during lifetime to replace left knee damaged in accident	80,000	80,000- 160,000	80,000 - 160,000 <sup>8</sup>
Spinal Stimulator had trial July 14 <sup>th</sup> helped 32.77 yrs*	2008	2009	Permanent to be placed by Dr. Vader	Pain control and control of symptoms of chronic pain disorder Trial completed	Perm - \$96,145(2) Elec -- \$10,310 (5) Battery \$4,000 (8) Remove - \$9,320(2)***	192,290 51,550 32,000 18,640	192,290 <sup>7</sup> 51,550 <sup>7</sup> 32,000 <sup>7</sup> 18,640 <sup>7</sup>
Gastric Bypass 32.77 yrs*	Unknown	Lifetime	1x/lifetime	Obesity - cost includes surgeon fees, anesthesia, 3 day stay and assistant as well as f/u	\$17,400	17,400	17,400 <sup>8</sup>
Lumbar Sympathetic Ganglion Blocks 32.77 yrs*	Unknown	Lifetime	Estimate 10 add'l in lifetime per reporting	CRPS - left knee pain	\$1,470/block	14,700	14,700 <sup>8</sup>

Recommendations	Year at which initiated	Year at which suspended	Frequency	Purpose	Unit Cost**	Total Cost	Present Value
Epidural – cervical injections 32.77 yrs*	2008	Lifetime	Estimate 12 add'l in lifetime per reporting	Pain reduction for cervical pain recommended by multiple physicians	\$2,725/injection \$255/MD eval \$2,980/Injection	35,760	35,760 <sup>8</sup>
<b>TOTAL COST</b>						<b>\$ 422,340- 522,340</b>	<b>\$442,340- 522,340</b>

\* See narrative for life expectancy – 32.77 yrs.  
 \*\*Pricing based on facilities in Las Vegas, NV and Riverside, CA . When billing available , pricing based on billing.  
 \*\*\* PERMANENT IMPLANTATION

Other costs to consider would include additional psychological counseling, medications for depression and other side effects of the chronic pain, pain from implantation and side effects of the procedures. These cannot be calculated.

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.8% 5 TOTAL MEDICAL CPI 3.3% 9 CONSUMER PRICE INDEX (CORE) 2.4%
- 2 MED CARE SERVICES 3.8% 8 EMPLOYMENT COST INDEX 3.1% 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%
- 3 PROFESSIONAL SERVICES 3.3% 7 OCCURRING IN NEXT 12 MONTHS
- 4 HOSPITAL RELATED 8.9% 8 COULD NOT BE STATED IN PRESENT VALUE

**11.DISCOUNT RATES:**

5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE L**

**Kathleen Hartmann, RN, BSN, CCM**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**L. LEISURE TIME/RECREATIONAL EQUIPMENT/SCHOOL**

Equipment	Year Initiated	Frequency	Unit Cost	Total Cost
None recommended	n/a	n/a	n/a	0

**TOTAL COST \$ 0**

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.6%
- 2 MED CARE SERVICES 3.9%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.9%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 COULD NOT BE STATED IN PRESENT VALUE
- 9 CONSUMER PRICE INDEX (CORE) 2.4%
- 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

**DISCOUNT RATES:**

5 year = 3.71%, 10 year = 4.22%, 30 year = 4.77%

**LIFE CARE PLAN  
TABLE M**

**Kathleen Hartmann, RN, BSN, CCM**

**CLIENT NAME: Enrique Rodriguez  
D.O.B : 07/15/1963  
D.O.I : 11/22/2004  
DATE PREPARED: 10/10/2008**

**M. ARCHITECTURAL RENOVATION**

Item	Age/Year Initiated	Frequency	Total Cost
None recommended	n/a	n/a	0

**TOTAL COST \$ 0**

**LIFE CARE PLAN  
TABLE N**

**Kathleen Hartmann, RN, BSN, CCM**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**N. TRANSPORTATION**

Recommendations	Year at which initiated	Year at which suspended	Unit Cost	Total Cost	Present Value	Recommended by
Mileage** 32.77 yrs*	2008	Lifetime	\$.58/mile Average 500 miles/yr \$290/yr	9,503	6,856 <sup>9,11</sup>	Additional required visits per this Life Care Plan will require revision if plan revised

**TOTAL COST \$ 9,503 \$ 6,856**

\* See narrative for Life Expectancy - 32.77 yrs  
 \*\* Factored into the mileage are all appointments if she moves from facility. Map Quest used to calculate mileage to different appointments. Utilizing current IRS rates.

**GROWTH RATES:**

- 1 MED CARE COMMODITIES 2.8%
- 2 MED CARE SERVICES 3.9%
- 3 PROFESSIONAL SERVICES 3.3%
- 4 HOSPITAL RELATED 6.9%
- 5 TOTAL MEDICAL CPI 3.3%
- 6 EMPLOYMENT COST INDEX 3.1%
- 7 OCCURRING IN NEXT 12 MONTHS
- 8 COULD NOT BE STATED IN PRESENT VALUE
- 9 CONSUMER PRICE INDEX (CORE) 2.4%
- 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

**11 DISCOUNT RATES:**

5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

**LIFE CARE PLAN  
TABLE O**

**CLIENT NAME:** Enrique Rodriguez  
**D.O.B :** 07/15/1963  
**D.O.I :** 11/22/2004  
**DATE PREPARED:** 10/10/2008

**Kathleen Hartmann, RN, BSN, CCM**

**O. POTENTIAL COMPLICATIONS**

Complication	Estimated Costs*	Present Value
Risk for Falls	500 - 50,000	500-50,000 <sup>8</sup>
Depression with Risk of Suicide	500 - 150,000	500-150,000 <sup>8</sup>
Arthritic/Degenerative Changes accelerated by Obesity	1,000 - 65,000	1,000-65,000 <sup>8</sup>
Degenerative Shoulder Changes Requiring Treatment and Surgery	1,000 - 60,000	1,000-60,000 <sup>8</sup>
<b>TOTAL COST \$ 3,000 - 325,000</b>		<b>\$ 3,000-325,000</b>

\*No predictive value, provided for information purposes only.

- GROWTH RATES:**
- 1 MED CARE COMMODITIES 2.8%
  - 2 MED CARE SERVICES 3.6%
  - 3 PROFESSIONAL SERVICES 3.3%
  - 4 HOSPITAL RELATED 6.8%
  - 5 TOTAL MEDICAL CPI 3.3%
  - 6 EMPLOYMENT COST INDEX 3.1%
  - 7 OCCURRING IN NEXT 12 MONTHS
  - 8 COULD NOT BE STATED IN PRESENT VALUE
  - 9 CONSUMER PRICE INDEX (CORE) 2.4%
  - 10 CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) 3.3%

**DISCOUNT RATES:**  
 5 year = 3.71%; 10 year = 4.22%; 30 year = 4.77%

# **EXHIBIT M**

ORIGINAL

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DISTRICT COURT  
CLARK COUNTY, NEVADA

*Alan D. Schuman*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ,	)	
	)	
Plaintiff,	)	CASE NO. A-531538
	)	
v.	)	DEPT. X
	)	
FIESTA PALMS LLC,	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MONDAY, NOVEMBER 8, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. WALTER KIDWELL

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

CLERK OF THE COURT

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Denver (303) 634-2295

EXHIBIT M

1 THE COURT: Very well.

2 BY MR. BAKER:

3 Q Have all of the opinions you've been given just now  
4 to a reasonable degree of medical probability?

5 A Yes.

6 Q Thank you.

7 [Pause]

8 THE COURT: Mr. Ward.

9 MR. WARD: Thank you, Your Honor.

10 THE COURT: Whenever you're ready.

11 [Pause]

12 CROSS-EXAMINATION

13 BY MR. WARD:

14 Q Good morning, Dr. Kidwell.

15 A Good morning, sir.

16 Q Now do you know who Dr. Thalgott is?

17 A Yes, I do.

18 Q Who's Dr. Thalgott?

19 A He's an orthopedic spine surgeon.

20 Q He's an orthopedic spine surgeon.

21 A That's correct.

22 Q And now, do you ever refer patients to Dr. Thalgott?

23 A Yes, I do.

24 Q You do. Why do you refer them to Dr. Thalgott?

25 A Because he's an excellent spine surgeon.

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Denver (303) 634-2295

1 Q And do you rely on him to make a diagnosis as to  
2 when surgery is appropriate?

3 A Yes, many times. Yes.

4 Q Well, if you -- what I'm asking -- and perhaps my  
5 question wasn't a very good one. If you had a patient who you  
6 had a question about whether they needed back surgery, and you  
7 referred him to -- him or her to Dr. Thalgott, you would  
8 expect Dr. Thalgott to do an independent evaluation.

9 A That's correct.

10 Q You wouldn't expect that you would make a  
11 determination of what kind of surgery would be performed and  
12 then just ask Dr. Thalgott to perform that?

13 A Oh, no. He's -- what surgery would need to be done  
14 would be strictly his call.

15 Q Okay. So --

16 A In my role, I have a pretty good feel for who might  
17 be surgical, but ultimately, the decision to do surgery is up  
18 to the surgeon.

19 Q Right. And when Dr. Thalgott does surgery and does  
20 it under some sort of an anesthetic, does he often have an  
21 anesthesiologist?

22 A Well, I would hope so.

23 Q Okay. He wouldn't do that himself?

24 A No.

25 Q He wouldn't make that call?

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Denver (303) 634-2295

1 A Yes.

2 Q Okay. Would you explain to the Judge why that is?

3 A Well, the knee is the primary pain component. Once  
4 you treat that, you see what's left, number one. Number two,  
5 the spinal cord stimulator now can cover back pain and leg  
6 pain. That's new technology. Two years ago you couldn't make  
7 that statement. Spinal cord stimulator wouldn't treat leg  
8 pain.

9 Usually in the context of a failure back surgery  
10 syndrome, but RSD is certainly an indication for it as well.  
11 But now the technology exists that with a tripole technology,  
12 we can cover back pain from about L-1 on down pretty reliably.

13 Q And Dr. Schifini testified that he actually put a  
14 lead to his back on the temporary spinal cord stimulator.

15 A Right.

16 Q And that that didn't help his back pain except  
17 transiently. Did you understand that?

18 A I didn't know that, but whether I did or not is  
19 irrelevant because that was done more than two years ago if I  
20 recall.

21 Q Correct. Now you've stated that you know  
22 Dr. Thalgott, is that right?

23 A That's correct.

24 Q And he's a good surgeon?

25 A He's a great surgeon.

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Denver (303) 634-2295

1 Q And you've transferred patients back and forth with  
2 him?

3 A Yes.

4 Q Would Dr. Thalgott ever recommend surgery on a  
5 person awaiting a spinal cord stimulator for his knee that  
6 he's unable to get?

7 MR. WARD: Object, no foundation for this. We don't know  
8 what Dr. Thalgott has to say about this. This is speculative.

9 THE COURT: Mr. Baker.

10 MR. BAKER: He said he understands Dr. Thalgott. They  
11 refer patients back and forth. He's had experience with  
12 patients with Dr. Thalgott and he's aware for the standards  
13 for prescribing surgery and recommending surgery in patients.

14 MR. WARD: Your Honor, this witness said on  
15 cross-examination that he didn't know what was in  
16 Dr. Thalgott's mind and that he couldn't even interpret  
17 Dr. Thalgott's suspicions in his medical records. So, how he  
18 could possibly offer this kind of an opinion is without  
19 foundation.

20 THE COURT: Well, let me ask you this, Mr. Baker. The  
21 way you phrased your question, it was a general one. Does it  
22 apply to specifically the Plaintiff?

23 MR. BAKER: Huh-uh, general.

24 THE COURT: General question?

25 MR. BAKER: Yeah, but I can restate the question.

**AVTranz**

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Denver (303) 634-2295

1 THE COURT: Well, let's have you restate it then as it  
2 applies to Plaintiff.

3 BY MR. BAKER:

4 Q Would it be acceptable to recommend surgery for  
5 Enrique Rodriguez on his back when he is still suffering from  
6 an untreated RSD on his knee?

7 A I have not seen Dr. Thalgott do that, so I don't  
8 think so.

9 Q Okay. And it's nothing that you would recommend?

10 A Uh-uh.

11 Q And because you will continue to have the postural  
12 changes, is that correct?

13 A Correct.

14 Q And will you explain to the Judge, is there a cycle  
15 associated with the back pain and the postural changes, the  
16 limping and the use of assistive devices?

17 A When his pain is bad, I would anticipate that he  
18 would have an altered gait, altered posture, and that would  
19 adversely affect his back.

20 Q And we've heard testimony in this Court as well  
21 about the fact that if back surgery was done before his knee  
22 was repaired, he would likely rip out that back surgery due to  
23 the continued postural changes. Do you have an opinion with  
24 respect to that?

25 MR. WARD: Objection, leading, argumentative.

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1 THE WITNESS: that would --

2 THE COURT: Overruled.

3 THE WITNESS: Oh.

4 THE COURT: You can answer the question, sir.

5 THE WITNESS: That would put asymmetric stress on the  
6 back and could, if you fused one level, it would probably  
7 accelerate adjacent segment breakdown.

8 BY MR. BAKER:

9 Q Another thing too, since Dr. Thalgott's reports,  
10 it's been three years, is that right?

11 A Correct.

12 Q Could you explain to a reasonable degree of medical  
13 probability to the Judge what's been occurring with respect to  
14 Enrique's back and neck as a result of continued postural  
15 changes?

16 A My suspicion is that it would continue to hurt and  
17 possibly get worse --

18 MR. WARD: Object.

19 THE WITNESS: -- mechanically.

20 MR. WARD: Move to strike. There's no foundation that  
21 this doctor knows what's been going on. In fact, the  
22 foundation is specifically to the contrary. He began his  
23 answer with, "My suspicion." It calls for speculation and no  
24 foundation.

25 THE COURT: Sustain the objection.

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1 BY MR. BAKER:

2 Q Doctor, in patients that you've treated who have  
3 continued to have postural changes over time, could you please  
4 explain to the Judge they cycle that they get into with  
5 respect to their pain complaints?

6 MR. WARD: Relevance unless it relates to this patient.

7 MR. BAKER: Well, he's a human being like any other human  
8 being, isn't he?

9 THE COURT: Overrule the objection.

10 THE WITNESS: As I said, my suspicion is most patients I  
11 would expect, I would anticipate would go on to have further  
12 pain as a result of their altered gait and posture.

13 BY MR. BAKER:

14 Q And does the altered gait and posture help the  
15 condition or does it hinder and hurt the condition?

16 A It hurts the condition. It makes it worse.

17 Q In what way?

18 A Continued asymmetric stress on the structure  
19 involved.

20 Q Thank you, Doctor.

21 MR. BAKER: No further questions, Your Honor.

22 BY MR. BAKER:

23 Q And is your opinion with respect to that last  
24 question to a reasonable degree of medical probability?

25 A Yes, sir, it is.

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1 MR. BAKER: Thanks to my team. I appreciate it.

2 THE COURT: Okay, Mr. Ward. Any follow-up?

3 MR. WARD: Yes, Your Honor.

4 RE CROSS-EXAMINATION

5 BY MR. WARD:

6 Q Doctor, the diagnosis you made on this patient is  
7 what, that he has some internal nerve fibers growing in his  
8 disc?

9 A No, the definition was internal disc disruption.

10 Q And you think that's what's causing the problem?

11 A Most likely, yes.

12 Q Okay. You haven't seen anything like that from  
13 Dr. Thalgott with respect to this patient, have you?

14 A Didn't he in one of his notes say this is discogenic  
15 pain?

16 Q I don't know. Did he?

17 A I saw it.

18 Q Did -- but you're suggesting that he's a surgical  
19 candidate, isn't that right?

20 A I'm suggesting he's a potential surgical candidate.

21 Q And Dr. Thalgott says unequivocally that he's not a  
22 surgical candidate, isn't that true?

23 A At that point and time, yes.

24 Q Well, at that point and time. You haven't seen this  
25 patient for how many years?

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1 A Three or four years.

2 Q And so all of the treatment that you're testifying  
3 to about occurring tot his patient and what he had got and  
4 what he needed in the last three-and-a-half years has all been  
5 since the very last time you saw this patient, is that true?

6 A True, but what you should be asking me is why do I  
7 think he's a potential surgical candidate. That's what we're  
8 not asking here.

9 Q But I'm not asking you that because you're an  
10 anesthesiologist. You're no spine surgeon. So you don't do  
11 spine surgeries, do you?

12 A Correct, but I --

13 Q Okay.

14 A -- send people to surgeons for surgery.

15 Q And you send people to spine surgeons to do  
16 evaluations and offer opinions?

17 A Well, I would think you'd want to know why I'm  
18 saying what I'm saying.

19 Q Isn't it true that you send them to spine surgeons  
20 to offer opinions?

21 A Correct.

22 Q And you expect them to look at the patient and  
23 evaluate them?

24 A Remember, Dr. Thalgott sent the patient to me, but  
25 I'll take them.

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1 Q Okay, so he sent the patient to you. Did he send  
2 this patient to you to tell him whether he should be doing  
3 surgery?

4 A No.

5 Q Okay. Thank you.

6 THE COURT: Mr. Baker?

7 FURTHER REDIRECT EXAMINATION

8 BY MR. BAKER:

9 Q So, why? So, why?

10 MR. WARD: Did he see it's the scope of the direct or the  
11 recross?

12 MR. BAKER: It's exactly the whole point of the recross,  
13 Your Honor.

14 THE COURT: I think the question is appropriate, but I'll  
15 ask you to narrow the focus some.

16 BY MR. BAKER:

17 Q Did you want to respond to the question why do you  
18 believe he's going to require a lumbar surgery?

19 A Yes, I mean I think that's the crux of the whole  
20 thing, why.

21 Q Give it to us.

22 A A surgeon will say they're not a surgical candidate  
23 at this point and time. He doesn't feel he's appropriate for  
24 surgery at this point and time. There is incomplete data,  
25 simply incomplete data.

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1           The hypothesis is that he has internal disc  
2 disruption in the lumbar spine. There are two basic  
3 structures that cause this kind of pain in the low back, discs  
4 and facet joints. Neither one of them have been explored as  
5 far as a potential pain generator.

6           The symptoms are most consistent with discogenic  
7 pain. It could be facet pain, but most consistently with  
8 discogenic or perhaps both. The way to prove or disprove the  
9 hypothesis is to do a discogram.

10          Q    And we talked about the fact that -- or you spoke  
11 about the fact that we don't want to cause pain, that your  
12 lumbar epidural injections aren't painful. Tell her about a  
13 discogram.

14          A    A discogram is very painful. It's the worst  
15 procedure I do on people. We don't take it lightly. You take  
16 a patient, you put needles in all the discs you are going to  
17 test, and under pressure you'll inject x-ray contrast to  
18 stretch the disc. If the disc is torn or causing discogenic  
19 pain, it hurts -- excuse my French -- it hurts like hell.  
20 It's extremely painful.

21           I've seen patients with Post-Traumatic Stress  
22 Disorder have discograms. It's something we don't take  
23 lightly and there are techniques to blunt the pain of it.

24          Q    And isn't actually the point of the discogram to re  
25 -- give me the word. It's called committing pain, but it's

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1 to --

2 A Reproduce.

3 Q -- reproduce --

4 A Reproduce the pain, identify the pain generator, and  
5 that's what this is all about is identifying the exact pain  
6 generator. You can look at an MRI and see multi level disc  
7 disease. You don't know what's hurting. You don't know which  
8 disc or which structure is actually causing that pain. And  
9 that's the purpose of these procedures, to determine exactly  
10 which structure would require surgery if surgery was an  
11 option.

12 Dr. Thalgott doesn't have any more information than  
13 I do. He's an excellent surgeon and I understand him  
14 completely. At that point and time, he's not a surgical  
15 candidate. He also has the specter of his knee problem, not a  
16 surgical candidate.

17 However, let's say he didn't have a knee problem and  
18 I did a discogram showing that he had maybe one or two levels  
19 positive. I guarantee he'd be a surgical candidate. And  
20 based by multiple reputable spine surgeons in this town.

21 Q And he --

22 A Now, I am not a spine surgeon. I admit it, but I  
23 sure work with them a lot.

24 Q And can I ask you to turn --

25 MR. WARD: Wait, I want to voice an objection. I object

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1 to the last response and I move to strike on the basis that  
2 it's speculative. He's talking about things that Dr. Thalgott  
3 might have done or would have done. Dr. Thalgott has not been  
4 here to testify. Dr. Thalgott hasn't seen the patient for  
5 several years. This gentleman hasn't seen the patient for  
6 several years. It is all speculative.

7 MR. BAKER: He's talking about the course of treatment  
8 that someone with a diagnosis of internal disc disruption.  
9 That's a recognize diagnosis within the community, a diagnosis  
10 he deals with all the time. He has a tremendous experience of  
11 individuals who are diagnosed with internal disc disruption.

12 He set the foundation, the fact that they ruled out  
13 a radicular component. He's testified to a reasonable degree  
14 of medical probability that the pain is discogenic rather than  
15 neurogenic and testified to a reasonable degree of probability  
16 that there's an internal disc disruption. There's a complete  
17 foundation for that question.

18 THE COURT: Any final thoughts, Mr. Ward?

19 MR. WARD: I won't waste the Court's time by repeating  
20 what I just said, Your Honor.

21 THE COURT: Objection is noted for the record.  
22 Overruled.

23 BY MR. BAKER:

24 Q Doctor, could you please turn to Exhibit 39, page  
25 19?

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# **EXHIBIT N**

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DISTRICT COURT  
CLARK COUNTY, NEVADA

*John D. Quinn*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
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v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE  
WEDNESDAY, NOVEMBER 3, 2010  
REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF FORREST P. FRANKLIN

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.  
Benson, Bertoldo & Baker  
  
For the Defendant: KENNETH C. WARD, ESQ.  
Archer Norris

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**EXHIBIT N**

1 felt comfortable about, something that you knew something  
2 about?

3 A I did.

4 Q Okay. And what were you asked -- well, first of  
5 all, when were you hired; do you remember?

6 A I want to say the second quarter of this year I  
7 produced the report on the 19th of August. So that seems  
8 right.

9 Q Okay. And what were you asked to do?

10 A To develop, unless I already had one, and render an  
11 opinion with respect to the standard of care as it relates to  
12 throwing objects, memorabilia, promotional articles into  
13 crowds.

14 Q Okay. Now the concept of throwing articles,  
15 memorabilia, whatever, into crowds, is that something that you  
16 were familiar with?

17 A I have been all my security career, yes, sir.

18 Q Okay. And, I mean, you didn't say: Oh, my  
19 goodness, I've never heard of anybody doing this?

20 A Let me do it another way. I never -- I've hardly  
21 ever heard of anybody not doing it.

22 Q Okay. And so in terms of what it was you did to  
23 prepare for this case, to prepare to give an opinion and write  
24 your report, what did you do?

25 A I reviewed some documentation, some depositions that

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1 your firm had taken. I looked at a document security manual  
2 from Palms, and I formed an opinion.

3 Q Okay. And after you formed an opinion did you  
4 prepare a report?

5 A I did, it's here as Exhibit 69.

6 Q Okay. And what opinion did you come to?

7 A That throwing memorabilia as a promotional effort  
8 into crowds is not a substandard protocol.

9 Q Okay. And are you familiar with other places that  
10 throw items into crowds?

11 A I am. In fact I've initiated processes where we've  
12 thrown items into many crowds, both in the philanthropic  
13 operations, as well as completely secure venues.

14 Q Okay. And with respect to organizations that you  
15 belong to, do you belong to any large organizations?

16 A I belong to ASIS International, which has 83,000  
17 members, of which as many as 30 to 50,000 attend an annual  
18 conference.

19 Q And have you attended the annual conference?

20 A Almost every year, with very few exceptions.

21 Q And that's a security group?

22 A It is a security group.

23 Q And do they throw items, promotional items into the  
24 audience at the conference?

25 A We do that two ways: the conference is a series of

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1 breakout sessions for educational purpose. It has a series of  
2 keynote speakers like Colin Powell, and Sully, the guy that  
3 crashed the plane into -- into the Hudson River. Somebody  
4 always of repute. And they had exhibits, and the exhibits  
5 there are, I think there were 1100 exhibitors almost every  
6 year.

7 They, the exhibitors, regularly throw packages of  
8 mints, hand sanitizer, young ladies from Stanley a couple of  
9 years ago threw small basketballs. The Canadian contingent in  
10 fact has Canada Night, which is a sort of adjunct breakout,  
11 threw hockey pucks, real life hard hockey pucks into the  
12 crowd.

13 So, yes. And that's impressive to me because this  
14 is the largest security organization on the planet, so clearly  
15 there's no standard that they reached.

16 Q Okay. And have you seen the Palms area where this  
17 incident occurred?

18 A Yes, sir, I have.

19 Q And was there anything about the Palms area where  
20 this occurred that you thought would preclude the tossing of  
21 promotional items to people that were there?

22 A Well, in fairness, given the time that I saw it,  
23 which is several years after the event, unless there were some  
24 drastic architectural or structural changes, I saw nothing  
25 that would have --

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1           Now she expected the security guards to tell them to  
2 stop throwing promotion items; is that right?

3           A     That's what I just heard, yes.

4           Q     And you read in her deposition too, that that's  
5 because throwing promotional items in the sports bar of a  
6 hotel created a foreseeable danger to people in that room?

7           A     That's what she said

8           MR. BAKER: Thank you. No further questions, Your Honor.

9           THE COURT: Very well. Mr. Ward?

10          MR. WARD: Yes, Your Honor.

11                                 REDIRECT EXAMINATION

12          BY MR. WARD:

13          Q     Mr. Franklin, if all of those things that Mr. Baker  
14 just said to you were true, then that suggests that someone  
15 violated the rules; is that correct?

16          A     Yes.

17          Q     Okay. With respect to the safety, is it your  
18 opinion as a security expert and a crowd control expert that  
19 it is unsafe to throw things into crowds?

20          A     It's my opinion it's not unsafe to throw things into  
21 crowds.

22          Q     So do you see any evidence that anyone  
23 conscientiously disregarded the safety of people?

24          A     No, I don't.

25          Q     And do you agree, you heard the testimony of Ms.

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# **EXHIBIT O**

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DISTRICT COURT  
CLARK COUNTY, NEVADA

*Ann D. Blum*  
CLERK OF THE COURT

ENRIQUE RODRIGUEZ, )  
 )  
Plaintiff, )  
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v. )  
 )  
FIESTA PALMS LLC, )  
 )  
Defendant. )

CASE NO. A-531538  
DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 9, 2010

REPORTER'S PARTIAL TRANSCRIPT  
BENCH TRIAL  
TESTIMONY OF DR. THOMAS CARGILL

APPEARANCES:

For the Plaintiff: STEVEN M. BAKER, ESQ.  
ROBERT S. CARDENAS, ESQ.

For the Defendant: KENNETH C. WARD, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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1 objection, Your Honor.

2 THE COURT: I don't --

3 MR. BAKER: Dr. Cargill's report put out two bases that  
4 he was critical of Terry Dinneen. One was that he continued  
5 to project a future income based upon a housing market that  
6 has changed and a burst bubble, and the second was that the  
7 discounting rates that he used were today's discounting rates  
8 instead of some other type of thing.

9 He never, ever mentions the information that was  
10 relied on, has no criticism of the information relied on, and  
11 in no way reflects that that information makes it -- any way  
12 impacts the ability for Mr. Dinneen to calculate the wage  
13 loss.

14 THE COURT: Sustain the objection.

15 BY MR. WARD:

16 Q Dr. Cargill, when you -- you first heard this report  
17 of August 17, 2010, is that correct?

18 A Well, I prepared two reports.

19 Q Okay.

20 A The August report and then as a supplemental report  
21 in October.

22 MR. BAKER: I don't have a supplemental report. Did you  
23 say August report?

24 THE WITNESS: Yes, August 17, 2010 was my original report  
25 and then I provided a supplemental report on October 5th.

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1 BY MR. WARD:

2 Q Dr. Cargill, let me ask you about your report at the  
3 bottom of page 2, the report that titles, "Estimate of Lost  
4 Compensation." Do you see that?

5 A Yes, I do.

6 Q Now, in your report, you note that Mr. Dinneen has  
7 made some opinions based upon the market, is that correct?

8 A Yes.

9 Q And what he's done is he has averaged the earnings  
10 over the period of 1999 to the year 2004, is that correct?

11 A Well, that was my understanding what he did.

12 Q Okay.

13 A But that's not what he actually did.

14 Q Okay. But that was your understanding at the time?

15 A Yes.

16 Q And you used -- and then he used that as an estimate  
17 of pre-incident future earnings, correct?

18 A Correct.

19 Q And do you think that is appropriate?

20 A Well, no, I did not.

21 Q Right. And in your report, you say what? What's  
22 your criticism of that?

23 A Well, I said that it is inappropriate to average  
24 earnings over the period from 1999 to 2004 and use the average  
25 as an estimate of pre-incident future earnings.

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1 an averaging technique that Mr. Dinneen utilized and spoke to,  
2 this Court has now three times sustained my objection with  
3 respect to that line of questioning.

4 THE COURT: Well, I'd sustain the objection as previously  
5 sustained.

6 BY MR. WARD:

7 Q The reason why you can't use 2004 data in the same  
8 way as other data is because it's influenced by the bubble in  
9 the housing market. Is that true?

10 A That is correct. And when I make the statement  
11 about the average, I'm talking about '99, 2000, 2001. That  
12 was not a bubble period. It is inappropriate to claim.

13 MR. BAKER: Your Honor, this is five times now.

14 THE WITNESS: Can I finish answering the question?

15 THE COURT: Well, there's nothing in his report at all  
16 that addressed the issue of averaging as I understand it.

17 MR. BAKER: He says that it is inappropriate to average  
18 in the context of the bursting housing market, in the bursting  
19 bubble. Now he's speaking about the methodology of averaging  
20 as being inappropriate.

21 If he wants to talk about the bursting, the Court  
22 understands my objection.

23 THE COURT: I do. Please proceed, Mr. Ward.

24 MR. WARD: Yes.

25 ///

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1 Q You also had problems with Mr. Dinneen's discounting  
2 rate?

3 A Yes.

4 Q Could you -- and you're using a historical rate?

5 A No.

6 Q What rate did you use?

7 A I'm using a rate that is based on economic theory,  
8 economic evidence, what the U.S. Congressional Budget Office  
9 uses.

10 Q Give me a number.

11 A Would you please let me finish?

12 THE COURT: Yeah, I think you should. Mr. Baker --

13 MR. BAKER: Sorry, Your Honor.

14 THE COURT: -- you keep firing questions. He can't  
15 finish his answer before you fire another one.

16 MR. BAKER: There was caffeine in the cough drop.

17 THE WITNESS: What the trustees of the Social Security  
18 Administration use, and they use a real interest rate of 3  
19 percent. So, whatever inflation rate you assume, the discount  
20 rate automatically is determined.

21 If you assume a 1 percent inflation rate, then the  
22 discount rate is 4 percent. If you assume a 2 percent  
23 inflation rate, then the discount is 5 percent. It's the  
24 ratio that's important. So I use a real interest rate of 3  
25 percent, which is based on economic theory, economic evidence.

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1 But we're -- economists are very, very confident  
2 that that real interest rate ranges between 2 and 4 and 3 is a  
3 good average. And that's what pretty much everybody uses.

4 Q And is that a conservative number?

5 A I don't know if I'd call it conservative. You could  
6 certainly make an argument that it could be a little higher,  
7 but I think for a long run real return on government  
8 securities, 3 percent is -- a real return of 3 percent would  
9 be acceptable to almost anybody that really knows the  
10 financial system.

11 Q Thank you.

12 A And the problem in focusing on current interest  
13 rates is very low.

14 MR. BAKER: Your Honor. That's all right.

15 THE WITNESS: But if you go out and buy a bunch of bonds  
16 at low interest rates, you're going to have a capital loss in  
17 a couple of years because as interest rates rise and everybody  
18 projects that they're going to rise, the value of bonds will  
19 fall. That's why you can't use current interest rates. It's  
20 economic nonsense.

21 MR. WARD: Thank you, Doctor.

22 THE WITNESS: Okay.

23 MR. BAKER: No questions, Your Honor.

24 THE COURT: No follow-up, Mr. Baker?

25 MR. BAKER: No follow-up, Your Honor.

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

**\* \* \* \***

**FCH1, LLC, A NEVADA LIMITED  
LIABILITY COMPANY F/K/A FIESTA  
PALMS, LLC, D/B/A THE PALMS  
CASINO RESORT,**

**Appellant,**

**vs.**

**No. 59630**

**ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,**

**Respondent.**

\_\_\_\_\_ /

**APPELLANT'S APPENDIX**  
**VOLUME 1**

**ROBERT L. EISENBERG (Bar # 0950)**  
**Lemons, Grundy & Eisenberg**  
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**Reno, Nevada 89519**  
**775-786-6868**  
**Email: [rle@lge.net](mailto:rle@lge.net)**

**ATTORNEYS FOR APPELLANT**

CHRONO INDEX

**CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX**

<b><u>NO.</u></b>	<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOL.</u></b>	<b><u>PAGE NO.</u></b>
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17.	Plaintiff's Opposition to Defendant's Motion to Compel Responses to Request for Production of Documents, to Compel Further Responses to Interrogatories; Request for Sanctions; and Motion to Compel Independent Medical Examination of Plaintiff	08/09/10	1	135 - 137
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1 COMP  
2 W. JONATHAN WEBER, ESQ.  
3 Nevada Bar No. 7554  
4 BENSON, BERTOLDO, BAKER & CARTER, CHTD.  
5 7408 W. Sahara Avenue  
6 Las Vegas, Nevada 89117  
7 (702) 228-2600  
8 Attorneys for Plaintiff

Nov 15 4 53 PM '06  
*Shirley C. Ruyter*  
CLERK

6 DISTRICT COURT  
7 CLARK COUNTY, NEVADA

9 ENRIQUE RODRIGUEZ, an individual; )  
10 )  
11 Plaintiffs )  
12 vs. )  
13 )  
14 FIESTA PALMS, L.L.C., a Nevada Limited Liability )  
15 Company, d/b/a PALMS CASINO RESORT; )  
16 DOES I through X, inclusive; and ROE BUSINESS )  
17 ENTITIES I through X, inclusive, )  
18 )  
19 Defendants. )

CASE NO. *A531538*  
DEPT. NO.: *X*

16 COMPLAINT

18 COMES NOW Plaintiff ENRIQUE RODRIGUEZ, by and through his attorney of  
19 record W. JONATHAN WEBER, ESQ., of the law firm of BENSON, BERTOLDO, BAKER &  
20 CARTER, CHTD., and for his claims of relief against the Defendants, and each of them, alleges  
21 and complains as follows:  
22

23 ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

24 1.

25 That Plaintiff, ENRIQUE RODRIGUEZ, was at the time of the Incident, a resident of  
26 Riverside County, State of California.  
27  
28

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

**BENSON, BERTOLDO, BAKER & CARTER**  
ATTORNEYS AT LAW

COUNTY CLERK

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2.

That at all times herein mentioned, Defendant, FIESTA PALMS, L.L.C., d/b/a PALMS CASINO RESORT (hereinafter, collectively referred to as "PALMS RESORT") was, and still is, a Nevada Limited Liability Company duly authorized and regularly conducting business within Clark County, State of Nevada.

3.

That at all times herein mentioned Defendant JANE DOE #1, as designated hereinafter, was, and still is, a resident of the State of Nevada, County of Clark.

4.

That at all times herein mentioned, Defendant ROE BUSINESS ENTITY #1, as designated hereinafter was, and still is, a business entity regularly conducting business in the State of Nevada, County of Clark.

5.

That the true names and capacities of the Defendants DOES I through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, and each of them, are unknown to Plaintiffs, who, therefore, sue said Defendants by said fictitious names. Defendants designated as DOES I through X are individuals who, as herein alleged, were participating in the events described herein as either a PALM GIRL, a patron of the subject Sports Book/Sports Bar, and/or are individuals responsible for training, supervising, and/or controlling the subject premises, the conduct of the PALM GIRLS, and/or the activities occurring at the time and place alleged herein. Plaintiff is informed, believes and thereon alleges that each of the Defendants designated as DOE is in some manner negligently and/or statutorily responsible for the events and happenings referred to and caused damages proximately to Plaintiff ENRIQUE RODRIGUEZ as herein alleged. Plaintiff will ask leave of the Court to amend his Complaint to insert the true



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names of such Defendants when the same have been ascertained.

6.

That the true names and capacities of the Defendants ROE BUSINESS ENTITIES I through X, inclusive, are unknown to Plaintiff, who, therefore sues said Defendants by said fictitious names. Defendants designated as ROE BUSINESS ENTITIES I through X are owners, operators, agents, employers, employees, assigns, maintainers, inspectors, predecessors and/or successors in interest, contractors, subcontractors, political subdivisions, governmental bodies, insurers or entities otherwise in possession and/or control of the persons and/or premises mentioned herein and/or are agencies, corporations and/or business interests employing, training, contracting, and/or otherwise responsible for the services of the PALM GIRLS and/or the activities occurring on the subject premises at the time and place alleged herein. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated as a ROE BUSINESS ENTITY is in some manner negligently, vicariously, statutorily, contractually, jointly and/or severally or otherwise responsible for the events and happenings referred to and caused damages proximately to Plaintiff as herein alleged. Plaintiff will ask leave of the Court to amend his Complaint to insert the true names of such Defendants when the same has been ascertained.

7.

.That at all times pertinent hereto, and particularly on or about November 22, 2004, Defendant PALMS RESORT owned, operated, maintained and controlled a sports bar/book open to the public, located within the PALMS RESORT, 4321 West Flamingo Road, Las Vegas, Nevada 89103.

8.

That on or about November 22, 2004, Plaintiff, ENRIQUE RODRIGUEZ, was on the



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premises of PALMS RESORT as a patron at the PALMS RESORT.

9.

That on November 22, 2004, Plaintiff ENRIQUE RODRIGUEZ went to the Palms' sports bar/book to watch a football game. During half-time, agents, employees, and/or assigns of the PALMS (hereinafter known as the "PALMS GIRLS") were participating in a promotion wherein they were throwing souvenirs to Sports Book/Sports Bar patrons while blindfolded.

10.

That the agents, employees, and/or assigns of the PALMS RESORT known as the PALM GIRLS were contracted from, supplied by, and/or otherwise provided by an agency, company, and/or other business entity hereby designated as ROE BUSINESS ENTITY #1.

11.

In response to an unknown PALMS GIRL (hereby designated as "JANE DOE #1") throwing souvenirs in the Sports Book/Sports Bar while blind-folded, a customer within the Sports Book/Sports Bar dove for a thrown souvenir and hit Plaintiff's extended and stationary left knee. Plaintiff then struck the person next to him, hitting the left side of his head, then falling down, thereby sustaining the injuries and damages alleged herein.

**FIRST CAUSE OF ACTION**

**(Defendants JANE DOE #1, individually; ROE BUSINESS ENTITY #1; PALMS RESORT: Negligence)**

12.

That on or about November 22, 2004, Defendant JANE DOE #1 negligently, carelessly, and recklessly threw souvenirs into the crowd at the PALMS RESORT sport book while blindfolded, thereby creating a frenzy among the patrons of said Sports Book/Sports Bar, thereby causing an unknown patron of the Sports Book/Sports Bar to impact with Plaintiff ENRIQUE RODRIGUEZ' knee, thereby causing the injuries and damages complained of herein.



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13.

That on or about November 22, 2004, Defendant, PALMS RESORT, and/or its employees, agents or assigns, negligently, carelessly and recklessly caused, allowed, and permitted Defendant JANE DOE #1 to throw said souvenirs while blindfolded, causing a frenzy among customers, resulting in a situation that Defendant PALMS RESORT, knew, or should have known, was unreasonably dangerous to patrons of the Sports Book/Sports Bar, in particular to Plaintiff ENRIQUE RODRIGUEZ, thereby causing the injuries and damages alleged herein.

14.

That on or about November 22, 2004, Defendant, ROE BUSINESS ENTITY #1, and/or its employees, agents or assigns, negligently, carelessly and recklessly caused, allowed, and permitted Defendant "JANE DOE #1 to throw said souvenirs, causing a frenzy among patrons of the Sports Book/Sports Bar, resulting in a situation that Defendant PALMS RESORT, knew, or should have known, was unreasonably dangerous to patrons of the Sports Book/Sports Bar, in particular to Plaintiff ENRIQUE RODRIGUEZ, thereby causing the injuries and damages alleged herein.

15.

That the aforesaid acts of Defendants, PALMS RESORT, JANE DOE #1, and/or ROE BUSINESS ENTITY #1, and/or their employees, agents or assigns were breaches of the duty of reasonable care owed by said Defendants to Sports Book/Sports Bar patrons, and in particular to Plaintiff ENRIQUE RODRIGUEZ.

16.

That all acts and omissions alleged with respect to Defendant JANE DOE #1 occurred while said defendant was acting within the scope and course of her agency, employment and or



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assignment with Defendant PALMS RESORT and ROE BUSINESS ENTITY #1, and each of them. Defendants PALMS RESORT and ROE BUSINESS ENTITY #1, and each of them, are therefore vicariously, contractually, statutorily and/or otherwise liable for the negligence, carelessness and recklessness of Defendant JANE DOE #1 as alleged herein.

17.

As a direct and proximate result of the negligence, carelessness and recklessness of Defendants, PALMS RESORT, JANE DOE #1, and/or ROE BUSINESS ENTITY #1, and/or their employees, agents or assigns, and each of them, Plaintiff, ENRIQUE RODRIGUEZ, was injured in his health, strength and activity, sustaining shock and injury to his body, nervous system and person, all of which have caused, and will continue to cause Plaintiff physical, mental and nervous pain and suffering.

18.

That as a direct and proximate result of the negligence, carelessness and recklessness of Defendants PALMS RESORT, JANE DOE #1, and/or ROE BUSINESS ENTITY #1, and/or their employees, agents or assigns, and each of them, Plaintiff, ENRIQUE RODRIGUEZ, has incurred and continues to incur medical expenses, economic losses, possible future medical expenses and economic losses, and loss of enjoyment of life, all to Plaintiff's damages in an amount in excess of TEN THOUSAND DOLLARS (\$10,000).

**SECOND CAUSE OF ACTION**

**(PALMS RESORT; ROE BUSINESS ENTITY #1: Negligent Employee Hiring, Training, Retention and Supervision)**

19.

Plaintiff realleges and reasserts each and every statement contained in the above Paragraphs, inclusive. Plaintiff further alleges as follows:



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20.

At all time relevant hereto, Defendant PALMS RESORT and/or ROE BUSINESS ENTITY #1, and each of them, was the employer of and/or otherwise in control of Defendant, JANE DOE #1.

21.

At and before the time of the subject incident, Defendants PALM RESORT and ROE BUSINESS ENTITY #1, and each of them, had a duty to adequately and reasonably hire, train, and supervise Defendant JANE DOE #1, and a related duty to effectuate and implement adequate and reasonable policies and procedures with respect to the conduct of their, and each of their, employees.

22.

At all times pertinent hereto, Defendants PALMS RESORT and ROE BUSINESS ENTITY #1, and each of them, negligently and carelessly breached said standard of care by, but not limited to, failing to ascertain said Defendants qualifications and ability to responsibly perform her duties, failing to instruct said Defendant regarding safe and reasonable methods of distributing souvenirs to a crowd, failing to instruct said Defendant in safe and reasonable methods of crowd control, instructing and allowing for the distribution of souvenirs while blindfolded, failing to create and disseminate clear and concise written and/or verbal protocols with respect to the same, and/or by retaining said Defendant when it was known, or should have been known, that she was incapable of safely performing her work activities.

23.

That as a direct and proximate result of the negligent and careless hiring, training, supervision and retention of Defendant JANE DOE #1 by Defendants PALMS RESORT and ROE BUSINESS ENTITY #1, and each of them, Plaintiff, ENRIQUE RODRIGUEZ, was injured in his health, strength and activity, sustaining shock and injury to his body, nervous system and person, all of which have caused, and will continue to cause Plaintiff physical, mental and nervous pain and suffering.



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24.

That as a direct and proximate result of the negligent and careless hiring, training, supervision and retention of Defendant JANE DOE #1 by Defendants PALMS RESORT and ROE BUSINESS ENTITY #1, and each of them, Plaintiff ENRIQUE RODRIGUEZ, sustained personal injuries and has incurred, and continues to incur, medical expenses, loss of income, loss of earning capacity, disability, property damage and loss of enjoyment of life, all to Plaintiff's special and general damages in an amount in excess of TEN THOUSAND DOLLARS (\$10,000).

**THIRD CAUSE OF ACTION:**

**(PALMS RESORT: Punitive Damages)**

25.

Plaintiff reaffirms and realleges all of the allegations contained in the paragraphs above as though fully set herein. Plaintiff further alleges as follows:

26.

The aforesaid actions and omissions of Defendants PALMS RESORT, ROE BUSINESS ENTITIY #1, JANE DOE #1, were malicious, intentional, oppressive and/or in conscious and reckless disregard of the consequences to PALMS RESORT patrons, and in particular to Plaintiff ENRIQUE RODRIGUEZ.

27.

As a direct and proximate result of the aforesaid malicious, intentional, oppressive or consciously and recklessly disregarded actions of said Defendants, and each of them, Plaintiff ENRIQUE RODRIGUEZ, was injured in his health, strength and activity, sustaining shock and injury to his body, nervous system and person, all of which have caused, and will continue to cause Plaintiff physical, mental and nervous pain and suffering.



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That as a direct and proximate result of aforesaid malicious, intentional, oppressive or recklessly disregarded actions and omissions of Defendants, and each of them, Plaintiff ENRIQUE RODRIGUEZ, sustained personal injuries and has incurred, and continues to incur, medical expenses, loss of income, loss of earning capacity, disability, property damage and loss of enjoyment of life, all to Plaintiff's special and general damages in an amount in excess of TEN THOUSAND DOLLARS (\$10,000).

WHEREFORE, Plaintiff prays for judgment against the Defendants, and each of them, as follows:

**FIRST CAUSE OF ACTION**

1. For general damages and loss in an amount in excess of TEN THOUSAND DOLLARS (\$10,000);
2. For special damages in an amount to be determined at time of trial;
3. For loss of income and earning capacity in an amount as yet undetermined;
4. For reasonable attorneys fees, pre and post-judgment interest, and costs of suit; and
5. For such other and further relief as the Court may deem just and proper.

**SECOND CAUSE OF ACTION**

1. For general damages and loss in an amount in excess of TEN THOUSAND DOLLARS (\$10,000);
2. For special damages in an amount to be determined at time of trial;
3. For loss of income and earning capacity in an amount as yet undetermined;
4. For reasonable attorneys fees, pre and post-judgment interest, and costs of suit; and



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5. For such other and further relief as the Court may deem just and proper.

**THIRD CAUSE OF ACTION**

1. For general damages and loss in an amount in excess of TEN THOUSAND DOLLARS (\$10,000);

2. For special damages in an amount to be determined at time of trial;

3. For punitive damages in an amount to be determined at trial;

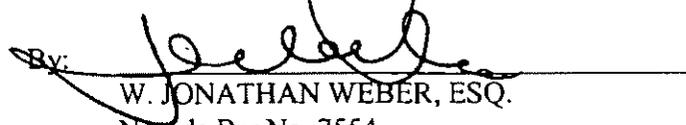
4. For loss of income and earning capacity in an amount as yet undetermined;

5. For reasonable attorneys fees, pre and post-judgment interest, and costs of suit; and

6. For such other and further relief as the Court may deem just and proper.

DATED this 13<sup>th</sup> day of November, 2006.

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

By: 

W. JONATHAN WEBER, ESQ.  
Nevada Bar No. 7554  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff



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ANS  
JEFFERY A. BENDAVID, ESQ.  
Nevada Bar No. 6220  
MORAN LAW FIRM, LLC  
630 South Fourth Street  
Las Vegas, Nevada 89101  
(702) 384-8424  
Attorney for Defendant,  
Fiesta Palms, LLC

FILED

APR 23 1 54 PM '07

*Cliff JRS*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, an individual, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FIESTA PALMS, L.L.C., a Nevada )  
Limited Liability Company, dba PALMS )  
CASINO RESORT; DOES I through X, )  
Inclusive; and ROE CORPORATIONS, )  
I -X, inclusive, )  
 )  
Defendants. )  
 )

Case No. A531538  
Dept . No. X

DEFENDANT FIESTA PALM'S LLC dba PALMS CASINO RESORT'S  
ANSWER TO PLAINTIFF'S COMPLAINT

COMES NOW, Defendant FIESTA PALMS, LLC dba PALMS CASINO  
RESORT ("FIESTA PALMS") through its attorney of record, JEFFERY A.  
BENDAVID, ESQ., of the MORAN LAW FIRM, LLC, hereby answers Plaintiff's  
Complaint on file herein as follows:

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MORAN LAW FIRM LLC  
MORAN BRANDON BENDAVID MORAN  
ATTORNEYS AT LAW  
630 SOUTH 4TH STREET  
LAS VEGAS, NEVADA 89101  
PHONE: (702) 384-8424  
FAX: (702) 384-6568

6208

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2  
3 **GENERAL ALLEGATIONS**  
4

5 1. As to Paragraph 1 of Plaintiff's Complaint on file herein, Defendant  
6 FIESTA PALMS is without knowledge or information sufficient to form a belief as  
7 to the truth of the allegations contained therein.

8 2. As to Paragraph 2 of Plaintiff's Complaint on file herein, Defendant  
9 FIESTA PALMS is without knowledge or information sufficient to form a belief as  
10 to the truth of the allegations contained therein.

11 3. As to Paragraph 3 of Plaintiff's Complaint on file herein, Defendant  
12 FIESTA PALMS is without knowledge or information sufficient to form a belief as  
13 to the truth of the allegations contained therein.

14 4. As to Paragraph 4 of Plaintiff's Amended Complaint on file herein,  
15 Defendant FIESTA PALMS is without knowledge or information sufficient to form  
16 a belief as to the truth of the allegations contained therein.

17 5. As to Paragraph 5 of Plaintiff's Complaint on file herein, Defendant  
18 FIESTA PALMS is without knowledge or information sufficient to form a belief as  
19 to the truth of the allegations contained therein.

20 6. As to Paragraph 6 of Plaintiff's Complaint on file herein, Defendant  
21 FIESTA PALMS is without knowledge or information sufficient to form a belief as  
22 to the truth of the allegations contained therein.

23 7. As to Paragraph 7 of Plaintiff's Complaint on file herein, Defendant  
24 FIESTA PALMS is without knowledge or information sufficient to form a belief as  
25 to the truth of the allegations contained therein.

26 8. As to Paragraph 8 of Plaintiff's Complaint on file herein, Defendant  
27



28 MORAN LAW FIRM LLC  
MORAN BRANDON BRADY MORAN  
ATTORNEYS AT LAW

630 SOUTH 4TH STREET  
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FIESTA PALMS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

9. As to Paragraph 9 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

10. As to Paragraph 10 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

11. As to Paragraph 11 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

**FIRST CAUSE OF ACTION**

12. As to paragraph 12 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS denies the allegations contained therein.

13. As to paragraph 13 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS denies the allegations contained therein.

14. As to paragraph 14 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS denies the allegations contained therein.

15. As to paragraph 15 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS denies the allegations contained therein.

16. As to paragraph 16 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS denies the allegations contained therein.

17. As to paragraph 17 of Plaintiff's Complaint on file herein, Defendant



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FIESTA PALMS denies the allegations contained therein.

18. As to paragraph 18 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS denies the allegations contained therein.

**SECOND CAUSE OF ACTION**

19. As to Paragraph 19 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS repeats and realleges each and every response to paragraphs above.

20. As to paragraph 20 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS denies the allegations contained therein.

21. As to paragraph 21 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS denies the allegations contained therein.

22. As to paragraph 22 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS denies the allegations contained therein.

23. As to paragraph 23 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS denies the allegations contained therein.

24. As to paragraph 24 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS denies the allegations contained therein.

**THIRD CAUSE OF ACTION**

25. As to Paragraph 25 of Plaintiff's Complaint on file herein, Defendant FIESTA PALMS repeats and realleges each and every response to paragraphs above. Additionally, Defendant denies each allegation in the paragraph. Also Plaintiff's Third Cause of Action has been dismissed pursuant to the Stipulation and Order dated December 26, 2006.



MORAN LAW FIRM LLC  
MORAN EDANDON BENDAVIE MORAN

630 SOUTH 4TH STREET  
LAS VEGAS, NEVADA 89101  
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FAX: (702) 384-6568

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2 26. As to Paragraph 26 of Plaintiff's Complaint on file herein,  
3 Defendant FIESTA PALMS repeats and realleges each and every response to  
4 paragraphs above. Additionally, Defendant denies each allegation in the paragraph.  
5 Also Plaintiff's Third Cause of Action has been dismissed pursuant to the  
6 Stipulation and Order dated December 26, 2006.  
7

8 27. As to Paragraph 27 of Plaintiff's Complaint on file herein,  
9 Defendant FIESTA PALMS repeats and realleges each and every response to  
10 paragraphs above. Additionally, Defendant denies each allegation in the paragraph.  
11 Also Plaintiff's Third Cause of Action has been dismissed pursuant to the  
12 Stipulation and Order dated December 26, 2006.  
13

14 28. As to Paragraph 28 of Plaintiff's Complaint on file herein,  
15 Defendant FIESTA PALMS repeats and realleges each and every response to  
16 paragraphs above. Additionally, Defendant denies each allegation in the paragraph.  
17 Also Plaintiff's Third Cause of Action has been dismissed pursuant to the  
18 Stipulation and Order dated December 26, 2006.  
19  
20

21 **AFFIRMATIVE DEFENSES**

22 **FIRST AFFIRMATIVE DEFENSE**

23 Plaintiffs' Amended Complaint on file herein fails to state a claim against  
24 Defendant FIESTA PALMS on which relief can be granted.  
25

26 **SECOND AFFIRMATIVE DEFENSE**

27 Plaintiffs are estopped from pursuing any claim against the Defendant  
28 FIESTA PALMS.



MORAN LAW FIRM LLC  
MORAN BRANDON BENDAVIO MORAN  
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**THIRD AFFIRMATIVE DEFENSE**

Any claims of the Plaintiffs are barred by the doctrine of laches.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs have not suffered any injury be reason of any act, or omission, by this Defendant FIESTA PALMS; therefore Plaintiffs do not have any right or standing to assert the claims at issue.

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiffs failed to mitigate their damages received, if any, and therefore, any recovery awarded to the Plaintiffs against the Defendant FIESTA PALMS should be reduced by that amount not mitigated.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiffs are barred by the doctrine of unclean hands.

**SEVENTH AFFIRMATIVE DEFENSE**

By virtue of the acts, deeds, conduct and/or the failure or omission to act under the circumstances, the Plaintiffs have waived their rights, if any existed, to assert the claims against the Defendant FIESTA PALMS.

**EIGHTH AFFIRMATIVE DEFENSE**

The damages which are alleged to have been incurred by the Plaintiffs, if any in fact were suffered by Plaintiffs were the direct result in whole or in part, of the Plaintiffs' own intentional, willful, and/or negligent acts and deeds.

**NINTH AFFIRMATIVE DEFENSE**

The claims of the Plaintiffs as alleged in the Complaint, and the loss of damage, if any in fact exist, are the direct and proximate result of the acts, deeds,



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MORAN BEARDON BENDAVI MORAN  
ATTORNEYS AT LAW

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LAS VEGAS, NEVADA 89101  
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FAX: (702) 384-6568

1  
2 omissions or failure to act, or the conduct of third parties, over whom the Defendant  
3 FIESTA PALMS had no control, nor the right, duty or obligation to control.

4  
5 **TENTH AFFIRMATIVE DEFENSE**

6 The Plaintiffs lack standing to bring the claims asserted in this lawsuit  
7 against this Defendant FIESTA PALMS.

8 **ELEVENTH AFFIRMATIVE DEFENSE**

9 Defendant FIESTA PALMS denies the allegations of Plaintiffs' Complaint  
10 and demand strict proof thereof.

11  
12  
13 **TWELFTH AFFIRMATIVE DEFENSE**

14 Plaintiffs' claims are barred because any alleged injuries to Plaintiffs were  
15 the result of superseding or intervening causes.

16 **THIRTEENTH AFFIRMATIVE DEFENSE**

17 Plaintiffs' claims are barred because Plaintiffs' alleged injuries were not  
18 caused by any improper or unwarranted action by Defendant FIESTA PALMS.

19  
20 **FOURTEENTH AFFIRMATIVE DEFENSE**

21 It has been necessary for the Defendant FIESTA PALMS to employ the  
22 services of an attorney to defend this action and a reasonable sum should be allowed  
23 to Defendant FIESTA PALMS for attorney's fees together with costs incurred  
24 herein.

25  
26 **FIFTEENTH AFFIRMATIVE DEFENSE**

27 Some of the foregoing Affirmative Defenses have been plead for purposes of  
28 non-waiver. Defendant FIESTA PALMS has not concluded discovery in this matter



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MORAN BRADON BENDAVID MORAN  
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and specifically reserves the right to amend this Answer to include additional Affirmative Defenses if discovery of facts so warrant.

**WHEREFORE**, Defendant prays for judgment as follows:

1. That Plaintiffs take nothing by way of their Amended Complaint on file herein;
2. For reasonable attorney's fees and costs of suit incurred herein; and
3. For such other and further relief as this Court may deem just and proper in the premises.

DATED this 20 of April, 2007

**MORAN LAW FIRM, LLC**

  
\_\_\_\_\_  
**JEFFERY A. BENDAUID, ESQ.**  
Nevada Bar No. 6220  
630 South 4<sup>th</sup> Street  
Las Vegas, Nevada 89101  
*Attorney for Fiesta Palms, LLC*



**MORAN LAW FIRM, LLC**  
MORAN BRANDON BENDAUID MORAN

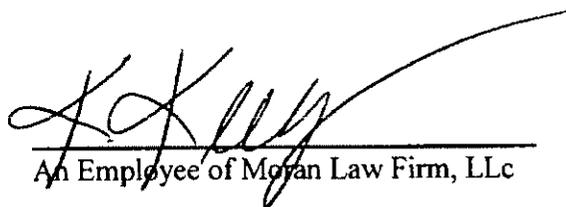
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CERTIFICATE OF MAILING

I hereby certify that on the 23 day of April, 2007, I served the foregoing  
DEFENDANT FIESTA PALM'S LLC dba PALMS CASINO RESORT'S  
ANSWER TO PLAINTIFFS' COMPLAINT upon each of the parties to this  
action by depositing copies in the United States mail, pre-paid, addressed to them as  
follows:

W. JONATHAN WEBER, ESQ  
7408 W. SAHARA AVE  
LAS VEGAS, NV 89117

  
An Employee of Moran Law Firm, LLC





FILED

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*[Signature]*  
CLERK OF THE COURT

1 LTWT  
STEVEN BAKER, ESQ.  
Nevada Bar No. 4522  
2 BENSON, BERTOLDO,  
BAKER & CARTER, CHTD.  
3 7408 W. Sahara Avenue  
4 Las Vegas, Nevada 89117  
(702) 228-2600  
5 Attorneys for Plaintiff  
ENRIQUE RODRIGUEZ

6 DISTRICT COURT

7 CLARK COUNTY, NEVADA

8 \* \* \* \* \*

9  
10 ENRIQUE RODRIGUEZ, an individual; ) CASE NO.: A531538  
11 ) DEPT. NO.: X  
12 Plaintiffs, )  
13 vs. )  
14 FIESTA PALMS, L.L.C., a Nevada Limited )  
15 Liability Company, d/b/a PALMS CASINO )  
16 RESORT; DOES I through X, inclusive; and )  
17 ROE BUSINESS ENTITIES I through X, )  
inclusive, )  
Defendants. )

18 PLAINTIFF'S 16.1 LIST OF  
19 DOCUMENTS AND WITNESSES

20 Pursuant to NRCP 16.1, Plaintiff hereby submits the following list of  
21 knowledgeable persons and documents with attached materials as follows:

22 I.

23 LIST OF KNOWLEDGEABLE PERSONS

- 24 1. PMK, Custodian of Records  
25 American Medical Response  
26 1200 S. Martin Luther King Blvd.  
27 Las Vegas, NV 89102

28 Persons Most Knowledgeable of American Medical Response will testify as to Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby.

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

**BENSON BERTOLDO BAKER & CARTER**  
ATTORNEYS AT LAW

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The Custodian of Records will testify regarding the authenticity of medical records and bills.

- 2. PMK, Custodian of Records  
Spring Valley Hospital and Medical Center  
5400 S. Rainbow Blvd.  
Las Vegas, NV 89118

Persons Most Knowledgeable of Spring Valley Hospital and Medical Center will testify as to Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

- 3. PMK, Custodian of Records  
Physician's Management Solution  
6700 Indiana Ave., Suite 145  
Riverside, CA 92506

Persons Most Knowledgeable of Physician's Management Solution will testify as to Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

- 4. PMK, Custodian of Records  
Rancho Physical Therapy, Inc.  
630 E. Latham Ave.  
Hemet, CA 92564

Persons Most Knowledgeable of Rancho Physical Therapy will testify as to Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

- 5. Eric E. Campbell, DC  
Custodian of Records  
The Wellness Group  
34740 Via Carnaghi  
Wildomar, CA 92595

Eric E. Campbell, DC will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

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6. PMK, Custodian of Records  
MRI of Inland Valley  
44274 George Cushman #108  
Temecula, CA 92592

Persons Most Knowledgeable of MRI of Inland Valley will testify as to Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

7. William Simpson, M.D.  
Custodian of Records  
32395 Clinton Keith Rd. #104  
Wildomar, CA 92595

William Simpson, M.D., will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

8. PMK, Custodian of Records  
Las Vegas Neurosurgery,  
Orthopaedics & Rehabilitation  
600 S. Rancho Dr., Suite 107  
Las Vegas, NV 89106

Persons Most Knowledgeable of Las Vegas Neurosurgery, Orthopaedics & Rehabilitation will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

9. PMK, Custodian of Records  
Louis Mortillaro, M.D.  
501 S. Rancho Dr. Suite F37  
Las Vegas, NV 89106

Persons Most Knowledgeable will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

10. PMK, Custodian of Records  
I.V. League Pharmacy, Inc.  
6076 Bristol Pkwy. Suite 104  
Culver City, CA 90230



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Persons Most Knowledgeable of I.V. League Pharmacy will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

- 11. PMK, Custodian of Records  
Valley Hospital and Medical Center  
620 Shadow Lane  
Las Vegas, NV 89106

Persons Most Knowledgeable of Valley Hospital and Medical Center will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

- 12. PMK, Custodian of Records  
Matt Smith, Physical Therapy  
600 S. Rancho Dr. Box 357  
Las Vegas, NV 89107

Persons Most Knowledgeable of Matt Smith, Physical Therapy will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

- 13. PMK, Custodian of Records  
Russell J. Shah, M.D., Ltd.  
2628 W. Charleston Blvd.  
Las Vegas, NV 89102

Persons Most Knowledgeable of Russell J. Shah, Ltd. will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

- 14. PMK, Custodian of Records  
Lawrence R. Miller, M.D.  
8641 Wilshire Blvd. Suite 200  
Beverly Hills, CA 90211

Persons Most Knowledgeable of Lawrence R. Miller, M.D. will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the



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charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

- 15. PMK, Custodian of Records  
North Valley Medical Supply  
3053 W. Craig Rd. Suite B  
North Las Vegas, NV 89032

Persons Most Knowledgeable of Lawrence R. Miller, M.D. will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

- 16. PMK, Custodian of Records  
Pain Institute of Nevada  
600 S. Rancho Dr. Suite 113  
Las Vegas, Nevada 89106

Persons Most Knowledgeable of Pain Institute of Nevada will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

- 17. PMK, Custodian of Records  
Quality RESP Solutions  
20818 Higgins Court  
Torrance, CA 90501

Persons Most Knowledgeable of Quality RESP Solutions will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

- 18. PMK, Custodian of Records  
California Hand Surgery & Orthopedics  
P.O. Box 515110  
Los Angeles, CA 900515110

Persons Most Knowledgeable of California Hand Surgery & Orthopedics will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.



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19. PMK, Custodian of Records  
Jacob E. Tauber, M.D.  
9033 Wilshire Blvd. Suite 401  
Beverly Hills, CA 90211

Persons Most Knowledgeable of Jacob E. Tauber, M.D. will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

20. PMK, Custodian of Records  
Lake Mead Radiology/Nevada Imaging Centers  
5495 S. Rainbow Blvd. #101  
Las Vegas, Nevada 89118

Persons Most Knowledgeable of Lake Mead Radiology / Nevada Imaging testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

21. PMK, Custodian of Records  
Wilshire Surgicenter, Inc.  
11999 San Vicente BL, #440  
Los Angeles, CA 90049

Persons Most Knowledgeable of Wilshire Surgicenter, Inc. will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

22. PMK, Custodian of Records  
Medical District Surgery Center  
2020 Goldring, Suite 300  
Las Vegas, Nevada 89106

Persons Most Knowledgeable of Medical District Surgery Center will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

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23. PMK, Custodian of Records  
Nevada Sleep Diagnostics  
62 N. Pecos Rd. Suite B  
Henderson, Nevada 89074

Persons Most Knowledgeable of Nevada Sleep Diagnostics will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

24. PMK, Custodian of Records  
Nevada ENT Center  
1815 E. Lake Mead Blvd. #307  
Las Vegas, Nevada 89030

Persons Most Knowledgeable of Nevada ENT Center will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

25. PMK, Custodian of Records  
Insight Mountain Diagnostics  
800 Shadow Lane  
Las Vegas, Nevada 89106

Persons Most Knowledgeable of Insight Mountain Diagnostics will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

26. Custodian of Records  
Med-Care Solutions  
10120 W. Flamingo Rd. Suite 412  
Las Vegas, Nevada 89147

The Custodian of Records of Med-Care Solutions will testify regarding the authenticity of medical bills.

27. PMK, Custodian of Records  
Strehlow Radiology  
3742 E. Tropicana Ave. Suite 1  
Las Vegas, Nevada 89121



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Persons Most Knowledgeable of Strehlow Radiology will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

28. PMK, Custodian of Records  
Integrated Healthcare of Nevada  
4517 W. Sahara Ave.  
Las Vegas, NV 89120

Persons Most Knowledgeable of Integrated Healthcare of Nevada will testify regarding Mr. Rodriguez' injuries, care, treatment, prognosis, the necessity of that treatment, causation for which that care and treatment was rendered and the reasonableness of the charges thereby. The Custodian of Records will testify regarding the authenticity of medical records and bills.

Plaintiff reserves the right to amend and supplement this list of knowledgeable persons as discovery continues. Plaintiff reserves the right to take the depositions of any and all knowledgeable persons and/or to call any and all knowledgeable persons to testify as witnesses at the time of arbitration and/or trial. Plaintiff reserves the right to call any and all medical providers to testify as expert witnesses at the time of arbitration and/or trial.

II.

LIST OF DOCUMENTS

1. Medical records and triage reports from American Medical Response;
2. Medical records and billing statements from Spring Valley Medical Center;
3. Medical records and billing statements from Physician's Management Solution;
4. Billing statement from Rancho Physical Therapy, Inc.;
5. Billing statement from Eric E. Campbell, D.C.;
6. Medical records and billing statements from MRI of Inland Valley;
7. Medical records from William Simpson, M.D.;



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8. Medical records and billing statements from Las Vegas Neurosurgery, Orthopedics and Rehabilitation;
9. Medical records and billing statements from Louis Mortillaro, M.D.;
10. Billing statements from IV League Pharmacy;
11. Medical records and billing statements from Valley Hospital and Medical Center;
12. Billing statements from Matt Smith, Physical Therapy;
13. Medical records and billing statements from Russell J. Shah, M.D.;
14. Medical records from Lawrence R. Miller, M.D.;
15. Billing statement from North Valley Medical Supply;
16. Medical records from Pain Institute of Nevada;
17. Billing statements from Quality Resp Solutions;
18. Billing statement from Cal Hand Surgery & Orthopaedics;
19. Medical records and billing statements from Jacob E. Tauber, M.D.;
20. Reports and billing statements from Lake Mead Radiology/Nevada Imaging Centers;
21. Medical records and billing statement from Wilshire Surgicenter, Inc.;
22. Medical record and billing statement from Medical District Surgery Center;
23. Medical records and billing statement from Nevada Sleep Diagnostics;
24. Medical records and billing statements from Nevada ENT Center;
25. Medical records and billing statement from Insight Mountain Diagnostics;
26. Medical record and billing statement from Strehlow Radiology;
27. Medical record and billing statements from Integrated Healthcare of Nevada.

Plaintiff reserves the right to amend the above list of documents and to submit additional documents as discovery continues. Plaintiff reserves the right to submit all



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documents as evidence at the time of arbitration and/or trial.

**DAMAGES:**

Plaintiff has incurred the following medical expenses as a result of this incident:

No.	Provider	Amount
1	AMR – Mercy Ambulance	\$ 534.70
2.	Spring Valley Hospital	\$ 1,202.00
3.	Physicians Management Solution	\$ 1,267.59
4.	Rancho Physical Therapy	\$ 10,933.00
5.	Eric E. Campbell, D.C.	\$ 272.00
6.	MRI of Inland Valley	\$ 2,350.00
7.	William Simpson, M.D.	\$ UNKNOWN
8.	Las Vegas Neurosurgery, Orthopedics & Rehabilitation	\$ 16,659.50
9.	Louis Mortillaro, M.D.	\$ 13,217.00
10.	I.V. League Pharmacy	\$ 3,155.91
11.	Valley Hospital and Medical Center	\$ 15,999.00
12.	Matt Smith Physical Therapy	\$ 2,055.00
13.	Russell J. Shah, M.D.	\$ 400.00
14.	Lawrence R. Miller, M.D.	\$ UNKNOWN
15.	North Valley Medical Supply	\$ 36.95
16.	Pain Institute of Nevada	\$ UNKNOWN
17.	Quality Resp. Solutions	\$ 3,287.27
18.	Cal Hand Surgery & Orthopedics	\$ 2,338.83
19.	Jacob E. Tauber, M.D.	\$ 9,745.00
20.	Lake Mead Radiology/Nevada Imaging Centers	\$ 3,915.00
21.	Wilshire Surgicenter, Inc.	\$ 17,991.00
22.	Medical District Surgery Center	\$ 5,135.29
23.	Nevada Sleep Diagnostics	\$ 3,350.00
24.	Nevada ENT Center	\$ 1,030.00
25.	Insight Mountain Diagnostics	\$ 2,635.00
26.	Strehlow Radiology	\$ 85.00
27.	Integrated Healthcare of Nevada	\$ 3,650.00
-----	-----TOTAL CHARGES-----	\$ 121,245.04

Plaintiff's treatment for his injuries is continuing in nature, and the list of past medical expenses will change. Plaintiff reserves the right to supplement this list accordingly.



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Plaintiff has incurred loss of income and therefore, will supplement these damages.

Dated this 20<sup>th</sup> day of September, 2007.

BENSON, BERTOLDO,  
BAKER & CARTER, CHTD.

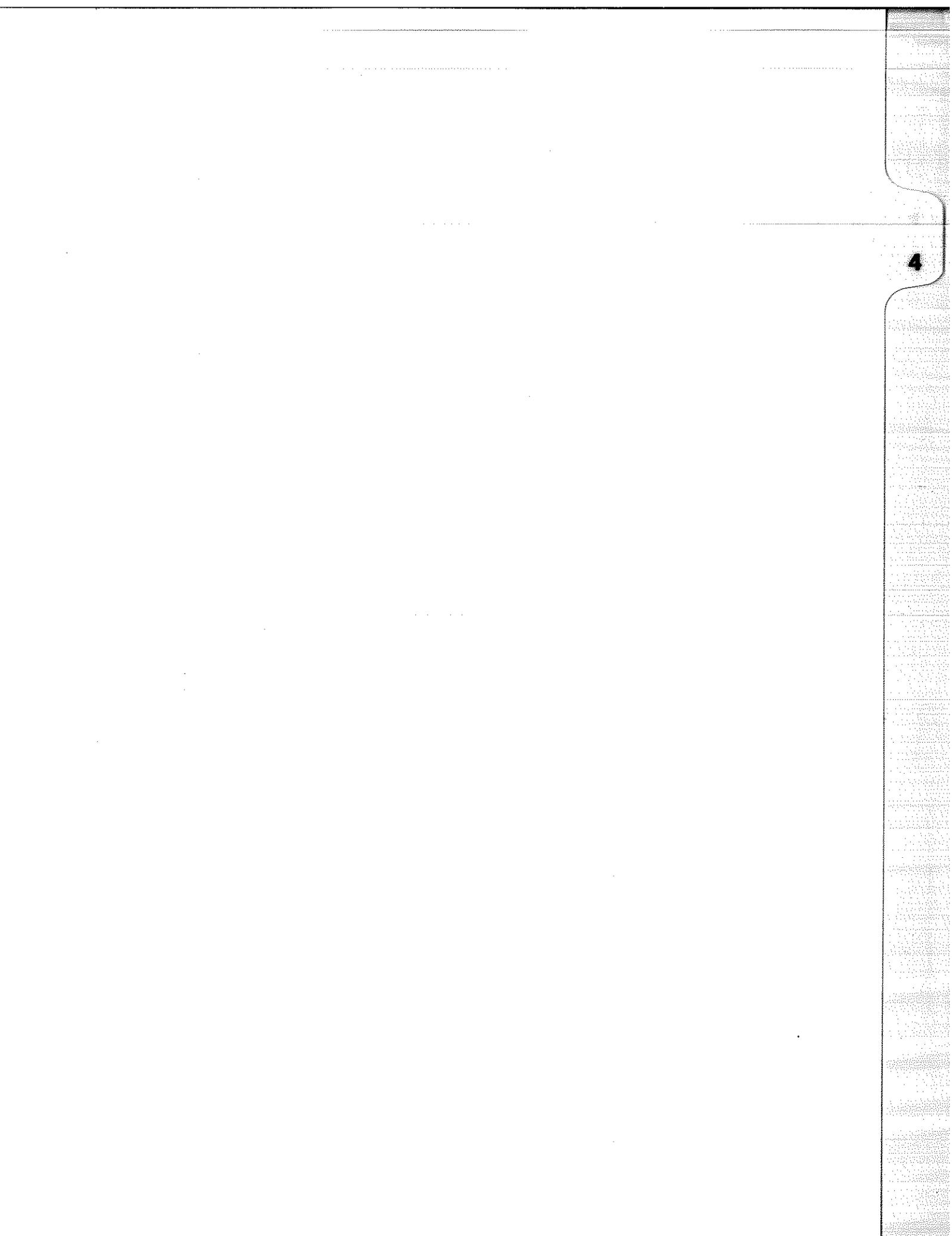
STEVEN M. BAKER, ESQ.  
Nevada Bar No. 4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
(702) 228-2600  
Attorneys for Plaintiff

**RECEIPT OF COPY**

RECEIPT OF COPY of PLAINTIFF'S EARLY CASE CONFERENCE LIST  
OF PERSONS MOST KNOWLEDGEABLE AND LIST OF DOCUMENTS  
PRODUCED is hereby acknowledged:

This 20<sup>th</sup> day of September, 2007.

Moran & Associates  
Jeffery A. Bendavid, Esq.  
630 S. Fourth St.  
Las Vegas, NV 89101  
*Attorneys for Defendant Fiesta Palms, LLC*



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CLERK OF THE COURT

1 SUPP  
2 STEVEN M. BAKER, ESQ.  
3 Nevada Bar No. 4522  
4 Benson, Bertoldo, Baker & Carter  
5 7408 W. Sahara Avenue  
6 Las Vegas, Nevada 89117  
7 (702) 228-2600  
8 Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

9 ENRIQUE RODRIGUEZ, an individual, )  
10 )  
11 Plaintiffs )  
12 vs. )  
13 )  
14 FIESTA PALMS, L.L.C., a Nevada Limited Liability )  
15 Company, d/b/a PALMS CASINO RESORT; )  
16 DOES I through X, inclusive; and ROE BUSINESS )  
17 ENTITIES I through X, inclusive, )  
18 )  
19 Defendants. )

CASE NO: A531538  
DEPT. NO: X

**PLAINTIFF'S FIFTH SUPPLEMENTAL EARLY CASE  
CONFERENCE LIST OF DOCUMENTS AND WITNESSES**

20 COMES NOW, Plaintiff, Enrique Rodriguez, by and through his attorney of-record,  
21 Steven M. Baker, Esq., of the law firm of Benson, Bertoldo, Baker & Carter, and pursuant to  
22 Nevada Rules of Civil Procedure herein submits the following supplement to his early case  
23 conference list of witnesses and documents as follows:

**WITNESSES**

- 24 1. Robert Gutierrez, MD  
25 Person Most Knowledgeable and/or Custodian of Records  
26 5380 South Rainbow, Suite 100  
Las Vegas, Nevada 89118  
838-3889 Telephone

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

**BENSON  
BERTOLDO  
BAKER  
& CARTER**  
ATTORNEYS AT LAW

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This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

- 2. Canyon Medical Billing / Las Vegas Surgery  
Person Most Knowledgeable and/or Custodian of Records  
7435 South Eastern Avenue, Suite A5-273  
Las Vegas, Nevada 89123

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

- 3. Lake Mead Radiologists  
Person Most Knowledgeable and/or Custodian of Records  
5496 South Rainbow Blvd., Suite 101  
Las Vegas, Nevada 89118  
597-1145 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

- 4. Rancho Physical Therapy  
Person Most Knowledgeable and/or Custodian of Records  
630 East Latham Avenue  
Hemet, California 92543  
760-630-2258 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

- 5. Russell J. Shah, MD  
Person Most Knowledgeable and/or Custodian of Records  
10624 South Eastern Avenue, Suite A-425  
Henderson, Nevada 89052  
644-0500 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

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6. Matt Smith Physical Therapy  
Person Most Knowledgeable and/or Custodian of Records  
600 South Rancho Drive, Suite 103  
Las Vegas, Nevada 89106  
243-4769 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

Plaintiff reserves the right to call any and all witnesses identified by any other party.

Plaintiff reserves the right to call any and all experts designated by other parties in this case to render expert testimony. This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.

Plaintiff reserves the right to call any and all witnesses necessary for impeachment or rebuttal purposes.

Plaintiff reserves the right to supplement this list of witnesses as discovery continues and as new information becomes available.

**DOCUMENTS**

1. Billing records from Robert Gutierrez, MD in the amount of 3,010.80, consisting of two pages.
2. Billing record from Canyon Medical Billing / Las Vegas Surgery in the amount of \$1,972.00, consisting of one page.
3. Billing record from Lake Mead Radiologists in the amount of \$741.15, consisting of one page.
4. Medical records and billing records from Rancho Physical Therapy, in the amount of \$10,933.00, consisting of 115 pages.



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5. Medical records and billing records from Russell Shah, MD in the amount of 25,400.00, consisting of 57 pages.
6. Medical records and billing records from Matt Smith Physical Therapy in the amount of \$7,090.00, consisting of thirty-six pages.

Plaintiff reserves the right to amend the above list of documents and the right to submit additional documents, if any exists, as such documents may become available to plaintiff throughout the course of discovery.

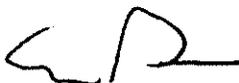
Plaintiff reserves the right to submit any and/or all of the above documents and any documents produced throughout the course of discovery as evidence at the time of trial.

Plaintiff reserves the right to introduce any and all evidence and other tangible things identified by other parties.

Plaintiff reserves the right to supplement this list of documents as discovery continues and additional information becomes available.

DATED this 10 day of January, 2008.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of January, 2008, a true and correct copy of the foregoing PLAINTIFF'S FIFTH SUPPLEMENTAL EARLY CASE CONFERENCE LIST OF WITNESSES AND DOCUMENTS was mailed in a sealed envelope by U.S. Mail, postage prepaid to the following addressees:

10676-05  
Moran & Associates  
Jeffery A. Bendavid, Esq.  
630 S. Fourth St.  
Las Vegas, NV 89101  
Attorneys for Defendant Fiesta Palms, LLC

S. Anderson  
An Employee of Benson, Bertoldo, Baker & Carter



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7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

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SUPP  
STEVEN M. BAKER, ESQ.  
Nevada Bar No. 4522  
Benson, Bertoldo, Baker & Carter  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
(702) 228-2600  
Attorneys for Plaintiff

*Chris [Signature]*  
CLERK OF THE COURT

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FILED  
DISTRICT COURT

CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, an individual,	)	CASE NO: A531538
	)	DEPT. NO: X
Plaintiffs	)	
vs.	)	
	)	
FIESTA PALMS, L.L.C., a Nevada Limited Liability	)	
Company, d/b/a PALMS CASINO RESORT;	)	
DOES I through X, inclusive; and ROE BUSINESS	)	
ENTITIES I through X, inclusive,	)	
	)	
Defendants.	)	

**PLAINTIFF'S SIXTH SUPPLEMENTAL EARLY CASE  
CONFERENCE LIST OF DOCUMENTS AND WITNESSES**

COMES NOW, Plaintiff, Enrique Rodriguez, by and through his attorney of record, Steven M. Baker, Esq., of the law firm of Benson, Bertoldo, Baker & Carter, and pursuant to Nevada Rules of Civil Procedure herein submits the following supplement to his early case conference list of witnesses and documents as follows:

**WITNESSES**

- Louis Mortillaro, Ph.D.  
Person Most Knowledgeable and/or Custodian of Records  
501 South Rancho Drive, Suite F37  
Las Vegas, Nevada 89106  
256-1330 Telephone

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BAKER  
& CARTER  
ATTORNEYS AT LAW

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This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

Plaintiff reserves the right to call any and all witnesses identified by any other party.

Plaintiff reserves the right to call any and all experts designated by other parties in this case to render expert testimony. This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.

Plaintiff reserves the right to call any and all witnesses necessary for impeachment or rebuttal purposes.

Plaintiff reserves the right to supplement this list of witnesses as discovery continues and as new information becomes available.

**DOCUMENTS**

1. Medical records and billing records from Rancho Physical Therapy, in the amount of \$10,933.00, consisting of 31 pages.
2. Medical records and billing records from Louis Mortillaro, Ph.D., in the amount of \$18,017.00, consisting of 14 pages.

Plaintiff reserves the right to amend the above list of documents and the right to submit additional documents, if any exists, as such documents may become available to plaintiff throughout the course of discovery.

Plaintiff reserves the right to submit any and/or all of the above documents and any documents produced throughout the course of discovery as evidence at the time of trial.

Plaintiff reserves the right to introduce any and all evidence and other tangible things identified by other parties.



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Plaintiff reserves the right to supplement this list of documents as discovery continues and additional information becomes available.

DATED this 24 day of January, 2008.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of January, 2008, a true and correct copy of the foregoing PLAINTIFF'S SIXTH SUPPLEMENTAL EARLY CASE CONFERENCE LIST OF WITNESSES AND DOCUMENTS was mailed in a sealed envelope by U.S. Mail, postage prepaid to the following addressees:

10676-05  
Jeffery A. Bendavid, Esq.  
Moran & Associates  
630 S. Fourth St.  
Las Vegas, NV 89101  
Attorneys for Defendant Fiesta Palms, LLC

S. Anderson  
An Employee of Benson, Bertoldo, Baker & Carter







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treatment of the plaintiff, and to the authenticity of the medical and billing records provided

- 2. Louis Mortillaro, Ph.D.  
Person Most Knowledgeable and/or Custodian of Records  
501 South Rancho Drive, Suite F37  
Las Vegas, Nevada 89106  
256-1330 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

- 3. California Hand Surgery & Orthopedic Spec Medical Clinic  
Person Most Knowledgeable and/or Custodian of Records  
8651 Wilshire Blvd., Suite 200  
Beverly Hills, California 90211

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided

- 4. Advanced Urgent Care  
Person Most Knowledgeable and/or Custodian of Records  
9975 South Eastern Avenue, Suite 110  
Las Vegas, Nevada 89182

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided

- 5. Rancho Physical Therapy  
Person Most Knowledgeable and/or Custodian of Records  
630 East Latham Avenue  
Hemet, California 92543  
951-652-9213

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided

- 6. The Bone & Joint Institute  
Michael Crovetti, DO  
Person Most Knowledgeable and/or Custodian of Records  
880 Seven Hills Drive, Suite 140  
Henderson, Nevada 89052

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This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided

- 7. Robert Gutierrez, MD  
Person Most Knowledgeable and/or Custodian of Records  
5380 South Rainbow, Suite 100  
Las Vegas, Nevada 89118  
838-3889 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided

- 8. Wilshire Surgicenter, Inc.  
Person Most Knowledgeable and/or Custodian of Records  
8641 Wilshire Blvd., Suite 201  
Beverly Hills, California 90211  
310-289-8600 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided

- 9. Matt Smith Physical Therapy  
Person Most Knowledgeable and/or Custodian of Records  
600 South Rancho Drive, Suite 103  
Las Vegas, Nevada 89106  
233-6179 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided

Plaintiff reserves the right to call any and all witnesses identified by any other party.

Plaintiff reserves the right to call any and all experts designated by other parties in this case to render expert testimony. This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.

Plaintiff reserves the right to call any and all witnesses necessary for impeachment or rebuttal purposes.

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Plaintiff reserves the right to supplement this list of witnesses as discovery continues and as new information becomes available.

DOCUMENTS

1. Medical and billing records from Russell J. Shah, MD, in the amount of \$875.00, consisting of 9 pages.
2. Billing records from Louis Mortillaro, Ph.D., in the amount of \$19,022.00, consisting of 8 pages.
3. Medical and billing records from California Hand Surgery & Orthopaedic Spec Medical Clinic, in the amount of \$ 954.36, consisting of 13 pages.
4. Billing record from Advanced Urgent Care, in the amount of \$74.00, consisting of one page
5. Billing records from Rancho Physical Therapy, in the amount of \$10,933.00, consisting of 11 pages
6. Canyon Medical for the Bone & Joint Institute, Dr. Crovetti, in the amount of \$700.00, consisting of one page.
7. Billing records from Robert Gutierrez, MD, in the amount of \$3,010.80, consisting of two pages
8. Medical records from Wilshire Surgicenter, consisting of 123 pages
9. Medical records and billing records from Matt Smith Physical Therapy, in the amount of \$12,906.00, consisting of 47 pages.

Plaintiff reserves the right to amend the above list of documents and the right to submit additional documents, if any exists, as such documents may become available to plaintiff



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throughout the course of discovery.

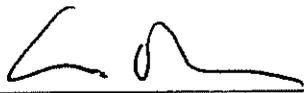
Plaintiff reserves the right to submit any and/or all of the above documents and any documents produced throughout the course of discovery as evidence at the time of trial.

Plaintiff reserves the right to introduce any and all evidence and other tangible things identified by other parties.

Plaintiff reserves the right to supplement this list of documents as discovery continues and additional information becomes available.

DATED this 26 day of July, 2008.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1<sup>st</sup> day of July, 2008, a true and correct copy of the foregoing PLAINTIFF'S SEVENTH SUPPLEMENTAL EARLY CASE CONFERENCE LIST OF WITNESSES AND DOCUMENTS was mailed in a sealed envelope by U.S. Mail, postage prepaid to the following addressees:

10676-05  
Jeffery A. Bendavid, Esq.  
Moran & Associates  
630 S. Fourth St.  
Las Vegas, NV 89101  
Attorneys for Defendant Fiesta Palms, LLC  
384-8424 Telephone  
384-6568 Facsimile

*S. Addison*

\_\_\_\_\_  
An Employee of Benson, Bertoldo, Baker & Carter



ENSON  
BERTOLDO  
BAKER  
& CARTER  
ATTORNEYS AT LAW

CLERK OF THE COURT

1 SUPP  
2 STEVEN M. BAKER, ESQ.  
3 Nevada Bar No. 4522  
4 Benson, Bertoldo, Baker & Carter  
5 7408 W. Sahara Avenue  
6 Las Vegas, Nevada 89117  
7 (702) 228-2600  
8 Attorneys for Plaintiff

FILED  
Jul 25 12 52 PM '08  
C. D. ...  
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

9 ENRIQUE RODRIGUEZ, an individual, )  
10 )  
11 Plaintiffs )  
12 vs. )  
13 )  
14 FIESTA PALMS, L.L.C., a Nevada Limited Liability )  
15 Company, d/b/a PALMS CASINO RESORT; )  
16 DOES I through X, inclusive; and ROE BUSINESS )  
17 ENTITIES I through X, inclusive, )  
18 )  
19 Defendants. )

CASE NO: A531538  
DEPT. NO: X

PLAINTIFF'S EIGHTH SUPPLEMENTAL EARLY CASE  
CONFERENCE LIST OF DOCUMENTS AND WITNESSES

20 COMES NOW, Plaintiff, Enrique Rodriguez, by and through his attorney of record,  
21 Steven M. Baker, Esq., of the law firm of Benson, Bertoldo, Baker & Carter, and pursuant to  
22 Nevada Rules of Civil Procedure herein submits the following supplement to his early case  
23 conference list of witnesses and documents as follows:

WITNESSES

- 24 1. Matt Smith Physical Therapy  
25 Person Most Knowledgeable and/or Custodian of Records  
26 848 North Rainbow Blvd., Box 357  
27 Las Vegas, Nevada 89107

28 This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and  
treatment of the plaintiff, and to the authenticity of the medical and billing records provided

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2. Louis Mortillaro, Ph.D.  
Person Most Knowledgeable and/or Custodian of Records  
501 South Rancho Drive, Suite F37  
Las Vegas, Nevada 89106  
256-1330 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

3. Jacob E. Tauber, MD  
Person Most Knowledgeable and/or Custodian of Records  
9033 Wilshire Blvd., Suite 401  
Beverly Hills, California 90211  
323-655-2968 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

4. California Hand Surgery & Orthopeadic Specialty Medical Clinic  
Person Most Knowledgeable and/or Custodian of Records  
8541 Wilshire Blvd., Suite 200  
Beverly Hills, California 90211  
310-289-8600 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

Plaintiff reserves the right to call any and all witnesses identified by any other party.

Plaintiff reserves the right to call any and all experts designated by other parties in this case to render expert testimony. This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.

Plaintiff reserves the right to call any and all witnesses necessary for impeachment or rebuttal purposes.

Plaintiff reserves the right to supplement this list of witnesses as discovery continues and as new information becomes available.



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DOCUMENTS

1. Billing records from Louis Mortillaro, Ph.D., in the additional amount of \$670.00, consisting of 4 pages.
2. Medical and billing records from California Hand Surgery & Orthopaedic Specialty Medical Clinic, in the amount of \$ 214.36, consisting of 2 pages.
3. Medical records and billing records from Matt Smith Physical Therapy, in the amount of \$2,579.00, consisting of 11 pages.
4. Billing records from Jacob E. Tauber, MD, in the amount of \$9,745.00, consisting of two pages.

Plaintiff reserves the right to amend the above list of documents and the right to submit additional documents, if any exists, as such documents may become available to plaintiff throughout the course of discovery.

Plaintiff reserves the right to submit any and/or all of the above documents and any documents produced throughout the course of discovery as evidence at the time of trial.

Plaintiff reserves the right to introduce any and all evidence and other tangible things identified by other parties.



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Plaintiff reserves the right to supplement this list of documents as discovery continues and additional information becomes available.

DATED this 23 day of July, 2008.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25<sup>th</sup> day of July, 2008, a true and correct copy of the foregoing PLAINTIFF'S EIGHTH SUPPLEMENTAL EARLY CASE CONFERENCE LIST OF WITNESSES AND DOCUMENTS was mailed in a sealed envelope by U.S. Mail, postage prepaid to the following addressees:

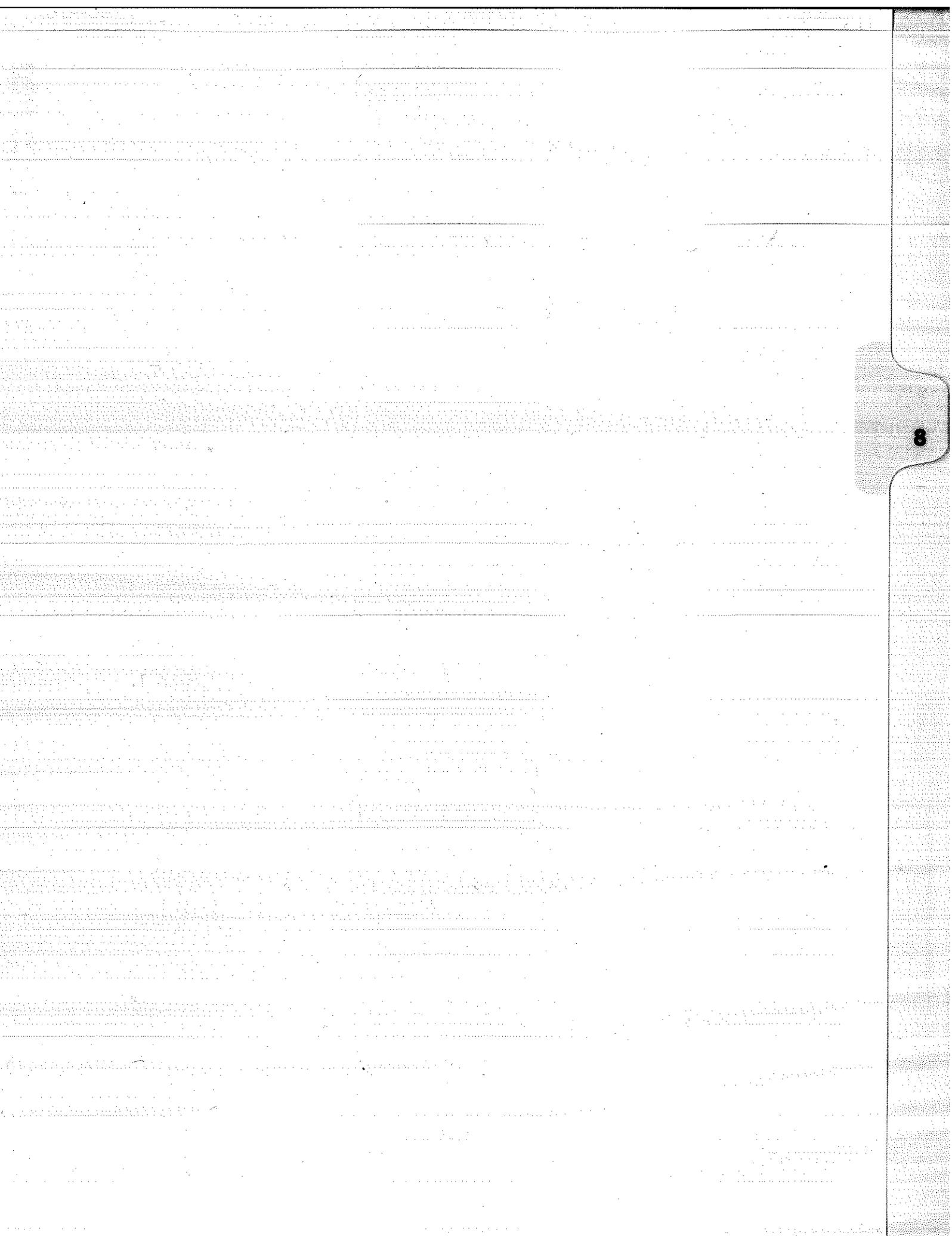
10676-05  
Jeffery A. Bendavid, Esq.  
Moran & Associates  
630 S. Fourth St.  
Las Vegas, NV 89101  
Attorneys for Defendant Fiesta Palms, LLC  
384-8424 Telephone  
384-6568 Facsimile

*S. Anderson*

\_\_\_\_\_  
An Employee of Benson, Bertoldo, Baker & Carter



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FILED

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*Ed [Signature]*  
CLERK OF THE COURT

1 SUPP  
2 STEVEN M. BAKER, ESQ.  
3 Nevada Bar No. 4522  
4 Benson, Bertoldo, Baker & Carter  
5 7408 W. Sahara Avenue  
6 Las Vegas, Nevada 89117  
7 (702) 228-2600  
8 Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

9 ENRIQUE RODRIGUEZ, an individual, )  
10 )  
11 Plaintiffs )  
12 vs. )  
13 )  
14 FIESTA PALMS, L.L.C., a Nevada Limited Liability )  
15 Company, d/b/a PALMS CASINO RESORT; )  
16 DOES I through X, inclusive; and ROE BUSINESS )  
17 ENTITIES I through X, inclusive, )  
18 )  
19 Defendants. )

CASE NO: A531538  
DEPT. NO: X

PLAINTIFF'S NINTH SUPPLEMENTAL EARLY CASE  
CONFERENCE LIST OF DOCUMENTS AND WITNESSES

20 COMES NOW, Plaintiff, Enrique Rodriguez, by and through his attorney of record,  
21 Steven M. Baker, Esq., of the law firm of Benson, Bertoldo, Baker & Carter, and pursuant to  
22 Nevada Rules of Civil Procedure herein submits the following supplement to his early case  
23 conference list of witnesses and documents as follows:

WITNESSES

- 24 1. Matt Smith Physical Therapy  
25 Person Most Knowledgeable and/or Custodian of Records  
26 848 North Rainbow Blvd., Box 357  
27 Las Vegas, Nevada 89107

RECEIVED

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CLERK OF THE COURT

28 This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and  
treatment of the plaintiff, and to the authenticity of the medical and billing records provided



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2. Louis Mortillaro, Ph.D.  
Person Most Knowledgeable and/or Custodian of Records  
501 South Rancho Drive, Suite F37  
Las Vegas, Nevada 89106  
256-1330 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

3. G. Michael Elkanich, MD  
Person Most Knowledgeable and/or Custodian of Records  
2680 Crimson Canyon Drive  
Las Vegas, Nevada 89128-9995

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided

4. Joseph J. Schifini, MD  
Person Most Knowledgeable and/or Custodian of Records  
526 South Tonopah Drive, Suite 160  
Las Vegas, Nevada 89106  
870-0011 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

5. Centennial Upright MRI / Centennial Medical Group  
Person Most Knowledgeable and/or Custodian of Records  
4640 West Craig Road  
North Las Vegas, Nevada 89032

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

6. Russell J. Shah, MD  
Person Most Knowledgeable and/or Custodian of Records  
2628 West Charleston Blvd.  
Las Vegas, Nevada 89102

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and



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treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

Plaintiff reserves the right to call any and all witnesses identified by any other party.

Plaintiff reserves the right to call any and all experts designated by other parties in this case to render expert testimony. This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.

Plaintiff reserves the right to call any and all witnesses necessary for impeachment or rebuttal purposes.

Plaintiff reserves the right to supplement this list of witnesses as discovery continues and as new information becomes available.

DOCUMENTS

1. Billing records from Louis Mortillaro, Ph.D., in the amount of \$20,027.00, consisting of 4 pages.
2. Medical record from Joseph J. Schifini, MD, consisting of one page.
3. Medical records and billing records from Matt Smith Physical Therapy, in the amount of \$3,368.00, consisting of 21 pages.
4. Billing records from G. Michael Elkanich, MD, in the amount of \$ 785.00, consisting of one pages.
5. Billing records from Centennial Upright MRI / Centennial Medical Group, in the amount of \$7,500.00, consisting of one page
6. Medical records and billing records from Russell J. Shah, MD, in the amount of \$400.00, consisting of four pages.

Plaintiff reserves the right to amend the above list of documents and the right to submit additional documents, if any exists, as such documents may become available to plaintiff



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throughout the course of discovery.

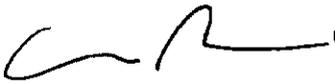
Plaintiff reserves the right to submit any and/or all of the above documents and any documents produced throughout the course of discovery as evidence at the time of trial.

Plaintiff reserves the right to introduce any and all evidence and other tangible things identified by other parties.

Plaintiff reserves the right to supplement this list of documents as discovery continues and additional information becomes available.

DATED this 7 day of October, 2008.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff



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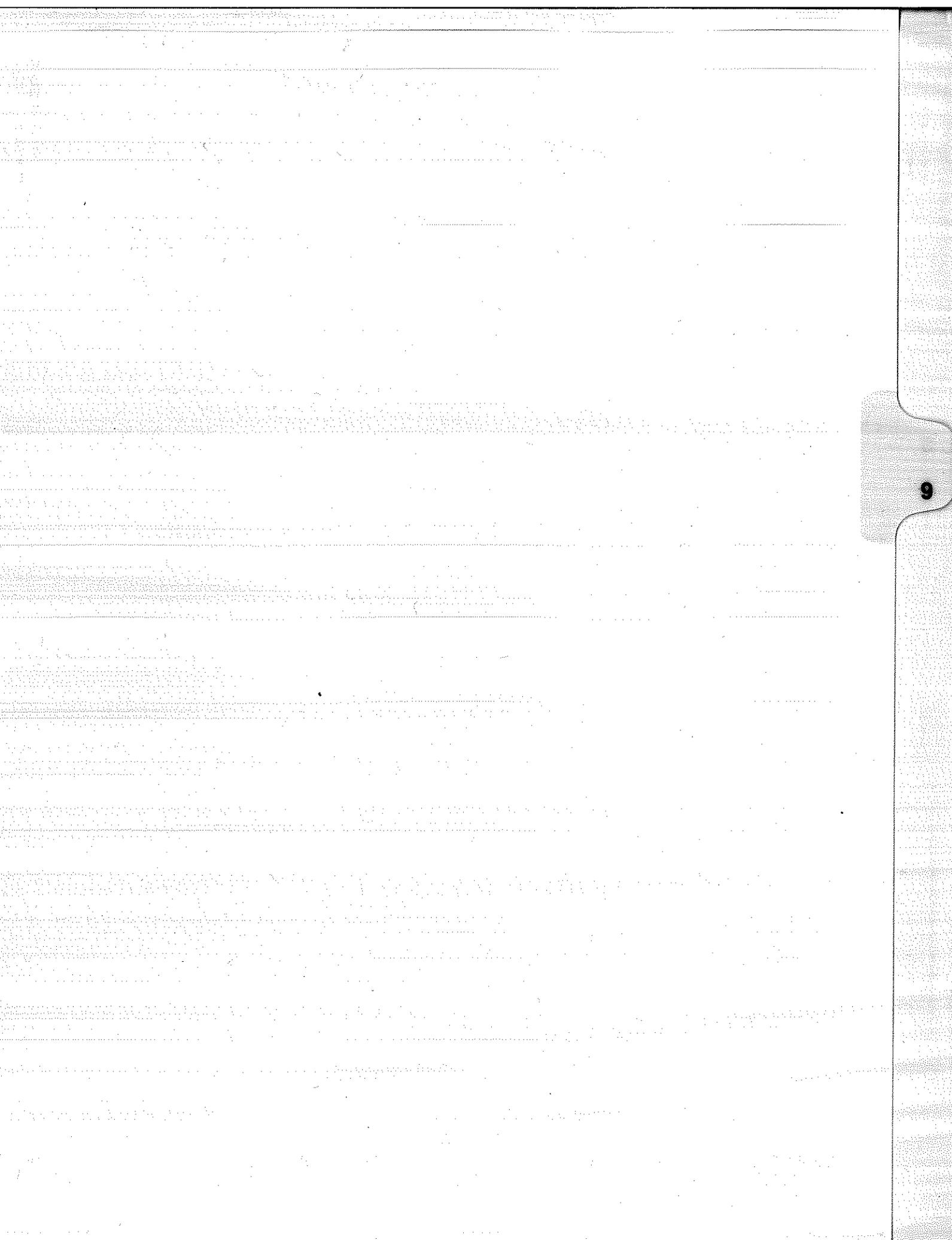
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10<sup>th</sup> day of October, 2008, a true and correct copy of the foregoing PLAINTIFF'S NINTH SUPPLEMENTAL EARLY CASE CONFERENCE LIST OF WITNESSES AND DOCUMENTS was mailed in a sealed envelope by U.S. Mail, postage prepaid to the following addressees:

10676-05  
Jeffery A. Bendavid, Esq.  
Moran & Associates  
630 S. Fourth St.  
Las Vegas, NV 89101  
Attorneys for Defendant Fiesta Palms, LLC  
384-8424 Telephone  
384-6568 Facsimile

10676-05  
Kenneth C. Ward, Esq.  
Archer Norris  
2033 North Main Street, Suite 800  
P.O. Box 8035  
Walnut Creek, CA 94596  
Co-Counsel for Fiesta Palms  
925-930-6600 Telephone  
925-930-6620 Facsimile

S. Anderson  
An Employee of Benson, Bertoldo, Baker & Carter







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treatment of the plaintiff, and to the authenticity of the medical and billing records provided

- 2. Louis Mortillaro, Ph.D.  
Person Most Knowledgeable and/or Custodian of Records  
501 South Rancho Drive, Suite F37  
Las Vegas, Nevada 89106  
256-1330 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

- 3. G. Michael Elkanich, MD  
Person Most Knowledgeable and/or Custodian of Records  
2680 Crimson Canyon Drive  
Las Vegas, Nevada 89128-9995

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided

- 4. Advanced Urgent Care  
Craig Jorgenson, MD  
Person Most Knowledgeable and/or Custodian of Records  
9975 South Eastern Avenue, Suite 110  
Las Vegas, Nevada 89183

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

- 5. Centennial Upright MRI  
Person Most Knowledgeable and/or Custodian of Records  
4640 West Craig Road  
North Las Vegas, Nevada 89032  
933-0409 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical and billing records provided.

Plaintiff reserves the right to call any and all witnesses identified by any other party.

Plaintiff reserves the right to call any and all experts designated by other parties in this



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case to render expert testimony. This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.

Plaintiff reserves the right to call any and all witnesses necessary for impeachment or rebuttal purposes.

Plaintiff reserves the right to supplement this list of witnesses as discovery continues and as new information becomes available.

DOCUMENTS

1. Billing records from Matt Smith Physical Therapy, in the amount of \$164.00, consisting of 1 page.
2. Billing record from G. Michael Elkanich, MD, in the amount of \$ 240.00, consisting of one page.
3. Billing record from Advanced Urgent Care, in the amount of \$239.00, consisting of one page
4. Billing records from Louis Mortillaro, Ph.D., in the amount of \$20,362.00, consisting of four pages.
5. Medical records and billing records from Centennial Upright MRI Center, in the amount of \$7,500.00, consisting of fourteen pages.

Plaintiff reserves the right to amend the above list of documents and the right to submit additional documents, if any exists, as such documents may become available to plaintiff throughout the course of discovery.

Plaintiff reserves the right to submit any and/or all of the above documents and any documents produced throughout the course of discovery as evidence at the time of trial.



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Plaintiff reserves the right to introduce any and all evidence and other tangible things identified by other parties.

Plaintiff reserves the right to supplement this list of documents as discovery continues and additional information becomes available.

DATED this 29 day of October, 2008.

BENSON, BERTOLDO, BAKER & CARTER

BY: 

STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of October, 2008, a true and correct copy of the foregoing PLAINTIFF'S TENTH SUPPLEMENTAL EARLY CASE CONFERENCE LIST OF WITNESSES AND DOCUMENTS was mailed in a sealed envelope by U.S. Mail, postage prepaid to the following addressees:

10676-05 Jeffery A. Bendavid, Esq. Adam S. Davis, Esq. Moran Law Firm 630 So. Fourth Street Las Vegas, NV 89101 702-384-8424 Telephone 702-384-6568 Facsimile Co-Counsel for Defendant Fiesta Palms, LLC	10676-05 Kenneth C. Ward Archer, Norris 2033 North Main Street, Suite 800 P.O. Box 8035 Walnut Creek, California 94596-3728 925-930-6600 Telephone 925-930-6620 Facsimile Attorneys for Defendant
10676-05 Marsha L. Stephenson, Esq. Stephenson & Dickinson 2820 West Charleston Blvd., Suite 19 Las Vegas, Nevada 89102-1942 702-474-7229 Telephone 702-474-7237 Facsimile Co-counsel for Defendant	

*S. Anderson*

An Employee of Benson, Bertoldo, Baker & Carter



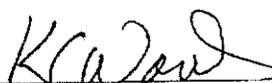


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KENNETH C. WARD, ESQ., of the law firm of ARCHER NORRIS and hereby demands a jury trial of the issues.

Dated: April 14, 2009

ARCHER NORRIS

  
Kenneth C. Ward (Bar No. 6530)  
A Professional Law Corporation  
2033 North Main Street, Suite 800  
PO Box 8035  
Walnut Creek, California 94596-3728  
Attorneys for Defendants  
FIESTA PALMS, LLC, a Nevada Limited  
Liability Company, d/b/a/ THE PALMS  
CASINO RESORT

1 **PROOF OF SERVICE**

2 **Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC**  
3 **Court and Action No: District Court, Clark County, Nevada Action No. A531538**

4 I, Olga E. Villeda, declare that I am over the age of eighteen years and not a party to this  
5 action or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035,  
6 Walnut Creek, California 94596-3728. On April 14, 2009, I caused the following document(s) to  
7 be served:

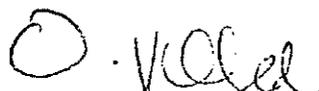
8 **DEMAND FOR JURY TRIAL**

- 9  by placing a true copy of the document(s) listed above, enclosed in a sealed envelope,  
10 addressed as set forth below, for collection and mailing on the date and at the business  
11 address shown above following our ordinary business practices. I am readily familiar  
12 with this business' practice for collection and processing of correspondence for  
13 mailing with the United States Postal Service. On the same day that a sealed envelope  
14 is placed for collection and mailing, it is deposited in the ordinary course of business  
15 with the United States Postal Service with postage fully prepaid.
- 16  by having a true copy of the document(s) listed above transmitted by facsimile to the  
17 person(s) at the facsimile number(s) set forth below before 5:00 p.m. The transmission  
18 was reported as complete without error by a report issued by the transmitting facsimile  
19 machine.
- 20  by placing a true copy of the document(s) listed above, in a box or other facility  
21 regularly maintained by Federal Express, an express service carrier, or delivered to a  
22 courier or driver authorized by the express service carrier to receive documents, in an  
23 envelope designated by the express service carrier, with delivery fees paid or provided  
24 for, addressed as set forth below.

25 Steven M. Baker, Esq.  
26 Benson, Bertoldo, Baker & Carter  
27 7408 W. Sahara Avenue  
28 Las Vegas, NV 89117  
Phone: (702) 228-2600  
*Attorneys for Plaintiff*  
Enrique Rodriguez

Jeffery A. Bendavid, Esq.  
Moran Law Firm  
630 S. 4th Street  
Las Vegas, NV 89101  
T: 702.384.8424  
F: 702.384.6568  
Co-Counsel for Defendant  
Fiesta Palms, LLC a Nevada Limited  
Liability Company, d/b/a The Palms  
Casino Resort

29 I declare under penalty of perjury that the foregoing is true and correct. Executed on April  
30 14, 2009, at Walnut Creek, California.

31   
32 \_\_\_\_\_  
33 Olga E. Villeda



ORIGINAL

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

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SUPP  
STEVEN M. BAKER, ESQ.  
Nevada Bar No. 4522  
Benson, Bertoldo, Baker & Carter  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
(702) 228-2600  
Attorneys for Plaintiff

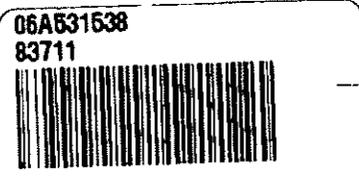
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*E. J. [Signature]*  
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DISTRICT COURT

CLARK COUNTY, NEVADA

ENRIQUE RODRIGUEZ, an individual, )  
)  
Plaintiffs )  
vs. )  
)  
FIESTA PALMS, L.L.C., a Nevada Limited Liability )  
Company, d/b/a PALMS CASINO RESORT; )  
DOES I through X, inclusive; and ROE BUSINESS )  
ENTITIES I through X, inclusive, )  
)  
Defendants. )

CASE NO: A531538  
DEPT. NO: X



PLAINTIFF'S THIRTEENTH SUPPLEMENTAL EARLY CASE  
CONFERENCE LIST OF DOCUMENTS AND WITNESSES

COMES NOW, Plaintiff, Enrique Rodriguez, by and through his attorney of record,  
Steven M. Baker, Esq., of the law firm of Benson, Bertoldo, Baker & Carter, and pursuant to  
Nevada Rules of Civil Procedure herein submits the following supplement to his early case  
conference list of witnesses and documents as follows:

WITNESSES

1. Louis Mortillaro, PhD  
Person Most Knowledgeable and/or Custodian of Records  
501 South Rancho Drive, Suite F37  
Las Vegas, Nevada 89106  
256-1330 Telephone

ENSON  
BERTOLDO  
BAKER  
& CARTER  
ATTORNEYS AT LAW

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This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical records and billing records provided.

2. Advanced Urgent Care—Primary  
Jorgenson and Koka  
Person Most Knowledgeable and/or Custodian of Records  
9975 South Eastern Avenue, #110  
Las Vegas, Nevada 89183

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical records and billing records provided.

3. Russell J. Shah, MD  
Person Most Knowledgeable and/or Custodian of Records  
10624 South Eastern Avenue, Suite A-425  
Las Vegas, Nevada 89102  
644-0500 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical records and billing records provided.

4. Chynoweth, Hill and Leavitt, LLC  
Aaron, DeGraff, P.T.A.  
Berne Leavitt, P.T.  
Jeff Davenport, P.T.  
Person Most Knowledgeable and/or Custodian of Records  
3831 West Charleston Blvd.  
Las Vegas, Nevada 89102

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical records and billing records provided.

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Plaintiff reserves the right to call any and all witnesses identified by any other party.

Plaintiff reserves the right to call any and all experts designated by other parties in this case to render expert testimony. This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.

Plaintiff reserves the right to call any and all witnesses necessary for impeachment or rebuttal purposes.

Plaintiff reserves the right to supplement this list of witnesses as discovery continues and as new information becomes available.

DOCUMENTS

1. Billing records from Louis Mortillaro, PhD, in the amount of \$21,902.00, consisting of four pages.
2. Billing records from Advanced Urogen Care—Primary, Jorgenson and Koka, in the amount of \$74.00, consisting of one page
3. Medical records and billing records from Russell J. Shah, MD, in the amount of \$825.00, consisting of nine pages
4. Billing records from Chynoweth, Hill and Leavitt, in the amount of \$1,542.00, consisting of six pages.

Plaintiff reserves the right to amend the above list of documents and the right to submit additional documents, if any exists, as such documents may become available to plaintiff throughout the course of discovery.

Plaintiff reserves the right to submit any and/or all of the above documents and any documents produced throughout the course of discovery as evidence at the time of trial.



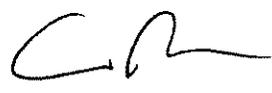
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Plaintiff reserves the right to introduce any and all evidence and other tangible things identified by other parties.

Plaintiff reserves the right to supplement this list of documents as discovery continues and additional information becomes available.

DATED this 30 day of April, 2009.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
\_\_\_\_\_  
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of April, 2009, a true and correct copy of the foregoing PLAINTIFF'S THIRTEENTH SUPPLEMENTAL EARLY CASE CONFERENCE LIST OF WITNESSES AND DOCUMENTS was mailed in a sealed envelope by U.S. Mail, postage prepaid to the following addressees:

10676-05 Jeffery A. Bendavid, Esq. Adam S. Davis, Esq. Moran Law Firm 630 So. Fourth Street Las Vegas, NV 89101 702-384-8424 Telephone 702-384-6568 Facsimile Co-Counsel for Defendant Fiesta Palms, LLC	10676-05 Kenneth C. Ward Archer, Norris 2033 North Main Street, Suite 800 P.O. Box 8035 Walnut Creek, California 94596-3728 925-930-6600 Telephone 925-930-6620 Facsimile Attorneys for Defendant
10676-05 Marsha L. Stephenson, Esq. Stephenson & Dickinson 2820 West Charleston Blvd., Suite 19 Las Vegas, Nevada 89102-1942 702-474-7229 Telephone 702-474-7237 Facsimile Co-counsel for Defendant	

S. Anderson  
An Employee of Benson, Bertoldo, Baker & Carter



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*E. J. ...*  
CLERK OF THE COURT

1 SUPP  
2 STEVEN M. BAKER, ESQ.  
3 Nevada Bar No. 4522  
4 Benson, Bertoldo, Baker & Carter  
5 7408 W. Sahara Avenue  
6 Las Vegas, Nevada 89117  
7 (702) 228-2600  
8 Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

9 ENRIQUE RODRIGUEZ, an individual, )  
10 Plaintiffs )  
11 vs. )  
12 FIESTA PALMS, L.L.C., a Nevada Limited Liability )  
13 Company, d/b/a PALMS CASINO RESORT; )  
14 DOES I through X, inclusive; and ROE BUSINESS )  
15 ENTITIES I through X, inclusive, )  
16 Defendants. )

CASE NO: A531538  
DEPT. NO: X

06A531538  
83678



PLAINTIFF'S FOURTEENTH SUPPLEMENTAL EARLY CASE  
CONFERENCE LIST OF DOCUMENTS AND WITNESSES

17 COMES NOW, Plaintiff, Enrique Rodriguez, by and through his attorney of record,  
18 Steven M. Baker, Esq., of the law firm of Benson, Bertoldo, Baker & Carter, and pursuant to  
19 Nevada Rules of Civil Procedure herein submits the following supplement to his early case  
20 conference list of witnesses and documents as follows:  
21

WITNESSES

- 22  
23 1. Advanced Urgent Care—Primary  
24 Jorgenson and Koka  
25 Person Most Knowledgeable and/or Custodian of Records  
26 9975 South Eastern Avenue, #110  
27 Las Vegas, Nevada 89183  
28

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

ENSON, BERTOLDO, BAKER & CARTER  
ATTORNEYS AT LAW

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This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical records and billing records provided.

3. Rancho Physical Therapy  
John G. Nork, MD  
Person Most Knowledgeable and/or Custodian of Records  
630 East Latham Avenue  
Hemet, California 92543  
951-696-9353 Telephone

This witness is expected to testify as to his/her knowledge of the injuries, diagnosis and treatment of the plaintiff, and to the authenticity of the medical records and billing records provided.

Plaintiff reserves the right to call any and all witnesses identified by any other party.

Plaintiff reserves the right to call any and all experts designated by other parties in this case to render expert testimony. This plaintiff may ask expert witness questions of any percipient and/or expert witnesses called by any party at trial.

Plaintiff reserves the right to call any and all witnesses necessary for impeachment or rebuttal purposes.

Plaintiff reserves the right to supplement this list of witnesses as discovery continues and as new information becomes available.

**DOCUMENTS**

1. Billing records from Advanced Urgent Care—Primary, Jorgenson and Koka, in the amount of \$239.00, consisting of one page
2. Billing records from Rancho Physical Therapy, in the amount of \$805.00, consisting of nine pages.



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Plaintiff reserves the right to amend the above list of documents and the right to submit additional documents, if any exists, as such documents may become available to plaintiff throughout the course of discovery.

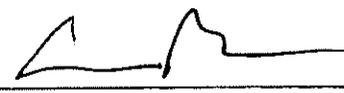
Plaintiff reserves the right to submit any and/or all of the above documents and any documents produced throughout the course of discovery as evidence at the time of trial.

Plaintiff reserves the right to introduce any and all evidence and other tangible things identified by other parties.

Plaintiff reserves the right to supplement this list of documents as discovery continues and additional information becomes available.

DATED this 30 day of April, 2009.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of April, 2009, a true and correct copy of the foregoing PLAINTIFF'S FOURTEENTH SUPPLEMENTAL EARLY CASE CONFERENCE LIST OF WITNESSES AND DOCUMENTS was mailed in a sealed envelope by U.S. Mail, postage prepaid to the following addressees:

10676-05 Jeffery A. Bendavid, Esq. Adam S. Davis, Esq. Moran Law Firm 630 South Fourth Street Las Vegas, Nevada 89101 702-384-8424 Telephone 702-384-6568 Facsimile Co-Counsel for Defendant Fiesta Palms, LLC	10676-05 Kenneth C. Ward Archer, Norris 2033 North Main Street, Suite 800 P.O. Box 8035 Walnut Creek, California 94596-3728 925-930-6600 Telephone 925-930-6620 Facsimile Attorneys for Defendant
10676-05 Marsha L. Stephenson, Esq. Stephenson & Dickinson 2820 West Charleston Blvd., Suite 19 Las Vegas, Nevada 89102-1942 702-474-7229 Telephone 702-474-7237 Facsimile Co-counsel for Defendant	

*S. Anderson*

An Employee of Benson, Bertoldo, Baker & Carter



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ACOM  
STEVEN M. BAKER  
Nevada Bar No. 4522  
BENSON, BERTOLDO, BAKER & CARTER  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Telephone : (702) 228-2600  
Facsimile : (702) 228-2333  
e-mail : [monique@bensonlawyers.com](mailto:monique@bensonlawyers.com)  
Attorneys for Plaintiff

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*Ernest J. ...*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

06A531538  
239860



\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
  
Plaintiff,  
  
vs.  
  
FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES 1 through X,  
inclusive,  
  
Defendants.

CASE NO: A531538  
DEPT NO: 10

AMENDED COMPLAINT

COMES NOW the Plaintiff ENRIQUE RODRIGUEZ, by and through his attorney of record Steven M. Baker, Esq., of the law firm of BENSON, BERTOLDO, BAKER & CARTER, and for his claims of relief against the Defendants, and each of them, alleges and complains as follows:

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

1.

That Plaintiff, ENRIQUE RODRIGUEZ was at the time of the incident, a resident of Riverside County, State of California.

2.

That at all times herein mentioned, Defendant, Fiesta Palms, L.L.C., d/b/a The Palms Casino Resort (hereinafter, collectively referred to as "PALMS RESORT") was, and still is, a

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333  
BENSON BERTOLDO BAKER & CARTER ATTORNEYS AT LAW  
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Nevada Limited Liability Company duly authorized and regularly conducting business within Clark County, State of Nevada.

3.

That at all times herein mentioned, Defendant BRANDY L. BEAVERS was and is a resident of Clark County or the State of Nevada, now residing in the State of Arizona.

4.

That the true names and capacities of the Defendants Does I through X, inclusive, and Roe Business Entities I through X, inclusive, and each of them, are unknown to Plaintiffs, who, therefore, sues said Defendants by said fictitious names. Defendants designated as Does I through X are individuals who, as herein alleged, were participating in the events described herein as either as Palm Girl, a patron of the subject Sports Book/Sports Bar, and/or are individuals responsible for training, supervising, and/or controlling the subject premises, the conduct of the Palm Girls, and/or the activities occurring at the time and place alleged herein. Plaintiff is informed, believes and thereon alleges that each of the Defendants designated as Doe is in some manner negligently and/or statutorily responsible for the events and happenings referred to and caused damages proximately to Plaintiff Enrique Rodriguez as herein alleged. Plaintiff will ask leave of the Court to amend his Complaint to insert the true names of such Defendants when the same have been ascertained.

5.

That the true names and capacities of the Defendants Roe Business Entities I through X, inclusive, are unknown to Plaintiff, who, therefore sues said Defendants by said fictitious names. Defendants designated as Roe Business Entities I through X are owners, operators, agents, employers, employees, assigns, maintainers, inspectors, predecessors and/or successors in interest, contractors, subcontractors, political subdivisions, governmental bodies, insurers or entities otherwise in possession and/or control of the persons and/or premises mentioned herein and/or are agencies, corporations and/or business interests employing, training, contracting, and/or otherwise responsible for the services of the Palm Girls and/or the activities occurring on



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the subject premises at the time and place alleged herein. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated as a Roe Business Entity is in some manner negligently, vicariously, statutorily, contractually, jointly and/or severally or otherwise responsible for the events and happenings referred to and caused damages proximately to Plaintiff as herein alleged. Plaintiff will ask leave of the Court to amend his Complaint to insert the true names of such Defendants when the same has been ascertained.

6.

That at all times pertinent hereto, and particularly on or about November 22, 2004, Defendant Palms Resort owned, operated, maintained and controlled a sports bar/book open to the public, located within the Palms Resort, 4321 West Flamingo Road, Las Vegas, Nevada 89103.

7.

That on or about November 22, 2004, Plaintiff, ENRIQUE RODRIGUEZ was on the premises of Defendant PALMS RESORT as a patron thereof.

8.

That on November 22, 2004, Plaintiff ENRIQUE RODRIGHUZ went to the Palms' sports bar/book to watch a football game. During half-time, agents, employees, and/or assigns of the Palms and, in particular, Defendant BRANDY L. BEAVERS were participating in a promotion wherein they were throwing souvenirs to Sports Book/Sports Bar patrons while blindfolded.

9.

That the agents, employees, and/or assigns of the Palms Resort known as the Palm Girls were contracted from, supplied by, and/or otherwise provided by an agency, company, and/or other business entity hereby designated as Roe Business Entity.

10.

In response to Palm Girl BRANDY L. BEAVERS throwing souvenirs in the Sports Book/Sports Bar while blind-folded, a customer within the Sports Book/Sports Bar dove for a



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thrown souvenir and hit Plaintiff's extended and stationary left knee. Plaintiff then struck the person next to him, hitting the left side of his head, then falling down, thereby sustaining the injuries and damages alleged herein.

**FIRST CAUSE OF ACTION**  
(Negligence of BRANDY L. BEAVERS and PALMS RESORT)

11.

That on or about November 22, 2004, Defendant BRANDY L. BEAVERS negligently, carelessly, and recklessly threw souvenirs into the crowd at the Palms Resort sport book while blindfolded,, thereby causing an unknown patron of the Sports Book/Sports Bar to impact with Plaintiff Enrique Rodriguez's knee, thereby causing the injuries and damages complained of herein.

12.

That on or about November 22, 2004, Defendant, PALMS RESORT, and/or its employees, agents or assigns, negligently, carelessly and recklessly caused, allowed, and permitted Defendant BRANDY L. BEAVERS to throw said souvenirs while blindfolded, thereby causing an unknown patron of the Sports Book/Sports Bar to impact with Plaintiff Enrique Rodriguez's knee, thereby causing the injuries and damages alleged herein.

13.

That on or about November 22, 2004, Defendant PALMS RESORT, Roe Business Entity, and/or its employees, agents or assigns, negligently, carelessly and recklessly caused, allowed, and permitted Defendant BRANDY L. BEAVERS to throw said souvenirs, thereby causing an unknown patron of the Sports Book/Sports Bar to impact with Plaintiff Enrique Rodriguez's knee, thereby causing the injuries and damages alleged herein.

14.

That the aforesaid acts of Defendants PALMS RESORT, BRANDY L. BEAVERS and/or Roe Business Entity, and/or their employees, agents or assigns were breaches of the duty of reasonable care owed by said Defendants to Sports Book/Sports Bar patrons, and in particular to Plaintiff ENRIQUE RODRIGUEZ.



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15.

That all acts and omissions alleged with respect to Defendant BRANDY L. BEAVERS occurred while said Defendant was acting within the scope and course of her agency, employment and or assignment with Defendant PALMS RESORT and Roe Business Entity, and each of them. Defendants PALMS RESORT and Roe Business Entity, and each of them, are therefore vicariously, contractually, statutorily and/or otherwise liable for the negligence, carelessness and recklessness of Defendant BRANDY L. BEAVERS as alleged herein.

16.

As a direct and proximate result of the negligence, carelessness and recklessness of Defendants PALMS RESORT, BRANDY L. BEAVERS and/or Roe Business Entity, and/or their employees, agents or assigns, and each of them, Plaintiff, ENRIQUE RODRIGUEZ, was injured in his health, strength and activity, sustaining shock and injury to his body, nervous system and person, all of which have caused, and will continue to cause Plaintiff physical, mental and nervous pain and suffering.

17.

That as a direct and proximate result of the negligence, carelessness and recklessness of Defendants PALMS RESORT, BRANDY L. BEAVERS, and/or Roe Business Entity, and/or their employees, agents or assigns, and each of them, Plaintiff ENRIQUE RODRIGUEZ has incurred and continues to incur medical expenses, economic losses, possible future medical expenses and economic losses, and loss of enjoyment of life, all to Plaintiff's damages in an amount in excess of Ten Thousand Dollars (\$10,000).

**SECOND CAUSE OF ACTION**  
(PALMS RESORT and ROE BUSINESS ENTITY  
Negligent Employee Hiring, Training, Retention, and Supervision)

18.

Plaintiff replays and realleges each and every statement contained in the preceding paragraphs as though fully set forth herein.



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19.

At all time relevant hereto, Defendants PALMS RESORT and/or Roe Business Entity, and each of them, was the employer of and/or otherwise in control of Defendant BRANDY L. BEAVERS.

20.

At and before the time of the subject incident, Defendants PALMS RESORT and Roe Business Entity, and each of them, had a duty to adequately and reasonably hire, train, and supervise Defendant BRANDY L. BEAVERS and a related duty to effectuate and implement adequate and reasonable policies and procedures with respect to the conduct of their, and each of their, agents and/or employees.

21.

At all times pertinent hereto, Defendants PALMS RESORT and Roe Business Entity, and each of them, negligently and carelessly breached said standard of care by, but not limited to, failing to ascertain said Defendant BRANDY L. BEAVERS', qualifications and ability to responsibly perform her duties, failing to instruct said Defendant regarding safe and reasonable methods of distributing souvenirs to a crowd, failing to instruct said Defendant in safe and reasonable methods of crowd control, failing to create and disseminate clear and concise written and/or verbal protocols with respect to the same, and/or by retaining said Defendant when it was known, or should have been known, that she was incapable of safely performing her work activities.

22.

That as a direct and proximate result of the negligent and careless hiring, training, supervision and retention of Defendant BRANDY L. BEAVERS by Defendants PALMS RESORT and Roe Business Entity, and each of them, Plaintiff, ENRIQUE RODRIGUEZ was injured in his health, strength and activity, sustaining shock and injury to his body, nervous system and person, all of which have caused, and will continue to cause Plaintiff physical, mental and nervous pain and suffering.



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23.

That as a direct and proximate result of the negligent and careless hiring, training, supervision and retention of Defendant BRANDY L. BEAVERS by Defendants PALMS RESORT and Roc Business Entity, and each of them, Plaintiff ENRIQUE RODRIGUEZ sustained personal injuries and has incurred, and continues to incur, medical expenses, loss of income, loss of earning capacity, disability, property damage and loss of enjoyment of life, all to Plaintiff's special and general damages in an amount in excess of Ten Thousand Dollars (\$10,000).

**THIRD CAUSE OF ACTION**  
(PALMS RESORT AND BRANDY L. BEAVERS – Punitive Damages)

24.

Plaintiff repleads and realleges each and every statement contained in the preceding paragraphs as though fully set forth herein.

25.

The aforesaid actions and omissions of Defendants PALMS RESORT, BRANDY L. BEAVERS, and Roe Business Entity, were malicious, intentional, oppressive and/or in conscious and reckless disregard of the consequences to patrons of Defendant PALMS RESORT, and, in particular, to Plaintiff ENRIQUE RODRIGUEZ.

26.

As a direct and proximate result of the aforesaid malicious, intentional, oppressive or consciously and recklessly disregarded actions of said Defendants, and each of them, Plaintiff ENRIQUE RODRIGUEZ was injured in his health, strength and activity, sustaining shock and injury to his body, nervous system and person, all of which have caused, and will continue to cause Plaintiff physical, mental and nervous pain and suffering.

27.

That as a direct and proximate result of aforesaid malicious, intentional, oppressive or recklessly disregarded actions and omissions of said Defendants, and each of them, Plaintiff ENRIQUE RODRIGUEZ sustained personal injuries and has incurred, and continues to incur,



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medical expenses, loss of income, loss of earning capacity, disability, and loss of enjoyment of life, all to Plaintiff's special and general damages in an amount in excess of Ten Thousand Dollars (\$10,000).

WHEREFORE, Plaintiff prays for judgment against the Defendants, and each of them, as follows:

**FIRST CAUSE OF ACTION**

1. For general damages and loss in an amount in excess of Ten Thousand Dollars (\$10,000);
  2. For special damages in an amount to be determined at time of trial;
  3. For loss of income and earning capacity in an amount as yet undetermined;
  4. For reasonable attorney's fees, pre and post-judgment interest, and cost of suit;
- and
5. For such other and further relief as the Court may deem just and proper.

**SECOND CAUSE OF ACTION**

1. For general damages and loss in an amount in excess of Ten Thousand Dollars (\$10,000);
  2. For special damages in an amount to be determined at time of trial;
  3. For loss of income and earning capacity in an amount as yet undetermined;
  4. For reasonable attorneys fees, pre and post-judgment interest, and cost of suit;
- and
5. For such other and further relief as the Court may deem just and proper.

**THIRD CAUSE OF ACTION**

1. For general damages and loss in an amount in excess of Ten Thousand Dollars (\$10,000);
2. For special damages in an amount to be determined at time of trial;
3. For punitive damages in an amount to be determined at trial;
4. For loss of income and earning capacity in an amount as yet undetermined;

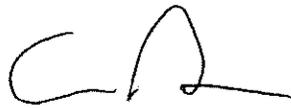


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5. For reasonable attorneys fees, pre and post-judgment interest, and cost of suit;  
and  
6. For such other and further relief as the Court may deem just and proper.

DATED: July 6, 2009

BENSON, BERTOLDO, BAKER & CARTER

By: 

STEVEN M. BAKER  
Nevada Bar No. 4522  
7408 W. Sahara Avenue  
Las Vegas, Nevada 89117  
Telephone: (702) 228-2600  
Facsimile : (702) 228-2333  
e-mail : [susan@bensonlawyers.com](mailto:susan@bensonlawyers.com)  
Attorneys for Plaintiff



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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of BENSON, BERTOLDO, BAKER & CARTER and that on the 8<sup>th</sup> day of July, 2009, I served a true and correct copy of the above and foregoing ~~\*\*\*~~ Amended Complaint on the parties as shown below:

Ø Via U.S. Mail by placing said document in a sealed envelope, with postage prepaid [N.R.C.P. 5(b)]

\_\_\_\_\_ Via facsimile [E.D.C.R. 7.26(a)]

\_\_\_\_\_ Via U.S. Mail [N.R.C.P. 5(b)] and via facsimile [E.D.C.R. 7.26(a)]

addressed as follows:

10676-05 Co-Counsel for Fiesta Palms  
Kenneth C. Ward, Esq.  
Archer Norris  
2033 North Main Street, Suite 800  
P.O. Box 8035  
Walnut Creek, California 94596  
925-930-6600 Telephone  
925-930-6620 Facsimile

10676-05 Attorneys for Fiesta Palms  
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10676-05 Co-Counsel for Fiesta Palms  
Marsha L. Stephenson, Esq. Attorneys for Fiesta Palms  
Stephenson & Dickinson  
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Las Vegas, Nevada 89102  
474-7229 Telephone  
474-7237 Facsimile

By: *Eusan C. Rhader*  
An Employee of:  
BENSON, BERTOLDO, BAKER & CARTER



7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333

**BENSON-BERTOLDO**  
**ERIK AKER & CARTER**  
ATTORNEYS AT LAW

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DISTRICT COURT  
CLARK COUNTY, NEVADA

*Alvin D. Shuman*  
CLERK OF THE COURT

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

CASE NO: A531538  
DEPT NO: 10

vs.

FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/b/a PALMS CASINO RESORT, BRANDY L. BEAVERS, individually, DOES 1 through X, inclusive, and ROE BUSINESS ENTITIES 1 through X, inclusive,

AMENDED ORDER SETTING BENCH TRIAL

Defendants.

IT IS HEREBY ORDERD THAT:

A. The above entitled case is set for a BENCH TRIAL on October 4, 2010 at 9:00 a.m.

B. A Pre-Trial Conference with the designated attorney and/or parties in proper person will be held on September 10, 2010 at 9:00 a.m.

C. A Calendar Call will be held September 24, 2010 at 9:00 a.m. Trial counsel (any any party in proper person) must appear.

D. The Pre-trial Memorandum must be filed no later than 9-22, 2010, with a courtesy copy delivered to chambers. EDCR 2.67 must be complied with.

E. All discovery deadlines, deadline for filing dispositive motions and motions to amend the pleadings or add parties are controlled by the Stipulation to Extend Discovery filed on November 24, 2009.

F. Stipulations to continue a trial date will not be considered by the Court. Pursuant to EDCR 2.35, a motion to continue trial due to any discovery issues or deadlines must be made before the Discovery Commissioner.

G. All motions in limine shall be filed at least 45 days prior to trial.

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H. Orders shortening time will not be signed except in extreme emergencies.

**AN UPCOMING TRIAL DATE IS NOT AN EXTREME EMERGENCY**

Failure of the designated trial attorney or any party appearing in proper person to appear for any court appearances or to comply with this Order shall result in any of the following: (1) dismissal of the action; (2) default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy or sanction.

Counsel must advise the Court immediately when the case settles or is otherwise resolved prior to trial. A stipulation which terminates a case by dismissal shall indicate whether a Scheduling Order has been filed and, if a date has been set, the date of that trial.

DATE: May 7, 2010

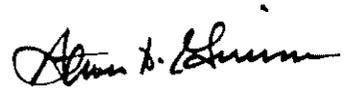
Jessie Walsh  
JESSIE WALSH, District Judge

I hereby certify that on the date filed, I caused to be Placed a copy of the foregoing Order in the folder(s) in the Clerk's Office or mailed to the following:

- Steven M. Baker, Esq. (Benson, Bertoldo, Baker & Carter, Chtd.)
- Marsha Stephenson, Esq. (Stephenson & Dickinson)
- Keith Gillette, Esq. (Archer, Norris)

Jeri Winter  
JERI WINTER, Judicial Assistant



  
CLERK OF THE COURT

1 **DOW**  
Jeffrey A. Bendavid, Esq. (NV Bar No. 6220)  
2 MORAN LAW FIRM, LLC  
630 South Fourth Street  
3 Las Vegas, NV 89101  
Telephone: 702.384.8424  
4 Facsimile: 702.384.6568

5 Kenneth C. Ward (Bar No. 6530)  
Keith R. Gillette (Bar No. 11140)  
6 ARCHER NORRIS  
A Professional Law Corporation  
7 2033 North Main Street, Suite 800  
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8 Walnut Creek, California 94596-3728  
Telephone: 925.930.6600  
9 Facsimile: 925.930.6620

10 Attorneys for Defendant FIESTA PALMS, LLC, a  
Nevada Limited Liability Company, d/b/a/ THE  
11 PALMS CASINO RESORT

DISTRICT COURT  
CLARK COUNTY, NEVADA

15 ENRIQUE RODRIGUEZ,  
16 Plaintiffs,

17 v.

18 FIESTA PALMS, LLC, a Nevada Limited  
19 Liability Company, d/b/a/ The Palms  
20 Casino Resort, et al.,  
21 Defendants.

Case No. A531538

**REBUTTAL EXPERT DISCLOSURE**

**[N.R.C.P. 16.1(a)(2)]**

Dept. No. X

22 Defendant FIESTA PALMS, LLC, a Nevada Limited Liability Company, dba THE  
23 PALMS CASINO RESORT ("The Palms" or "Defendant"), by and through its attorneys of  
24 record, and KEITH R. GILLETTE of the law firm of ARCHER NORRIS and JEFFREY A.  
25 BENDAVID of the MORAN LAW FIRM, hereby make the following disclosure of rebuttal  
26 experts pursuant to N.R.C.P. 16.1(a)(2), and scheduling orders in this matter, as indicated in bold.

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REBUTTAL EXPERT DISCLOSURE  
(NRC P 16.1(A)(2) A531538

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Expert Witnesses

3. **Thomas F. Cargill, Ph.D., LTD**  
**65 Bennington Court**  
**Reno, NV 89511**

Mr. Cargill is an economist, and has been retained to analyze and provide opinion testimony as to the claimed economic loss to of Plaintiff Enrique Rodriguez. It is anticipated that his opinion testimony will encompass and include rebuttal opinion testimony on plaintiff's claimed economic losses, as well as issues arising from and relating to the report prepared by plaintiff's expert Terrance Dineen. His written report will be provided supplementally upon receipt. Mr. Cargill reserves the right to amend and supplement the opinions and conclusions as described herein based on additional evidence adduced in discovery. Mr. Cargill's CV, current rate schedule and recent case list are attached as **Exhibit A**.

4. **Forrest P. Franklin**  
**C/O TALBOT**  
**455 Galindo St. , Ste. #2244**  
**Concord, CA 94520**

Mr. Franklin is a consultant in the area of premises security. Mr. Franklin has been retained to analyze and provide opinion testimony on issues relating to site security, security protocols, event management, and training of premises personnel. . It is anticipated that his opinion testimony will encompass and include rebuttal opinion testimony on issues arising from and relating to the report prepared by plaintiff's expert Steven Baker. His written report will be provided supplementally upon receipt. Ms. Franklin's CV and current rate schedule are attached as **Exhibit B**.

Defendant reserves this right to call as an expert witness any person whose testimony is needed to present an adequate defense in rebuttal to the allegations and contentions of plaintiff. Additional expert witnesses may be retained to testify. If this occurs, the identities will be disclosed immediately.

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Discovery is ongoing, and the above-disclosed experts expressly reserve the right to supplement their opinions and conclusions set out in their reports attached hereto. Likewise, as discovery is ongoing, defendant reserves the right to supplement this Disclosure.

Dated: July 14, 2010

ARCHER NORRIS



---

Kenneth C. Ward (Bar No. 6530)  
Keith R. Gillette (Bar No. 11140)  
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ZA126/987174-1

# EXHIBIT A

RESUME  
THOMAS F. CARGILL  
January 2010

**University Office Address:**

Department of Economics  
University of Nevada Reno  
Reno, NV 89557-0207  
Phone Number: (775) 784-6812  
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65 Bennington Court  
Reno, NV 89511  
Phone Number: (775) 849-1588  
FAX Number: (775) 849-1586  
E-mail address: tcargill1588@charter.net

**EDUCATION**

1. A.A.(emphasis in Economics), City College of San Francisco, June 1962.
2. B.S. in Economics, University of San Francisco, August 1964.
3. M.A. in Economics, University of California, Davis, September 1965.
4. Ph.D. in Economics, University of California, Davis, June 1968.

**ACADEMIC RECOGNITION**

1. University Scholarship, 1962-1964, USF.
2. Regents Graduate Fellowship, 1964-1966, UCD.
3. Ford Foundation Doctoral Dissertation Fellowship in Economics, 1967-1968.
4. Honorable Mention, 1967 National Science Foundation Dissertation Fellowship Competition.
5. Outstanding Researcher Award, University of Nevada, Reno, 1977-1978.
6. UNR Foundation Professor, 1986.

7. Listed in Who's Who in Economics (Third Edition). Mark Blaug (editor). Edward Elgar Publishing Limited: Cheltenham, United Kingdom, pp. 192-193.
8. Listed in several Marquis Who's Who Publication. Providence, NJ.
9. Year 2001 Winner of the Best Paper Award, Journal of the Korean Economy, for T. F. Cargill, "Central Bank Independence in Korea," Spring 2001 issue.
10. 2008 Regents' Research of the Year Award, Nevada System of High Education, Board of Regents.

#### **AREAS OF RESEARCH**

1. Financial Markets, Regulation, and Monetary Policy.
2. Financial and Monetary Systems in Asian with Emphasis on Japan.
3. Applied Econometrics, Regional Economics, and History of Economic Thought.

#### **EXPERIENCE: TEACHING AND RESEARCH POSITIONS**

1. Teaching Assistant in Economics, UCD, 1966-67.
2. 1968-1969: Lecturer in Economics, UCD, 1968-1969.
3. Lecturer in Economics, California State University, Sacramento, Spring 1969.
4. Assistant Professor of Economics, Purdue University, 1969-1973.
5. Associate Professor of Economics, UNR, 1973-1978.
6. Professor of Economics, UNR, 1978 to present.
7. Visiting Scholar, Office of the Comptroller of the Currency, Washington, D.C., March 1980-July 1980.
8. Visiting Professor, Graduate School of Administration, UCD, Spring 1982 and Spring 1983.
9. Visiting Scholar, Hoover Institution, Stanford University, Fall 1983 and Spring 1985.
10. Visiting Scholar, Bank of Japan, Tokyo, Japan, August 1984-December 1984.

11. Visiting Scholar, Federal Reserve Bank of San Francisco, January 1985-June 1986, April/May 2001, July 2002, December 2004, and December 2005. (Various Periods).
12. Researcher and Editor, Bureau of Business and Economic Research and Nevada Small Business Development Center, UNR, 1987 to 1996.
13. Visiting Scholar, Ministry of Finance, Tokyo, Japan, May 1987.
14. Visiting Scholar, Federal Deposit Insurance Corporation, Washington, D.C., January 1988 and Summer 1988.
15. Visiting Scholar, Ministry of Posts and Telecommunications, Tokyo, Japan, June 1991 and October 1992.
16. Visiting Scholar, Centre for Japanese Economic Studies, Macquarie University, Sydney, Australia, August 1993.
17. Visiting Researcher, Bank of Japan, Tokyo, Japan, June 1994 and 1998.
18. Visiting Researcher, Keio University, Tokyo, Japan, June 1997.
19. Visiting Scholar, Bank of Korea, Seoul, Korea, July 1997 and January 1998.
20. POSCO Fellow, East-West Center, located on campus of the University of Hawaii at Manoa, November 2000.
21. Visiting Lecturer, University of Hawaii at Manoa, College of Business Administration, Summer 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008 and 2009.

#### **PUBLICATIONS: PROFESSIONAL PAPERS**

1. D. Bailey and T. F. Cargill. "The Military Draft and Future Income." Western Economics Journal. December 1969, 4:365-370.
2. T. F. Cargill. "An Empirical Investigation of the Wage-Lag Hypothesis," American Economic Review. December 1969, 59:806-816.
3. T. F. Cargill and G. Rausser. "Futures Price Behavior as a Stochastic Process." 1969 Proceedings of the American Statistical Association, Business and Economic Statistics Section. 1969: 438-445. (Presented at the American Statistical Association Meeting, August 1969, New York).

4. G. Rausser and T. F. Cargill. "The Existence of Broiler Cycles: An application of Spectral Analysis." American Journal of Agricultural Economics. February 1970, 52:109-121.
5. T. F. Cargill. "Open Market Operations: The Long and Short Run View," 1970 Proceedings of the American Statistical Association, Business and Economic Statistics Section. 1970: 84-90. (Presented at a joint session of the American Statistical and American Economic Associations, December 1970, Detroit, Michigan).
6. T. F. Cargill. "Construction Activity and Secular Change in the United States," Applied Economics. June 1971, 3:85-97. (Presented at the Western Economic Association Meeting, August 1970, Davis, California).
7. T. F. Cargill and R. Meyer. "Simulation Study of Hannan's Procedures for Estimating a Distributed Lag Process." 1971 Proceedings of the American Statistical Association, Business and Economic Statistics Section. 1971: 316-323. (Presented at the American Statistical Association Meeting, August 1971, Fort Collins, Colorado).
8. T. F. Cargill and R. Meyer. "A Spectral Approach to Estimating the Distributed Lag Relationship Between Long and Short Term Interest Rates." International Economic Review. June 1972, 13:223-238.
9. T. F. Cargill and G. Rausser. "Time and Frequency Domain Representations of Future Prices as a Stochastic Process." Journal of the American Statistical Association. March 1972, 67:23-30.
10. T. F. Cargill and R. Meyer. "A Monte Carlo Study of the Almon Distributed Lag Estimation Procedure." 1972 Proceedings of the American Statistical Association, Business and Economic Statistics Section. 1972: 252-257. (Presented at the American Statistical Association Meeting, 1972, Montreal, Canada).
11. T. F. Cargill and R. Meyer. "Estimating the Demand for Electricity by Time of Day." Applied Economics. June 1972, 3:233-246.
12. T. F. Cargill. "Credit Unions and the Low Income Consumer." Journal of Consumer Affairs. Summer 1973, 7:69-76. (Presented at the Western Economic Association Meeting, August 1972, Santa Clara, California).
13. T. F. Cargill. "Early Applications of Spectral Methods to Economic Time Series." History of Political Economy. 1974, 6:1-16. (Presented at the 1971 Western Economic Association Meeting, August 1971, Vancouver, British Columbia). Reprinted in Time Series Models, Causality and Exogeneity edited by O. F. Hamouda and J.C.R. Rowley, London: Edward Elgar Publications, 1997.

14. T. F. Cargill and R. Meyer. "Interest Rates and Prices Since 1950." International Economic Review. June 1974, 15:458-471. (Presented at the Econometric Society Meeting, December 1971, New Orleans, Louisiana).
15. T. F. Cargill and R. Meyer. "Wages, Prices, Unemployment: Distributed Lag Estimates." Journal of the American Statistical Association. March 1974, 69, 98-107. (Presented at the Econometric Society Meeting, December 1972, Toronto, Canada).
16. T. F. Cargill and R. Meyer. "Estimating Term Structure Phenomena from Data Aggregated Over Time." Journal of Money, Credit and Banking. November 1974, 6:503-515.
17. T. F. Cargill and R. Meyer. "Some Time and Frequency Domain Distributed Lag Estimators: A Comparative Monte Carlo Study." Econometrica. November 1974, 42:1031-1044.
18. T. F. Cargill. "Performance of Limited-Income Credit Unions: 1969-1970." Technical Studies: Volume II of the National Commission on Consumer Finance. Washington, D.C. 1975.
19. T. F. Cargill. "The Term Structure of Interest Rates: A Test of the Expectations Hypothesis." Journal of Finance. June 1975, 30:761-771.
20. T. F. Cargill and R. Rausser. "Temporal Price Behavior in Commodity Futures Markets." Journal of Finance. September 1975, 30:1043-1053. (Presented at the Western Economic Association Meeting, June 1974, Las Vegas, Nevada). Reprinted in A. E. Peck (editor), Selected Writings on Futures Markets: Research Directions in Commodity Markets, 1970-1980. Chicago: Chicago Board of Trade, 1984.
21. T. F. Cargill. "Anticipated Price Changes and Nominal Interest Rates in the 1950's." Review of Economics and Statistics. August 1976, 58:364-367. (Presented at the Western Economic Association Meeting, June 1975, San Diego, California).
22. T. F. Cargill and W. Eadington. "Behavior of Nevada's Gaming Revenues Over Time." Nevada Review of Business and Economics, Spring 1977.
23. T. F. Cargill. "Recent Research on Credit Unions: A Survey." Journal of Economics and Business. Winter 1977, 29:155-162. Reprinted in S.K. Kaushik (editor), Banking, Money Markets and Monetary Policy. Lexington, MA.; Ginn Custom Publishing, 1980.
24. T. F. Cargill. "Direct Evidence on the Darby Hypothesis for the United States." Economic Inquiry. January 1977, 15:132-134.

25. T. F. Cargill and R. Meyer. "Intertemporal Stability of the Relationship Between Interest Rates and Price Changes." Journal of Finance. September 1977, 32:1001-1015. (Presented at the Federal Reserve Bank of San Francisco, March 1974). Paper abstracted in The C.F.A. Digest, Spring 1978, 8:27-28.
26. T. F. Cargill. "Negative Impact of Interest Rate Ceilings: The Case of Regulation Q." Nevada Review of Business and Economics. Fall 1977, 1:7-10. Reprinted in the Collegiate Forum. Spring 1978, 6-7. Dow Jones & Co., Inc.
27. T. F. Cargill and R. Meyer. "The Time Varying Response of Income to Changes in Monetary and Fiscal Policy." Review of Economics and Statistics. February 1978, 55:1-7. (Presented at the 1977 Meetings of the Econometric Society and Southwestern Economics Association, New York and Dallas, Texas, respectively. Also presented at the Federal Reserve Bank of San Francisco, May 1976).
28. T. F. Cargill and W. Eadington. "Nevada's Gaming Revenues: Time Characteristics and Forecasting." Management Science. August 1978, 24:1221-1230.
29. T. F. Cargill. "Negative Impact of Interest Rate Ceilings: The Case of Regulation Q; Reply." Nevada Review of Business and Economics. Summer 1978, 2:17.
30. T. F. Cargill. "Is the Nevada Economy Recession Proof?" Nevada Review of Business and Economics. Summer 1979, 3:9-15.
31. T. F. Cargill. "Clark Warburton and the Development of Monetarism Since the Great Depression." History of Political Economy. Fall 1979, 11:425-449. (Presented at the History of Economics Meeting, Toronto, Canada, May 1978, the Federal Reserve Bank of San Francisco, November 1978, and other places). Reprinted in Mark Blaug (editor), Pioneers in Economics, London: Edward Elgar Publishing Company, 1992. Also reprinted in O. F. Hamouda and J. C. R. Rowley (editors), Foundations of Probability, Econometrics and Economic Games, London: Edward Elgar Publishing Limited.
32. T. F. Cargill and R. Meyer. "Stability of the Demand Function for Money: An Unresolved Issue." American Economic Review. May 1978, 69:318-323. (Presented at the 1978 American Economic Association Meeting, Chicago, August 1978).
33. T. F. Cargill and R. Meyer. "The Term Structure of Inflationary Expectations and Market Efficiency." Journal of Finance. March 1980, 35:57-70. (Presented at the Econometric Society Meeting, Chicago, August 1978).
34. T. F. Cargill. "The Institutional Framework of Monetary Policy." Social Science Journal. April 1980, 17:79-87. (Presented at the Western Economic Association Meeting, San Francisco, June 1976).

35. T. F. Cargill and T. Troxel. "Modeling Life Insurance Savings: Some Methodological Issues." Journal of Risk and Insurance. September 1979, 66:391-410. (Presented at the 1977 Risk Theory Seminar, University of Texas, Austin, April 1977 and the American Risk and Insurance Association Meeting, Phoenix, Arizona, August 1977).
36. T. F. Cargill. "A Tribute to Clark Warburton, 1896-1979." Journal of Money, Credit and Banking. February 1981, 13:89-93.
37. D. Smith, T. F. Cargill, and R. Meyer. "An Economic Theory of the Credit Union." Journal of Finance. May 1981, 36:519-528. (Presented at the American Finance Association Meeting, Denver, Colorado, September 1980).
38. T. F. Cargill and R. Meyer. "Revealed Preferences in Macroeconomic Policy Decisions." Journal of Macroeconomics. Spring 1981, 36:519-528. (Presented at the Econometric Society Meeting, New York, December 1977 and the Federal Reserve Bank of San Francisco, November 1977).
39. T. F. Cargill. "Deficits, Government Spending, and Inflation." Western Tax Review. May 1980, 1:82-94, also published in Nevada Review of Business and Economics, Fall 1979, 3:2-9.
40. T. F. Cargill and G. Garcia. "The Impact of Deregulation on the Financial System." Issues in Bank Regulation. Winter 1981, 4:10-14.
41. T. F. Cargill and R. Meyer. "Dynamic Portfolio Behavior of Commercial Banks: An Integrated Analysis." Quarterly Review of Economics and Business. Spring 1982, 22:67-80.
42. T. F. Cargill. "The Great Depression and the Keynesian-Monetarist Debate." Western Tax Review. Spring 1982, 3:132-142.
43. T. F. Cargill and R. Meyer. "A Method of Analysis for Regulatory Impacts in Banking." In V.K. Smith (editor), Advances in Applied Microeconomic, Vol. 2. Greenwich, CT.; JAI Press Inc., 1982. (Presented at the Western Economic Association Meeting, Las Vegas, June 1979).
44. T. F. Cargill and G. Garcia. "Deregulation and Monetary Control Fifteen Months Later." Nevada Review of Business and Economics. Fall 1981, 5:9-18.
45. T. F. Cargill and S. Ghiglieri. "The Deregulation and Monetary Control Act of 1980." Nevada Review of Business and Economics. Spring/Summer 1981, 5:22-29.
46. T. F. Cargill and J. Walker. "Forecasting Nevada State Government Revenues." Nevada Review of Business and Economics. Spring/Summer 1981, 5:2-6.

47. T. F. Cargill. "The Nevada Economy: Past, Present, and Future." Southwestern Review of Management and Economics. Fall 1982, 2:73-86.
48. T. F. Cargill and R. Meyer. "Estimating the Value of Risk Information." In Haim Levy (editor), Research in Finance, Vol. 4. Greenwich, CT.; JAI Press Inc., 1983.
49. T. F. Cargill and R. Meyer. "Forecasting the Term Structure of Interest Rates and Portfolio Planning Models." Journal of Economics and Business. 1983, 35:399-411.
50. T. F. Cargill and R. Meyer. "Interest Rates and Uncertainty: Nominal and Risk-Adjusted Yields." West Coast Academic/Federal Reserve Economic Research Seminar, No. 6. Federal Reserve Bank of San Francisco, 1982.
51. T. F. Cargill and R. Meyer. "Municipal Interest Rates and the Term Structure of Inflationary Expectations." The Financial Review. May 1984, 19:135-151.
52. T. F. Cargill and K. Sullivan. "An Historical Perspective on Nevada Banking." Journal of the West. April 1984, 23:118.
53. T. F. Cargill and R. Meyer. "Forecast Evaluation of Livingston Data on Inflation Rates and Inflation Uncertainty." Decision Sciences. Spring 1985, 16:161-176.
54. T. F. Cargill. "A U.S. Perspective on Japanese Financial Liberation." Monetary and Economic Studies. The Bank of Japan. May 1985, 3:115-161 (In English and Japanese).
55. T. F. Cargill. "U.S. Financial Reform: Historical Perspective," FRBSF Weekly Letter, Federal Reserve Bank of San Francisco, March 22, 1985.
56. T. F. Cargill, "Japan's Financial Reform," FRBSF Weekly Letter, May 10, 1985.
57. T. F. Cargill, "A Tale of Two Financial Reforms," FRBSF Weekly Letter, May 17, 1985.
58. T. F. Cargill, "Is Competitive Banking Stable?" FRBSF Weekly Letter, April 18, 1986.
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#### RESEARCH SUPPORT

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3. Suntory Foundation, Osaka, Japan, 1983.
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8. Ishii Foundation, Tokyo, Japan, 1990.
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#### OTHER PROFESSIONAL ACTIVITIES

1. Academic Consulting: National Commission on Consumer Finance (1973), National Credit Union Administration (1975), Bureau of Business and Economic Research, UNR (since 1973), American College Testing Program (1977, 1980, 1981, and 1982), Nevada Budget Division and Gaming Control Board (1978), Nevada Budget Division (1986-1993), World Bank (1987 and 1988), Japan Center for International Exchange (1992), International Monetary Fund (1997, 1998, 2000, 2001, 2002, 2003, 2004 and 2005), U.S. Central Intelligence Agency (2002) and, State of Nevada Department of Labor (2008).
2. Other Consulting (Selected): Environmental Impact Planning Corp., San Francisco, CA. (1974), Teknekron, Inc., Berkeley, CA. (1976), Nevada Highway Department (1976), Nevada Employment Security Department (1976, 1982, and 1987), Nevada National Bank, Reno, NV (1979-1981), Sierra Pacific Power Company, Reno, NV (1979, 1984, 1988, 1990-91, and 1992), Pacific Telephone Company (1980), Nevada Bell (1999), and expert witness related to economic aspects of litigation from 1976 to the present.
3. Lectures to State and local groups. Newspaper, radio, and T.V. interviews in northern Nevada relating to local and national economic conditions.
4. Quoted in the Wall Street Journal (July 25, 1985, September 25, 1985, and July 13, 2006). Interviewed by Investor's Business Daily on Japan issues. Quoted in major Japanese newspapers and appeared on Japanese TV (NHK) which was seen in 25 countries day after 1992 presidential elections. Quoted in nation-wide newspapers in Korea (July 1997 and January 1998). Quoted in the Economist, September 25<sup>th</sup> - October 1<sup>st</sup>, 1999 and twice in 2001.
5. Written testimony in response to request from Representative Fernand J. St. Germain on the conduct of Federal Reserve monetary policy, April 1983.
6. Written report to Senator Bryan on U.S. Treasury to reform the structure of U.S. banking, 1991.
7. Contributed to Congressional Budget Office study on deposit insurance reform, 1991.

8. Referee for NSF proposals, professional journals, and academic publishers.
9. Served as chair or discussant for a number of national and regional professional meetings.
10. Developed forecasts of calls received by the Reno Crisis Call and Suicide Prevention Center, 1987 to 1991.
11. Developed and organized session on credit unions for American Finance Association Meetings, September 1980, Denver, Colorado. Session papers selected for publication in the Journal of Finance. May 1981, 519-556.
12. Participant to conferences (selected list) sponsored by the Federal Reserve Bank of San Francisco (1978-2001), National Bureau of Economic Research (1981), American Enterprise Institute (1982), Federal Reserve Bank of Chicago (1985, 1990, 1993, and 1997), Bank of Japan (1985, 1987, 1989, 1993, and 2000), 12th U.S.-Hungarian Economists Roundtable, Budapest, Hungary (November 1989), Ministry of Posts and Telecommunications, Tokyo, Japan (March 1990), and Second International Conference on Financial Systems sponsored by the Financial Services Agency and Keio University, December 2006.
13. Presented papers at the following (selected): Board of Governors of the Federal Reserve System, Research Staff, Washington, D.C. (1976); Federal Reserve Bank of San Francisco (1974, 1976, 1977, 1978, 1982, 1984, 1986); Federal Reserve Bank of Kansas City (1979); Comptroller of the Currency, Washington, D.C. (1979, 1981, and 1995); University of California at Berkeley (1981); University of Oregon (1989); Tokyo University (1984); Osaka University (1986 and 1991); Yokohama National University (1984); Bank of Japan, Institute for Monetary and Economic Studies (1984, 1991, 1992, 2000 and 2009); University of Colorado, Boulder Institute for Continuing Regulatory Education (1986, 1987, and 1988); Ministry of Finance, Institute of Fiscal and Monetary Studies, Tokyo, Japan (1987); Foundation for Advanced Information and Research (FAIR), Osaka, Japan, 1987); Osaka Bankers Association, Osaka, Japan (1988); Federal Deposit Insurance Corporation (1988); Japan Economic Institute, Washington, D.C. (1988); University of Colorado, Economic Institute (1988); Northern California Japan Society (1988); Japan Economic Seminar, Harvard University (1989); Cornell University (1990); Arizona State University (1988); Claremont Graduate School (1991 and 1992); Brooklyn Law School (1992); Columbia University (1992 and 1998); University of Nevada-Reno, Tokyo, Japan (1992); and Macquarie University, Sydney, Australia (1993); University of Southern California (1994); University of California, San Diego (1994); National Dong Hwa University, Hualien, Taiwan (1995); Keio University, Tokyo, Japan (1997); Federal Reserve Bank of Chicago and World Bank (1997); Korea Economic Research Institute, Seoul, Korea (1998); Georgetown University (1998); Institute for Financial Affairs, Tokyo, Japan (1998); International Monetary Fund (1997, 1998, 2000, 2001, and 2002); East-West Center, University of Hawaii (1999, 2000, and 2003); University of Hawaii (1991, 1998-2001, 2006), U.S.

Department of State (2004), Princeton University (2005), Keio University, Tokyo, Japan (2009) and Shih Hsin University, Taipei, Taiwan (2009).

14. Presented lectures on financial reform and deregulation May 1983 in Tokyo, Japan (Bank of Japan, Nihon-Keizai Center, Keizai Club, and Federation of Bankers Associations of Japan) and Osaka, Japan (Colloquium on Japan U.S. Financial Interdependence). October and November 1984 lectured on U.S. and Japanese financial reform at Fudan University, Shanghai, The People's Republic of China, November 1984. Lectured on U.S. financial and monetary policies during October 1988, People's Bank of China, Beijing, China.
15. Organized four-week program for visiting banks from the Czech Republic, International Programs and Services, UNR, October 1994.
16. Presented lectures on monetary theory and policy, Bank Indonesia, Jakarta, Indonesia. March 1994.
17. Participated in programs sponsored by Harvard Law School, Program on International Financial Systems, 1998-2009.
18. Presentation on Japan's economy, Federal Reserve Bank of San Francisco Board of Directors Meeting, Honolulu, Hawaii, June 14, 2001.

#### **OTHER ACTIVITIES (Selected)**

1. Chair, Honors Program in Economics, Purdue University 1969-1972.
2. Chair, Presidential Planning Committee for the College of Business, UNR, 1976.
3. Chair, 1978 Selection Committee for best paper in Economic Inquiry.
4. Member, 1978 Program Committee for Western Finance Association Meeting.
5. Chair, Graduate Council, UNR, 1983-1984.
6. Member, United Way Resource Allocation Committee, 1985-1987.
7. Advisor, Nevada Far East Trade Mission, State of Nevada, Fall 1985/Spring 1986.
8. President, Board of Directors of the Crisis Call and Suicide Prevention Center, Reno, NV., 1991 to October 1993, Member, October 1993 to December 1996.
9. Member, Advisory Council, Korean Economic Institute of America, Washington, D.C., Member, May 1996 to present.

10. Chair, University of Nevada, Reno Faculty Senate Ad Hoc Committee on Retirement. 1998.
11. Member, Standing Committee on Judicial Ethics and Election Practices, State of Nevada, 1998 to 2005.
12. Associate Editor, North Korean Review, 2004 to present.
13. Director, Center for Advanced Studies, University of Nevada, Reno, 2005 to September 2007.

Statement of Fees  
Effective: January 1, 2008  
Thomas F. Cargill

1. \$300 per hour for all effort directed toward litigation support.
2. Minimum fee of \$750 which is requested at the time of retention and charged against effort expended on the project at the above hourly rate.
3. Depositions are charged at the flat rate of \$700 up to a two-hour deposition. Deposition time beyond two hours is billed at the rate of \$350 per hour. Court testimony is billed at \$350 per hour.
4. Out-of-pocket expenses.

Deposition and Court Testimony as Expert Witness, January 1, 2005 to  
December 8, 2009

Thomas F. Cargill

This list is the most accurate listing that can be generated from my existing records. It is possible the list may not include every instance of testimony.

**DEPOSITION TESTIMONY**

**2005**

Yehia Awada v. Shuffle Master, Inc. [District Court, Clark County, Case No. A456205] (March 10, 2005, Las Vegas, NV)

Santiago Correa v. Jensen Enterprises [Ninth Judicial District Court, Douglas County, Case No. 04-CV-0071] (April 6, 2005, Reno, NV)

Jack White Custom Homes v. Herbert M. Burridge, et al. [Ninth Judicial District Court, Douglas County, Case 03-CV-0168] (May 16, 2005, Minden, NV)

Orco Construction Supply v. Steve LaForge, White Cap Industries [Second Judicial District Court, Washoe County, Case CV04-00058] (August 25, 2005, Reno, NV)

Reaves v. Hightree Associates [District Court, Clark County, Case No. A476993] (October 13, 2005, Las Vegas, NV)

Muller v. AMEX Assurance Company [United States District Court, District of Nevada, Case No. CV-N-05-0023-HDM-VPC] (November 16, 2005, Reno, NV)

**2006**

Scott v. United Rentals [District Court, Washoe County, NV, Case No. CV04-00668] (February 1, 2006, Reno, NV)

Chapman Industries v. United Insurance Company of America [District Court, Washoe County, Case No. CV87-6780] (February 7, 2006, Reno, NV)

Corey v. Nor-Cal Beverage Co., Inc. [Superior Court of California, Yolo County, Case No. CV 01-928] (February 9, 2006, Reno, NV)

Evans Creek v. The County of Washoe [District Court, Washoe County, Case No. CV-N-04-0433-HDM-VPE] (March 2, 2006, Reno, NV)

McCunn v. Paul W. Hiss [District Court, Washoe County, Case No. CV01-06803] (March 23, 2006, Reno, NV)

Kinstel v. AutoZone, Inc. [District Court, Clark County, Case No. A501221] (April 18, 2006, Reno, NV)

Susan Franklin v. Craig Primary Care [District Court, Clark County, Case No. A481853] (April 20, 2006, Las Vegas, NV)

Marcum v. Arndell Construction, et al. [District Court, Washoe County, Case No. 04-01900] (July 11, 2006, Reno, NV)

American Agcredit, FLCA v. Stewart, et al. [District Court, Washoe County, Case No. CV04-01393] (August 11, 2006, Reno, NV)

Dike v. Carrier Commercial Refrigeration, Inc. dba Wells Manufacturing [U.S. District Court for the District of Nevada, Case No. 3:05-CV-0549-HDM-PVC] (August 16, 2006, Reno, NV)

Van Asdale v. IGT [U.S. District Court for the District of Nevada, Case No. CV-N-04-0703-ECR-RAM] (Reno, NV, September 27, 2006)

Kauffman v. Hite [Family Division, District Court, Washoe County, Case No. DV05-00088] (September 22, 2006 Reno, NV)

Western Insurance Company v. Brandt, et al [District Court, Washoe County, Case No. CV02-04558] (November 1, 2006, Reno, NV).

Lidji and Fishman v. State Farm Insurance Co., et al [District Court, Clark County, Case No. A491976] (November 7, 2006, Reno, NV).

## 2007

Nichols v. Bates [District Court, Clark County, Case No. A507935] (January 5, 2007, Reno, NV).

Treick, et al. v. St. Jude's Ranch for Children [District Court, Clark County, Case No. A493499] (January 25, 2007, Las Vegas, NV).

TM & KKH, Inc. d/b/a Michael Hohl Honda Subaru v. Carson Tahoe Hospital [District Court, Carson City County, Case No. 04-01497A] (March 13, 2007, Reno, NV).

Sachanko v. Bob's Construction [District Court, Clark County, Case No. A493326] (March 22, 2007, Las Vegas, NV).

Nevada Power Company v. North Brown Properties [District Court, Clark County, Case No. A508237] (May 4, 2007, Las Vegas, NV).

McKinney and Gorham v. Bengé [District Court, Clark County, Case No. A452965] (May 16, 2007, Las Vegas, NV).

Kent v. Anderson [District Court, Clark County, Case No. A514053] (July 25, 2007, Reno, NV).

Grof v. Dux Machinery Corp [District Court, Elko County, Case No. CV C 05 489] (September 11, 2007, Reno, NV).

Hinostroza v. Circus Circus Casino [District Court, Clark County, Case No. A521054] (December 4, 2007, Reno, NV).

Bayramkul v. California Traditions, Inc. et al [District Court, Washoe County, Case No. CV06-01565] (December 6, 2007, Reno, NV).

## 2008

Giglio v. Carmine's Little Italy [District Court, Clark County, Case No. A523058] (May 12, 2008, Reno, NV).

Remmer v. Fink [District Court, Clark County, Case No. A514382] (September 9, 2008, Reno, NV).

Armbruster v. Board of Regents of the Nevada System of Higher Education [District Court, Clack County, Case No. A508923] (October 1, 2008, Reno, NV).

Arrowcreek Homeowners' Association v. Southwest Pointe Associates [District Court, Washoe County, Case No. CV07-00512] (October 8, 2008, Reno, NV)

Nevada Power Company v. Treasure Cove, LLC and Nevada Power Company v. Pardee Homes of Nevada [District Court, Clark County] (December 11, 2008, Reno, NV).

## 2009

Scarpati v. Fabulous Freddy's Car Wash [District Court, Clark County] (March 30, 2009, Reno, NV).

Jaramillo v. Smith's [District Court, Clark County] (May 6, 2009, Las Vegas, NV).

Cross v. Ziegler [District Court, Clark County, Case No. A548611] (July 21, 2009, Reno, NV).

Lambert v. Ryhal [District Court, Clark County, Case No. A540519] (July 22, 2009, Reno, NV).

Dare v. Davis Freight [District Court, Clark County, Case No. A537027] (August 27, 2009, Las Vegas, NV).

Cutler v. Drabant [District Court, Clark County, Case No. A528527] (November 13, 2009, Reno, NV).

McCloud v. ATC Vancom, Inc., et al. [District Court, Clark County, Case No. A538914] (November 13, 2009, Reno, NV).

Bowers v. Southwest Homes [District Court, Clark County, Case No. A516972] (December 1, 2009, Las Vegas, NV).

McLellan v. Ralphs Grocery dba Food 4 Less [District Court, Clark County, Case No. A507988] (December 3, 2009, Las Vegas, NV).

Clark v. Metropolitan Life Insurance Co. [United States District Court for the District of Nevada, Case No. 3:08-CV-00158-LRH-(VPC)] (December 8, 2009, Reno, NV).

### COURT/ARBITRATION TESTIMONY

#### 2005

Allen v. Republic Silver State Disposal [District Court, Clark County, NV, Case No. A419960] (November 4, 2005, Las Vegas)

Sierra Gateway Ventures v. Landmark Homes/Santerra [Second Judicial District Court, Washoe County, Case No. CV03-04778] (November 21, 2005, Reno, NV)

#### 2006

Corey v. Nor-Cal Beverage Co., Inc. [Superior Court of California, Yolo County, Case No. CV 01-928] (March 21, 2006, Woodland, CA)

Chapman Industries v. United Insurance Company of America [District Court, Washoe County, Case No. CV87-6780] (February 24, 2006, Reno, NV)

Conley v. May Trucking, Inc. [District Court, Washoe County] (March 30, 2006, Reno, NV)

American Agcredit, FLCA v. Stewart, et al. [District Court, Washoe County, Case No. CV04-01393] (October 12, 2006, Reno, NV).

Kauffman v. Hite [Family Division, District Court, Washoe County, Case No. DV05-00088] (October 10, 2006 Reno, NV)

#### 2007

Lidji and Fishman v. State Farm Insurance Co., et al [District Court, Clark County, Case No. A491976] Arbitration Hearing (February 1, 2007, Las Vegas, NV).

#### 2008

Estate of Shirley Giovacchini v. Commission of Internal Revenue [Federal Tax Court, Reno, NV, January 10, 2008].

Pelfrey v. Smith's [District Court, Washoe County] (January 24, 2008, Reno, NV).

Grimes v. Combined Transport Inc. [Federal Court] (December 10, 2008, Reno, NV).

#### 2009

Giglio v. Carmine's Little Italy [District Court, Clark County] (May 6, 2009, Las Vegas, NV).

TM & KKH, Inc. d/b/a Michael Hohl Honda Subaru v. Carson Tahoe Hospital [District Court, Carson City County, Case No. 04-01497A] (October 2, 2009, Reno, NV).

White v. Tim Bertagnolli, et al. [District Court, Carson City Case No. 08-TRT-00067-1B] (October 21, 2009, Carson City, NV).

# EXHIBIT B

## **F**orrest Franklin

is Board Certified in security management, disaster preparedness, and homeland security. He has consulted to multi-national corporations, and domestic and foreign governments at all levels. He is an author, educator, and an internationally recognized expert in the areas of workplace violence, crisis episode intervention and premises liability. He has authored global security operations protocols currently disseminated in thirty-nine countries.

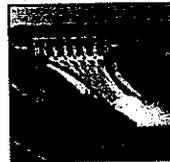
He is currently Director of Security and Fire/Life Safety at Transamerica Pyramid, tasked with protection of that icon from avowed terrorist attack, and previously held the same post for twelve years, also directing investigations, at Embarcadero Center, a \$1.2 billion, mixed use "city within a city" in San Francisco. He has been Director of Investigations for a major international consultancy and poised a 160 site high-tech firm's security department for migration to South and Central America.



Franklin has worked as a consultant and expert witness for plaintiff and defense attorneys in more than two hundred fifty cases involving premise and personal liability, adequacy of security/safety and security management, operations and training. He has been expert of record in three landmark workplace mass murder litigations.



Certified "RAM-Wsm" (risk assessment methodology for water), Forrest has devoted more than three thousand hours to treatment and the hydro-power and tested catastrophe disaster, natural or counter-terrorism security vulnerability assessments for water distribution utilities; and for dams and irrigation districts in geothermal arenas. He has developed, implemented and management programs that contemplate every known kind of man-made.



He has served two terms on the Professional Certification Board of A.S.I.S., was elected six times as Secretary/Treasurer of California Association of Licensed Investigators, and has most recently served on the A.S.I.S. International Foundation's Board of Trustees and the Councils on Diversity and Fire Life Safety.



Forrest is also active in American College of Forensic Examiners, Building Owners and Managers Association, Institute for Real Estate Management, Chambers of Commerce, and Law Enforcement & Security Liaison Association participating regularly in their lecture and literary circuits.

He is heavily involved in philanthropic support of the American Diabetes Association and ALS (Lou Gehrig's Disease) Association.

Mr. Franklin attained baccalaureate degrees in English and history at University of San Francisco and a master's degree in administration at Golden Gate University, where he also served twelve years on its faculty. He is a doctoral candidate. Forrest is a licensed Private Investigator in California.

Corporate Security/Operations Director – 16 years  
White collar crime forensic auditor – 4 years  
Workplace violence intervention – 18 years  
Foreign government liaison – 2 years  
Retail distribution security – 8 years  
University Faculty – 12 years



**Forrest P. Franklin, D.A.B.F.E**

**Curriculum Vitae**

Board Certified in Security Management, Disaster Recovery and Homeland Security  
Focus Group Consultants, Inc. A Nevada Professional Corporation  
888 516 1222 [thefocusgrp@aol.com](mailto:thefocusgrp@aol.com)

**Experience**

**2006-Present Director of Security – Transamerica Pyramid, San Francisco.**

*Establish standard security operations policy for the protection of an Icon; identify and deploy resources including counter-terrorism and intelligence gathering local state and federal law enforcement agencies; analyze, prioritize counter-surveillance and interpret findings for ownership. Develop business continuity program for nationwide distribution.*

**1989-Present Consultant, Security Expert Witness**

*Expert testimony-premises liability/security management (over 300 cases). Security operations procedure analysis/development. Revise or create contracts, post orders, and manuals. Security vulnerability surveys and audits. Guard service conversions. Threat assessment-Crisis intervention (workplace violence). Disaster recovery planning. Covert video. Executive protection. Investigation. Pre-employment screening and integrity assurance. Trial preparation--witness pre-qualification. Typical assignments included:*

- *2004-2005 Pro-tem Global Security Director, multi-national high-tech firm posturing for evolution in South America. Direction of access control & remote monitoring projects for 122 sites--Americas, Asia, Europe--56 officers, IT/Operations/Facilities/HR/Counsel interface. Complete Department modernization. Audit compliance with Sarbanes-Oxley.*
- *2003-2004 Analyst, vulnerability assessments for dams, hydropower, combustion turbine, geothermal compliance--Federal Energy Regulatory Commission--DHS mandates.*
- *2002-2003 Facilitator, EPA grant governing compliance post-911 risk assessment for a major California public municipal water production/distribution, sanitation, fire suppression utility using Sandia Laboratory RAM-W protocol.*

**1987-1989 Director of Operations  
Embarcadero Center/Pacific Property Services, San Francisco, CA.**

*Orchestrate all facility operations and contract services.*

**1978-1987 Director of Security & Investigation, Fire-Life Safety & Disaster Planning  
Embarcadero Center, LLP, San Francisco, CA.**

*Direct contract and in-house guard and Crime Prevention (18 off-duty police). Local, state, and federal, law enforcement and foreign government liaison. Direct security/fire-life safety/investigation. Interface with all operational facets of \$1.2 billion, ten acre, multi-structure high-rise complex, retail mall, hotels, garages (2,400 stalls), amphitheater and contiguous public areas. Media spokesperson, special event production coordination. Crisis management coordinator. Implement protection of ownership executives. Drill and evacuation implementation. Indoctrinate administrators, contractors, performing arts participants and 25,000 tenants.*

**1970-1978 Director of Investigation/ Executive Consultant  
Management Information Research Associates, San Rafael, CA.**

*Direct internal security audit and investigation units operating in ten western states. Develop evidence for prosecution, litigation, arbitration, bonding claims and Grand Jury proceedings. Human Resource integrity screening. Technical consultant to public agencies, domestic/multi national corporations. Investigate complex felony cases involving consumer fraud, drugs in the workplace and white-collar crime. Coordinate investigative activities with private sector and law enforcement, tax and regulatory authorities.*

**1968-1970 Peace Officer--San Leandro, CA.**

## Education

2006-9 Rutherford University of British Columbia – Candidate Ph.D. – Org. Psych.  
1975 Golden Gate University – M.A. Public Administration  
1969 Oakland Police Academy – Graduate  
1968 University of San Francisco – B.E. History  
1967 University of San Francisco – A.B. Literature  
Prep Salesian College, Oxford, Great Britain

## Certification/Participation

Fellow, American College of Forensic Examiners Institute, 2010  
Chair, Emergency Preparedness Committee, BOMA, 2010  
Fire-Life Safety Council, ASIS Int'l, 2008-10  
Chair, Private Sector Liaison, Mass Terror Attack Simulations, San Francisco, 2007-08  
Public Safety Committee, BOMA, 2007-08  
Panelist, National Facility & Technology Conference, Baltimore, 2006  
Panelist, Center for Nonproliferation, Monterey Institute for International Studies, 2005  
Diversity Council, ASIS International, 2005  
Board of Trustees, ASIS Int'l Foundation, 2004  
Certified Homeland Security (DHS III), American College of Forensic Examiners, 2004  
RAM-W (sm) Risk Assessment Methodology for Water – Sandia Laboratories 2003  
Building Owners & Managers Association Security & Safety Task Force, 2001-08  
Diplomate, (DABFE) American College of Forensic Examiners, 2001  
Secretary-Treasurer, California Association of Licensed Investigators, 1992-98  
Certified Disaster Recovery Planner (CDRP), 1991-present  
Chair, Re-certification Committee, Professional Certification Board, 1991-92  
Chair, Liaison Committee, Professional Certification Board, 1991-92  
Chair/Historian, A.S.I.S. San Francisco Chapter, 1988  
Chair Professional Certification Board, A.S.I.S., 1987-92  
Executive Committee on Security, Golden Gate Bridge 50<sup>th</sup> Anniversary, 1987  
Director: Chair, Membership Committee, Chief Special Agents, 1987-89  
Chair, Education Committee, San Francisco Chamber of Commerce, 1987-89  
Chair, Executive Committee, Security Council, San Francisco Fair, 1985-87  
Chair, CPP Review/Exam Committee, 1984-87  
Councilman, Tiburon, California (annex) 1984-86  
Curriculum Advisory Committee, Golden Gate University, 1980-90  
Certified Protection Professional (CPP), 1980-present  
Adjunct Professor, Golden Gate University, 1978-90

## Publications

- "Vulnerability Assessment in Post-9/11 Environment".  
American College of Forensic Examiners International Conference, September, 2006  
National Facilities Management & Technology Conference, March 2006  
ASIS Annual Chapter Seminar March, 2005
- "Post-9/11 Vulnerability Assessment". Association of Threat Assessment Professionals, March 2005.
- "Safety & Security—Perception vs. Reality". ACFEI Symposium, May 2004.
- "Post Disaster Trauma—Mental Health & Crisis Intervention". ACFEI Symposium May 2004.
- "How to Maintain Control". Security Management, May 2002.
- "Premise Security Liability—An Investigator's Perspective". CALI Journal, Spring, 2002.
- "Worker Compensation Claims". Security Business Practices Reference, May 2001.
- "Defeating Vandalism". Security Business Practices Reference, May 2001
- "Tracking Applications to Theft Abatement". Security Business Practices Reference, January 1999.
- "Premises Security Liability-Logic or Just Language". Expert/Ease Newsletter, August 1998.
- "Job Sleuths". San Francisco Business Times, March 9, 1998.
- "Standing Guard". California Real Estate Journal, August 1997
- "Workplace Violence-The Problem and the Panacea". CALI Newsletter, January 1995
- "CPP Examination Qualification Criteria Update". Security Management, February 1993
- "Violence in the Workplace: Over the Edge". Security Management, September 1991
- "Pass/Fail Variance": CPP Progress Report, Security Management, September 1990
- Certification Revocation Procedures—ASIS Policy Guide (By-laws) Incorporated, 1989
- Tiburon Annexation Feasibility Study – Author, 1985

## Affiliations

American College of Forensic Examiners  
ASIS International  
Bay Area Security/Law Enforcement Liaison Group (8-Ball)  
Building Owners and Managers Association  
California Association of Licensed Investigators  
Chambers of Commerce

American Diabetes Association  
ALS Association (Lou Gehrig's disease)

## Fee Schedule

Expert Testimony—pre trial analysis, trial, alternate resolution	\$280/hr
Deposition	\$380/hr
Consulting—Assessment, integration, planning, due diligence	\$230/hr

1 CERTIFICATE OF MAILING

2 **Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC**  
3 **Court and Action No: District Court, Clark County, Nevada Action No. A531538**

4 I, Tracy Pico, declare that I am over the age of eighteen years and not a party to this action  
5 or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035, Walnut  
6 Creek, California 94596-3728. On July 14, 2010, I caused the following document(s) to be  
7 served:

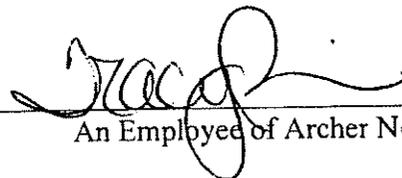
8 **REBUTTAL EXPERT DISCLOSURE**

- 9  by placing a true copy of the document(s) listed above, enclosed in a sealed envelope,  
10 addressed as set forth below, for collection and mailing on the date and at the business  
11 address shown above following our ordinary business practices. I am readily familiar  
12 with this business' practice for collection and processing of correspondence for  
13 mailing with the United States Postal Service. On the same day that a sealed envelope  
14 is placed for collection and mailing, it is deposited in the ordinary course of business  
15 with the United States Postal Service with postage fully prepaid.
- 16  by having a true copy of the document(s) listed above transmitted by facsimile to the  
17 person(s) at the facsimile number(s) set forth below before 5:00 p.m. The transmission  
18 was reported as complete without error by a report issued by the transmitting facsimile  
19 machine.
- 20  by placing a true copy of the document(s) listed above, in a box or other facility  
21 regularly maintained by Federal Express, an express service carrier, or delivered to a  
22 courier or driver authorized by the express service carrier to receive documents, in an  
23 envelope designated by the express service carrier, with delivery fees paid or provided  
24 for, addressed as set forth below.

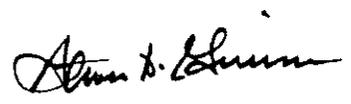
25 Steven M. Baker, Esq.  
26 Benson, Bertoldo, Baker & Carter  
27 7408 W. Sahara Avenue  
28 Las Vegas, NV 89117  
Phone: (702) 228-2600  
*Attorneys for Plaintiff*  
Enrique Rodriguez

Jeffery A. Bendavid, Esq.  
Moran Law Firm  
630 S. 4th Street  
Las Vegas, NV 89101  
T: 702.384.8424  
F: 702.384.6568  
Co-Counsel for Defendant  
Fiesta Palms, LLC a Nevada Limited  
Liability Company, d/b/a The Palms  
Casino Resort

29 I declare under penalty of perjury that the foregoing is true and correct. Executed on  
30 July 14, 2010, at Walnut Creek, California.

31   
32 \_\_\_\_\_  
33 An Employee of Archer Norris



  
CLERK OF THE COURT

1 MOT  
Marsha L. Stephenson, Esq. (NV Bar No. 6530)  
2 STEPHENSON & DICKINSON, P.C.  
2820 West Charleston Blvd., Suite 19  
3 Las Vegas, NV 89102-1942  
4 Telephone: (702) 474-7229  
Facsimile: (702) 474-7237

5 Kenneth C. Ward (Bar No. 6530)  
6 ARCHER NORRIS  
A Professional Law Corporation  
7 2033 North Main Street, Suite 800  
PO Box 8035  
8 Walnut Creek, California 94596-3728  
Telephone: 925.930.6600  
9 Facsimile: 925.930.6620

10 Attorneys for Defendant FIESTA PALMS, LLC, a  
Nevada Limited Liability Company, d/b/a/ THE  
11 PALMS CASINO RESORT

12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

15 ENRIQUE RODRIGUEZ,  
16 Plaintiffs,  
17 v.  
18 FIESTA PALMS, LLC, a Nevada Limited  
19 Liability Company, d/b/a/ The Palms  
Casino Resort, et al.,  
20 Defendants.

Case No. A531538

**MOTION TO COMPEL RESPONSES TO  
REQUEST FOR PRODUCTION OF  
DOCUMENTS, TO COMPEL FURTHER  
RESPONSES TO INTERROGATORIES;  
REQUEST FOR SANCTIONS; AND  
MOTION TO COMPEL INDEPENDENT  
MEDICAL EXAMINATIONS OF  
PLAINTIFF**

Date:  
Time:  
Dept. No.

23  
24 COMES NOW defendant FIESTA PALMS, LLC, a Nevada Limited Liability Company,  
25 d/b/a/ THE PALMS CASINO RESORT (hereinafter "Palms Casino"), by and through counsel of  
26 record, Marsha L. Stephenson,, Esq., of the law firm of STEPHENSON & DICKINSON, P.C,  
27 and Kenneth C. Ward, Esq., of the law firm of ARCHER NORRIS, and hereby files the following  
28 MOTION TO COMPEL INDEPENDENT MEDICAL EXAMINATIONS OF PLAINTIFF (the

ZA126/993522-1



1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. BACKGROUND TO THIS MOTION**

3 Plaintiff in this action has asserted substantial physical and emotional injuries he attributes  
4 to events occurring at The Palms Casino Resort in November 2004. Since at least September  
5 2005, plaintiff has sought the treatment of psychologist Louis Mortillaro to assist in evaluating  
6 and treating the psychological injuries he attributes to this accident.

7 In May 2009, plaintiff submitted to a physical examination with The Palms Casino's  
8 consultant, Dr. George Becker. Dr. Becker holds the unique qualifications in both the fields of  
9 psychiatry and orthopedics. Plaintiff underwent a physical examination in May 2009. However,  
10 plaintiff has refused to submit to psychological evaluation, notwithstanding the emotional and  
11 mental injuries he attributes to this incident, and the opinions of his treating psychologist, Louis  
12 Mortillaro.

13 As developed within, good cause exists to require plaintiff to submit to mental  
14 examinations by The Palms Casino's consultants. For this purpose, defendant has retained the  
15 services of Dr. George Becker, who has the assistance of other healthcare providers that are well  
16 versed in standardized testing protocols for mental health evaluations.

17 Plaintiff has also refused to agree to an Independent Medical Examination, despite making  
18 significant claims of physical and mental injury allegedly as a result of an incident forming the  
19 basis of the complaint.

20 For the reasons set forth below, Plaintiff should be compelled to provide responses to the  
21 discovery requests, and should be required to attend an Independent Medical Examination.

22 **II. STATEMENT OF FACTS**

23 On November 22, 2004, Plaintiff was in the sports bar at The Palms Casino for the  
24 purposes of watching a football game. Plaintiff alleges that during half-time of the football game,  
25 an unknown patron dove for a souvenir, thrown in to the bar area by a blindfolded "Palms girl,"  
26 and struck the Plaintiff's left knee. Plaintiff further alleges that he then struck another patron  
27 while falling and injured the left side of his head. Over the last five years, Plaintiff has been  
28 under the care of numerous medical providers with a diverse range of specialties.

1 Plaintiff contends that he is suffering from various and serious medical conditions,  
2 including, but not limited to, constant, sharp, tingling, throbbing pain and stiffness in his left  
3 knee. His claimed associated symptoms are generalized weakness, swelling, sleeping difficulties,  
4 and loss of balance. His symptoms are allegedly aggravated by bending his knee, walking,  
5 driving, and lying down and interfere with his daily activities such as sleeping, working, and  
6 recreation. Plaintiff claims he has not worked since the incident at issue.

7 Plaintiff also alleges that he suffers from psychological injuries. His claimed  
8 psychological conditions include low energy level, depression, problems with concentration,  
9 sexual difficulties, anger, feeling lonely, problems with attention span, despair, problems with  
10 finances, blaming, work fears, impatience, confusion, problems with planning, irritability,  
11 anxiety, hostility, problems with relationships, communicating, judgment, guilt, memory, bad  
12 attitude, stress, worry, sleep problems, personality change, self-esteem, and the inability to be  
13 social.

14 As part of the discovery process, The Palms Casino deposed Louis Mortillaro, Ph.D., a  
15 psychologist that has been treating plaintiff since September 2005. In his deposition, Dr.  
16 Mortillaro testified that it was his professional opinion that plaintiff had suffered emotional and  
17 psychological injuries arising from and relating to the accident. Dr. Mortillaro also opined that  
18 plaintiff's emotional health prospectively was "guarded." Dr. Mortillaro has opined that plaintiff  
19 will require additional healthcare treatment for the mental injuries that Dr. Mortillaro has  
20 attributed to the incident.

21 As noted above, plaintiff submitted to a physical examination in May 2009 with Dr.  
22 Becker. However, plaintiff's counsel refused at that time, and continues to refuse, to allow  
23 plaintiff to submit to a psychological examination. For this reason, The Palms Casino now seeks  
24 an order from this court requiring plaintiff to submit to a psychological examination.

25 Prior to the filing this motion, in accordance with E.D.C.R. Rule 2.34(d), counsel for  
26 Palms Casino spoke on several occasions with Plaintiff's counsel Steven Baker, Esq. regarding  
27 the requested mental examination of plaintiff. Plaintiff has indicated a refusal to allow such an  
28 examination to go forward. The conferences have occurred both in person and telephonically.

1           A.     **THIS COURT HAS THE AUTHORITY TO ORDER PLAINTIFF TO**  
2                   **ATTEND AN ADDITIONAL INDEPENDENT MEDICAL EXAMINATION**

3           Nevada Civil Procedure Rule 35 governs the ordering of physical examinations. Rule  
4 35(a) states:

5                   [w]hen the mental or physical condition...of a party...is in  
6                   controversy, the court in which the action is pending may order  
7                   the party to submit to a physical or mental examination by a  
8                   suitably licensed or certified examiner or to produce for  
9                   examination the person in the party's custody or legal control. The  
                 order may be made only on motion for good cause shown and  
                 upon notice to the person to be examined and to all parties and  
                 shall specify the time, place, manner, conditions, and scope of the  
                 examination and the person or persons by whom it is to be made.

10           All physical and mental examinations, including multiple examinations, are at the  
11           discretion of the Court based on the independent facts of each case. "Each request for an  
12           independent medical examination must turn on its own facts, and the number of examinations to  
13           which a party may be subjected depends solely upon the circumstances underlying the request."  
14           *Shirsat v. Mutual Pharmaceutical Co., Inc.*, 169 F.R.D. 68, 72 (E.D.Pa., 1996) (citing *Peter v.*  
15           *Nelson*, 153 F.R.D. 635, 637 (N.D. Iowa 1994). Accordingly, "[e]ven when an examination has  
16           been previously ordered in the same case, a subsequent examination may be ordered if the court  
17           deems it necessary." *Id.*

18           Moreover, "where alleged injuries fall into entirely separate areas of medical  
19           specialization, examinations by practitioners in such fields are held to be authorized under" Rule  
20           35. *Marshall v. Peters* (1962) 31 F.R.D. 238, 239; see also, *Peters v. Nelson* (1994) 153 F.R.D  
21           635, 637; *Shapira v. Superior Court* (1990) 274 Cal.Rptr. 516. Accordingly, as in this case,  
22           when a plaintiff asserts medical conditions encompassing entirely distinct areas of medical  
23           specialization, multiple medical exams are properly granted.

24           A party moving for a mental or physical exam must demonstrate that the pertinent medical  
25           condition is "in controversy" and show "good cause" for the requested exam. *Schlagenhauf v.*  
26           *Holder* (1964) 379 U.S. 104, 118-19. Through his allegations and testimony at deposition,  
27           Plaintiff has identified psychological damages that he attributes to the incident at the Palms  
28           Casino. Further, his treating psychologist, Louis Mortillaro, Ph.D., has similarly opined that

1 plaintiff has suffered emotional damage and mental injuries associated with the event at issue.  
2 Accordingly, plaintiff's psychological condition and mental injuries attributed to the incident  
3 place his psychological issues "in controversy," and there is the necessary "good cause" for the  
4 Court to order this examination.

5 **1. PLAINTIFF CLEARLY PLACED HIS PHYSIOLOGICAL AND PSYCHOLOGICAL**  
6 **CONDITION IN CONTROVERSY**

7 A plaintiff in a negligence action who asserts a mental or physical injury places that  
8 mental or physical injury clearly in controversy. *Schlagenhauf*, supra, 379 U.S. at 119. Plaintiff  
9 claims that the negligence of Palms Casino caused a host of assorted medical conditions  
10 associated with the original knee injury, including psychological effects from the pain associated  
11 with the injury. Plaintiff contends that because of the left knee injury he is now prevented from  
12 physically or emotionally enjoying daily activities such as sleeping, working, and recreation. He  
13 also claims he will require future medical care. Plaintiff's claims of physical and mental injury  
14 clearly place his medical condition in issue to justify an IME. This claim is substantiated by the  
15 opinion testimony of plaintiff's treating psychologist, Louis Mortillaro, Ph.D.

16 **2. GOOD CAUSE EXISTS TO JUSTIFY SUBMITTING PLAINTIFF TO A**  
17 **PSYCHOLOGICAL EXAMINATION**

18 "The words 'good cause' in rule 35 indicates that there must be a greater showing of need  
19 than relevance." *O'Sullivan v. Rivera*, 229 F.R.D. 184, 186 (D.N.M. 2004) (citing, *Schlagenhauf*,  
20 supra 379 U.S. at 117-18). Good cause exists in this case because of the severity of the injuries  
21 claimed by Plaintiff. Further, there is a complicated medical history associated with this  
22 seemingly minor incident. To present a thorough defense and refute Plaintiff's claims, Palms  
23 Casino must have an opportunity to conduct an orthopedic exam and psychological testing of  
24 Plaintiff.

25 From this single incident, Plaintiff has been under the care of the numerous medical  
26 facilities and independent medical professionals listed below:

27 ///  
28

- 1           ▪ Margaret Goodman, M.D.
- 2           ▪ Robert Gutierrez, M.D.
- 3           ▪ Siamak Dardashti, M.D.
- 4           ▪ Family Wellness Clinic
- 5           ▪ Foot and Ankle Surgical Group
- 6           ▪ Integrated Healthcare of NV
- 7           ▪ Walter M Kidwell, M.D.
- 8           ▪ Govind Koka M.D.
- 9           ▪ Magnolia Medical Clinic
- 10          ▪ Matt Smith Physical Therapy
- 11          ▪ Lawrence Miller M.D. (California Hand Surgery & Orthopedics)
- 12          ▪ Louis F. Mortillaro, PhD.
- 13          ▪ Nevada Ear Nose Throat Center
- 14          ▪ Nevada Imaging Center
- 15          ▪ Nevada Pain Management
- 16          ▪ Nevada Sleep Diagnostics
- 17          ▪ John G. Nork M.D. (Associated Physicians)
- 18          ▪ Rancho Physical Therapy
- 19          ▪ Riverside Community Hospital
- 20          ▪ Russell J. Shah, M.D. Ltd
- 21          ▪ Mary Ann Shannon M.D. (Las Vegas Neurosurgery, Orthopedics and Rehab)
- 22          ▪ William Simpson M.D. (The Wellness Group)
- 23          ▪ Matt Smith, PT
- 24          ▪ Southern Nevada Pain Center
- 25          ▪ Strehlow Radiology Consulting
- 26          ▪ Jacob E. Tauber M.D.
- 27          ▪ John S. Thalgott, M.D. (Center for Disease)
- 28          ▪ Valley Hospital Medical Center

16           In addition to the medical providers he has seen, Plaintiff's claimed injuries include, but  
17 are not limited to, a constant, sharp, tingling, throbbing pain and stiffness in his left knee,  
18 generalized weakness, swelling, sleeping difficulties, loss of balance, aching in the back, neck,  
19 right hand, feet, and chest, weight gain, low energy level, depression, problems with  
20 concentration, sexual difficulties, anger, feeling lonely, problems with attention span, despair,  
21 problems with finances, blaming, work fears, impatience, confusion, problems with planning,  
22 irritability, anxiety, hostility, problems with relationships, communicating, judgment, guilt,  
23 memory, bad attitude, stress, worry, sleep problems, personality change, self-esteem, and the  
24 inability to be social.

25           With such a significant history of multi-system disorders related to Plaintiff's right knee  
26 injury, it is crucial that plaintiff submit to a psychological examination for a complete evaluation  
27 of Plaintiff's claims. Plaintiff has been diagnosed with several disorders during the last five years  
28 including, but not limited to, Reflex Sympathetic Dystrophy Syndrome (also known as Complex

1 Regional Pain Syndrome), Axis I mood disorder, and left knee derangement.

2 Based on the foregoing, an additional examination comprising a psychological IME is not  
3 only relevant but also necessary for The Palms Casino to evaluate Plaintiff's claims of  
4 psychological injury attributed to the incident on November 22, 2004.

5 **3. DEFENDANT REQUESTS THAT DR. BECKER AND DR. SMITH BE ALLOWED**  
6 **TO EXAMINE PLAINTIFF AT THE TIME AND PLACE SET FORTH HEREIN.**

7 As required by Nevada Rule 35, Defendant seeks an IME of Plaintiff as set forth below:

8 **DATE:** August 25, 2010

9 **TIME:** 8:30 a.m. to 12:30 p.m., 1:30 p.m. to 5:30 p.m.

10 **PLACE:** Orthopedic Surgery and Psychiatry  
11 1375 Sutter Street, Suite 304  
12 San Francisco, CA 94109  
13 tel: (415) 563-7383  
14 (Or a time and place to be agreed with Plaintiff's counsel)

15 **EXAMINER:** Dr. Becker, Dr. Smith

16 **SPECIALTY:** Orthopedics, Psychiatry, Psychology

17 **MANNER AND CONDITIONS OF EXAMINATION:**

18 Dr. Becker will conduct the examination in his office, or a place to be determined. He  
19 may be assisted by nurses, technicians, and other qualified health care professionals. Dr. Smith  
20 will conduct the examination in his office, or a place to be determined. He may be assisted by  
21 nurses, technicians, and other qualified health care professionals. The reasonable costs for  
22 airfare, meals, lodging and transportation for Plaintiff during the tests will be reimbursed by  
23 Defendant.

24 **NATURE AND SCOPE OF EXAMINATIONS:**

25 Plaintiff will be interviewed to obtain a comprehensive history pertinent to the  
26 psychological/metal claims at issue. The examiner will also conduct a mental status examination.  
27 The examinations will not involve any diagnostic test or procedure that is painful, protracted, or  
28 obtrusive. Plaintiff will undergo a series of psychological testing and a neuropsychological  
examination related to plaintiff's emotional and psychological claims. The examination will not  
involve any diagnostic test or procedure that is painful, protracted, or obtrusive.

1                   4.       **DEFENDANT WILL BE PREJUDICED WITHOUT AN OPPORTUNITY TO**  
2                                   **CONDUCT BOTH AN ORTHOPEDIC EXAM AND PSYCHOLOGICAL TESTING**  
3                                   **OF PLAINTIFF**

4                   The need for The Palms Casino to undertake a psychological examination of plaintiff, in  
5 addition to the previous physical examination is significant because of the severity and  
6 complicated medical history associated with this seemingly minor incident. Without an  
7 opportunity to conduct the additional examination of Plaintiff, Palms Casino will be prejudiced in  
8 preparing its defense of this action, and at trial, and will be unable to adequately evaluate and  
9 address Plaintiff's claimed injuries. Without the requested additional exam, Palms Casino's  
10 experts will be unable to adequately comment on Plaintiff's current condition and alleged  
11 restrictions, thereby putting it at a significant disadvantage at trial.

12                                   **III. CONCLUSION**

13                   As developed above, Plaintiff's emotional injury attributed to the incident in November  
14 2004, places psychological and mental condition "in controversy." While plaintiff has previously  
15 submitted to a physical examination, there is also "good cause" for the requested examination of  
16 plaintiff's psychological/mental aspects.

17 Dated: July 28, 2010

18                                   ARCHER MORRIS



19                                   Keith R. Gillette, Esq. (NV Bar No. 11140)  
20                                   2033 North Main Street  
21                                   Walnut Creek, CA 94596  
22                                   Attorneys for Defendant FIESTA PALMS,  
23                                   LLC, a Nevada Limited Liability Company,  
24                                   d/b/a/ THE PALMS CASINO RESORT



CLERK OF THE COURT

1 STEVEN M. BAKER  
2 Nevada Bar No. 4522  
3 BENSON, BERTOLDO, BAKER & CARTER  
4 7408 W. Sahara Avenue  
5 Las Vegas, Nevada 89117  
6 Telephone : (702) 228-2600  
7 Facsimile : (702) 228-2333  
8 Attorneys for Plaintiff

6 DISTRICT COURT  
7 CLARK COUNTY, NEVADA

8 ENRIQUE RODRIGUEZ, an individual,  
9 Plaintiff,

CASE NO: A531538  
DEPT NO: 10

10 vs.

BENCH TRIAL DATE: 10/4/10  
HEARING DATE: 8/11/10

11 FIESTA PALMS, L.L.C., a Nevada Limited  
12 Liability Company, d/b/a PALMS CASINO  
13 RESORT, BRANDY L. BEAVERS,  
14 individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,

15 Defendants.

16 **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL RESPONSES TO**  
17 **REQUEST FOR PRODUCTION OF DOCUMENTS, TO COMPEL FURTHER RESPONSES TO**  
18 **INTERROGATORIES; REQUEST FOR SANCTIONS; AND MOTION TO COMPEL**  
19 **INDEPENDENT MEDICAL EXAMINATION OF PLAINTIFF**

20 I.  
21 STATEMENT OF FACTS

22 Plaintiff hereby adopts the Statement of Facts (with respect to the occurrence of the  
23 incident) as set forth in Defendant's Motion at bar.

24 II.  
25 POINTS AND AUTHORITIES

26 As an initial matter, Defendant has not addressed the Requests for Production or  
27 Interrogatory Responses as set forth in the instant Motion's title. As such, those issues will not  
28 be addressed herein. Also, clearly, there has been no assertion of facts supporting the requested  
sanctions.

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Second, Plaintiff already underwent an IME with Dr. Becker on May 21, 2009. No change in Plaintiff's condition has been alleged since that time. Therefore, a second IME is clearly inappropriate.

Third, the expert disclosure deadline ran in this matter on June 15, 2010, Calendar Call is September 24, 2010, trial commences on October 4, 2010.

Fourth, the constellation of complaints set forth in Defendant's Motion all fall within the very general scope of emotional pain and suffering. No organic brain injury has been alleged herein and, therefore, the requested IME is inappropriate.

III.  
CONCLUSION

For the reasons above, it is respectfully requested that the Motion to Compel at bar be denied.

Dated this 9th day of August, 2010.

BENSON, BERTOLDO, BAKER & CARTER, CHTD.

By:   
STEVEN M. BAKER, ESQ.  
Nevada Bar #4522  
ROBERT S. CARDENAS, ESQ.  
Nevada Bar # 7301  
7408 West Sahara Avenue  
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Attorney for Plaintiff

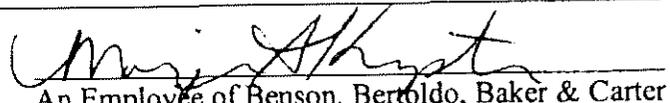


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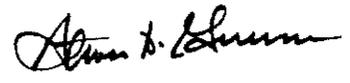
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of August, 2010, a true and correct copy of the foregoing document was mailed in a sealed envelope by U.S. Mail, + faxed permitted postage prepaid to the following addressees:

10676-05 Jeffery A. Bendavid, Esq. Adam S. Davis, Esq. Moran Law Firm 630 South Fourth Street Las Vegas, Nevada 89101 702-384-8424 Telephone 702-384-6568 Facsimile Co-Counsel for Defendant Fiesta Palms, LLC	10676-05 Keith Gillette, Esq. Archer, Norris 2033 North Main Street, Suite 800 P.O. Box 8035 Walnut Creek, California 94596-3728 925-930-6600 Telephone 925-930-6620 Facsimile Attorneys for Defendant
10676-05 Marsha L. Stephenson, Esq. Stephenson & Dickinson 2820 West Charleston Blvd., Suite 19 Las Vegas, Nevada 89102-1942 702-474-7229 Telephone 702-474-7237 Facsimile Co-counsel for Defendant	

  
An Employee of Benson, Bertoldo, Baker & Carter





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5 Attorneys for Plaintiff

6 DISTRICT COURT  
7 CLARK COUNTY, NEVADA

8 \* \* \*

9 ENRIQUE RODRIGUEZ, an individual,  
10 Plaintiff,

CASE NO: A531538  
DEPT NO: 10

11 vs.

12 FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
13 RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
14 and ROE BUSINESS ENTITIES I through X,  
inclusive,

BENCH TRIAL DATE: 10/25/10

15 Defendants.  
16

17 PLAINTIFF'S PRE-TRIAL MEMORANDUM

18 Plaintiff, ENRIQUE RODRIGUEZ, by and through his attorney of record, STEVEN M.  
19 BAKER, ESQ. of the law firm of BENSON, BERTOLDO, BAKER & CARTER, hereby submits  
20 his Pre-Trial Memorandum pursuant to EDCR Rule 2.68.

21 I.

22 STATEMENT OF FACTS

23  
24 This action arises from personal injuries suffered by the Plaintiff on November 22, 2004 o  
25 the premises of Fiesta Palms, L.L.C., d/b/a Palms Casino Resort. At said time, Plaintiff was a  
26 patron at the Palms and was in attendance at a promotional Monday Night Football party  
27 sponsored by the Defendant. At half-time, promotional objects were thrown into the crowd,  
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causing a patron to rush for the item, contacting the Plaintiff on the side of his knee, resulting in multiple injuries to Plaintiff.

**II.**

**LIST OF ALL CLAIMS FOR RELIEF**

Plaintiff makes the following claims for relief: Negligence; Negligent Employee Hiring, Training, Retention and Supervision; and Punitive Damages.

**III.**

**AFFIRMATIVE DEFENSES**

**A. FIESTA PALMS, L.L.C. :**

1. Defendant FIESTA PALMS, LLC, allege twelve affirmative defenses:
2. Failure to state a claim;
3. Estoppel;
4. Laches;
5. Plaintiff has not suffered any injuries;
6. Plaintiff failed to mitigate his damages;
7. Unclean hands;
8. By virtue of acts, deeds, conduct and/or failure or omission to act under the circumstances, Plaintiff waived his right to assert claim;
9. Damages in whole or in part result of Plaintiff's actions;
10. Defendant had no control, right, duty or obligation to control;
11. Lack of standing;
12. Deny allegations and require strict proof of allegations;

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13. Superseding or intervening causes;
14. Claims barred; injuries not caused by any improper or unwarranted action by Defendant.

**B. BRANDY BEAVERS – Default Issued**

**IV.**

**CLAIMS OR DEFENSES TO BE ABANDONED**

None.

**V.**

**PROPOSED AMENDMENTS TO THE PLEADINGS**

None.

**B. DOCUMENTS**

1. Incident Report (FP0118-124) – produced by Defendant
2. Palms Security Policy Manual – produced by Defendant
3. Medical records and billing statement from Spring Valley Hospital (SVMC 0000001-11)
4. Medical records and billing statement from Desert Radiologists (Desert Radiologist 0000001-2)
5. Medical records and billing statement from Shadow Emergency Physicians (Shadow Emergency 0000001-4)
6. Medical records and billing statement from Associated Physicians (Associated Physicians 0000001-16)
7. Medical records and billing statement from Open MRI of Inland Valley (OPEN MRI 0000001-4)
8. Medical records and billing statement from Wellness Group (Wellness Center 0000001-14)
9. Medical records and billing statement from Vision Radiology (Vision Radiology Consultants 0000001-3)
10. Medical records and billing statement from VQ Ortho Care (VQ Orthocare 0000001-6)
11. Medical records and billing statement from IV League Pharmacy (IV League 0000001-22)



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12. Medical records and billing statement from Valley Hospital Medical Center (VHMC 0000001-61)
13. Medical records and billing statement from Strehlow Radiology (Strehlow 0000001-2)
14. Medical records and billing statement from Insight Mountain Diagnostics (INSIGHT 0000001-24)
15. Medical records and billing statement from Rancho Physical Therapy (Rancho P.T. 0000001-302)
16. Medical records and billing statement from Las Vegas Neurosurgery, Orthopedics & Rehabilitation (LVNORA 0000001-24)
17. Medical records and billing statement from Integrated Health Care (Integrated 0000001-33)
18. Medical records and billing statement from NV Sleep Diagnostics (NV Sleep 0000001-20)
19. Medical records and billing statement from Village East Drugs (Village East Drugs 0000001-11)
20. Medical records and billing statement from Medical District Surgery Center (Medical District Surgery Center 0000001-79)
21. Medical records and billing statement from Beverly Tower Wilshire Advanced Imaging (Beverly Tower Imaging 0000001-3)
22. Pharmacy Record from Safeway Pharmacy (Safeway 0000001)
23. Medical records and billing statement from Jacob Tauber, M.D. and George Graf, M.D. (Dr. Tauber 0000001-28)
24. Medical records and billing statement from Yakov Treyzon, M.D. (Treyzon, M.D. 0000001-9)
25. Medical records and billing statement from F. Michael Ferrante, M.D. (UCLA 0000001-6)
26. Medical records and billing statement from Quality Respiratory Solutions/King Medical Supply (Quality Resp. Solu. 0000001-24)
27. Medical records and billing statement from Casiano Flaviano, M.D., Family Wellness Center (Family Wellness 0000001-3)
28. Medical records and billing statement from Walter Kidwell, M.D., Pain Institute of Nevada (Kidwell 0000001-22)
29. Medical records and billing statement from Olympia Anesthesia (Olympic 0000001-10)
30. Medical records and billing statement from Wilshire Surgicenter (Wilshire Surgicenter 0000001-121; Wilshire 0000001-3)
31. Daniel Kim, D.O., Nevada Ear, Nose & Throat
32. Medical records and billing statement from Douglas S. Stacey, D.P.M., Foot & Ankle Surgical Group (Dr. Stacey, D.P.M. 0000001-5)
33. Medical records and billing statement from North Valley Medical Supply (0000001-6)
34. Medical records and billing statement from Nevada Imaging Centers/Lake Mead Radiology (Lake Mead Rad. 0000001-18)



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- 35. Medical records and billing statement from Robert Gutierrez, M.D. ( Robert Gutierrez, M.D. 0000001-59)
- 36. Craig Jorgenson, M.D., Govind Koka, D.O., Advanced Urgent Care (Advanced Urgent Care 0000001- 2)
- 37. Medical records and billing statement from Govind Koka, D.O., Medical Associates of Southern Nevada/Primary Care Consultants (Primary Care Consultants KOKA 0000001-330)
- 38. Medical records and billing statement from Michael J. Crovetti, D.O., Bone & Joint Institute (Crovetti 0000001-38)
- 39. Medical records and billing statement from John Thalgott, M.D., Center for Disease and Surgery of the Spine (CDSS 0000001-72)
- 40. Medical records and billing statement from Las Vegas Surgery Center (LV Survery Center 0000001-10)
- 41. Medical records and billing statement from Joseph J. Schifini, M.D. (Schifini 0000001-19)
- 42. Medical records and billing statement from Lawrence Miller, M.D., Cal Hand Surgery (Cal. Hand 0000001-86)
- 43. Medical records and billing statement from Matt Smith Physical Therapy (Dr. Matt Smith 0000001-143; Valley Rehab. 0000001- 180)
- 44. Medical records and billing statement from Centennial Upright MRI (Centennial Upright MRI 0000001-12)
- 45. Billing statement from G. Michael Elkanich, M.D., Bone & Joint Institute (Elkanich 000001-2)
- 46. Pharmacy Statement from Walgreen's Pharmacy (Walgreens 0000001-75)
- 47. Medical records and billing statement from Thomas Vater, D.O. (Dr. Vater 0000001-18)
- 48. Medical records and billing statement from Russell J. Shah, M.D. (Shah 0000001-88)
- 49. Medical records and billing statement from Kelly Hawkins Physical Therapy/ Chynoweth, Hill & Leavitt (KHPT 0000001-44)
- 50. Medical records and billing statement from Louis F. Mortillaro, Ph.D. & Associates (Mortillaro 0000001-243)
- 51. Medical records and billing statement from Quest Diagnostics (Quest Diagnostics 0000001-15)
- 52. 1999 Tax Records (W-2 1999 0000001-8)
- 53. 2001 Tax Records (W-2 2001 0000001-8)
- 54. 2004 Tax Records (W-2 2004 0000001-10)
- 55. Medical bills from Total Wellness Clinic (Total Wellness 000001-8) – *Records will be supplemented upon receipt*
- 56. Expert Report of Terrence Dinneen (provided previously)
- 57. Expert Report of Steven T. Baker (provided previously)
- 58. List of Past Medical Expenses (Plaintiff's Computation of Damages)
- 59. Any exhibits designated by Defendants, and/or items produced pursuant to NRCP 16.1.



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- 60. Any and all disclosures by Plaintiff and Defendants
- 61. Any and all responsive documents to Requests for Production of Documents

**DEMONSTRATIVE EXHIBITS TO BE USED AT TRIAL**

- 1. Pain Stimulator
- 2. CPAP Machine
- 3. Cane
- 4. Model of Knee
- 5. Poster of R.S.D. explanation

**VII.**

**OBJECTIONS TO OTHER PARTY'S EXHIBITS**

Plaintiff and Defendants have met pursuant to EDCR Rule 2.67 and have agreed that they each reserve the right to object to the other side's exhibits after they have been fully identified and produced.

**A. WITNESSES EXPECTED TO TESTIFY**

- 1. Enrique Rodriguez
- 2. Maria Perez
- 3. Joaquin Mendoza
- 4. Ron Merkerson
- 5. Steve Ferrero
- 6. Vikki Kooinga
- 7. Sherri Long
- 8. Frank Schiula
- 9. Joseph Schifini, M.D.
- 10. Mary Ann Shannon, M.D.
- 11. Russell Shah, M.D.
- 12. Thomas Vater, M.D.
- 13. Terrance Dinneen, M.S., C.R.C., C.R.E., Expert Witness
- 14. Steven T. Baker, C.P.P., P.S.P., P.C.I., Expert Witness
- 15. Nick Tavaglione
- 16. Rich Ramirez
- 17. Dell Roberts
- 18. Any and all witnesses previously disclosed by either Plaintiff of Defendant.



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IX.

ISSUES OF LAW

Joint & Several Liability  
Default against Brandy Beavers

X.

ESTIMATE OF TIME REQUIRED FOR TRIAL

It is estimated that this trial will take 7 -- 10 Court days.

DATED this 27<sup>th</sup> day of September, 2010.

BENSON, BERTOLDO, BAKER & CARTER

STEVEN M. BAKER, ESQ.  
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Attorney for Plaintiff



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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and EDCR 7.26, I hereby certify that on the 27<sup>th</sup> day of Sept, 2010, I served the above and foregoing PLAINTIFF'S PRE-TRIAL MEMORANDUM, on all parties to this action by 1<sup>st</sup> Class, U.S. Mail, postage thereon fully prepaid addressed as follows:

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Attorneys for Plaintiff

FILED IN OPEN COURT

11-10-10  
STEVEN D. GRIERSON  
CLERK OF THE COURT

BY   
TERI BRAEGELMANN  
DEPUTY

DISTRICT COURT  
CLARK COUNTY, NEVADA

06A631638  
MSTR  
Motion to Strike  
1047383



\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

CASE NO: A531538

DEPT NO: 10

vs.

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,

HEARING DATE:

HEARING TIME:

Defendants.

PLAINTIFF'S MOTION TO STRIKE

COMES NOW, Plaintiff ENRIQUE RODRIGUEZ, by and through his attorney of  
record, STEVEN M. BAKER, ESQ., of the law firm of BENSON, BERTOLDO BAKER &  
CARTER, CHTD., and hereby files his Motion to Strike.

This Motion is made and based on the pleadings and papers on file herein, the  
following Points and Authorities and any oral argument that may be presented.

**1. Introduction**

Defendant presented two (2) experts in this trial<sup>1</sup>, neither of whom opined that their  
opinions were given to a reasonable degree of professional probability as required under

<sup>1</sup> Dr. Thomas Cargill (Economist) and Forrest Franklin (Liability).

1 Nevada law.<sup>2</sup>

2 Accordingly, Plaintiff is seeking an Order to Strike Dr. Cargill's testimony in its  
3 entirety, as well as an Order to Strike Mr. Franklin's opinions relative to standard of care and  
4 dangerous activity.

5  
6 **II. Statement of Facts**

7 **A. Forrest Franklin**

8 Forrest Franklin, Defendant's liability expert, was retained to develop, and render an  
9 opinion with respect to the standard of care as it relates to throwing objects, memorabilia,  
10 promotional articles into crowds.<sup>3</sup>

11 Mr. Franklin offered the following opinions:

- 12 1. That throwing memorabilia as a promotional effort  
13 into crowds is not a substandard protocol;<sup>4</sup>
- 14 2. That it is not unsafe to throw things into  
15 crowds;<sup>5</sup> and
- 16 3. That it is not below the standard of care to throw items into a crowd.<sup>6</sup>

17 None of these opinions, however, were given to a reasonable degree of professional  
18 probability. Moreover, they are in contradiction to the testimony of Ms. Long and Ms.  
19 Kooinga, as well as the legal theory of assumption of duty.

20  
21 **B. Dr. Thomas Cargill**

22 Dr. Cargill offered the following two (2) opinions at trial:

- 23 1. That Plaintiff could not have made as much in the current financial market that he  
24 could have back in 2004 because the bubble burst;<sup>7</sup> and

25  
26 <sup>2</sup> NRS 50.275; Hallmark v. Eldridge, 189 P.3d 646 (Nev. Jul 24, 2008) (NO. 46722)

27 <sup>3</sup> See **Exhibit "1,"** Trial Transcript of Franklin, 13: 9-13.

28 <sup>4</sup> Id., at 14: 6-8.

<sup>5</sup> Id., at 31:17-21.

<sup>6</sup> Id., at 33: 7-9.

<sup>7</sup> See **Exhibit "2,"** Trial Testimony of Cargill, 43: 5-25.



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2. Mr. Dineen's discount rates were inappropriate.<sup>8</sup>

Neither of these opinions were given to a reasonable degree of economic probability.

**III. Legal Argument**

The statute governing the admissibility of expert testimony in Nevada district courts is NRS 50.275, which, as construed by the Nevada Supreme Court<sup>9</sup>, tracks Federal Rule of Evidence (FRE) 702.<sup>10</sup>

NRS 50.275 states:

"[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."

To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

---

<sup>8</sup> Id., at 48: 1-3.

<sup>9</sup> See, e.g., Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1482, 970 P.2d 98, 107-08 (1998), overruled in part on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 270-71, 21 P.3d 11, 14-15 (2001); Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 242, 955 P.2d 661, 667 (1998); Fernandez v. Admirand, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992); Wright v. Las Vegas Hacienda, 102 Nev. 261, 262-63, 720 P.2d 696, 697 (1986).

<sup>10</sup> FRE 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.



1 Plaintiff is not challenging the “qualification requirement” relative to either Dr. Cargill  
2 or Mr. Franklin.

3 However, Plaintiff submits that both Dr. Cargill and Mr. Franklin’s testimony failed to  
4 satisfy the “assistance” requirement of NRS 50.275, in that neither expert provided opinions  
5 to a reasonable degree of professional, or in the case of Dr. Cargill, economic, probability.  
6

7 Accordingly, their opinions do not rise to the level of “scientific knowledge” within  
8 the meaning of Hallmark<sup>11</sup>, Daubert, NRS 50.275 and Federal Rule 702. Daubert, 509 U.S. at  
9 589-90, 113 S.Ct. at 2795 (declaring expert scientific testimony grounded only in speculation  
10 or conjecture to be inadmissible under Rule 702).

11 Nevada law requires expert opinions to be given to a reasonable degree of medical,  
12 professional and/or economic probability.<sup>12</sup> The opinions of Dr. Cargill and Mr. Franklin  
13 offered insufficient foundation for this court to take judicial notice of the scientific basis of  
14 those conclusions.<sup>13</sup>

15  
16 In United Exposition Service Co. v. SIIS, the Nevada Supreme Court concluded that  
17 an “award of compensation cannot be based solely upon possibilities and speculative  
18 testimony.”<sup>14</sup> In that case, which involved the payment of workers' compensation benefits  
19 after an industrial injury, the Nevada Supreme Court held that “physician[s] must state to a  
20 degree of reasonable medical probability that the condition in question was caused by the  
21 industrial injury, or sufficient facts must be shown so that the trier of fact can make the  
22 reasonable conclusion that the condition was caused by the industrial injury.”<sup>15</sup> The  
23 speculative nature of an opinion that an injury possibly could have been a precipitating factor  
24

25  
26 <sup>11</sup> Hallmark v. Eldridge, 189 P.3d 646 (Nev. Jul 24, 2008) (NO. 46722)

27 <sup>12</sup> See NRS 50.275; Hallmark v. Eldridge, 189 P.3d 646 (Nev. Jul 24, 2008) (NO. 46722)

28 <sup>13</sup> Id.

<sup>14</sup> 109 Nev. 421, 424, 851 P.2d 423, 425 (1993).

<sup>15</sup> Id. at 424-25, 851 P.2d at 425.



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was insufficient to support a finding of causation; specifically, the court stated, "A possibility is not the same as a probability."<sup>16</sup>

Nevada Federal Courts<sup>17</sup>, interpreting Nevada law, have also held that Daubert's "gatekeeping" obligation, requiring inquiry into both relevance and reliability, applies not only to "scientific" testimony, but to all expert testimony.

While counsel for the Defendant may have properly laid a foundation for their testimony, neither expert established a sufficient foundation in this case, since neither provided opinions to a reasonable degree of probability.

Accordingly, their testimony did not satisfy the "assistance" requirement of NRS 50.275.

**IV. Conclusion**

Based on the failure to provide opinions to a reasonable degree of professional and/or economic probability, Plaintiff respectfully requests for an Order to Strike the Opinions of Dr. Cargill and Forrest Franklin.

Dated this 16 day of Nov, 2010.

BENSON, BERTOLDO, BAKER & CARTER

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Attorneys for Plaintiff

<sup>16</sup> Id. at 425, 851 P.2d at 425.

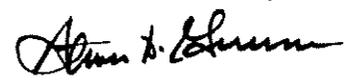
<sup>17</sup> Culbertson v. Freightliner Corp. 50 F.Supp.2d 998D.Nev., 1999.March 23, 1999



1 **OPPM**

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CLERK OF THE COURT

6 Attorneys for Defendant  
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12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

15 ENRIQUE RODRIGUEZ,  
16 Plaintiff,

17 v.

18 FIESTA PALMS, LLC, a Nevada Limited  
19 Liability Company, d/b/a THE PALMS  
20 CASINO RESORT, et al. ,

20 Defendants.

Case No. A531538

**DEFENDANT THE PALMS' OPPOSITION  
TO PLAINTIFF'S MOTION TO STRIKE**

Hearing Date: December 15, 2010  
Hearing Time: 10:00 a.m.  
Dept: 10

21 **I.**  
22 **INTRODUCTION**

23 Plaintiff challenges the admissibility of certain expert testimony presented by the Palms at  
24 the bench trial of this case. Plaintiff does not challenge the "qualification requirement" relative to  
25 either Forrest Franklin, the Palms' security protocols expert, or Thomas Cargill, Ph.D., the Palms'  
26 forensic economist. Plaintiff instead argues that both Mr. Franklin and Dr. Cargill's testimony  
27 failed to satisfy the liberal "assistance" requirement of NRS 50.275, apparently for the sole reason  
28 that neither expert used the magic words "to a reasonable degree of professional certainty." Both

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1 experts, stipulated to have been qualified experts, did in fact offer unequivocal expert testimony  
2 that would assist the trier of fact in understanding 1) that throwing promotional items was within  
3 the industry standard of care, and 2) that plaintiff's expert Dineen's calculations were flawed.  
4 Plaintiff's motion should be denied.

5 **II.**  
6 **RELEVANT FACTS, LAW AND ARGUMENT**

7 NRS 50.275 governs the admissibility of expert testimony. To testify as an expert witness  
8 under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must  
9 be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification  
10 requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the  
11 evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony  
12 must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited  
13 scope requirement). Hallmark v. Eldridge, 189 P.3d 646, 650 (Nev. 2008).

14 Plaintiff stipulated on the record that Mr. Franklin and Dr. Cargill are both qualified.

15 The point of plaintiff's motion is that the witnesses' testimony was not of assistance to the  
16 trier of fact because it was not reliable, and the reason it was not reliable was that it was not based  
17 on opinions held "... to a reasonable degree of professional probability as required under Nevada  
18 law." *Pl. Mot.* p. 1, ln. 26. Plaintiff argues that, unless an expert uses these magic words, that  
19 expert's testimony is not reliable. The statute and the authorities do not require the use of such  
20 "magic words", though, and so plaintiff's motion should be denied.

21 **A. Forrest Franklin**

22 As the Court will recall, Forrest Franklin is a security/hospitality safety expert. Mr.  
23 Franklin testified that: (1) throwing memorabilia as a promotional effort into crowds is not a  
24 substandard protocol;<sup>1</sup> (2) it is not unsafe to throw things into crowds;<sup>2</sup> and (3) it is within the  
25 standard of care to throw promotional items into crowds.<sup>3</sup>

26 Here, Mr. Franklin addressed whether throwing promotional items into a crowd was

27 <sup>1</sup> Trial Transcript of Forrest P. Franklin, 14: 6-8

28 <sup>2</sup> *Id.*, at 31: 17-21

<sup>3</sup> *Id.*, at 33: 7-13

1 within the standard of care in the casino/hospitality industry, and indeed opined that the activity  
2 was within the standard of care, notwithstanding the fact that the Palms had an internal procedure  
3 in place forbidding throwing items. Mr. Franklin's testimony is clearly relevant because his  
4 opinions make it more probable that the Palms did not act negligently in allowing items to be  
5 thrown. Mr. Franklin's testimony is thus helpful to the trier of fact.

6 Here, Mr. Franklin's testimony was reliable per NRS 50.275, Federal Rules of Evidence,  
7 Rule 702 and Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). As he  
8 testified, Mr. Franklin has had extensive experience as a security officer dealing with persons  
9 throwing objects into crowds. *Trial Transcript of Forrest P. Franklin*, 13: 14-21. Before  
10 offering an opinion, he visited the area of the Palms where the accident occurred, reviewed the  
11 relevant deposition testimony and the Palms security manual. *Id.*, 13: 22-25; 15: 16-18. These  
12 "facts and data" are reliable and are sufficient bases upon which a qualified expert like Mr.  
13 Franklin may offer an opinion.

14 **B. Dr. Cargill**

15 Dr. Cargill, an economist, testified as to plaintiff's wage earning history and damages. He  
16 commented on the reports prepared by plaintiff's expert Mr. Dineen, and rebutted Mr. Dineen's  
17 opinions. Dr. Cargill specifically testified that: (1) it was inappropriate to use an average of  
18 plaintiff's earnings over the period from 1999 to 2004 to predict future earnings;<sup>4</sup> and (2) using  
19 current interest rates to calculate future wage loss is improper.<sup>5</sup>

20 Dr. Cargill offered two opinions, both of which survive the Daubert "relevancy and  
21 reliability" standard for admissibility of expert testimony. First, Dr. Cargill testified that  
22 plaintiff's projected future income was derived through a flawed method of calculation of past  
23 income. (*Trial Transcript of Dr. Thomas Cargill*, 16: 4-8). He testified that averaging just three  
24 tax returns over a perhaps 6-year period does not accurately estimate past earnings and thus  
25 likewise is unreliable for forecasting future earnings. It was inappropriate to average these three  
26 tax returns (1999, 2001, 2004, all of which were prepared several years after the tax liabilities

27 <sup>4</sup> *Trial Transcript of Dr. Thomas Cargill*, 22: 6-25

28 <sup>5</sup> *Id.* at 55: 15-20

1 were incurred) in the context of an artificially inflated real estate bubble. *Id.*, at 29: 7-12. This  
2 testimony makes a fact of consequence—whether Mr. Dineen’s wage loss estimates are reliable—  
3 less probable than without the Cargill testimony. Therefore, the testimony is relevant and helpful  
4 to the trier of fact.

5 Second, Dr. Cargill offered the opinion that using current interest rates to project future  
6 lost income did not make economic sense because it did not take into account rates of inflation in  
7 the future. This testimony is relevant because it makes a fact of consequence, whether Mr.  
8 Dineen’s computation of damages is accurate, less probable than without it. It is relevant to total  
9 damages and does “assist the trier of fact to understand the evidence or to determine a fact in  
10 issue.”

11 Dr. Cargill’s technique is also reliable and generally accepted in the field of forensic  
12 economics. Under *Daubert*, the Court must determine whether the reasoning and methodology  
13 underlying the proposed expert’s testimony is valid. In making this inquiry, *Daubert* offers four  
14 non-exclusive factors: (1) whether the concept has been tested, (2) whether the concept has been  
15 subject to peer review, (3) what the known rate of error is, and (4) whether the concept is  
16 generally accepted by the community. *Shaffer v. Amada Am., Inc.*, 335 F. Supp. 2d 992, 995  
17 (E.D. Mo. 2003), citing *Daubert*, 509 U.S. at 593-95.

18 Here, Dr. Cargill offers testimony based on sound, proven economic theory. In fact, Dr.  
19 Cargill performed his calculations by using a rate that is used by the U.S. Congressional Budget  
20 Office and the trustees of the Social Security Administration<sup>6</sup>. Thus, the technique utilized by Dr.  
21 Cargill has attained “widespread acceptance.” The evidence serves an important function in this  
22 case because it presents contrary evidence to Mr. Dineen. Accordingly, the Court should deny  
23 plaintiff’s motion to strike certain expert testimony because the evidence meets the “assistance”  
24 requirement of NRS 50.275, FRE 702, *Daubert*, and *Hallmark*<sup>7</sup>.

25 **C. United Exposition distinguishable**

26 In his moving papers, plaintiff cites *United Exposition Serv. Co. v. State Indus. Ins. Sys.*,

27 <sup>6</sup> *Id.*, at 48:17-18

28 <sup>7</sup> *Hallmark v. Eldridge*, 189 P.3d 646, 650 (Nev. 2008)

1 109 Nev. 421 (Nev. 1993), in support of his argument that the Palms' experts are not reliable.  
2 However, that case is easily distinguishable on the facts. *United Exposition* first of all was a  
3 workers compensation case involving a medical expert, a physician, opining about causation. In  
4 that case, the claimant suffered a chest contusion at work, and two weeks later had emergency  
5 bypass surgery. The claimant submitted that the bypass surgery was related to his industrial  
6 injury, and submitted a letter from his treating doctor stating that the contusion "possibly could  
7 have been" a cause of condition requiring the bypass surgery.

8 Contrary to plaintiff's arguments, the court in *United Exposition* did not prescribe a  
9 requirement that all expert witnesses use magic words to state their opinion. The *United*  
10 *Exposition* court held that a physician had to express an opinion as to causation to a "degree of  
11 reasonable medical probability," or provide facts sufficient to allow the trier of fact to come to  
12 that conclusion. The *United Exposition* court was concerned that the testimony of the treating  
13 physician was so equivocal that the trier of fact could not rely on it, and could not draw a  
14 reasonable conclusion from it. Accordingly, if opinion testimony is sufficiently unequivocal and  
15 categorical, then regardless of the "magic words" used, it is relevant and admissible.

16 The court found that the testimony there in question – the medical opinion of applicant's  
17 treating physician that the applicant's industrial injury "possibly could have been"<sup>8</sup> a precipitating  
18 cause of the heart condition for which he was claiming—did not support the appeals officer's  
19 determination that the applicant's need for heart bypass surgery was definitively caused by or  
20 proximately related to the industrial accident. *Id.*, at 424-25.

21 Here, the experts' testimony was far stronger than that in *United Exposition*. Both  
22 Franklin and Cargill clearly and unequivocally stated their opinions and the factual bases  
23 therefore. Neither of them used any language equivalent to the phrase used by the doctor in  
24 *United Exposition*: "possibly could have been." Mr. Franklin offered definitive testimony that  
25 throwing objects into a crowd does not breach the industry standard of care, and as a matter of  
26 policy is not unsafe. He likewise offered the bases for his opinions, his years of experience,  
27 knowledge and training regarding crowds and crowd control. His testimony was relevant and

28 <sup>8</sup> *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 425 (Nev. 1993)

1 reliable and therefore meets the "assistance" requirement of NRS 50.275.

2 Likewise, Dr. Cargill very clearly inclined that it was his certain opinion, not merely a  
3 possibility, that plaintiff's earnings claims were severely inflated, and that plaintiff's expert  
4 improperly based his earnings estimates on plaintiff's highest record earning year ever, at or near  
5 the height of the real estate housing boom in Nevada. Dr. Cargill's opinion was in essence that a)  
6 plaintiff did not provide sufficient past earnings history or information to allow anyone to make  
7 calculations as to reliable past or future earnings losses and b) plaintiff's basing projected lost  
8 future earnings on a single year's earnings was not reliable and was inconsistent with the  
9 methodologies usually employed in the field of forensic economics. The Court should deny  
10 plaintiff's motion to strike the experts' testimony.

11 **III.**  
12 **CONCLUSION**

13 Neither of these experts' testimony was in any way equivocal, or expressed mere  
14 possibilities, as opposed to probabilities based on their expert training, education and knowledge.  
15 Their testimony is eminently reliable, far more so than the testimony of the treating doctor in  
16 *United Exposition*.

17 For the foregoing reasons, the Palms respectfully requests that the Court deny plaintiff's  
18 motion. The Court should consider the experts' testimony in rendering it's verdict in this matter,  
19 giving it all due weight according to the evidence.

20 ARCHER NORRIS

21 Dated: November 22, 2010



22  
23 Kenneth C. Ward  
24 Attorneys for Defendant  
25 FIESTA PALMS, LLC, a Nevada Limited  
26 Liability Company, d/b/a THE PALMS  
27 CASINO RESORT  
28

1 CERTIFICATE OF MAILING

2 **Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC**  
3 **Court and Action No: District Court, Clark County, Nevada Action No. A531538**

4 I, Tracy Pico, declare that I am over the age of eighteen years and not a party to this action  
5 or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035, Walnut  
6 Creek, California 94596-3728. On November 23, 2010, I caused the following document(s) to  
7 be served: **DEFENDANT THE PALMS' OPPOSITION TO PLAINTIFF'S MOTION TO  
8 STRIKE**

- 9  by placing a true copy of the document(s) listed above, enclosed in a sealed envelope,  
10 addressed as set forth below, for collection and mailing on the date and at the business  
11 address shown above following our ordinary business practices. I am readily familiar  
12 with this business' practice for collection and processing of correspondence for  
13 mailing with the United States Postal Service. On the same day that a sealed envelope  
14 is placed for collection and mailing, it is deposited in the ordinary course of business  
15 with the United States Postal Service with postage fully prepaid.
- 16  by having a true copy of the document(s) listed above transmitted by facsimile to the  
17 person(s) at the facsimile number(s) set forth below before 5:00 p.m. The transmission  
18 was reported as complete without error by a report issued by the transmitting facsimile  
19 machine.
- 20  by placing a true copy of the document(s) listed above, in a box or other facility  
21 regularly maintained by Federal Express, an express service carrier, or delivered to a  
22 courier or driver authorized by the express service carrier to receive documents, in an  
23 envelope designated by the express service carrier, with delivery fees paid or provided  
24 for, addressed as set forth below.

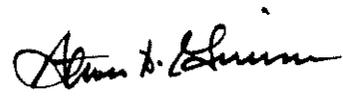
17 Steven M. Baker, Esq.  
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23 Co-Counsel for Defendant  
24 Fiesta Palms, LLC a Nevada Limited  
25 Liability Company, d/b/a The Palms  
26 Casino Resort

27 I declare under penalty of perjury that the foregoing is true and correct. Executed on  
28 November 23, 2010, at Walnut Creek, California.

25   
26 \_\_\_\_\_  
27 Tracy Pico





CLERK OF THE COURT

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11 DISTRICT COURT  
12 CLARK COUNTY, NEVADA

14 ENRIQUE RODRIGUEZ,  
15 Plaintiff,

16 v.

17 FIESTA PALMS, LLC, a Nevada Limited  
18 Liability Company, d/b/a THE PALMS  
CASINO RESORT, et al. ,  
19 Defendants.

Case No. A531538

**DEFENDANT FIESTA PALMS, LLC'S  
POST-TRIAL BRIEF**

**Dept: X**

21 Defendant FIESTA PALMS, LLC d/b/a THE PALMS CASINO RESORT hereby submits  
22 its post-trial brief on the following issues:

- 23 A) Tossing items at promotional events is within the industry standard of care;  
24 B) Defendant's internal policies do not raise the standard of care/legal duty owed to  
25 plaintiff;  
26 C) Treating healthcare providers, who were neither designated per NRCP 26 as non-  
27 retained experts nor provided expert reports, may not offer expert opinions on aspects of  
28

1 plaintiff's condition outside the scope of their treatment of plaintiff;

2 D) Where a plaintiff "is" his business, he must offer more than speculation to bear his  
3 burden of proof on damages and lost profits; and

4 E) Punitive damages are improper.

5 **I.**  
6 **BACKGROUND FACTS**

7 On November 22, 2004, Defendant FIESTA PALMS, LLC's had scheduled a Monday  
8 night football game promotion event at its Race and Sports Book.

9 In advance of this event, the Palms' promotional department hired Brandy Beavers (whose  
10 default has been entered) to staff this promotional event. Beavers, an independent contractor,  
11 brought two other independent contractors with her to the event-- the three of them were dressed  
12 as cheerleaders. The Palms paid Beavers for all three women's work, without making any  
13 withholdings; presumably Beavers paid the other two workers.

14 Part of their assignment as promotional independent contractors was to interact with the  
15 crowd, create a festive atmosphere, and hand out promotional items such as plastic water bottles  
16 during commercials and at halftime. The Palms had an oral policy, set more than a year before  
17 the date of this incident by promotions director Sherry Long, that promotional items were not to  
18 be thrown to patrons/into crowds during promotional events.

19 During half-time, Beavers contrary to the policy threw a Palms-logo plastic water bottle --  
20 one of the promotional giveaways that night -- into the crowd in the general direction of plaintiff  
21 Enrique Rodriguez. An unidentified woman sitting 10 to 15 feet away from where Rodriguez  
22 was standing apparently noticed a bottle being thrown. She jumped up, darted to the area where  
23 the bottle had landed on the floor, and according to plaintiff dove for the bottle, hitting Plaintiff's  
24 left leg and knee.

25 Plaintiff filed an Amended Complaint against Palms and Beavers and asserted the  
26 following causes of action against Palms: (1) general negligence (2) negligent employee hiring,  
27 training, retention and supervision; and (3) punitive damages. Plaintiff does not allege that he  
28 was actually injured by the bottle thrown into the crowd, or by any direct act of the Palms.

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II.  
APPLICABLE LAW

A. Tossing promotional items at promotional events is within industry standard of care

The Palms' liability expert's testimony clearly establishes that the Palms' independent contractor's throwing a plastic water bottle during a promotional event does not breach the applicable industry standard of care. The Palms' evidence at trial, presented through its security/hospitality expert Forrest Franklin, established that it is in fact within the industry standard of care to toss promotional items at promotional events:

Moreover, throwing souvenirs into crowds is a standard practice in a host of event types, Cirque de Soleil, Teatro Zinzanni, even Blue Men who addition to solid substance, spew all manner of lubricants and other foreign liquids into their audiences. And who has not been to a baseball game, or seen one on television wherein foul balls, home runs, bats or broken pieces thereof, all manner of food stuffs, and the team mascot's products, often from a moving vehicle, jettisoned into the crowd, causing anticipated jostling and bodily contact, and all this with great fanfare often replayed on the field jumbotron? In my opinion Brandy Beavers' and Palm Girls' actions were not "unreasonably dangerous to the patrons of the Sports Book (or) in particular to Plaintiff...", nor did they fall below any perceived standard of behavior, hire, training or retention.

*Franklin August 19, 2010 Expert Report, at 2.* Mr. Franklin's expert report has been admitted into evidence as Exhibit 68. In any event, the item was on the ground at the time the unidentified woman dove for it. Franklin's testimony confirms his written opinions:

14 Q Okay. Now the concept of throwing articles,  
15 memorabilia, whatever, into crowds, is that something that you  
16 were familiar with?

17 A I have been all my security career, yes, sir.

18 Q Okay. And, I mean, you didn't say: Oh, my  
19 goodness, I've never heard of anybody doing this?

20 A Let me do it another way. I never -- I've hardly  
21 ever heard of anybody not doing it.

*Franklin November 3, 2010 Trial Testimony, p. 13, lns. 14-21.* And further:

22 Q Okay. And what opinion did you come to?

23 A That throwing memorabilia as a promotional effort  
24 into crowds is not a substandard protocol.  
25

*Franklin November 3, 2010 Trial Testimony, p. 14, lns. 6 - 8.*

Opposing counsel was able to cross examine Mr. Franklin, and elicit testimony as quoted

1 in his motion papers. However, Mr. Franklin's ultimate opinion is that throwing memorabilia as  
2 promotional efforts into crowds is "not a substandard protocol." The fact that he also opined that  
3 the Palms appeared to have breached its own procedure is not conclusive as to liability for  
4 breaching the appropriate standard of care:

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REDIRECT EXAMINATION

11 BY MR. WARD:

12 Q Mr. Franklin, if all of those things that Mr. Baker

13 just said to you were true, then that suggests that someone

14 violated the rules; is that correct?

15 A Yes.

16 Q Okay. With respect to the safety, is it your

17 opinion as a security expert and a crowd control expert that

18 it is unsafe to throw things into crowds?

19 A It's my opinion it's not unsafe to throw things into

20 crowds.

21 Q So do you see any evidence that anyone

22 conscientiously disregarded the safety of people?

23 A No, I don't.

24 Q And do you agree, you heard the testimony of Ms.

25 Colinga, about the foreseeability of injury; do you agree with

26 that?

27 A No.

28 Q Do you think that it is -- that the tossing of

promotional items into crowds presents a foreseeable

possibility of injury?

Franklin's answer was "No". *Id.* at 31:11 – 32:7. Accordingly, Franklin's expert testimony confirms that tossing promotional items into crowds

- is not unsafe;
- does not present a foreseeable risk of injury; and
- is within the industry standard of care.

Commonsense and experiences at events such as baseball and basketball games, parades, etc., confirm Franklin's opinions. The Court should reject plaintiff's arguments to the contrary.

1 **B. Defendant's internal policies do not raise the standard of care/legal duty owed to**  
2 **plaintiff**

3 As set out immediately above, according to the Palms' expert Forrest Franklin tossing  
4 items in a promotional event is not unsafe and is within the standard of care in the  
5 casino/hospitality industry. While the industry standard of care according to Mr. Franklin was  
6 met, the Defendant's internal policy was breached here by Brandy Beavers, an independent  
7 contractor. Plaintiff has attempted to "re-define" the standard of care upwards based on the  
8 Defendant's violation of its own internal policies.

9 In essence, plaintiff makes a negligence *per se* argument, based not on the breach of a  
10 statute, but of an internal policy, one that is higher than the standard of care in the industry. This  
11 is not the law.

12 While breach of an internal policy that is stricter than the industry standard of care may be  
13 considered by the trier of fact as some evidence of negligence, it is not *prima facie* evidence of  
14 negligence.

15 Likewise, a defendant's instituting an internal policy that is stricter than the industry  
16 standard does not "heighten" the legal duty owed, and violation of such an internal policy does  
17 not establish negligence.

18 The only Nevada case on point is *K-Mart v. Washington*, 109 Nev. 1180 (1993)  
19 (overturned in part for unrelated reasons).<sup>1</sup> In that case, plaintiff sued Kmart for false  
20 imprisonment. Plaintiff sought to admit Kmart's loss prevention manual into evidence to show  
21 that Kmart did not meet its own standards and thus breached the standard of care in detaining the  
22 plaintiff. In opposition, Kmart argued that the manual created a higher standard of care than that  
23 imposed by Nevada law, and that it was not legally required to hew to its loss prevention manual  
24 in every circumstance, but only to the legal duty of care.

25 <sup>1</sup> The *K-mart* court cited to a Georgia case, *Luckie v. Piggly Wiggly*, 173 Ga. App. 177 (1984). In that case, plaintiff  
26 sued a grocery store for false imprisonment. A Georgia statute set the standard of care, providing a defense to  
27 owners if they acted with "reasonable prudence." At trial, plaintiff sought admission into evidence of store's internal  
28 policies regarding dealing with shoplifters. The trial court excluded the evidence. The Georgia Court of Appeals  
found the store's private guidelines to be "illustrative" of what might constitute reasonable prudence. The court held  
the evidence is admissible for the limited purpose of illustrating the applicable standard. However, compliance with  
one's own guidelines would not conclusively establish "reasonableness," nor would failure to comply demonstrate  
"unreasonableness" *per se*.

1 On review, the Nevada Supreme Court noted that in negligence cases, self-imposed  
 2 guidelines and internal policies are generally admissible as relevant to the issue of failure to  
 3 exercise due care. The self-imposed guidelines and internal policies were not conclusive of the  
 4 legal standard of care. *Id.* The Court held that the manual was admissible on the issue of the  
 5 reasonableness of the merchant's behavior, but the jurors were instructed not to hold Kmart to its  
 6 own manual standards. They were free to weigh the evidence against Kmart's own evidence that  
 7 reasonable force was customary in the industry.

8 Similar to the *Kmart* case, that the tossing of items during promotional events may have  
 9 occurred does not establish that the Palms breached the applicable standard of care. Plaintiff has  
 10 offered no evidence of the applicable standard of care. The Palms' expert Mr. Franklin  
 11 conclusively testified that it was completely appropriate, safe and within the standard of care to  
 12 throw promotional items at promotional events.

13 **C. Treating healthcare providers, who were neither designated per NRCP 16.1 or 26 as**  
 14 **non-retained experts, nor provided expert reports, may not offer expert opinions on**  
 15 **aspects of plaintiff's condition outside the scope of their treatment of plaintiff**

16 As the Court saw throughout the progress of the trial, plaintiff did not have any retained  
 17 medical experts. With regard to plaintiff's medical case, his counsel elicited testimony from only  
 18 four treating healthcare providers, not from all of plaintiff's treaters. Plaintiff attempted to have  
 19 these four treaters aggregate the opinions and conclusions of the other 25+ treaters. The  
 20 testimony by witness is represented in this chart:

Witness	Testified Regarding
Mary Ann Shannon / Las Vegas Neurosurgery	American Medical Response
Mary Ann Shannon / Las Vegas Neurosurgery	Nathan Heaps, M.D. (Spring Valley Hospital Medical Center)
Mary Ann Shannon / Las Vegas Neurosurgery	John G. Nork, M.D. (Associated Physicians)
Mary Ann Shannon / Las Vegas Neurosurgery	Eric Campbell, D.C. / William Simpson, M.D. (Wellness Group)
Mary Ann Shannon, Las Vegas Neurosurgery	Mary Ann Shannon (Las Vegas Neurosurgery)
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Joseph Nicola, D.C. (Integrated Health Care)
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Yakov Treyzon, M.D.
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Casiano Flaviano, M.D. (Family Wellness Center)

Witness	Testified Regarding
Walter M. Kidwell, M.D. / Pain Institute of Nevada	Walter M. Kidwell, M.D. (Pain Institute of Nevada)
Russell J. Shah, M.D.	Rancho Physical Therapy
Russell J. Shah, M.D.	F. Michael Ferrante, M.D. (UCLA)
Russell J. Shah, M.D.	Lawrence Miller, M.D. (California Hand Surgery / Olympic Anesthesia)
Russell J. Shah, M.D.	Robert Gutierrez, M.D. (orthopedic surgeon)
Russell J. Shah, M.D.	Matt Smith Physical Therapy
Russell J. Shah, M.D.	Valley Rehabilitation
Russell J. Shah, M.D.	G. Michael Elkanich, M.D. (Bone & Joint Institute)
Russell J. Shah, M.D.	Russell J. Shah, M.D.
Russell J. Shah, M.D.	Kelly Hawkins Physical Therapy
Joseph Schifini, M.D. / Las Vegas Surgery Center	F. Michael Ferrante, M.D. (UCLA)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Douglas S. Stacey, D.P.M. (Foot & Ankle Surgery Group)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Govind Koka, D.O. (Medical Associates of Southern Nevada / Primary Care Consultants)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Michael J. Crovetti, D.O. (Bone and Joint Institute)
Joseph Schifini, M.D. / Las Vegas Surgery Center	John Thalgott, M.D. (Center for Disease and Surgery of the Spine)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Joseph J. Schifini, M.D. (Las Vegas Surgery Center)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Lawrence Miller, M.D. (California Hand Surgery)
Joseph Schifini, M.D. / Las Vegas Surgery Center	Thomas Vater, D.O. (VaterSpine)

Those four providers offered their own “expert” opinions as to all of the other nontestifying, treating healthcare providers’ (such as orthopedic surgeons) opinions, conclusions, and courses of treatment, both past and future, as well as testifying that the non-testifying treaters’ bills and expenses were reasonable and necessary, and finally provided cost information for treatments outside the scope of their normal treatment or expertise.

A particularly striking example comes in the testimony of Dr. Schifini, one of plaintiff’s treating anesthesiologist/pain management specialists. Dr. Schifini testified that his first visit with plaintiff was in November 2007. *Schifini Trial testimony, 1:39:17*. He testified he did not speak with Dr. Ferrante, a pain management specialist at UCLA who saw Rodriguez once in September or October 2006 and performed 1 1/2 hour IME at the specific request of his attorneys. *Trial Exh. 25, UCLA 000006*. In short, he had no connection whatsoever with Dr. Ferrante or Dr. Ferrante’s treatment of plaintiff. This notwithstanding, on questioning from plaintiff’s counsel,

1 Dr. Schifini testified as to Dr. Ferrante's qualifications and background. Dr. Schifini then  
 2 proceeded to discuss in detail the opinions and conclusions that he believed that Dr. Ferrante  
 3 would have reached had he followed plaintiff's treatment.

4 Dr. Schifini then began to discuss what he believed was Dr. Larry Miller's treatment of  
 5 plaintiff as memorialized in his records. *Trial Exh. 42*. Dr. Miller, an anesthesiologist and pain  
 6 management specialist in Los Angeles, last saw plaintiff in May 2007, fully six months before Dr.  
 7 Schifini's first consult with plaintiff. Dr. Schifini did not refer plaintiff to Dr. Miller. Dr. Miller  
 8 did not refer plaintiff to Dr. Schifini. The two doctors did not consult. Dr. Schifini knew nothing  
 9 about Dr. Miller's treatment except what was reflected in his records. Yet, Dr. Schifini testified  
 10 that he agreed with Dr. Miller's diagnosis, and that Dr. Miller's treatments were medically  
 11 necessary and related to the Palms injury, and the charges were reasonable.

12 Dr. Schifini next proceeded to give the same sort of expert testimony with regard to the  
 13 treatment of plaintiff by Drs. Crovetti, Koka, Stacey, Vater, and Thalgott, all as memorialized in  
 14 their records.

15 Finally, and most significantly, Dr. Schifini proceeded to testify as to the specific costs of  
 16 the proposed spinal cord stimulator that he opined to Dr. Ferrante would believe was necessary,  
 17 had Dr. Ferrante actually treated plaintiff within the past several years. He specifically stated that  
 18 the costs of lifetime surgeries, surgeons, replacement batteries, replacement electrodes, and office  
 19 visits would total \$721,000. *Schifini Trial testimony 3:20:50*. This was an improper expert  
 20 opinion, as no foundation was laid for it, nor was it disclosed previously, nor was Dr. Schifini  
 21 disclosed as an expert. Moreover, Dr. Schifini's costings are some three times greater than  
 22 plaintiff's own expert lifecare planner Kathleen Hartman, R. N.'s estimates:

32.77 yrs*	2008	2009	Permanent to be placed by Dr. Vader	Pain control and control of symptoms of chronic pain disorder Trial completed	Perm - \$96,145(2) Elec - \$10,310 (5) Battery\$4,000 (8) Remove - \$9,320(2)***	192,290 51,550 32,000 18,640	192,290 51,550 32,000 18,640
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26 *Dineen & Hartman initial expert report, p. 17.*

27 By way of further example, Dr. Kidwell, one of plaintiff's treating anesthesiologists/pain  
 28 specialists, testified that although he had never spoken with Dr. Thalgott (an orthopedic surgeon

1 in Los Angeles who had not seen plaintiff for at least three years before the date of trial), and  
2 although Dr. Thalgott had written that plaintiff was not a surgical candidate, it was Dr. Kidwell's  
3 opinion that if Dr. Thalgott knew what had transpired between then and now, he would change  
4 his opinion. Dr. Kidwell testified not as to what he thought would be the course, but what he  
5 thought Dr. Thalgott, a nontestifying treating doctor, would prescribe. This is pure speculation.

6 Plaintiff via this tactic was able to offer into evidence the "expert opinions" of 28 different  
7 healthcare providers through only four witnesses, subjecting only four witnesses to cross-  
8 examination on the "opinions" of 28 different providers as understood by the four testifying  
9 treaters. However, the law does not allow a treating provider, otherwise not disclosed as an  
10 expert, to offer expert opinions as to the treatment that would be prescribed or recommended by  
11 another, nontestifying treater. The Court's considering this testimony in its verdict would be  
12 error.

13 Plaintiff's entire medical case, a series of opinions of "experts by proxy" is improper under  
14 NRC 16 and 26, is inadmissible hearsay, and is completely without foundation. Plaintiff did not  
15 demonstrate any foundation for any of the testifying treaters to offer the opinions they offered  
16 with regard to plaintiff's back surgery needs, what plaintiff's MRIs showed, whether his knee  
17 surgeries were necessary, whether the nontestifying treaters' bills were reasonable, or the lifetime  
18 costs for plaintiff's proposed spinal cord stimulator, some \$723,000 as testified by Dr. Schifini at  
19 3:20:50 of his trial testimony. These opinions and the other opinions like them should not be  
20 considered by this Court in rendering its verdict here.

21 *Prabhu v. Levine (a.k.a. Franco) inapposite*

22 At a pretrial hearing on this issue, plaintiff relied on *Prabhu v. Levine (a.k.a. Franco)*, 112  
23 Nev. 1538 (1996) in support of his argument that treating doctors can provide expert testimony  
24 regardless of whether they have been disclosed as expert witnesses or issued NRC 26 reports.  
25 The Court allowed this testimony, over defendant's objection. The Court did, though, note the  
26 Palms' continuing hearsay and relevance objections regarding the use of testifying treaters to get  
27 into evidence the opinions of nontestifying treaters, as well as foundationless opinions on costs,  
28 future treatment and other relevant issues, as well as the Palms' objections on the basis that the

1 experts were not disclosed as experts and did not issue reports per NRCP 16 and 26.

2 *Prabhu* as the Court is aware was a medical malpractice lawsuit. The manner in which  
3 the trial court allowed the treating doctor to provide expert testimony in that case is substantially  
4 different from the manner in which plaintiff was allowed to present "expert" testimony via  
5 treating physicians in this case. The Palms respectfully submits that this Court will commit error  
6 if it considers the nondisclosed "expert" testimony of plaintiff's treating physicians.

7 In *Prabhu*, the plaintiff Ms. Franco sued her doctor for medical malpractice. Ms. Franco's  
8 treating ophthalmologic surgeon Dr. Levine performed five surgeries on her to correct maladies  
9 caused by Dr. Prabhu's misdiagnoses. Dr. Levine did not testify at trial, but his deposition was  
10 read into the record, providing his opinions as to causation and standard of care, as well as Ms.  
11 Franco's prognosis. Dr. Levine offered the following testimony, as summarized by the Supreme  
12 Court:

13 Dr. Levine testified that the growth of acoustic neuroma tumors  
14 over time results in blurred vision and that significant interference  
15 with vision does not occur until the tumors are medium sized or  
16 larger. Dr. Prabhu testified that Ms. Franco did not complain of  
17 vision problems in February 1982, and both Ms. Franco and Dr.  
18 Freeman testified that in December 1982 or January 1983, Ms.  
19 Franco began developing severe vision problems at close distances.  
20 Additionally, Ms. Franco testified that her symptoms grew  
21 dramatically worse between February 1982 and July 1983.

22 Dr. Levine also explained that acoustic neuroma patients with  
23 tumors of two centimeters or less rarely suffer post-operative  
24 paralysis and seldom need additional surgery after the tumor is  
25 removed. Additionally, he stated that those patients with small  
26 tumors who do suffer post-operative facial paralysis have a better  
27 prognosis for recovery than patients with medium or large tumors.  
28 During Dr. Levine's testimony, a chapter that he wrote regarding  
eye care after acoustic neuroma surgery was admitted into  
evidence. A portion of this chapter mirrored Dr. Levine's testimony  
about vision problems and tumor size, as well as the prognosis for  
patients with small tumors and larger tumors. Specifically, the  
chapter included a summary of statistics regarding acoustic  
neuroma patients, their preoperative and postoperative symptoms,  
and correlating tumor sizes (small, medium or large). Dr. Freeman  
also testified that if a tumor is caught very early, facial nerve  
paralysis might be avoided.

*Prabhu v. Levine*, 112 Nev. 1538, 1544-1545 (Nev. 1996). All of these facts were either within  
his personal knowledge as her treating ophthalmologic surgeon, or within his personal knowledge

1 as the author of the referenced treatise. Counsel for Dr. Prabhu took Dr. Levine's deposition and  
2 questioned Dr. Levine on all of these issues. Dr. Levine's opinions were of record at the time of  
3 trial.

4 Prabhu's counsel made objection to Dr. Levine's testimony because he was not disclosed  
5 as an expert under NRCP 26 (no mention was made of expert reports), but was only identified as  
6 a treating physician. However, the decision reflects that Prabhu's counsel was unable to show  
7 prejudice at this technical failure: Prabhu's counsel deposed Dr. Levine and learned all of his  
8 opinions at deposition. Prabhu's counsel, then, had the opportunity to secure his own experts'  
9 opinions to counter Dr. Levine's. Accordingly, Prabhu's counsel could not show any surprise or  
10 prejudice at Levine's testimony at trial, especially considering that testimony was simply Levine's  
11 own deposition taken by Prabhu's own counsel. Under those circumstances, the Court found no  
12 abuse of discretion in allowing the testimony of the treating doctor on ultimate issues in the case.

13 The nature of Dr. Levine's testimony and treatment of plaintiff is different from the  
14 testimony—to which the Palms objected—that was offered by Drs. Shannon, Schifini, Shah and  
15 Kidwell. Unfortunately, defendants have been unable to locate any other Nevada decision  
16 discussing the exact issue confronting this Court on this point. Unlike Dr. Levine's testimony,  
17 though, where he offered expert opinions on issues learned within the scope of his own specific  
18 and detailed treatment of Ms. Franco, Mr. Rodriguez's testifying treating doctors as described  
19 above have offered opinions on ultimate issues such as causation based not on their own treating  
20 opinions, but on the opinions and records of other doctors, unrelated to their treatment of plaintiff.

21 This testimony is far broader than—and radically different from—the testimony offered  
22 by Dr. Levine in the *Prabhu* case, and should not be allowed.

23 1. *Two parts to valid expert disclosure*

24 Indeed, under the prevailing authorities, these providers cannot offer testimony at all other  
25 than as percipient witnesses (i.e., testimony outside the scope of their specific treatment of  
26 plaintiff) without having been disclosed as experts pursuant to NRCP 16(a)(2)(A) and NRCP 26.  
27 While the Supreme Court in *Prabhu* seemed to minimize plaintiff's failure to designate Levine as  
28 an expert, the fact is that defendant in that case was not prejudiced and so the trial court had not

1 abused its discretion. In the case where prejudice is patent—as here—expert disclosures are  
2 crucially important in allowing a defendant to prepare its case.

3 Under Nevada law, there is a two-part disclosure requirement for expert witnesses.  
4 Nevada Rule of Civil Procedure 16.1(a) provides:

5 (2) Disclosure of Expert Testimony.

6 (A) In addition to the disclosures required by paragraph (1), a party  
7 shall disclose to other parties the identity of any person who may be  
8 used at trial to present evidence under NRS 50.275, 50.285 and  
9 50.305 [the evidentiary statutes governing expert testimony].

10 (B) Except as otherwise stipulated or directed by the court, this  
11 disclosure shall, with respect to a witness who is retained or  
12 specialized employed to provide expert testimony in the case or  
13 whose duties as an employee of the party regularly involve giving  
14 expert testimony, be accompanied by a written report prepared and  
15 signed by the witness. Or the court, upon good cause shown or by  
16 stipulation of the parties, may relieve a party of the duty to prepare  
17 a written report in an appropriate case. The report shall contain a  
18 complete statement of all opinions to be expressed and the basis and  
19 reasons therefor; the data or other information considered by the  
20 witness in forming the opinions; any exhibits to be used as a  
21 summary of or support for the opinions; the qualifications of the  
22 witness, including a list of all publications authored by the witness  
23 within the preceding 10 years; the compensation to be paid for the  
24 study and testimony; and a listing of any other cases in which the  
25 witness has testified as an expert at trial or by deposition within the  
26 preceding four years.

17 *NRCP 16.1(a)(2)(A) and (B)*. Accordingly, for a witness to be allowed to offer expert testimony  
18 at trial, he must first be formally disclosed as such and, if specifically retained to provide expert  
19 testimony, he must generate a formal written report.

20 None of Mr. Rodriguez's testifying treating doctors were designated as experts. They  
21 were all identified in 16.1 disclosures as treating physicians and percipient witnesses, but none  
22 were disclosed in plaintiff's expert disclosures as "non-retained" experts.

23 This may seem like a technical distinction. After all, all of them were available for  
24 deposition, and, like in the *Levine* case, the Palms could have deposed all of them and learned  
25 their opinions. However, plaintiff had 30+ treating healthcare providers in this case. It is  
26 patently unfair and prejudicial to either require the Palms to have deposed every single one of  
27 them on the off chance that one might offer expert testimony, or for defendant to have to wait  
28

1 until trial to find out which providers are going to offer expert testimony. Here, plaintiff was  
2 required by NRCP 16.1 and 26 to have timely designated as experts the four treaters who testified  
3 at trial. Because he did not, the Palms was severely prejudiced in preparing its defense.

4 2. *NRCP 16 disclosure of treating healthcare provider as expert mandatory*

5 While so-called "non-retained experts" like treating healthcare providers may not  
6 necessarily be required to provide written reports under 16.1(a)(2)(B), they still must be timely  
7 and formally disclosed as experts under 16.1(a)(2)(A).

8 The reason is the nature of their opinion testimony: Lay witnesses, those "not testifying  
9 as an expert," *NRS 50.265*, may provide opinions rationally based on the perception of the  
10 witness (e.g., speed or height), only experts can provide opinions "based on scientific, technical,  
11 or other specialized knowledge," *NRS 50.275*, which are by definition expert opinions.

12 The authorities are clear that a treating doctor, otherwise **not** retained for purposes of  
13 litigation, is nonetheless **still providing** expert testimony if the testimony consists of opinions  
14 based on "scientific, technical, or other specialized knowledge," regardless of whether those  
15 opinions were formed during the scope of interaction with a party prior to litigation. *Musser v.*  
16 *Gentiva Health Servs.*, 356 F.3d 751, 757, fn. 2 (7th Cir. 2004); *Cf. O'Conner v. Commonwealth*  
17 *Edison Co.*, 13 F.3d 1090, 1105 n.14 (7th Cir. 1994).<sup>2</sup> Accordingly, it is clear that while a  
18 treating physician may not necessarily be required to offer a written expert report, the treating  
19 physician/healthcare provider must always be disclosed as an expert if he/she is going to be  
20 called at trial to offer any testimony outside the bare facts of his/her treatment.

21 Plaintiff has argued that he did comply with all of the court's disclosure rules with regard  
22 to percipient witnesses and accordingly the Palms has for years known the identities of all of  
23 plaintiff's treating healthcare providers. He has argued that no prejudice will result from  
24 plaintiff's "form over substance" failure to formally disclose the treating healthcare providers,  
25 previously disclosed as percipient witnesses, as experts under NRCP 16.1(a)(2)(A). This was,  
26 after all, essentially the ruling in *Prabhu*. However, and in addition to the specific prejudice to

27 \_\_\_\_\_  
28 <sup>2</sup> Treating physicians are not exempt from the disclosure and report requirements because "we do not distinguish the  
treating physician from other experts when the treating physician is offering expert testimony...."

1 defendants here discussed above, the authorities are clear that the federal rules and their NRCPC  
2 counterpart demand this formal disclosure:

3 Formal disclosure of experts is not pointless. Knowing the identity  
4 of the opponent's expert witnesses allows a party to properly  
5 prepare for trial. Gentiva should not be made to assume that each  
6 witness disclosed by the Mussers could be an expert witness at trial.  
7 *Cf. Patel v. Gayes*, 984 F.2d 214, 217-18 (7th Cir. 1993) (affirming,  
8 under the pre-1993 Federal Rules of Civil Procedure, the exclusion  
9 of expert testimony as to duty of care from treating physicians when  
10 they were not disclosed as experts). The failure to disclose experts  
11 prejudiced Gentiva because there are countermeasures that could  
12 have been taken that are not applicable to fact witnesses, such as  
13 attempting to disqualify the expert testimony on grounds set forth in  
14 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125  
15 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), retaining rebuttal experts,  
16 and holding additional depositions to retrieve the information not  
17 available because of the absence of a report. In sum, we agree with  
18 the district court that even treating physicians and treating nurses  
19 must be designated as experts if they are to provide expert  
20 testimony.

21 *Musser, supra*, at 757 – 758 (emphasis added).

22 In this case, just as in *Musser*, plaintiff sought to elicit expert opinion testimony from  
23 treating healthcare providers including physicians, none of whom were formally designated as  
24 experts under the civil rules. The Palms never had the opportunity to depose any of plaintiff's  
25 treating providers as experts, as they were never designated as such.

26 This is an important distinction, as the court in *Musser* recognized: There are  
27 "countermeasures" that the Palms could have taken to address the treating providers' "expert"  
28 testimony, most significantly developing rebuttal expert testimony on the various providers'  
opinions as elicited in their depositions. The Palms could not do this here, as plaintiff never  
designated which providers it would seek to elicit expert testimony from at trial.

There is no Nevada authority on point unfortunately, but the federal authorities, including  
*Musser*, affirm that treating physicians must be disclosed as experts if they are to provide expert  
testimony. Defendant has been sorely prejudiced by plaintiff's having elicited expert testimony  
from nondisclosed, non-retained experts at trial.

3. *Written report required where bases for opinions stray from the core of treatment*

The second part of the expert disclosure under Nevada law is the written report

1 requirement. Of course, an expert witness specifically hired by counsel to provide testimony in  
2 litigation must also prepare a written report containing all of his opinions and conclusions as well  
3 as the factual bases therefor. *NRCP 16.1(a)(2)(B)*. A properly disclosed treating physician or  
4 healthcare provider may provide expert testimony without issuing an expert report, but only so  
5 long as the bases for her opinions are limited to her personal observations, diagnosis, and  
6 treatment of plaintiff. *Roberson v. Bair*, 242 F.R.D. 130, 134 (D.D.C. 2007).

7 However, and significantly for this case, an expert report is required when that treatment  
8 provider's testimony strays from the core of the physician's treatment. *Fielden v. CSX Transp.*  
9 *Inc.*, 482 F.3d 866, 870 (6th Cir. 2007). See *Kirkham v. Societe Air Fr.*, 236 F.R.D. 9, 12 (D.D.C.  
10 2006) (written report requirement applies to opinions on causation, prognosis, and permanency.)  
11 By way of example, any opinion offered by a treating physician or healthcare provider (who has  
12 been otherwise properly disclosed) that is based on information contained in a report of a defense  
13 medical examination, an agreed medical examination for purposes of workers compensation, or  
14 any other information outside of the scope of a treating physician's examination and treatment of  
15 plaintiff, is of a consulting nature, and the witness purporting to offer that opinion will be  
16 considered a consulting expert who is subject to the report requirement. *Shapardon v. West*  
17 *Beach Estates*, 172 F.R.D. 415, 417 (D. Haw. 1997).

18 Here, this is exactly the sort of opinion that plaintiff's for testifying treaters offered. Their  
19 opinions were of a consulting nature, and were not formed solely within the scope of their  
20 treatment of plaintiff. Many of the facts and opinions testified to by Drs. Shannon, Schifini,  
21 Kidwell and Shah were outside the scope of their treatment of plaintiff, and were based on  
22 reviews of the other nontestifying treaters' records as well as defendants' own experts' reports—  
23 they criticized the Palms' own expert Dr. Becker, something a treating doctor would never  
24 normally do, and something that is the exclusive provenance of retained expert witnesses. Those  
25 select few treating healthcare providers aggregated the hearsay testimony of these nontestifying  
26 providers and offered previously non-disclosed expert opinions based thereon at trial. Such  
27 testimony is inadmissible.

1 4. *Plaintiff's testifying treaters not qualified under Daubert to offer opinions on*  
2 *treatment/conclusions/opinions of nontestifying treaters*

3 Assuming *arguendo* that plaintiff's treating providers were properly disclosed, they still  
4 must be qualified to offer the opinions they seek to offer. The statute governing the admissibility  
5 of expert testimony in Nevada courts is NRS 50.275, which has been construed to track with  
6 Federal Rule of Evidence 702. *Hallmark v. Eldridge*, 189 P.3d 646, 650 (Nev. 2008). NRS  
7 50.275 states that

8 [i]f scientific, technical or other specialized knowledge will assist  
9 the trier of fact to understand the evidence or to determine a fact in  
10 issue, a witness qualified as an expert by special knowledge, skill,  
11 experience, training or education may testify to matters within the  
12 scope of such knowledge.

13 *Id.*

14 Therefore, to qualify as an expert witness under NRS 50.275, the witness must satisfy  
15 three requirements:

16 (1) he or she must be qualified in an area of 'scientific, technical or  
17 other specialized knowledge' (the qualification requirement); (2)  
18 his or her specialized knowledge must 'assist the trier of fact to  
19 understand the evidence or to determine a fact in issue' (the  
20 assistance requirement); and (3) his or her testimony must be  
21 limited 'to matters within the scope of [his or her specialized]  
22 knowledge' (the limited scope requirement).

23 *Hallmark, supra*, 189 P.3d at 650. The determination of competency of an expert witness is  
24 largely within the discretion of the trial judge. *Walton v. Eighth Judicial Dist. Court ex rel.*  
25 *County of Clark*, 94 Nev. 690, 693 (1978).

26 Before a person can testify as an expert witness, the court must first determine whether  
27 that person is qualified in an area of scientific, technical, or other specialized knowledge. The  
28 court should consider the following non-exhaustive factors: (1) formal schooling and academic  
degrees, (2) licensure, (3) work/employment experience, and (4) practical experience and  
specialized training. *Hallmark, supra*, 189 P.3d at 650-51.

Second, once a witness is found to be qualified, the anticipated testimony must assist the  
trier of fact in understanding the evidence or determining a fact in issue. NRS 50.275.  
Testimony will only assist the trier of fact if it is both relevant and the product of reliable

1 methodology. *Hallmark, supra*, 189 P.3d at 651. Nevada does not blindly follow *Daubert*, but  
2 does use the factors outlined in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), for  
3 guidance in determining whether an expert's testimony is based on reliable methodology. *Higgs*  
4 *v. State*, 222 P.3d 648, 657-58 (2010). Under *Daubert*, a judge may wish to consider whether the  
5 evidence at issue (1) has been tested, (2) has been subjected to peer review and publication, (3)  
6 has a known or potential error rate, and (4) has general or widespread acceptance. *Daubert*,  
7 *supra*, 509 U.S. at 593-94. However, application of the Daubert factors is not mechanical;  
8 Nevada judges are allowed to consider any other relevant factors. *Higgs, supra*, 222 P.3d at 657-  
9 58.

10 Finally, once a physician is qualified as an expert, he or she may testify to all matters  
11 within the scope of his or her knowledge, experience or training, subject to the court's discretion  
12 concerning whether the expert is truly qualified to render such testimony. *Fernandez v.*  
13 *Admirand*, 108 Nev. 963, 969 (1992). Mere designation as an expert in one area, though, does  
14 not give the witness a license to unconstrained testimony on all scientific, technical, or other  
15 specialized matters. *Eagleston v. Guido*, 41 F.3d 865 (2d Cir. 1994) (holding that an expert  
16 sociologist could not testify as to criminology or domestic violence); *see also Lord v. State*, 107  
17 Nev. 28, 33 (a detective witness was not qualified to testify that a person's injuries were caused  
18 by a fight despite the witness' extensive law enforcement experience).

19 Notwithstanding that none of the testifying treaters were disclosed as experts, the  
20 testifying treaters themselves did not have the qualifications to opine on any and every medical  
21 issue in this case. For example, Dr. Kidwell, an anesthesiologist, is not qualified to offer credible  
22 expert testimony as to what treatment Dr. Thalgott, an orthopedic spine surgeon who had not seen  
23 plaintiff since 2008, would currently prescribe if he were to examine plaintiff. In 2007 Dr.  
24 Thalgott wrote in his treatment record that plaintiff was not a candidate for back surgery.  
25 However, at trial, Dr. Kidwell testified that, had Dr. Thalgott followed plaintiff's treatment since  
26 2007, he would now recommend back surgery. There is simply no foundation for this "opinion"  
27 from Dr. Thalgott via Dr. Kidwell. Likewise, Dr. Schifini simply is not qualified to testify as to  
28 what Dr. Ferrante, a pain management specialist at UCLA who saw plaintiff several years before,

1 and with whom Dr. Schifini never consulted, would currently recommend for plaintiff. These and  
2 the other "opinions" elicited by plaintiff's counsel are improper and should be excluded.

3 5. *Plaintiff's selected few treaters' aggregation of nontestifying providers' opinions*  
4 *and records inadmissible hearsay*

5 NRS 51.035 defines hearsay generally as a statement offered into evidence to prove the  
6 truth of the matter asserted. Hearsay is inadmissible except as otherwise provided by law. NRS  
7 51.065.

8 Testimony of one treating physician as to the collective opinion of a group of other  
9 physicians of different opinions and specialties who do not testify is inadmissible hearsay under  
10 NRS 50.285. *Estes v. State*, 122 Nev. 1123, 1140-41 (2006). In *Estes v. State*, in a proceeding to  
11 determine the defendant's competency to stand trial, one of the defendant's physicians—who had  
12 been properly disclosed as an expert—testified as to his mental illness. *Id.* at 1141. During this  
13 testimony, the physician voiced a "collective opinion" of the defendant's competency on behalf  
14 of herself and other mental health professionals who were currently treating plaintiff but who were  
15 not called to testify at the proceedings. *Id.* On review, the Supreme Court of Nevada held that  
16 such testimony constituted inadmissible hearsay. *Id.*

17 However, the Court noted that NRS 50.285 allows otherwise properly disclosed and  
18 qualified experts to base their opinions on facts or data not otherwise admissible, if that  
19 information is of a type reasonably relied on by experts in the field. *Id.* Therefore, the  
20 physician's reasonable reliance on the opinions of her colleagues in forming her own diagnosis  
21 was "marginally appropriate." *Id.*

22 Applying the rule in *Estes* to this case, since plaintiff's treating healthcare providers were  
23 never disclosed as experts (*supra*, at pp. 1-5), they cannot be otherwise accepted as experts,  
24 regardless of their qualifications. Accordingly, such nondisclosed treating healthcare providers  
25 may not offer testimony based on hearsay, which they might otherwise do had they been properly  
26 qualified.

27 As set out above, treating healthcare providers who *have been* disclosed as non-retained  
28 experts may testify *only* as to what is encompassed within their personal observations and

1 treatment of the Plaintiff. Treating healthcare providers who *have not been* disclosed as non-  
2 retained experts *may not* testify as to any matters "based on scientific, technical or other  
3 specialized knowledge."

4 Here, plaintiff did not disclose any treating physicians as experts, and so they must be  
5 precluded from offering any expert testimony on any matters "based on scientific, technical or  
6 other specialized knowledge." Regardless of disclosure, plaintiff's selected few experts were  
7 never qualified to aggregate the records, observations and opinions of the nontestifying treaters.  
8 Finally, because plaintiff's treating healthcare providers were never disclosed, they may not rely  
9 on hearsay, which they otherwise might be allowed to do.

10 "The exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1)  
11 unless non-disclosure was justified or harmless." *Musser* at 758, citing *Finley v. Marathon Oil*  
12 *Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996). While defendant had the opportunity to depose the  
13 treaters during discovery, it never had the opportunity to depose them as experts because they  
14 were never disclosed as such. As discussed in *Musser*, this is a very important distinction, and  
15 plaintiff's failure to disclose prevented defendant from being able to prepare for trial, which has  
16 severely prejudiced defendant.

17 **D. Plaintiff cannot satisfy his burden of proof in establishing his alleged damages/lost**  
18 **earnings—he needs more than speculation to prove lost earnings**

19 Plaintiff has the burden of proving the fact of damage and the amount of damages. *Mort*  
20 *Wallin v. Commercial Cabinet Co.*, 105 Nev. 855, 857 (Nev. 1989). Each item of damages must  
21 be "proven by a preponderance of the evidence." *Las Vegas-Tonopah-Reno Stage Lines v. Gray*  
22 *Line Tours*, 106 Nev. 283, 290 (Nev. 1990).

23 1. *Plaintiff Must Established the Amount of Damages by Substantial Evidence.*

24 "[T]o justify a money judgment the amount ... must be proved," and "there must be  
25 substantial evidence as to the amount of damage, as the law does not permit arriving at such  
26 amount by conjecture[.]" *Cathcart v. Robison, Lyle, Belaustegui & Robb*, 106 Nev. 477, 480  
27 (Nev. 1990). "[T]o prove the right to damages without proving the amount, entitles a plaintiff to  
28 nominal damages only." *Id.* Thus, Plaintiff must prove the amount of damages to be awarded by

1 substantial evidence. Any lesser standard opens the door to conjecture and unjust awards.  
2 Failure of the Plaintiff to present substantial evidence of the amount of damages entitles him only  
3 to nominal damages.

4 2. *Plaintiff Must Prove the Amount of Damages With Reasonable Certainty.*

5 Plaintiff must prove the “amount” of damages “to a reasonable certainty” that is “not  
6 arrived at by mere conjecture but through substantial evidence.” *All Nite Garage v. A. A. A.*  
7 *Towing*, 85 Nev. 193, 199 (Nev. 1969). While the amount “need not be met with mathematical  
8 exactitude,” and “some uncertainty in the amount is allowed,” there “must be an evidentiary basis  
9 for determining a *reasonably accurate amount* of damages.” *Mort Wallin*, 105 Nev. at 857. The  
10 Restatement (Second) of Torts permits the plaintiff to recover damages “if, and only if, he  
11 establishes by proof the extent of the harm and the amount of money representing adequate  
12 compensation with as much certainty as the nature of the tort and the circumstances permit.”  
13 Rest. (2d) Torts § 912.

14 Plaintiff must provide a reasonable method for determining the amount of damages.  
15 “[I]f ... a reasonable method for ascertaining the extent of damage is offered through testimony,”  
16 it will be “sufficient if the evidence adduced will permit the jury to make a fair and reasonable  
17 approximation.” *Bader v. Cerri*, 96 Nev. 352, 358 (Nev. 1980) (citation omitted), overruled on  
18 other grounds, *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 608 (2000).

19 In *Mort Wallin*, plaintiff sought damages for diminution in the value of a store caused by  
20 defendant’s breach of contract, put on evidence of the fact of diminution, but did not provide  
21 evidence of the value of the store had defendant performed as promised and its value as a result of  
22 its actual performance. 105 Nev. at 857. The Supreme Court held plaintiff “failed to carry its  
23 burden to reasonably establish the amount of the diminution in property value” and vacated the  
24 diminution-in-value damages award.

25 Under Nevada case law, if the evidence Plaintiff provides is not substantial and does not  
26 permit the fact-finder to determine the amount of damages with reasonable accuracy, he has not  
27 carried his burden. Rather, Plaintiff must put on evidence of the amount of damages that permits  
28 the fact finder to make a reasonably accurate award of damages based on a reasonable method.

1 Plaintiff claims that he is a real estate investor/developer and has had his own real estate  
2 business for over fifteen years. Plaintiff claims lost earnings resulting from injuries he attributes  
3 to the subject accident. Because Plaintiff is in business for himself through his professional  
4 corporation, his lost earnings may be measured by the lost profits of his business. *Strauss v.*  
5 *Continental Airlines*, 67 S.W.3d 428, 437-438 (Tex. App. 2002).

6 3. *Plaintiff Cannot Prove that the Accident Caused Specified Losses.*

7 Proof that the accident caused Plaintiff specified losses is essential:

8 There is no automatic award for loss of income due to partial  
9 disability. The disability must result in a loss of income for it to be  
10 compensable. In this case, the plaintiff is a professional, whose  
11 earnings depend upon his training and professional skills, **which are more mental than physical. Therefore, a curtailment of his physical activities does not necessarily translate into a diminution in his earning capacity.**

12 *Nobile v. New Orleans Public Service, Inc.*, 419 So.2d 35, 39 (La. App. 1982) (emphasis added).  
13 In *Nobile*, the plaintiff, an architect, made the simplistic argument that “the disability caused a  
14 diminution in his activities and hence produced an actual loss of earnings.” *Id.* at 39. The court  
15 made short shrift of it: “The record does not support the plaintiff’s position.” *Id.* The evidence  
16 supported the conclusion that “the plaintiff voluntarily regulated his income by his own actions.”  
17 *Id.*

18 The evidence here has shown that, similar to *Nobile*, Plaintiff’s earnings from his real  
19 estate endeavors are the result more of his mental abilities and professional skills than physical  
20 capacities. Therefore, loss of earnings is not an inevitable result of physical injury. Plaintiff  
21 contends that, as a result of his injuries, he lost the ability to purchase and “flip” residential real  
22 estate, and thus lost profits. He must provide evidence that he lost business as a result of the  
23 injury, and not from other causes such as bad investments on his part or indeed the recent crash in  
24 the real estate market. For example, Plaintiff must provide evidence that he was unable to buy  
25 and sell real estate because of his injuries. He did not do so. Without such evidence, an award  
26 would be based on conjecture.

27 The *Strauss* case involved similarly insufficient evidence. There, an attorney sued the  
28 airline for lost profits caused by personal injuries suffered while boarding a flight. 67 S.W.3d at

1 432, 433. After trial, the court granted defendant's motion for judgment notwithstanding the  
2 verdict on the jury's \$1 million award of lost past profits. *Id.* at 434. The attorney argued that he  
3 lost profits as a result of his injuries because he could no longer travel to a particular small town  
4 in Mississippi and thus solicit personal injury cases from that town's sympathetic population,  
5 made up of persons working in and related to the maritime offshore oil industry. 67 S.W.3d at  
6 439.

7 The *Strauss* plaintiff, however, did not provide what the court called the "**presumptively**  
8 **available evidence**" of "**the numbers of cases he had represented [in that town] or the net**  
9 **earnings he made on each case prior to the injury.**" *Id.* (emphasis added). The court held, "in  
10 the **absence of additional available evidence, and the absence of any explanation as to why it**  
11 **was not provided,**" the evidence that was provided "is not sufficient." *Id.* (emphasis added). In  
12 addition, the attorney did not attempt to "segregate the fees earned from similar cases [to those  
13 from that town] from fees earned from other cases," with the result, "there is nothing from which  
14 a jury could determine the number of maritime cases from Kosciusko that Strauss might have  
15 obtained[.]" *Id.* The court held that the attorney did not demonstrate his damages "to the degree  
16 of proof to which they were susceptible." *Id.*

17 Mr. Rodriguez's proof of damages here was like the attorney in the *Strauss* case. The only  
18 evidence plaintiff has produced to support his lost earnings claims are his individual tax returns  
19 from 1999, 2001 and 2004, none of which were completed in any of those years, e.g., the 2004  
20 tax return was signed in 2009. These three tax returns, none of which were completed  
21 contemporaneously, by themselves are wholly insufficient to support Plaintiff's \$400,000 per  
22 year lost earnings claim. Plaintiff failed to produce any other evidence in support of his lost  
23 earnings claim during discovery.

24 4. *Plaintiff Has Failed to Provide Substantial Evidence of Revenues and Expenses to*  
25 *Prove Lost Profits.*

26 To determine his lost earnings, Plaintiff may not rely on his business' gross revenues.  
27 "Gross fees," the *Strauss* court held, "are not an appropriate basis" for determining lost earnings.  
28 *Id.* at 440. He must provide evidence of "expenses." *Id.* "Net earnings ... must include a

1 deduction for expenses incurred[.]” such as “office expenses, court fees, copy costs and the  
2 myriad other expenses associated with a case[.]” *Id.* In *Strauss*, the attorney failed to provide  
3 such evidence, and the court held the evidence insufficient to support an award of lost profits. *Id.*  
4 at 442.

5 To prove lost profits, Plaintiff must have, in addition to proving that the accident caused  
6 him to lose opportunities and sales, provided evidence of the gross revenues the sales reasonably  
7 would have generated, his expenses for the sales and the expenses of his professional corporation  
8 allocable to those sales, and ultimately estimated net revenues. Plaintiff failed to produce any  
9 such evidence during discovery or at trial.

10 5. *Plaintiff Has Failed to Provide Evidence of Lost Earnings to Support an Award of*  
11 *Damages for Lost Earning Capacity.*

12 Nevada has not expressly recognized loss of earning capacity as a recoverable loss distinct  
13 from lost future earnings. Nevada cases addressing lost earning capacity treat it as the same as  
14 lost future earnings. *E.g., Silver State Disposal Co. v. Shelley*, 105 Nev. 309, 312, 774 P.2d 1044,  
15 1046 (1989) (“the jury was adequately instructed on the recovery for lost wages and future lost  
16 wages (reduced earning capacity)”).

17 Loss of earning capacity has been distinguished from loss of earnings. Loss of earnings is  
18 “actual loss of income due to an inability to perform a specific job a party held from the time of  
19 injury to the date of trial.” *Strauss*, 67 S.W.3d at 435; *Johnson v. International of United Bhd. of*  
20 *C. & J.*, 54 Nev. 332, 336 (1932) (“loss of what plaintiff would otherwise have earned in his  
21 calling, and has been deprived of by the wrongful act”). Loss of earning capacity is diminished  
22 “ability and fitness to work in gainful employment” caused by the accident. *Id.* at 435 & n.2.

23 The issue of lost earning capacity is clearly presented when the injured plaintiff is a child  
24 who never held a job. *Id.* at 436. The distinction between lost earning capacity and lost future  
25 earnings largely disappears for injured plaintiffs, like Plaintiff, who has avowed a commitment to  
26 a particular profession. *Id.*

27 To recover for lost earning capacity, Plaintiff must have presented evidence that his  
28 earnings and earning capacity have been harmed by the accident. In *City of Fairbanks v. Nesbett*,

1 432 P.2d 607, 617 (Alaska 1967), the Alaska Supreme Court held, in a case involving an attorney,  
2 “In determining the extent of impairment of an attorney's earning capacity and the measurement  
3 of loss therefrom, we hold that there must be evidence presented to the jury concerning the extent  
4 of impairment.” The attorney did not place any evidence in the record of the effect of his ankle  
5 injury on his earning capacity. The court held, “it was error to submit this issue to the jury since  
6 they could only have speculated as to the extent of any impairment of appellee's capacity to earn  
7 money and the resulting monetary loss therefrom.” *Id.*

8 As previously stated, the only evidence Plaintiff has produced in an effort to support his  
9 lost earnings claim are his individual tax returns from 1999, 2001 and 2004 and his own self-  
10 serving anecdotal testimony. Plaintiff testified he had a business, Mary Star Enterprises, which  
11 he operated further to his real estate investments. He has produced no income/earnings records or  
12 profit and loss statements for this company. Plaintiff has failed to produce, other than these three  
13 individual tax returns, any evidence of his lost earnings. Indeed, his own expert Dineen simply  
14 took a six-year average of the three tax returns provided (add the three incomes and divide by  
15 six). There is no evidence of lost earnings or profits.

16 6. *Plaintiff Cannot Prove Lost Earnings or Lost Earnings Capacity.*

17 To recover lost earnings, and to prove that he has suffered a loss of earning capacity as a  
18 result of the accident, Plaintiff must have provided substantial evidence that the accident, and no  
19 other cause such as the crash in the real estate market, is the cause of lost earnings. Besides three  
20 years of tax returns, Plaintiff elected not to provide any of the other evidence he presumably has  
21 (or could have collected) all of which is necessary to make this showing.

22 Plaintiff claims to have had his own real estate business, Mary Star Enterprises, for over  
23 fifteen years. That business presumably has records, including business tax returns, profit and  
24 loss statements, and other indicia of legitimacy. Plaintiff certainly has information or access to  
25 information about key facts necessary to prove lost earnings and lost earning capacity. He knows  
26 or should know the number of sales he had for the 15 years preceding the subject accident. It was  
27 his business. He knows or should know his expenses attributed to such sales. He knows or has  
28 information about the revenues various types of sales generate. Plaintiff, however, failed to

1 provide any such evidence at deposition or in discovery or at trial.

2 Plaintiff has not shown that his alleged injuries have had any effect on his ability to do the  
3 mental and professional work of a real estate flipper. On this record, Plaintiff has failed to  
4 provide substantial evidence in support of a reasonably certain an award of damages.

5 **E. Punitive Damages are Improper.**

6 1. *Defendant's Lack of a Written Policy Prohibiting Throwing Items into a Crowd  
7 Does Not Constitute Despicable Conduct Required for Punitive Damages.*

8 Plaintiff claims that Palms' lack of a written policy prohibiting the throwing of items into  
9 a crowd constitutes despicable conduct required for punitive damages. First, the evidence will  
10 show that Palms already had an oral policy in place prohibiting the throwing of promotional  
11 items.

12 Palms is unaware of any case law supporting the proposition that defendant's failure to  
13 institute a written policy—when an oral policy is already in place—amounts to despicable  
14 conduct. Second, there is absolutely no evidence that Palms acted in conscious disregard of the  
15 rights and safety of Plaintiff when choosing to implement an oral, and not a written, policy  
16 prohibiting the throwing of promotional items.

17 To prevail on his punitive damages claim, Plaintiff must show that Palms was "guilty of  
18 oppression, fraud or malice, express or implied," as "proven by clear and convincing evidence."  
19 N.R.S. 42.005. The key terms are then defined as follows:

20 As used in this chapter, unless the context otherwise requires and  
21 except as otherwise provided in subsection 5 of NRS 42.005:

- 22 1. "**Conscious disregard**" means the knowledge of the  
23 probable harmful consequences of a wrongful act and a  
24 willful and deliberate failure to act to avoid those  
25 consequences.
- 26 2. "Fraud" means an **intentional** misrepresentation, deception  
27 or concealment of a material fact known to the person with  
28 the **intent** to deprive another person of his rights or property  
or to otherwise injure another person.
3. "Malice, express or implied" means conduct which is  
**intended** to injure a person or despicable conduct which is  
engaged in with a **conscious disregard** of the rights or  
safety of others.

1           4.     "Oppression" means despicable conduct that subjects a  
2                     person to cruel and unjust hardship with **conscious**  
3                     **disregard** of the rights of the person.

3 Nev. Rev. Stat. Ann. § 42.001.

4           The requisite state of mind must be "conscious disregard" as required for implied  
5           "malice" or "oppression," *id.* 42.001(1), (3), (4), unless it is intentional as is required for "fraud"  
6           or actual "malice." *id.* 42.001(2), (3).

7           The Supreme Court examined the meaning of "conscious disregard" as required for  
8           punitive damages in *Countrywide Home Loans, Inc. v. Thitchener*, 192 P.3d 243, 254 (2008).

9           The Supreme Court held that conscious disregard requires a culpable state of mind that must  
10          exceed gross negligence:

11                     To eliminate confusion regarding this mental element, the  
12                     Legislature defined conscious disregard under NRS 42.001(1) in  
13                     plain and unambiguous terms. Rather than rely on past cases that  
14                     pre-dated NRS 42.001(1), in defining what conduct would amount  
15                     to conscious disregard, we look no further than the statute's  
16                     language. **Since its language plainly requires evidence that a**  
17                     **defendant acted with a culpable state of mind, we conclude that**  
18                     **NRS 42.001(1) denotes conduct that, at a minimum, must**  
19                     **exceed mere recklessness or gross negligence.**

20          *Id.* at 255. Gross negligence, therefore, is insufficient, as a matter of law, to support a finding of  
21          implied malice or oppression necessary for an award of punitive damages. To obtain punitive  
22          damages, Plaintiff must prove that the requisite oppression, fraud or malice was committed in the  
23          course of conduct that is actionable on a theory that supports punitive damages. *See Falline v.*  
24          *GNLV Corp.*, 107 Nev. 1004, 1013 (1991). A claim of gross negligence will not support an  
25          award of punitive damages, because it fails to establish the requisite intent, as shown in this  
26          section.

27          There is no evidence that Palms acted with conscious disregard for the safety of Plaintiff  
28          to justify punitive damages. First, the evidence will show that Palms has an oral policy  
29          prohibiting the throwing of promotional items. This evidences Palms' efforts in protecting  
30          patrons from the throwing of promotional items. Second, Palms' failure to implement a written  
31          policy does not constitute conduct that exceeds recklessness or gross negligence, as required for  
32          punitive damages. Punitive damages are improper as there is absolutely no evidence that Palms

1 acted with a culpable state of mind when choosing to implement an oral, as opposed to a written  
2 policy, prohibiting the throwing of promotional items.

3 2. *Plaintiff Cannot Prove that an Officer, Director or Managing Agent of Defendant*  
4 *is Guilty of Oppression, Fraud, or Malice or Ratified Ms. Beavers' Throwing of*  
5 *the Promotional Water Bottle.*

6 Additionally, Plaintiff seeks punitive damages against Palms, a business entity. Under  
7 Nevada law, proof of malice alone is insufficient for an award of punitive damages against an  
8 entity.

9 Plaintiff must first prove that the defendant “has been guilty of oppression, fraud or  
10 malice, express or implied,” N.R.S. § 42.005, and that the oppression, fraud or malice was  
11 committed in the course of conduct that is actionable on a theory that supports punitive damages.  
12 *See Falline v. GNLV Corp.*, 107 Nev. 1004, 1013, 823 P.2d 888, 894 (1991).

13 Second, Plaintiff must make the additional showing required of entity defendants, which  
14 “can act only through its officers and employees.” *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev.  
15 598, 613, 5 P.3d 1043, 1053 (2000). The necessary showing requires proof of conduct by “an  
16 officer, director or managing agent.” N.R.S. § 42.007.

17 A managing agent is a person who is “largely ... unconstrained by corporate protocols and  
18 “possess[es] the discretion to create and implement policies.” *Countrywide Home Loans, Inc. v.*  
19 *Thitchener*, 192 P.3d 243, 258 (2008). The relevant evidence is not just job title but also “what  
20 the individual is authorized to do by the principal and whether the agent has the discretion as to  
21 what is done and how it is done.” *Id.*

22 “Supervisory status” is “not enough” to render an employee a managing agent and thus to  
23 impose punitive damages liability on his employer for his conduct. *Nittinger v. Holman*, 119  
24 Nev. 192, 198 (Nev. 2003). Supervisory status cannot be equated with managing agent;  
25 otherwise “corporate employers [will be] liable for punitive damages in most employment cases,”  
26 and a host of other cases as well. *Id.* A managing agent must have “the authority to deviate from  
27 the established policy,” to exercise his own “discretion” or to “exercise his independent  
28 judgment.” *Nittinger v. Holman*, 119 Nev. 192, 198 (Nev. 2003).

To obtain punitive damages, Plaintiff must prove (A) “an officer, director or managing

1 agent of the corporation” is “personally guilty of oppression, fraud or malice, express or implied,”  
2 or (B), where the wrongful acts were committed by an employee other than an officer, director or  
3 managing agent, “an officer, director or managing agent of the corporation who was expressly  
4 authorized to direct or ratify the employee's conduct on behalf of the corporation” either (1) “had  
5 advance knowledge that the employee was unfit for the purposes of the employment and  
6 employed him with a conscious disregard of the rights or safety of others” or (2) “expressly  
7 authorized or ratified the wrongful act of the employee for which the damages are awarded.”  
8 N.R.S. § 42.007; *Nittinger v. Holman*, 119 Nev. 192, 195, 69 P.3d 688, 691 (2003).

9 Third, Plaintiff must satisfy a heightened standard of proof. He must prove all predicate  
10 facts by clear and convincing evidence. N.R.S. § 42.005.

11 Plaintiff cannot satisfy this heightened standard of proof to recover punitive damages.  
12 Beavers was not even a Palms employee, much less an officer, director or managing agent of  
13 Palms. Second, Palms had an oral policy against throwing objects. Finally, there is no evidence  
14 that the Palms expressly authorize or ratify Ms. Beavers’ actions. Plaintiff may therefore not  
15 recover punitive damages against Palms.

### 16 III. 17 CONCLUSION

18 The Palms respectfully requests this Court to find as fact and hold as a matter of law that  
19 throwing promotional objects during a promotional event is safe, is within the industry standard  
20 of care, and is not a substandard protocol, and find that the Palms complied with this applicable  
21 standard and was not negligent with regard to any duty it may have owed to plaintiff.

22 The Palms further respectfully requests that this Court exclude the opinion testimony of  
23 plaintiff's non-retained, nondisclosed expert treating doctors, Dr. Shannon, Schifini, Shaw and  
24 Kidwell. Plaintiff's failure to disclose put the Palms in a "Catch-22" situation: The Palms never  
25 had notice of the testifying treaters' "expert" opinions until they were given at trial, and once the  
26 opinions were given, the Palms was not allowed to rebut them using its own properly designated  
27 expert Dr. Becker, since Dr. Becker had not included his rebuttal opinions in his written report.  
28 The Palms was severely prejudiced by plaintiff's failure to disclose the identities of his testifying

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expert witnesses, and was further severely prejudiced by the Court's allowing those unidentified experts to testify.

The Palms further respectfully requests that this Court find plaintiff has not submitted sufficient evidence in support of his claim to damages, and that plaintiff's self-serving testimony along with three tax returns over a 10-year period is simply not sufficient evidence to support a substantial award of damages.

Finally, the Palms respectfully requests that this Court rejected plaintiff's claim for punitive damages.

Dated: November 24, 2010.

ARCHER NORRIS



---

Kenneth C. Ward  
Attorneys for Defendant  
FIESTA PALMS, LLC, a Nevada Limited  
Liability Company, d/b/a THE PALMS  
CASINO RESORT

CERTIFICATE OF MAILING

**Name of Action: Enrique Rodriguez v. Fiesta Palms, LLC**  
**Court and Action No: District Court, Clark County, Nevada Action No. A531538**

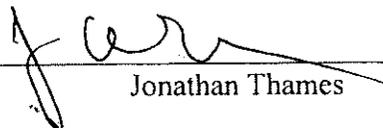
I, Jonathan Thames, declare that I am over the age of eighteen years and not a party to this action or proceeding. My business address is 2033 North Main Street, Suite 800, PO Box 8035, Walnut Creek, California 94596-3728. On November 24, 2010, I caused the following document(s) to be served: **DEFENDANT'S Post-Trial Brief**

- by placing a true copy of the document(s) listed above, enclosed in a sealed envelope, addressed as set forth below, on the date shown above for collection and mailing with the United States Postal Service, postage fully prepaid.
- by having a true copy of the document(s) listed above transmitted by facsimile to the person(s) at the facsimile number(s) set forth below before 5:00 p.m. The transmission was reported as complete without error by a report issued by the transmitting facsimile machine.
- by placing a true copy of the document(s) listed above, in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by the express service carrier to receive documents, in an envelope designated by the express service carrier, with delivery fees paid or provided for, addressed as set forth below.

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Fiesta Palms, LLC a Nevada Limited  
Liability Company, d/b/a The Palms  
Casino Resort

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 24, 2010, at Walnut Creek, California.

  
\_\_\_\_\_  
Jonathan Thames



CLERK OF THE COURT

1 STEVEN M. BAKER  
2 Nevada Bar No. 4522  
3 BENSON, BERTOLDO, BAKER & CARTER  
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9 Attorneys for Plaintiff

10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

12 \* \* \*

13 ENRIQUE RODRIGUEZ, an individual,

14 Plaintiff,

15 vs.

16 FIESTA PALMS, L.L.C., a Nevada Limited  
17 Liability Company, d/b/a PALMS CASINO  
18 RESORT, BRANDY L. BEAVERS,  
19 individually, DOES 1 through X, inclusive,  
20 and ROE BUSINESS ENTITIES I through X,  
21 inclusive,

22 Defendants.

CASE NO: A531538

DEPT NO: 10

BENCH TRIAL: 10/25/10

**PLAINTIFF'S CONFIDENTIAL  
TRIAL BRIEF**

23 COMES NOW, Plaintiff, ENRIQUE RODRIGUEZ, by and through his counsel, and  
24 hereby submits his Trial Brief as allowed and permitted by EDCR 7.27. As permitted  
25 further by EDCR 7.27, Plaintiff reserves the right not to serve opposing counsel with a copy  
26 of this Brief until after the close of evidence. This Trial Brief is intended to assist the Court  
27 in understanding the planned order of the trial as well as to educate the Court regarding  
28 Plaintiff's cause of action and the evidence to support that cause of action accordingly.

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I.  
STATEMENT OF FACTS

This is a premises liability matter that occurred November 22, 2004 at the Palms Sports Bar/Sports Book. Plaintiff ENRIQUE RODRIGUEZ was an invited guest to watch a football game. During half-time, agents, employees and/or assigns of the Palms (hereinafter known as the "PALMS GIRLS") were participating in a promotion wherein they were throwing souvenirs to Sports Bar/Sports Book patrons while blindfolded.

In response to the Palms Girl, Brandy Beavers, throwing souvenirs in the Sports Bar/Sports Book while blind-folded, a customer within the Sports Bar/Sports Book dove for a thrown souvenir and hit Mr. Rodriguez's extended and stationary left knee. Mr. Rodriguez then struck the person next to him, hitting the left side of his head, then falling down, thereby sustaining extensive injuries and damages.

II.  
PROCEDURAL HISTORY

On or about November 15, 2006, Plaintiff filed the Complaint against Fiesta Palms L.L.C. Fiesta Palms, L.L.C. filed its Answer on April 23, 2007. The Joint Case Conference Report was filed on October 29, 2007 and the parties began discovery pursuant to Nevada Rule of Civil Procedure 26. On or about May 8, 2009, Plaintiff filed his motion for leave to amend Complaint to include Defendant BRANDY BEAVERS.

BRANDY L. BEAVERS, Defendant herein, was duly served with a copy of the Amended Summons and Amended Complaint on the day 11<sup>th</sup> day of January, 2010. The



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default of Defendant BRANDY L. BEAVERS for failing to answer or otherwise plead to Plaintiff's Amended Complaint was entered by this Honorable Court on February 25, 2010.

III.

THEORY OF LIABILITY

Plaintiff has sued the Defendant the theory of negligence. This theory will be discussed below:

A. Negligence

In order to prevail on the issue of negligence, Plaintiff must show: 1) that the Defendant owed a duty of care to Plaintiff; 2) that Defendant breached his duty of care toward Plaintiff; 3) that Defendant's breach was the actual cause of Plaintiff's damages; 4) that Defendant's breach was the proximate cause of Plaintiff's damages; 5) that Plaintiff suffered damages as a result of Defendant's breach. Perez v. Las Vegas Medical Center, 107 Nev. 1, 4, 805 P.2d 589, 590-591 (1996).

Nevada's controlling law on "slip and fall" premises liability can be found in Moody v. Manny's Auto Repair, 110 Nev. 320, 871 P.2d 935 (1994), Sprague v. Lucky Stores, Inc., 109 Nev. 247, 849 P.2d 320 (1993), Asmussen v. New Golden Hotel Company, 392 P.2d 49 (1964), Worth v. Reed, 384 P.2d 1017 (1963), Eldorado Club, Inc. v. Graff, 377 P.2d 174 (1962), and Galloway v. McDonalds Restaurants, 102 Nev. 534, 728 P.2d 826 (1986). Determinations of liability should primarily depend upon whether the owner or occupier of land acted reasonably under the circumstances. Moody v. Manny's Auto Repair, supra. In Asmussen, the Court stated that a proprietor's liability may be found if the



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condition was 1) created by the proprietor or his agent, or 2) created by another and the proprietor had actual or constructive notice of its existence. The proprietor “who knows or in the exercise of reasonable care should know, of their dangerous and unsafe condition, and who invites others to enter upon the property, owes to such invitees a duty to warn them of the danger, where the peril is hidden, latent, or concealed, or the invitees are without knowledge thereof.” Galloway.

Through the course of discovery, Plaintiff has established that prior to the subject incident, Defendant PALMS was aware that promotional items were thrown into crowds; that Defendant PALMS acknowledged this behavior was inappropriate because it was a safety issue and could foreseeably cause injury to an individual; and that Defendant PALMS failed to implement any written safety standards, procedures and/or policies instructing employees and/or independent contractors not to throw items into crowds.

Further, Defendant PALMS has conceded that they are not sure if they ever instructed employees and/or independent contractors not to throw promotional items into crowds, and have no recollection as to whether they ever specifically instructed Ms. Beavers not to throw items into the crowd.

Specifically, Sheri Long, the Director of Marketing at The Palms testified that she was aware that promotional items were thrown into crowds; that Defendant acknowledged this behavior was inappropriate because it was a safety issue and could foreseeably cause injury to an individual.



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For purposes of this case, the Honorable Court is advised that the Key West Room discussed below is where promotions were held before being moved to the subject sports-book.

- Q. Was there a custom and practice of bringing pretty girls in to help in the Monday Night Football party as part of the promotion?
- A. Yes.
- Q. Was that routine each Monday night football party?
- A. Yes.
- Q. Okay. And where did they come from?
- A. Usually from outside vendors.
- Q. Third parties?
- A. Yes.
- Q. And, of course, the purpose there is just to create a kind party atmosphere, is that right?
- A. Correct.
- Q. Were you aware -- do you need that?
- A. No.
- Q. Were you of any of these girls throwing promotional items into the crowd while the party was being held in the banquet room?
- A. In the Key West?
- Q. In the Key West.



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A. I believe that it did happen once.

Q. In the Key West room?

A. Yes.

Q. And do you know who was throwing those things?

A. No.

Q. What was your opinion of that conduct?

A. **That it wasn't appropriate.**

Q. Why wasn't it appropriate?

A. **Because it definitely is a safety issue.**

Q. And it could foreseeably cause injury to somebody, is that right?

A. **Absolutely.<sup>1</sup>**

Ms. Long reiterated her safety concerns, but could not even recall if she ever instructed her staff that items should not be thrown into crowds during promotional events.

Q. Okay. And at the time in the Key West room when you discovered someone was throwing promotional items out into the crowd, who was it that you spoke to?

A. I'm sure it was the marketing manager.

Q. Who was that at that time?

A. I believe it was Maureen.

Q. Do you remember the substance of your conversation?

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<sup>1</sup> See Exhibit "1," Long Deposition, 48:1-25; 49:1-9.



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A. No, I don't recall.

Q. But you discussed that it wasn't safe to throw promotional items out into the crowd, is that right?

A. I believe so, yes.

Q. For the reason that you said, that there's a real safety concern associated with that?

A. Yes.

Q. And because it's foreseeable that, if you throw promotional items out during a Monday Night Football party, somebody could get hurt?

A. Correct.

Q. Okay. And did you follow that up with a memoranda in your department instructing your people that promotional items would not be thrown out during these parties?

A. I don't recall.

Q. Would it have been your responsibility to do that if there was a responsibility to do that, would you have been the one to do it?

A. Likely.

Q. I mean, how concerned were you? Were you pissed, for lack of a better legal word?

A. I don't -- I really don't recall. I mean, you know, obviously, I deal with a lot of different things every day.

Q. I see your phone ringing.



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- A. Some minor, some not minor.
- Q. Did you feel it was a minor or not minor issue?
- A. I really don't recall at the time. I'm thinking that it would have been more from the security side of things, the safety and security side of things that that concern would have been addressed. Likely my manager sent an e-mail out.
- Q. To whom?
- A. Within the company to the couple people in my department that it might have involved, just, you know, just a reminder, please don't do this.
- Q. Did you personally contact the security department, do you recall?
- A. No, I wouldn't have.
- Q. Did you bring it up at one of the staff meetings when the different directors from different departments met I think you said monthly?
- A. I really don't recall at the time if I did that. I know I have brought it up for other things with regard to safety, but specifically for that, not necessarily.
- Q. You brought it up -- oh. You've made your safety concerns known --
- A. Correct.
- Q. -- on other issues?
- A. Correct.
- Q. But you don't recall specifically with this issue?



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A. I don't recall.

Q. When you're hiring girls to do the promotions, do you interview them personally?

A. Did I? No.

Q. Who did?

A. My marketing manager generally did.

Q. Did you instruct your marketing manager to tell these girls don't throw stuff out in the crowd after you became aware that that was occurring in the Key West room?

A. I don't recall if we had the conversation.

Q. Do you know if you maybe you put it in writing to anybody?

A. I don't recall. That, I have no idea.<sup>2</sup>

Despite awareness of the foreseeable danger, Ms. Long testified that she cannot even recall if the issue was raised during staff and/or safety meetings.

Q. At any time during those meetings, did your manager or you or anybody bring up the issue that we shouldn't have girls throwing stuff at these promotional events?

A. I don't recall.

Q. You can't say one way or another?

A. No.<sup>3</sup>

<sup>2</sup> Id., at 53:17-25; 54-55:1-25; 56:1-9.

<sup>3</sup> Id., at 57:20-25; 58:1

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Continuing, Ms. Long indicated that she does not know if she instructed Ms. Beavers not to throw promotional items into the crowd, and cannot recall making any departmental procedures to instruct others.

Q. And it's fair to say that you don't know whether or not Denise specifically instructed Brandy not to throw promotional items into the crowd?

A. I don't know.

Q. Did you make it a departmental procedure to instruct these girls not to throw promotional items into the crowd after what happened in the Key West room?

A. I really don't recall.<sup>4</sup>

Lastly, Ms. Long acknowledged that there is no formal policy or procedure to prevent promotional items from being thrown into the crowd.

Q. Is there now a formal policy or procedure to prevent that from happening?

A. I don't have one in writing.<sup>5</sup>

Vikki Kooinga, Risk Manager at The Palms has also testified that she is unaware of any regulation against throwing promotional items into crowds. Importantly, she also testified that throwing items into a crowd could foreseeably cause injury to someone in the audience.

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<sup>4</sup> *Id.*, at 69: 8-16.

<sup>5</sup> *Id.*, at 72: 3-5.



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Q. Is there any regulation which has to do with throwing of objects during promotional events during the Palms Casino that was in existence in November 2004 that you're aware of?

A. I am not aware of.

Q. As a risk manager, would you instruct or allow employees of the Palms hotel to throw objects into an audience during a promotional event?

A. No.

Q. You would not?

A. I would not.

Q. And why would you not?

A. Just for the simple fact that, one, you could break the item, depending on what the item is, and common sense.

Q. You try to utilize common sense when you're risk managing, is that right?

A. Correct.

Q. And part of risk management is to provide for the safety, the reasonable safety of people upon the premises, is that true?

A. Correct.

Q. And as the risk manager of the Palms hotels, is it fair to say that you agree with me that throwing objects during a promotional event could foreseeably cause injury to someone in the audience?

MR. GILLETTE: That calls for a legal conclusion.

A. It could foreseeably, yes.

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Q. And that's one of the reasons why you as the risk manager would instruct employees of the Palms hotel not to throw those objects, is that fair to say?

MR. GILLETTE: Well, that calls for speculation, and it also misstates her prior testimony. You can go ahead and answer.

A. Could you repeat it?

Q. Sure. As the risk manager, one of the reasons -- using your common sense -- that you would tell your employees not to throw something into a crowd is because that could result in an injury to somebody in that crowd?

A. Correct.

Q. And that wouldn't be reasonable in terms of risk management, is that fair to say?

A. It's not something --

MR. GILLETTE: That calls for a legal But you can answer that.

A. It's not something that I would advise.

Q. Is there a policy or procedure in effect now at the Palms hotel not to throw objects into the audience during a promotional event?

A. I don't know if there's a specific policy, a written policy.<sup>6</sup>

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<sup>6</sup> See Exhibit "2," Kooinga Deposition, 30: 23-25; 31: 1-25; 32: 1-25; 33: 1-7.

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Ms. Kooinga has acknowledged that throwing promotional items into the crowd was inappropriate, wrong and beneath the standard of care for the hotel protecting the safety of their patrons upon the premises.

Q. Did you have any thoughts about the appropriateness of Brandy Beavers throwing promotional bottles out into the audience?

A. My personal opinion?

Q. Yes.

A. It is not appropriate.

Q. So you think that was wrong?

A. Yes.

Q. If Brandy Beavers was an employee of the Palms hotel at that time –

A. I'm sorry. Can I clarify something?

Q. Absolutely.

A. Based upon the report, he is stating that she threw it. I do not know if it was actually thrown.

Q. But, hypothetically, if it was thrown, in your opinion, that would be wrong?

A. Hypothetically, yes.

Q. Okay. And if Brandy Beavers was an employee of the Palms hotel at the time she threw that water bottle, she would have done something wrong?

A. I don't believe she was employed.



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Q. Hypothetically?

A. Hypothetically, I believe yes.

Q. Okay. And something that was beneath the standard of care for the hotel protecting the safety of their patrons upon the premises?

MR. GILLETTE: That calls for a legal conclusion.

BY MR. BAKER:

Q. You can answer.  
When he makes those objections, later a Judge might read these objections, and the Judge will decide if my question is profoundly stupid or not.  
MR. BAKER: Would you read the question back, please?

(Thereupon, the requested portion was read back.)

A. I think you had asked me in my opinion.

Q. Correct?

A. Yes, it would be.<sup>7</sup>

Lastly, Ms. Kooinga has testified that she would have expected Security to stop anyone from throwing items into the crowd.

Q. And if a security individual working at the Palms hotel in November of 2004 saw somebody throwing promotional items out into an audience, would you expect that security officer to tell them to stop doing it?

A. Yes.

<sup>7</sup> *Id.*, at 39: 16-25; 40: 1-25; 41: 1-8.



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MR. GILLETTE: Well, there's a relevance objection in there somewhere, Steve, simply because she doesn't control them. She doesn't supervise the activities of those individuals.

MR. BAKER: I understand.

BY MR. BAKER:

Q. You understood my question though?

A. Repeat it, please.

Q. Sure.  
The security officers using their common sense, as risk manager, you would expect them to stop the person throwing promotional items out into the audience?

MR. GILLETTE: Incomplete hypothetical.  
Go ahead and answer.

A. I would expect that they would, yes.

Q. And as the risk manager for the Palms hotel, it's your opinion that the standard of care would require that any security officer in the area would stop an individual from throwing promotional items out into the audience?

A. That they would if they had prior knowledge it was about to happen, if hypothetically this is exactly what happened is that Brandy Beavers threw a water bottle, once it left her hand, he may have seen it, he's in no position to stop it at that point. However, he may have gone to her afterwards and said do not do it again.

Q. However, just to get my question, I understand how you're framing it. But it would be appropriate for a security officer in the area to stop her from throwing those objects into the audience?

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A. If she had done it more than once, yes.

Q. And that would be what you would expect of security officers as the risk manager of the Palms hotel?

A. Yes.<sup>8</sup>

In this case, Defendant PALMS was aware that promotional items were thrown into crowds. Defendant has acknowledged this behavior was inappropriate because it was a safety issue and could *foreseeably* cause injury to an individual. Defendant acknowledged that the behavior was wrong and fell below the standard of for the hotel protecting the safety of their patrons upon the premises Yet, Defendant failed to implement any written safety standards, procedures and/or policies instructing employees and/or independent contractors *not* to throw items into crowds.

Lastly, Defendant PALMS conceded that they are not sure if they ever instructed employees and/or independent contractors not to throw promotional items into crowds, and have no recollection as to whether they ever specifically instructed Ms. Beavers not to throw items into the crowd.

Under NRS 42.001, implied malice is a discrete basis for assessing punitive damages where conscious disregard can be demonstrated. NRS 42.001(3).

Plaintiff submits that the evidence and testimony elicited to date demonstrate “conscious disregard.”

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<sup>8</sup> *Id.*, at 43: 12-25; 44: 1-25; 45: 1-6.



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IV.

BRIEF STATEMENT OF DAMAGES

Plaintiff's claimed injuries include the following:

1. Neck
2. Left wrist
3. Right hand and right fingers
4. Lower back
5. Left shoulder
6. Right shoulder
7. Left knee, shin, ankle, foot, left toe
8. Right foot
9. Right leg
10. Headaches
11. Sleep apnea

Plaintiff is permanently disabled and will require extensive future medical treatment.

Plaintiff presented to Dr. Shah, a neurologist, on August 10, 2010 for continued burning sensation in the left knee, pain in the right shoulder, sensory right hand tingling, numbness and decreased strength. Plaintiff awaits surgery for the permanent pain stimulator implant which is anticipated to negate the lower extremity symptoms. Dr. Shah's impression on August 10, 2010 follows:

1. Right lumbar radiculopathy
2. Right carpal tunnel regional abnormality



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- 3. Left knee pain
- 4. Cervical strain with sensory right arm radicular complaints
- 5. Right shoulder strain
- 6. Right ankle pain and weakness secondary to asymmetric weight on walking from left knee pain

1. **Special Damages:**

- a. *Past Medical Expenses* \$543,633
- b. *Future Medical Expenses* \$2,000,000
- c. *Past Loss of Earnings* \$290,000
- d. *Future Loss of Earnings* \$968,000

2. **General Damages:**

- a. *Past Pain, Suffering, and Loss of Enjoyment of Life* \$ Court's discretion
- b. *Future Pain, Suffering and Loss of Enjoyment of Life* \$ Courts discretion

3. **Total Damages:**

\$ Depending on the state of the evidence, Plaintiff will likely ask for total damages in the amount of \$5,000,000.00.



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VI.

Conclusion

Plaintiff respectfully thanks this Court for the opportunity to present this case.

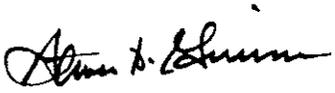
DATED this 27<sup>th</sup> day of September, 2010.

BENSON, BERTOLDO, BAKER & CARTER

BY: 

STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff



  
CLERK OF THE COURT

1 STEVEN M. BAKER  
Nevada Bar No. 4522  
2 BENSON, BERTOLDO, BAKER & CARTER  
7408 W. Sahara Avenue  
3 Las Vegas, Nevada 89117  
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4 Facsimile : (702) 228-2333  
Attorneys for Plaintiff  
5

6  
7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 \* \* \*

10 ENRIQUE RODRIGUEZ, an individual,  
11 Plaintiff,

CASE NO: A531538

DEPT NO: 10

12 vs.

**BENCH TRIAL DATE: 10/4/10**

13 FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
14 RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
15 and ROE BUSINESS ENTITIES I through X,  
inclusive,

**HEARING DATE:**

**HEARING TIME:**

16 Defendants.

17 **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR MISTRIAL**

18 COMES NOW the Plaintiff, ENRIQUE RODRIGUEZ, by and through his  
19 undersigned attorney of record, STEVEN M. BAKER, ESQ., of the law firm of BENSON,  
20 BERTOLDO, BAKER & CARTER, CHTD., and hereby files his Opposition to Defendants'  
21 Motion for Mistrial.  
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7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333





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This Opposition is made and based on the pleadings and papers on file herein, the following Points and Authorities, Affidavits of Counsel, and any oral argument that may be presented at the time set for hearing of this matter.

DATED this 3<sup>rd</sup> day of January, 2011.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff

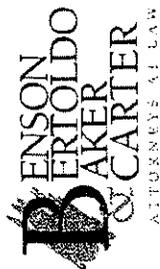
**I. Introduction**

Defendant is seeking a mistrial on the misguided position that Plaintiff served secret pre-trial and trial briefs.

As the Court will recall, Defense counsel, during Opening Argument, evidentiary phase of the trial, and Closing Argument, accused Plaintiff's counsel of engaging in a systematic "medical build-up," and manipulation of the medical records. Now, in a desperate and ill-founded manner, Defense counsel is accusing Plaintiff's counsel *and* Your Honor of engaging in a systematic *ex parte* conspiracy, rendering the trial unfair and impartial.

Plaintiff submits, supported by the Affidavit of Counsel<sup>1</sup> and Your Honor's own awareness and comprehension of the true factual circumstances, that Plaintiff did in fact provide the Court with one, and only one, Confidential Trial Brief before the commencement of trial, which was served on Defendant on December 14, 2010, in accordance with EDCR 7.27<sup>2</sup>, and provided the Court with **no** supplements thereto at any time during trial.

<sup>1</sup> See Exhibit "1," Affidavit of Steve Baker, Esq.  
<sup>2</sup> See Exhibit "2," Confidential Trial Brief, of September 27, 2010.



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II. Statement of Facts

As this Court is aware, this matter was originally set for a Bench Trial to begin on October 4, 2010.<sup>3</sup> Accordingly, Plaintiff, in accordance with EDCR 7.27, submitted his Confidential Trial brief to this Court on September 27, 2010.<sup>4</sup>

At no point during the evidentiary portion of the trial, or otherwise, did Plaintiff file or submit any additional *confidential* briefs.<sup>5</sup>

Rather, in anticipation of Defendant bringing a Rule 50 Motion on the issue of Punitive Damages, Plaintiff's counsel prepared a "Supplemental Confidential Bench Brief Re: Punitive Damages (dated November 10, 2010, the date the parties rested) which detailed the trial testimony of Defendant's employees and security expert.<sup>6</sup> The Supplemental brief was *never submitted, served or filed*, because Defendant surprisingly never argued, after the close of evidence but prior to the case being submitted for deliberation, that the punitive damage claim be dismissed.<sup>7</sup> Simply put, had Defendant argued for the dismissal of the punitive damages claim prior to the close of evidence as required by law, Plaintiff would have submitted and served the Supplemental brief<sup>8</sup> at that time.

Unfortunately, and in response to Defendant's "Post-Trial Brief," which amongst other things, argued for the rejection of any punitive damages, Plaintiff inadvertently made reference to and attached a copy of the Supplemental Confidential Bench Brief Re: Punitive Damages, rather than reiterating the content, as counsel failed to recall that the brief was never filed or served.<sup>9</sup> As this Court is now aware, the *un-filed* and *un-submitted* brief merely

<sup>3</sup> See Exhibit "3," Trial Setting.

<sup>4</sup> See Exhibit "1;" see also, Exhibit "2."

<sup>5</sup> See Exhibit "1."

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* It is important to note that the brief was signed on November 10, 2010 in anticipation of Defendant moving for a dismissal of the Punitive Damage claim.

<sup>9</sup> *Id.*; see also, Exhibit "4," Affidavit of Robert S. Cardenas, Esq.



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set forth the trial testimony *and* trial transcripts of Sheri Long, Vikki Kooinga and Forrest Franklin, Defendant’s safety expert.<sup>10</sup>

Importantly, this was the first and only time, such a brief was presented to Your Honor, and it was never filed, submitted or provided in a confidential and/or *ex parte* manner as suggested by counsel.<sup>11</sup> Moreover, the *un-filed* and *un-submitted* brief merely sets forth trial testimony of the aforesaid witnesses, providing direct citations to their respective trial testimony.<sup>12</sup> Equally importantly, even though never filed nor previously submitted, it was in fact “served” upon Defendant via an attachment to Plaintiff’s Motion to Strike.

Additionally, this Honorable Court will note that Defendant has not objected to nor questioned the propriety of any aspect of the Confidential Trial Brief filed in this matter. The court is also directed to the fact that said brief contains no evidentiary and/or other procedural points and authorities, but is rather a recitation of the anticipated liability testimony (which came into evidence nearly exactly as briefed), a chronology of Plaintiff’s medical treatment and damages, and a brief discussion of Plaintiff’s position relative to punitive damages.

**III. Legal Argument**

**A. Plaintiff’s Confidential Brief Does Not Violate the Mandates of EDCR 7.27**

Plaintiff’s permissive Confidential Brief was submitted to the Court prior to the commencement of trial on September 27, 2010.

Additionally, Plaintiff served his permissive Confidential Brief *before the close of trial* on December 14, 2010.

**Rule 7.27. Filing of civil trial memoranda.** Unless otherwise ordered by the court, an attorney may elect to submit to the court in any civil case, a trial memoranda 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

<sup>10</sup> See Exhibit “1,”  
<sup>11</sup> See  
<sup>12</sup> *Id.*

1 the original trial memoranda of points and authorities must be filed and a copy must be  
2 served upon opposing counsel at or before the close of trial.

3 EDCR 7.27 was obviously implemented to give parties the opportunity to address any  
4 grievances with respect to a confidential brief and to make a record of such objections prior to  
5 the case being adjudicated by verdict. Clearly, Plaintiff's conduct with respect to the Brief  
6 was in compliance with the subject Rule.

7 **B. Close of Trial Occurs Upon Rendering of Verdict**

8 The *close of trial* occurs upon the Judge, as in this case, or the jury rendering their  
9 decision. *Olivero v. Lowe*, 116 Nev. 395, 400, 995 P.2d 1023, 1026 (2000). Stated simply,  
10 as long as a confidential or "blind" brief is served upon opposing counsel prior to the Judge  
11 rendering her decision, the trial memorandum is deemed timely. *Id.*

12 *Olivero, supra*, is directly on point. In *Olivero*, early in the proceedings, counsel for  
13 Lowe lodged a "blind" trial brief with the district court under EDCR 7.27. The Nevada  
14 Supreme Court held that since Lowe provided a copy of the trial memorandum to Olivero's  
15 counsel as the judge was leaving the bench *following the rendition of his decision*, the service  
16 of the trial memorandum was untimely and violated EDCR 7.27.

17 Unlike *Olivero*, Your Honor is still deliberating, has yet to render a decision, and  
18 therefore, service of Plaintiff's brief on December 14, 2010 was appropriate.

19 **C. A Mistrial is Clearly Inappropriate**

20 As this Court is aware, a mistrial is a termination of a trial prior to a verdict or  
21 decision either because a fair or impartial trial has become impossible or because the jury  
22 cannot agree on a verdict. *Nevada Civil Practice Manual* § 2295.  
23

24 Importantly, mistrials are ordinarily limited to jury actions because a judge  
25 presumably is not subject to the same influences that prejudice a jury. *Hui v. State*, 103 Nev.  
26 321, 738 P.2d 892 (1987).  
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Moreover, as pointed out by Defendant, the decision on a mistrial rests within the sound discretion of the trial court and will not be overturned on appeal **absent probable abuse**. *Cramer v. Peavy*, 116 Nev. 575 (Nev. 2000); *Southern Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 242 (1978).

Defense counsel’s *cute* attempts at deference towards this Court are glaringly transparent, and candidly border on being outright disgusting.

“To be clear: The Palms does not allege that the Court engaged in actual impropriety.”<sup>13</sup>

As stated, Defense counsel has already accused Plaintiff’s counsel of engaging in a systematic “medical build-up,” and manipulation of the medical records. Not only is counsel now accusing Plaintiff’s counsel of submitting several secret *ex parte* briefs, he and his client are clearly accusing Your Honor of complicit and unlawful conduct.

*To be clear*, while The Palms and their Counsel have used the term “substantial irregularity” in support of their Motion, they are *really* alleging the following:

1. Your Honor systematically engaged in *ex parte* communication with Plaintiff’s counsel throughout the trial.<sup>14</sup>
2. Your Honor knowingly violated Nevada Code of Judicial Conduct, Canon 2.9(B).<sup>15</sup>
3. Your Honor has failed to uphold and promote the independence, integrity, and impartiality of the judiciary and has failed to avoid impropriety and appearance of impropriety in violation of Canon 1 of the Nevada Code of Judicial Conduct.<sup>16</sup>
4. Your Honor has failed to comply with the law, including the Code of Judicial Conduct.<sup>17</sup>
5. Your Honor has field to act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and has failed to avoid impropriety and the appearance of impropriety.<sup>18</sup>

<sup>13</sup> See Motion for Mistrial, 8: 20-22.

<sup>14</sup> “Plaintiff submitted secret briefs to the Court on substantive issues and evidence during trial. *Id.*, 7: 2-3.

<sup>15</sup> *Id.*, 7: 15-23.

<sup>16</sup> *Id.*, 8: 13-16.

<sup>17</sup> *Id.*, 8: 17-18.

1  
2 6. Your Honor is *partial* to Plaintiff and/or his counsel.<sup>19</sup>

3 7. Your Honor's conduct, impropriety and partiality, if a mistrial is not granted,  
4 constitute *probable abuse*.<sup>20</sup>

5 If these aren't the positions Mr. Ward and The Palms are making, then there is  
6 absolutely no basis for a mistrial. If Mr. Ward does in fact concede that these are the  
7 positions he is taking, they are ill-founded, unsupported, and lack any basis in truth, and, in  
8 any other context, would be defamatory.

9 Plaintiff would suggest that the tone and nature of Defendant's briefs and motions  
10 evidence a clear and consistent theme: they have conceded defeat on the issues of liability,  
11 causation and damages, and are gearing up their efforts for an appeal of the anticipated  
12 verdict, by claiming misconduct on the part of Plaintiff's counsel and misconduct,  
13 impropriety and partiality on the part of Your Honor.

14  
15 **IV. Conclusion**

16 Based on the foregoing, Plaintiff respectfully requests an order denying Defendant's  
17 offensive motion in its entirety.



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28 <sup>18</sup> *Id.*, 8: 18-20.

<sup>19</sup> *Id.*, 8: 24-27.

<sup>20</sup> Again, this is the appellate review standard.

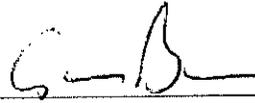


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Plaintiff would also respectfully requests sanctions in an amount to be determined by Your Honor for the inconvenience, burden and time spent addressing and responding to Defendant's offensive and inappropriate motion.

DATED this 13 day of January, 2011.

BENSON, BERTOLDO, BAKER & CARTER

BY:   
STEVEN M. BAKER, ESQ.  
Nevada Bar No.4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiffs

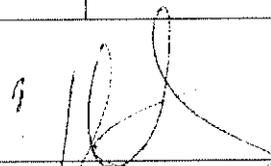


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of January 2011, a true and correct copy of the foregoing document was served via 1<sup>st</sup> Class, U.S. Mail, postage thereon fully prepaid as follows:

Keith Gillette, Esq. Archer Norris 2033 North Main Street, Suite 800 P.O. Box 8035 Walnut Creek, California 94596 Co-counsel for Fiesta Palms	925-930-6600 Telephone 925-930-6620 Facsimile
Jeffery A. Bendavid, Esq. Moran & Associates 630 S. Fourth St. Las Vegas, NV 89101 Attorneys for Defendant Fiesta Palms	384-8424 Telephone 384-6568 Facsimile
Marsha L. Stephenson, Esq. Stephenson & Dickinson 2820 West Charleston Blvd., Suite 19 Las Vegas, Nevada 89102 Co-counsel for Fiesta Palms	474-7229 Telephone 474-7237 Facsimile

  
An Employee of Benson, Bertoldo, Baker & Carter





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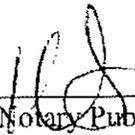
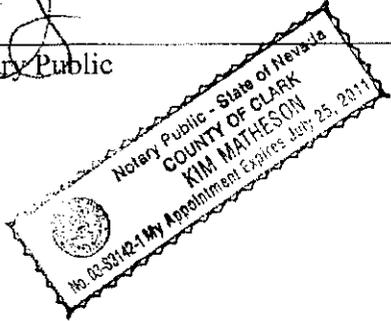
6. Several trial Motions have yet to be heard in this matter and no verdict has yet been reached, rendering this trial "un-closed" for the purposes of EDCR 7.27.

Further your affiant sayeth naught.

Dated this 13 day of January, 2011.

  
\_\_\_\_\_  
STEVEN M. BAKER

SUBSCRIBED AND SWORN to before  
me this \_\_\_\_\_ day of January, 2011.

  
\_\_\_\_\_  
Notary Public  




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Attorneys for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

CASE NO: A531538  
DEPT NO: 10  
BENCH TRIAL: 10/25/10

vs.

PIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES I through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,

PLAINTIFF'S CONFIDENTIAL  
TRIAL BRIEF

Defendants.

COMES NOW, Plaintiff, ENRIQUE RODRIGUEZ, by and through his counsel, and hereby submits his Trial Brief as allowed and permitted by EDCR 7.27. As permitted further by EDCR 7.27, Plaintiff reserves the right not to serve opposing counsel with a copy of this Brief until after the close of evidence. This Trial Brief is intended to assist the Court in understanding the planned order of the trial as well as to educate the Court regarding Plaintiff's cause of action and the evidence to support that cause of action accordingly.



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I.  
STATEMENT OF FACTS

This is a premises liability matter that occurred November 22, 2004 at the Palms Sports Bar/Sports Book. Plaintiff ENRIQUE RODRIGUEZ was an invited guest to watch a football game. During half-time, agents, employees and/or assigns of the Palms (hereinafter known as the "PALMS GIRLS") were participating in a promotion wherein they were throwing souvenirs to Sports Bar/Sports Book patrons while blindfolded.

In response to the Palms Girl, Brandy Beavers, throwing souvenirs in the Sports Bar/Sports Book while blind-folded, a customer within the Sports Bar/Sports Book dove for a thrown souvenir and hit Mr. Rodriguez's extended and stationary left knee. Mr. Rodriguez then struck the person next to him, hitting the left side of his head, then falling down, thereby sustaining extensive injuries and damages.

II.  
PROCEDURAL HISTORY

On or about November 15, 2006, Plaintiff filed the Complaint against Fiesta Palms L.L.C. Fiesta Palms, L.L.C. filed its Answer on April 23, 2007. The Joint Case Conference Report was filed on October 29, 2007 and the parties began discovery pursuant to Nevada Rule of Civil Procedure 26. On or about May 8, 2009, Plaintiff filed his motion for leave to amend Complaint to include Defendant BRANDY BEAVERS.

BRANDY L. BEAVERS, Defendant herein, was duly served with a copy of the Amended Summons and Amended Complaint on the day 11<sup>th</sup> day of January, 2010. The



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default of Defendant BRANDY L. BEAVERS for failing to answer or otherwise plead to Plaintiff's Amended Complaint was entered by this Honorable Court on February 25, 2010.

**III.**  
**THEORY OF LIABILITY**

Plaintiff has sued the Defendant the theory of negligence. This theory will be discussed below:

**A. Negligence**

In order to prevail on the issue of negligence, Plaintiff must show: 1) that the Defendant owed a duty of care to Plaintiff; 2) that Defendant breached his duty of care toward Plaintiff; 3) that Defendant's breach was the actual cause of Plaintiff's damages; 4) that Defendant's breach was the proximate cause of Plaintiff's damages; 5) that Plaintiff suffered damages as a result of Defendant's breach. Perez v. Las Vegas Medical Center, 107 Nev. 1, 4, 805 P.2d 589, 590-591 (1996).

Nevada's controlling law on "slip and fall" premises liability can be found in Moody v. Manny's Auto Repair, 110 Nev. 320, 871 P.2d 935 (1994), Sprague v. Lucky Stores, Inc., 109 Nev. 247, 849 P.2d 320 (1993), Asmussen v. New Golden Hotel Company, 392 P.2d 49 (1964), Worth v. Reed, 384 P.2d 1017 (1963), Eldorado Club, Inc. v. Graff, 377 P.2d 174 (1962), and Galloway v. McDonalds Restaurants, 102 Nev. 534, 728 P.2d 826 (1986). Determinations of liability should primarily depend upon whether the owner or occupier of land acted reasonably under the circumstances. Moody v. Manny's Auto Repair, supra. In Asmussen, the Court stated that a proprietor's liability may be found if the



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condition was 1) created by the proprietor or his agent, or 2) created by another and the proprietor had actual or constructive notice of its existence. The proprietor "who knows or in the exercise of reasonable care should know, of their dangerous and unsafe condition, and who invites others to enter upon the property, owes to such invitees a duty to warn them of the danger, where the peril is hidden, latent, or concealed, or the invitees are without knowledge thereof." Galloway.

Through the course of discovery, Plaintiff has established that prior to the subject incident, Defendant PALMS was aware that promotional items were thrown into crowds; that Defendant PALMS acknowledged this behavior was inappropriate because it was a safety issue and could foreseeably cause injury to an individual; and that Defendant PALMS failed to implement any written safety standards, procedures and/or policies instructing employees and/or independent contractors not to throw items into crowds.

Further, Defendant PALMS has conceded that they are not sure if they ever instructed employees and/or independent contractors not to throw promotional items into crowds, and have no recollection as to whether they ever specifically instructed Ms. Beavers not to throw items into the crowd.

Specifically, Sheri Long, the Director of Marketing at The Palms testified that she was aware that promotional items were thrown into crowds; that Defendant acknowledged this behavior was inappropriate because it was a safety issue and could foreseeably cause injury to an individual.



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For purposes of this case, the Honorable Court is advised that the Key West Room discussed below is where promotions were held before being moved to the subject sports-book.

Q. Was there a custom and practice of bringing pretty girls in to help in the Monday Night Football party as part of the promotion?

A. Yes.

Q. Was that routine each Monday night football party?

A. Yes.

Q. Okay. And where did they come from?

A. Usually from outside vendors.

Q. Third parties?

A. Yes.

Q. And, of course, the purpose there is just to create a kind party atmosphere, is that right?

A. Correct.

Q. Were you aware -- do you need that?

A. No.

Q. Were you of any of these girls throwing promotional items into the crowd while the party was being held in the banquet room?

A. In the Key West?

Q. In the Key West.



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A. I believe that it did happen once.

Q. In the Key West room?

A. Yes.

Q. And do you know who was throwing those things?

A. No.

Q. What was your opinion of that conduct?

A. That it wasn't appropriate.

Q. Why wasn't it appropriate?

A. Because it definitely is a safety issue.

Q. And it could foreseeably cause injury to somebody, is that right?

A. Absolutely.<sup>1</sup>

Ms. Long reiterated her safety concerns, but could not even recall if she ever instructed her staff that items should not be thrown into crowds during promotional events.

Q. Okay. And at the time in the Key West room when you discovered someone was throwing promotional items out into the crowd, who was it that you spoke to?

A. I'm sure it was the marketing manager.

Q. Who was that at that time?

A. I believe it was Maureen.

Q. Do you remember the substance of your conversation?

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<sup>1</sup> See Exhibit "1," Long Deposition, 48:1-25; 49:1-9.



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A. No, I don't recall.

Q. But you discussed that it wasn't safe to throw promotional items out into the crowd, is that right?

A. I believe so, yes.

Q. For the reason that you said, that there's a real safety concern associated with that?

A. Yes.

Q. And because it's foreseeable that, if you throw promotional items out during a Monday Night Football party, somebody could get hurt?

A. Correct.

Q. Okay. And did you follow that up with a memoranda in your department instructing your people that promotional items would not be thrown out during these parties?

A. I don't recall.

Q. Would it have been your responsibility to do that if there was a responsibility to do that, would you have been the one to do it?

A. Likely.

Q. I mean, how concerned were you? Were you pissed, for lack of a better legal word?

A. I don't -- I really don't recall. I mean, you know, obviously, I deal with a lot of different things every day.

Q. I see your phone ringing.



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A. Some minor, some not minor.

Q. Did you feel it was a minor or not minor issue?

A. I really don't recall at the time. I'm thinking that it would have been more from the security side of things, the safety and security side of things that that concern would have been addressed. Likely my manager sent an e-mail out.

Q. To whom?

A. Within the company to the couple people in my department that it might have involved, just, you know, just a reminder, please don't do this.

Q. Did you personally contact the security department, do you recall?

A. No, I wouldn't have.

Q. Did you bring it up at one of the staff meetings when the different directors from different departments met I think you said monthly?

A. I really don't recall at the time if I did that. I know I have brought it up for other things with regard to safety, but specifically for that, not necessarily.

Q. You brought it up -- oh. You've made your safety concerns known --

A. Correct.

Q. -- on other issues?

A. Correct.

Q. But you don't recall specifically with this issue?



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A. I don't recall.

Q. When you're hiring girls to do the promotions, do you interview them personally?

A. Did I? No.

Q. Who did?

A. My marketing manager generally did.

Q. Did you instruct your marketing manager to tell these girls don't throw stuff out in the crowd after you became aware that that was occurring in the Key West room?

A. I don't recall if we had the conversation.

Q. Do you know if you maybe you put it in writing to anybody?

A. I don't recall. That, I have no idea.<sup>2</sup>

Despite awareness of the foreseeable danger, Ms. Long testified that she cannot even recall if the issue was raised during staff and/or safety meetings.

Q. At any time during those meetings, did your manager or you or anybody bring up the issue that we shouldn't have girls throwing stuff at these promotional events?

A. I don't recall.

Q. You can't say one way or another?

A. No.<sup>3</sup>

<sup>2</sup> Id., at 53:17-25; 54-55:1-25; 56:1-9.

<sup>3</sup> Id., at 57:20-25; 58:1



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Continuing, Ms. Long indicated that she does not know if she instructed Ms. Beavers not to throw promotional items into the crowd, and cannot recall making any departmental procedures to instruct others.

Q. And it's fair to say that you don't know whether or not Denise specifically instructed Brandy not to throw promotional items into the crowd?

A. I don't know.

Q. Did you make it a departmental procedure to instruct these girls not to throw promotional items into the crowd after what happened in the Key West room?

A. I really don't recall.<sup>4</sup>

Lastly, Ms. Long acknowledged that there is no formal policy or procedure to prevent promotional items from being thrown into the crowd.

Q. Is there now a formal policy or procedure to prevent that from happening?

A. I don't have one in writing.<sup>5</sup>

Vikki Kooinga, Risk Manager at The Palms has also testified that she is unaware of any regulation against throwing promotional items into crowds. Importantly, she also testified that throwing items into a crowd could foreseeably cause injury to someone in the audience.

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<sup>4</sup> *Id.*, at 69: 8-16.

<sup>5</sup> *Id.*, at 72: 3-5.



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Q. Is there any regulation which has to do with throwing of objects during promotional events during the Palms Casino that was in existence in November 2004 that you're aware of?

A. I am not aware of.

Q. As a risk manager, would you instruct or allow employees of the Palms hotel to throw objects into an audience during a promotional event?

A. No.

Q. You would not?

A. I would not.

Q. And why would you not?

A. Just for the simple fact that, one, you could break the item, depending on what the item is, and common sense.

Q. You try to utilize common sense when you're risk managing, is that right?

A. Correct.

Q. And part of risk management is to provide for the safety, the reasonable safety of people upon the premises, is that true?

A. Correct.

Q. And as the risk manager of the Palms hotels, is it fair to say that you agree with me that throwing objects during a promotional event could foreseeably cause injury to someone in the audience?

MR. GILLETTE: That calls for a legal conclusion.

A. It could foreseeably, yes.



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Q. And that's one of the reasons why you as the risk manager would instruct employees of the Palms hotel not to throw those objects, is that fair to say?

MR. GILLETTE: Well, that calls for speculation, and it also misstates her prior testimony. You can go ahead and answer.

A. Could you repeat it?

Q. Sure. As the risk manager, one of the reasons -- using your common sense -- that you would tell your employees not to throw something into a crowd is because that could result in an injury to somebody in that crowd?

A. Correct.

Q. And that wouldn't be reasonable in terms of risk management, is that fair to say?

A. It's not something --

MR. GILLETTE: That calls for a legal But you can answer that.

A. It's not something that I would advise.

Q. Is there a policy or procedure in effect now at the Palms hotel not to throw objects into the audience during a promotional event?

A. I don't know if there's a specific policy, a written policy.<sup>6</sup>

<sup>6</sup> See Exhibit "2," Kooinga Deposition, 30: 23-25; 31: 1-25; 32: 1-25; 33:1-7.



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Ms. Kooinga has acknowledged that throwing promotional items into the crowd was inappropriate, wrong and beneath the standard of care for the hotel protecting the safety of their patrons upon the premises.

Q. Did you have any thoughts about the appropriateness of Brandy Beavers throwing promotional bottles out into the audience?

A. My personal opinion?

Q. Yes.

A. It is not appropriate.

Q. So you think that was wrong?

A. Yes.

Q. If Brandy Beavers was an employee of the Palms hotel at that time –

A. I'm sorry. Can I clarify something?

Q. Absolutely.

A. Based upon the report, he is stating that she threw it. I do not know if it was actually thrown.

Q. But, hypothetically, if it was thrown, in your opinion, that would be wrong?

A. Hypothetically, yes.

Q. Okay. And if Brandy Beavers was an employee of the Palms hotel at the time she threw that water bottle, she would have done something wrong?

A. I don't believe she was employed.



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Q. Hypothetically?

A. Hypothetically, I believe yes.

Q. Okay. And something that was beneath the standard of care for the hotel protecting the safety of their patrons upon the premises?

MR. GILLETTE: That calls for a legal conclusion.

BY MR. BAKER:

Q. You can answer.  
When he makes those objections, later a Judge might read these objections, and the Judge will decide if my question is profoundly stupid or not.  
MR. BAKER: Would you read the question back, please?

(Thereupon, the requested portion was read back.)

A. I think you had asked me in my opinion.

Q. Correct?

A. Yes, it would be.<sup>7</sup>

Lastly, Ms. Kooinga has testified that she would have expected Security to stop anyone from throwing items into the crowd.

Q. And if a security individual working at the Palms hotel in November of 2004 saw somebody throwing promotional items out into an audience, would you expect that security officer to tell them to stop doing it?

A. Yes.

<sup>7</sup> Id., at 39: 16-25; 40: 1-25; 41: 1-8.



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MR. GILLETTE: Well, there's a relevance objection in there somewhere, Steve, simply because she doesn't control them. She doesn't supervise the activities of those individuals.

MR. BAKER: I understand.

BY MR. BAKER:

Q. You understood my question though?

A. Repeat it, please.

Q. Sure.  
The security officers using their common sense, as risk manager, you would expect them to stop the person throwing promotional items out into the audience?

MR. GILLETTE: Incomplete hypothetical.  
Go ahead and answer.

A. I would expect that they would, yes.

Q. And as the risk manager for the Palms hotel, it's your opinion that the standard of care would require that any security officer in the area would stop an individual from throwing promotional items out into the audience?

A. That they would if they had prior knowledge it was about to happen, if hypothetically this is exactly what happened is that Brandy Beavers threw a water bottle, once it left her hand, he may have seen it, he's it in no position to stop it at that point. However, he may have gone to her afterwards and said do not do it again.

Q. However, just to get my question, I understand how you're framing it.  
But it would be appropriate for a security officer in the area to stop her from throwing those objects into the audience?



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A. If she had done it more than once, yes.

Q. And that would be what you would expect of security officers as the risk manager of the Palms hotel?

A. Yes.<sup>8</sup>

In this case, Defendant PALMS was aware that promotional items were thrown into crowds. Defendant has acknowledged this behavior was inappropriate because it was a safety issue and could *foreseeably* cause injury to an individual. Defendant acknowledged that the behavior was wrong and fell below the standard of for the hotel protecting the safety of their patrons upon the premises Yet, Defendant failed to implement any written safety standards, procedures and/or policies instructing employees and/or independent contractors *not* to throw items into crowds.

Lastly, Defendant PALMS conceded that they are not sure if they ever instructed employees and/or independent contractors not to throw promotional items into crowds, and have no recollection as to whether they ever specifically instructed Ms. Beavers not to throw items into the crowd.

Under NRS 42.001, implied malice is a discrete basis for assessing punitive damages where conscious disregard can be demonstrated. NRS 42.001(3).

Plaintiff submits that the evidence and testimony elicited to date demonstrate "conscious disregard."

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<sup>8</sup> *Id.*, at 43: 12-25; 44: 1-25; 45: 1-6.



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IV.

**BRIEF STATEMENT OF DAMAGES**

Plaintiff's claimed injuries include the following:

1. Neck
2. Left wrist
3. Right hand and right fingers
4. Lower back
5. Left shoulder
6. Right shoulder
7. Left knee, shin, ankle, foot, left toe
8. Right foot
9. Right leg
10. Headaches
11. Sleep apnea

Plaintiff is permanently disabled and will require extensive future medical treatment.

Plaintiff presented to Dr. Shah, a neurologist, on August 10, 2010 for continued burning sensation in the left knee, pain in the right shoulder, sensory right hand tingling, numbness and decreased strength. Plaintiff awaits surgery for the permanent pain stimulator implant which is anticipated to negate the lower extremity symptoms. Dr. Shah's impression on August 10, 2010 follows:

1. Right lumbar radiculopathy
2. Right carpal tunnel regional abnormality



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3. Left knee pain
4. Cervical strain with sensory right arm radicular complaints
5. Right shoulder strain
6. Right ankle pain and weakness secondary to asymmetric weight on walking from left knee pain

1. **Special Damages:**

a. <i>Past</i> Medical Expenses	\$543,633
b. <i>Future</i> Medical Expenses	\$2,000,000
c. Past Loss of Earnings	\$290,000
d. Future Loss of Earnings	\$968,000

2. **General Damages:**

a. Past Pain, Suffering, and Loss of Enjoyment of Life	\$ Court's discretion
b. Future Pain, Suffering and Loss of Enjoyment of Life	\$ Courts discretion

3. **Total Damages:** \$ Depending on the state of the evidence, Plaintiff will likely ask for total damages in the amount of \$5,000,000.00.



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VI.

Conclusion

Plaintiff respectfully thanks this Court for the opportunity to present this case.

DATED this 27<sup>th</sup> day of September, 2010.

BENSON, BERTOLDO, BAKER & CARTER

BY: 

STEVEN M. BAKER, ESQ.  
Nevada Bar No. 4522  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff

MAY 7 2010 10:26AM

BENSON-BERTOLDO

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DISTRICT COURT  
DISTRICT COURT  
CLARK COUNTY, NEVADA

*[Signature]*  
*[Signature]*  
CLERK OF THE COURT

\*\*\*

ENRIQUE RODRIGUEZ, an individual,  
Plaintiff,

CASE NO: A531538  
DEPT NO: 10

vs.

AMENDED ORDER SETTING  
BENCH TRIAL

FIESTA PALMS, L.L.C., a Nevada Limited  
Liability Company, d/b/a PALMS CASINO  
RESORT, BRANDY L. BEAVERS,  
individually, DOES 1 through X, inclusive,  
and ROE BUSINESS ENTITIES I through X,  
inclusive,

Defendants.

IT IS HEREBY ORDERED THAT:

- A. The above entitled case is set for a BENCH TRIAL on October 4, 2010 at 9:00 a.m.
- B. A Pre-Trial Conference with the designated attorney and/or parties in proper person will be held on September 10, 2010 at 9:00 a.m.
- C. A Calendar Call will be held September 24, 2010 at 9:00 a.m. Trial counsel (any party *in proper person*) must appear.
- D. The Pre-trial Memorandum must be filed no later than 9-22, 2010, with a courtesy copy delivered to chambers. EDCR 2.67 must be complied with.
- E. All discovery deadlines, deadline for filing dispositive motions and motions to amend the pleadings or add parties are controlled by the Stipulation to Extend Discovery filed on November 24, 2009.
- F. Stipulations to continue a trial date will not be considered by the Court. Pursuant to EDCR 2.35, a motion to continue trial due to any discovery issues or deadlines must be made before the Discovery Commissioner.
- G. All motions in limine shall be filed at least 45 days prior to trial.

BENSON-BERTOLDO  
EROLDO  
AKER  
& CARTER  
ATTORNEYS AT LAW

MC

RECEIVED  
MAY 10 2010  
CLERK OF THE COURT

RECEIVED  
MAY 7 2010  
CLERK OF THE COURT  
1 App. 237

7408 WEST SAHARA AVENUE • LAS VEGAS, NEVADA 89117 • (702) 228-2600 • FAX (702) 228-2333



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H. Orders shortening time will not be signed except in extreme emergencies.  
H. Orders shortening time will not be signed except in extreme emergencies.

**AN UPCOMING TRIAL DATE IS NOT AN EXTREME EMERGENCY**

Failure of the designated trial attorney or any party appearing in proper person to appear for any court appearances or to comply with this Order shall result in any of the following: (1) dismissal of the action; (2) default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy or sanction.

Counsel must advise the Court immediately when the case settles or is otherwise resolved prior to trial. A stipulation which terminates a case by dismissal shall indicate whether a Scheduling Order has been filed and, if a date has been set, the date of that trial.

DATE: May 7, 2010

Jessie Walsh  
JESSIE WALSH, District Judge

I hereby certify that on the date filed, I caused to be Placed a copy of the foregoing Order in the folder(s) in the Clerk's Office or mailed to the following:

- Steven M. Baker, Esq. (Benson, Bertoldo, Baker & Carter, Chd.)
- Marsha Stephenson, Esq. (Stephenson & Dickinson)
- Keith Gillette, Esq. (Archer, Norris)

Jeri Winter  
JERI WINTER, Judicial Assistant



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AFFIDAVIT OF ROBERT S. CARDENAS, ESQ.

STATE OF NEVADA        )  
  )ss:  
COUNTY OF CLARK        )

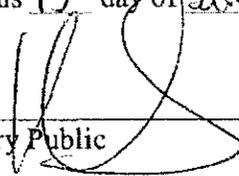
ROBERT S. CARDENAS, being first duly sworn, alleges as follows:

1. I am an attorney at law, licensed in the State of Nevada, and co-counsel for Plaintiff in the above-referenced matter.
2. On or about September 24, 2010, this Honorable Court docketed the trial of this matter to begin October 25, 2010.
3. The trial testimony concluded on or about November 10, 2010.
4. That on November 10, 2010 Affiant signed Plaintiff's Supplemental Confidential Brief re: Punitive Damages, which was prepared in anticipation of Defendant's' Rule 50 Motion for the dismissal of punitive damages upon the close of Plaintiff's case in chief.
5. That Defendant never made such a motion, nor did they move for a dismissal of the punitive damage claim.
6. That as a result Affiant opted not to submit, file or serve the Supplemental Confidential Brief. Thereafter, the supplemental brief was never filed.
7. That in response to Defendants' Post-Trial Brief and in Support of Plaintiff's Motion to Strike Affiant inadvertently made reference to, Plaintiff's Supplemental Confidential Brief re: Punitive Damages, attaching the same as an exhibit, rather than reiterating the content, as Affiant failed to recall that the brief was never filed or served.

Further your Affiant sayeth naught.

  
\_\_\_\_\_  
Robert S. Cardenas

Subscribed and sworn to before me  
me this 13 day of January, 2011.

  
\_\_\_\_\_  
Notary Public





1 Kenneth C. Ward (Bar No. 6530)  
keward@archernorris.com  
2 ARCHER NORRIS  
A Professional Law Corporation  
3 2033 North Main Street, Suite 800  
Walnut Creek, California 94596-3759  
4 Telephone: 925.930.6600  
Facsimile: 925.930.6620

FILED

JAN 20 2011

*[Signature]*  
CLERK OF COURT

5 Marsha L. Stephenson, (Bar No. 6150)  
6 STEPHENSON & DICKINSON, P.C.  
2820 West Charleston Blvd., Suite 19  
7 Las Vegas, NV 89102-1942  
Telephone: 702.474.7229  
8 Facsimile: 702.474.7237

9 Attorneys for Defendant  
FIESTA PALMS, LLC, a Nevada Limited Liability  
10 Company, d/b/a THE PALMS CASINO RESORT

11 DISTRICT COURT  
12 CLARK COUNTY, NEVADA

13 ENRIQUE RODRIGUEZ,  
14  
15 Plaintiff,

Case No. A531538

16 v.

17 FIESTA PALMS, LLC, a Nevada Limited  
18 Liability Company, d/b/a THE PALMS  
CASINO RESORT, et al. ,

DEFENDANT FIESTA PALMS, LLC'S  
MOTION FOR MISTRIAL, OR,  
ALTERNATIVELY, MOTION TO STRIKE  
PLAINTIFF'S CONFIDENTIAL  
PRETRIAL AND TRIAL BRIEFS ON EX  
PARTE APPLICATION FOR ORDER  
SHORTENING TIME; ORDER

19 Defendants.

Dept: X

20  
21 Defendant FIESTA PALMS, LLC, doing business as THE PALMS CASINO RESORT  
22 ("the Palms") hereby moves this Court for an order declaring a mistrial on the basis of substantial  
23 irregularity in these proceedings, or, in the alternative, for an order that all of plaintiff's  
24 confidential pretrial and trial briefs be filed of record to preserve the record for appeal, and  
25 thereafter immediately stricken.

26 //  
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RECEIVED

JAN 20 2011

CLERK OF THE COURT

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06A531538  
MOT  
Motion  
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DEPARTMENT X  
NOTICE OF HEARING  
DATE 1/27 TIME 9:00 AM  
APPROVED BY [Signature]

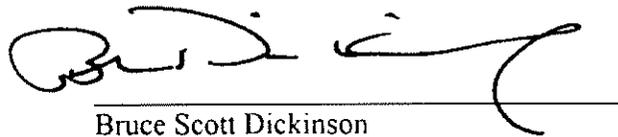
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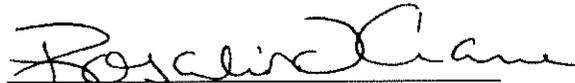
1 to Strike Trial Testimony of two of defendant's experts, and plaintiff's Motion to Strike  
2 Defendant's Posttrial Memorandum. Plaintiff's Motion to Strike Defendant's Posttrial  
3 Memorandum was set for hearing on shortened time, itself.

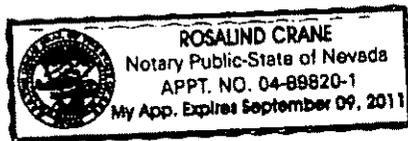
4 4. An order shortening time for the hearing of Defendant's motion for mistrial is  
5 necessary because otherwise it cannot be heard before the Court rules on plaintiff's other motions  
6 before it. Granting the instant motion for a mistrial would obviate the need for the Court to  
7 decide any of the other motions. Having this motion heard at the same time as the other motions  
8 would thus further judicial economy.

9 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing  
10 is true and correct. This affidavit is executed on January 11, 2011, at Las Vegas, Nevada.

11  
12   
13 Bruce Scott Dickinson

14  
15  
16 SUBSCRIBED AND SWORN to before me  
17 this 11 day of January, 2011.

18   
19 NOTARY PUBLIC



1 Defendant FIESTA PALMS, LLC, moves this Court for an order declaring a mistrial on  
2 the basis of substantial irregularity in these proceedings, or, in the alternative, for an order that all  
3 of plaintiff's confidential, secret pretrial and trial briefs be filed of record to preserve the record  
4 for appeal, and thereafter immediately stricken. The motion is made on the grounds as set forth  
5 below.

6 **I. RELEVANT FACTS**

7 The bench trial of plaintiff's slip and fall lawsuit against the Palms began on October 25,  
8 2010, and concluded with the parties' closing arguments on November 10, 2010.

9 Under EDCR 7.27, that was the time for plaintiff to file and serve any pretrial confidential  
10 trial brief :

11 Unless otherwise ordered by the court, an attorney may elect to  
12 submit to the court in any civil case, a trial memoranda of points  
13 and authorities *prior to* the commencement of trial by delivering  
14 one unfiled copy to the court, without serving opposing counsel or  
15 filing the same, *provided that* the original trial memoranda of points  
16 and authorities *must be filed and a copy must be served upon*  
17 *opposing counsel* at or before the close of trial...

18 EDCR 7.27, italics added.

19 Plaintiff did not serve any EDCR 7.27 brief.

20 The Palms reasonably assumed none had been submitted to the Court.

21 It turns out, though, that Plaintiff had submitted a confidential pre-trial brief to the Court  
22 but failed to file and serve it at or before the close of trial. The Palms learned of the secret brief  
23 only when Plaintiff moved to strike the Palms' posttrial memorandum. In plaintiff's motion to  
24 strike the Palms' posttrial memorandum, plaintiff himself referred to his EDCR 7.27 brief as well  
25 as a "supplemental" confidential bench brief "Re: Punitive Damages" to which he had attached a  
26 prior day's unofficial trial transcript.

27 On or about December 14, 2010, more than a month after the close of trial but before  
28 verdict was rendered, the Palms' counsel finally received "Plaintiff's Confidential Trial Brief"  
from Plaintiff's counsel. As the Court knows, this brief is dated September 27, 2010, almost a  
month before trial commenced, and discusses Plaintiff's theories of liability and damages.

Plaintiff did not timely file this brief with the Court or timely served it upon the Palms. The

1 Court's docket reflects that this brief has still not been filed.

2 In addition to the secret trial brief, plaintiff also provided the Court with at least one  
3 confidential bench memorandum during trial to which he attached an unofficial transcript of the  
4 previous day's trial testimony. In his Motion to Strike, Plaintiff references a document entitled  
5 "Plaintiff's Supplemental Confidential Bench Brief Re: Punitive Damages," at footnote 1 (page 7)  
6 of its Motion and references the trial transcript testimony of Sherry Long, dated October 25,  
7 2010, as Exhibit 1 to that brief.

8 The Palms has no idea how many of these "Supplemental Confidential Bench Briefs"  
9 plaintiff submitted to the court throughout the 2 1/2 week bench trial. It is likely that there were  
10 several, as the one the Palms knows about was designated "Re: Punitive Damages." Presumably,  
11 there are more briefs "Re:" other issues and evidence. The Palms can only conclude that there  
12 was a continuous stream of secret briefing on contested issues and evidence.

13 These *ex parte* communications to the Court are in violation of the Eighth District local  
14 rules, the Nevada Rules of Civil Procedure, and Nevada and the United States constitutional  
15 articles mandating that litigants receive due process of law. They constitute such a substantial  
16 irregularity that the Palms cannot be assured it received a fair and impartial trial.

17 Accordingly, the Palms moves this Court for a Mistrial.

## 18 II. LEGAL ARGUMENT

### 19 A. Plaintiff's confidential, *ex parte* submissions to the Court during trial are so 20 irregular as to have prevented a fair and impartial trial

21 There is no Nevada rule or statute governing the standard for the granting of a mistrial.  
22 The doctrine is centuries old, and is a common law invention to prevent the negative effects of  
23 impropriety and irregularity on the judicial process. The online magazine Slate provides this  
24 description:

25 Trial judges have ultimate discretion, and anything that might  
26 impede a jury's ability to remain impartial or prevent it from  
27 reaching a unanimous decision is grounds for a mistrial. One of the  
28 earliest articulations of the standard comes from an opinion written  
by the 19<sup>th</sup>-century Supreme Court Justice Joseph Story, who wrote  
that judges should declare a mistrial whenever "there is a manifest  
necessity for the act, or the ends of public justice would otherwise  
be defeated."

1 The "manifest necessity" standard has proven amorphous. There is  
2 a plethora of circumstances that could warrant a mistrial, including  
3 procedural error; misconduct; the illness or injury of a lawyer,  
4 judge, or juror that prevents him or her from continuing; or an  
5 unexpected event, such as an outburst in the courtroom, that might  
6 unfairly influence the jury. Mistrials can occur for more  
7 idiosyncratic reasons as well: A West Virginia judge recently  
8 declared one because a juror drank beer during the lunch break.

9 Pellettieri, *When Can a Judge Declare a Mistrial?*, <http://www.slate.com/id/2098069/>, March 31,  
10 2004. The decision on a mistrial rests within the sound discretion of the trial court. *Cramer v.*  
11 *Peavy*, 116 Nev. 575 (Nev. 2000); *Southern Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 242  
12 (1978).

13 The general definition in NRCP 59 is instructive, in that it permits a court after verdict on  
14 motion of a party to grant a motion for a new trial where one of the enumerated causes or grounds  
15 "materially affect[s] the substantial rights of an aggrieved party". The relevant ground here is  
16 irregularity:

17 (1) Irregularity in the proceedings of the court, jury, master, or  
18 adverse party, or any order of the court, or master, or abuse of  
19 discretion by which either party was prevented from having a fair  
20 trial . . . .

21 NRCP 59. Even though this case was tried to the Court, the standard should be the same.

22 Here, plaintiff's *ex parte* trial and bench briefs constitute such an irregularity in the  
23 proceedings that the Palms has been deprived of its right to a fair and impartial trial. No remedy  
24 other than granting a mistrial can maintain this Court's appearance of impartiality. Only through  
25 a new trial may the Palms be assured that it will have received a fair trial.

26 *Ex parte* communications with a court on matters of substance are impermissible. Nevada  
27 Code of Judicial Conduct, Canon 2.9(A)(1) (2010); *see also Rudin v. State* (2004) 120 Nev. 121,  
28 141; *Daniel v. State* (2003) 119 Nev. 498, 509. Exceptions are few, limited and structured to  
ensure compliance with due process. A judge may permit *ex parte* communication when  
authorized by law. See Nevada Code of Judicial Conduct, Canon 2.9(A)(5) (2010). EDCR 7.27  
permits confidential trial briefs, but even then the briefs must be disclosed, placed in the record  
and served on opposing counsel by the end of trial.

Plaintiff here submitted a secret trial brief to the court which, reasonably, would never

1 have come to the light of day had Plaintiff not let the cat out of the bag in his motion to strike.

2 More egregiously, Plaintiff submitted secret briefs to the Court on substantive issues and  
3 evidence *during trial*. The Palms would not have known about these briefs without Plaintiff's  
4 admission in his motion to strike about the supplemental brief "Re: Punitive Damages." Neither  
5 this brief nor any of Plaintiff's other supplemental briefs have seen the light of day. There is no  
6 authority for submitting such briefs during trial. There is no precedent for it. Confidential briefs  
7 submitted *ex parte* to the Court *during trial* are not authorized by any Nevada law and are  
8 therefore improper *ex parte* communications.

9 Plaintiff opened up a direct line of communication to the Court on substantive matters  
10 during the presentation of the evidence. Notice was not given to the Palms. An opportunity to  
11 respond timely was not afforded the Palms.

12 Plaintiff's continuing submissions to the Court during trial gave Plaintiff a litigation  
13 advantage over the Palms. Plaintiff had unfettered access to the Court on issues of liability, trial  
14 testimony, damages, and who knows what else.

15 In circumstances like these, the Court should promptly notify all parties of the attempted  
16 *ex parte* communication and provide all parties with an opportunity to respond:

17 (B) If a judge inadvertently receives an unauthorized *ex parte*  
18 communication bearing upon the substance of a matter, the judge  
19 shall make provision promptly to notify the parties of the substance  
of the communication and provide the parties with an opportunity  
to respond.

20 Nevada Code of Judicial Conduct, Canon 2.9(B) (2010); *see also Rushen v. Spain* (1983) 464  
21 U.S. 114, 119 ("When an *ex parte* communication relates to some aspect of the trial, the trial  
22 judge generally should disclose the communication to counsel for all parties."). Disclosure as  
23 contemplated by Canon 2.9(B) did not occur here.

24 Due process requires impartiality of the Court. "A fair trial in a fair tribunal is a basic  
25 requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). The Palms still does  
26 not know what plaintiff wrote in his supplemental secret bench briefs, but, whatever it is, it  
27 should have been disclosed promptly so the Palms could respond timely and as *it* saw fit. Now  
28 that can never happen. The Palms has been deprived of its right to a fair and impartial trial.

1 Even if there were "only" two secret briefs, Plaintiff has had the opportunity to submit  
2 argument and evidence to the Court contrary to the Palms' interests, without the Palms having an  
3 opportunity to respond or even knowing what was submitted to the Court. This deprived the  
4 Palms its right to due process. For these reasons, the Palms' Motion for Mistrial must be granted.

5 **B. In the alternative, plaintiff's confidential trial and bench briefs must be**  
6 **disclosed to the Palms, filed of record, and thereafter stricken from the record**

7 Even if the Court decides not to grant the Palms' motion for mistrial, at the very least, the  
8 Palms is entitled to have all improperly submitted documents disclosed and filed of record to  
9 preserve the record for appeal, and thereafter an order entered striking them from the record.  
10 Plaintiff's "Confidential Trial Brief," "Supplemental Confidential Bench Brief," and any other  
11 briefs submitted are in violation of EDCR 7.27. As such, they all should be appropriately served  
12 upon the opposing party – the Palms – and subsequently stricken from the record as improper.

13 **III. CONCLUSION**

14 Canon 1 of the Nevada Code of Judicial Conduct reads as follows:

15 A judge shall uphold and promote the independence, integrity, and  
16 impartiality of the judiciary and shall avoid impropriety and the  
appearance of impropriety.

17 Rule 1.1. Compliance With the Law. A judge shall comply  
with the law, including the Code of Judicial Conduct.

18 Rule 1.2. Promoting Confidence in the Judiciary. A judge shall  
19 act at all times in a manner that promotes public confidence in the  
independence, integrity, and impartiality of the judiciary and shall  
20 avoid impropriety and the appearance of impropriety.

21 Rule 1.2 is perhaps the most important rule on these facts. To be clear: The Palms does  
22 not allege that the Court engaged in actual impropriety. The Palms does believe, though, that  
23 plaintiff improperly continued to make his arguments and submit inadmissible evidence during  
24 trial. Indeed, the appellate record will not contain any of this evidence or argument unless the  
25 Court orders otherwise. There is no way to "fix" this other than a mistrial and a new trial. Under  
26 Rule 1.2, the Court should grant a mistrial because that is the only remedy that will "promote  
27 public confidence in the ... impartiality..." of the judicial system. A mistrial is the only remedy  
28 that will avoid the appearance of impropriety.

1 For the foregoing reasons, Defendant The Palms respectfully requests that the Court grant  
2 its Motion for Mistrial.

3  
4 Dated: January 11, 2010.

ARCHER NORRIS



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Kenneth C. Ward  
Attorneys for Defendant  
FIESTA PALMS, LLC, a Nevada Limited  
Liability Company, d/b/a THE PALMS  
CASINO RESORT

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