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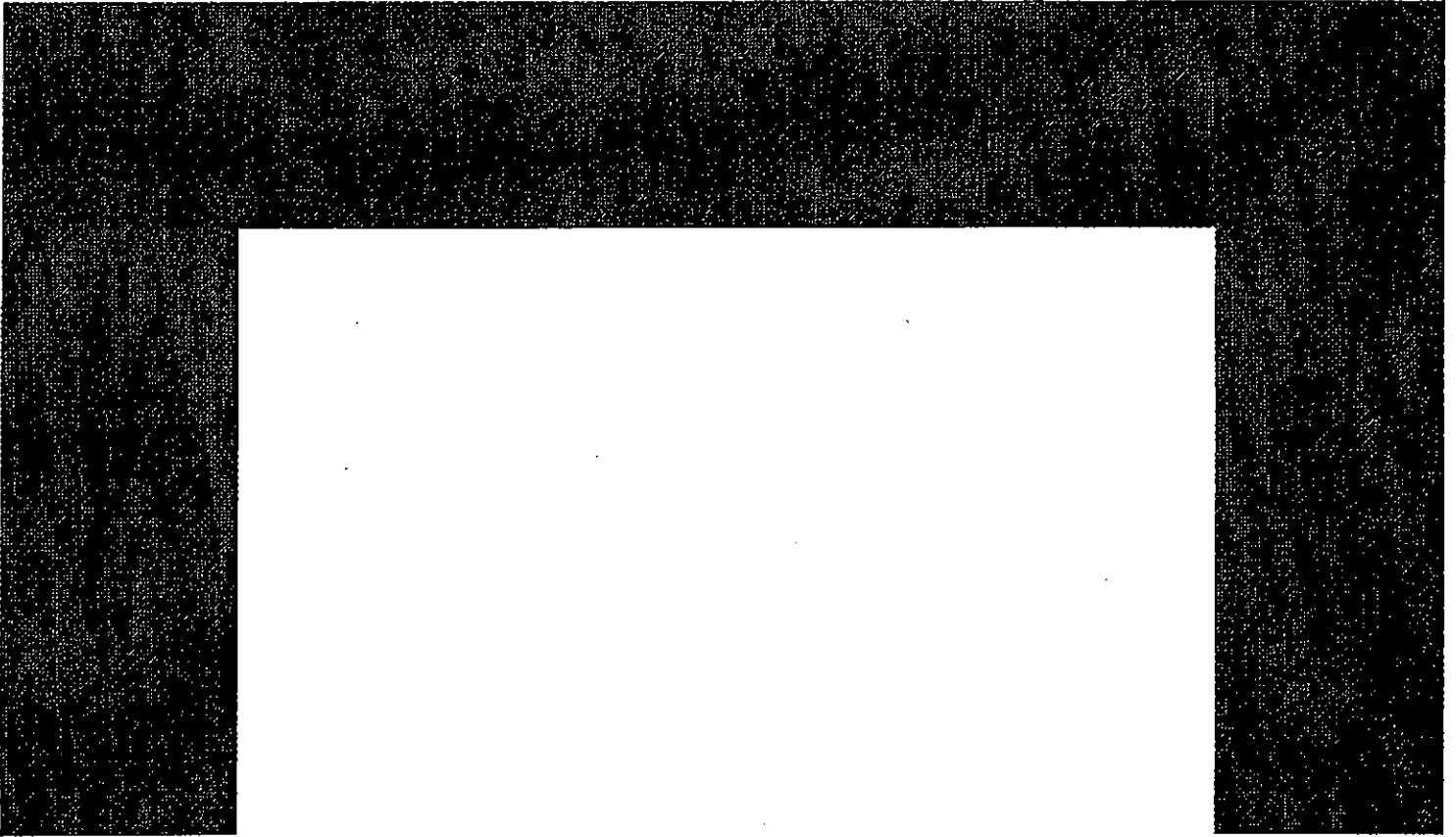
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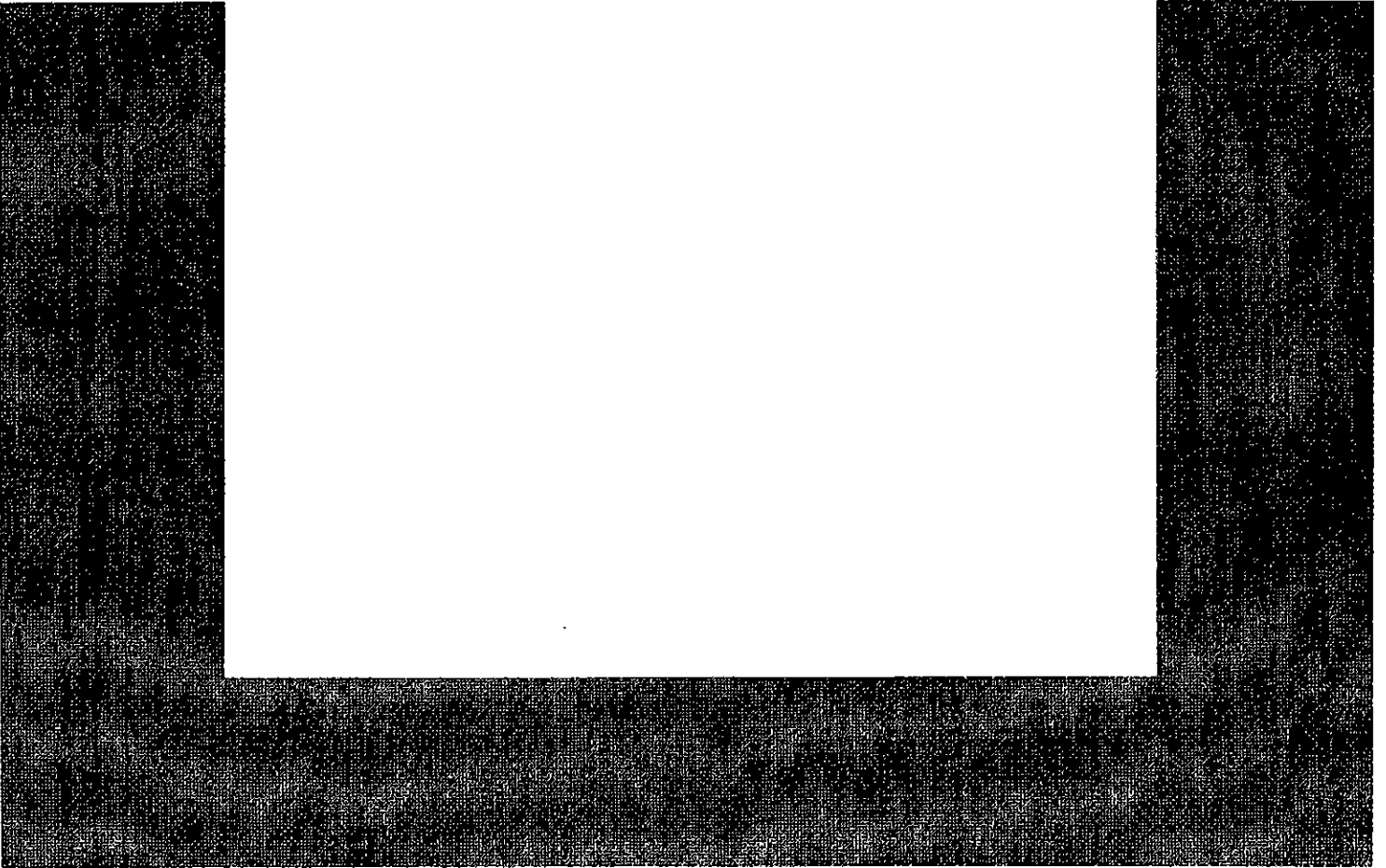
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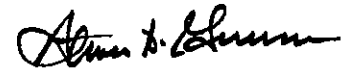


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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

11 Plaintiff,

12 v.

13 JENNY RISH; JAMES RISH; LINDA RISH;
14 DOES I - V; and ROE CORPORATIONS I - V,
inclusive,

15 Defendants.

CASE NO. A539455

DEPT. NO X

DEFENDANT JENNY RISH'S OPPOSITION TO
PLAINTIFFS' OMNIBUS MOTION IN LIMINE

19 COMES NOW Defendant JENNY RISH, by and through her attorney, Rogers, Mastrangelo,
20 Carvalho & Mitchell, and hereby submits this Opposition to Plaintiff's Omnibus Motion in Limine.

21 DATED this 4th day of February, 2011.

22 ROGERS, MASTRANGELO, CARVALHO &
23 MITCHELL

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Statement of Facts**

3 This personal injury action arises out of a MVA that occurred April 15, 2005. Defendant
4 Jenny Rish rear-ended a vehicle driven by Plaintiff William Simao. Plaintiff alleges personal injuries
5 as a result.

6 **II. Law and Argument**

7 **Defendant's Opposition to the Plaintiffs' Motions to Exclude the Following Evidence**

8 **I. Prior and Subsequent (sic) Unrelated Accidents, Injuries and Medical Conditions**

9 The Plaintiff moves to exclude evidence of (1) his prior 2003 motorcycle accident, and (2)
10 his high blood pressure and/or cholesterol. He argues that unless the medical experts opine, to a
11 reasonable degree of medical probability, that his alleged condition was caused by the prior
12 motorcycle accident or his high blood pressure condition, such evidence is inadmissible. The
13 argument correctly posits that expert opinion testimony on diagnosis and cause must be stated to a
14 scientific probability. However, the Plaintiff then incorrectly argues (1) that *Moriscato* applies to
15 general negligence cases (its holding is expressly limited to "standard of care," i.e., medical
16 malpractice actions), and (2) that *Moriscato* excludes "any reference" to potential unrelated causes
17 (on the contrary, it expressly admits foundation testimony, including "other theories" that have been
18 ruled out, i.e., potential alternate causes; only the conclusive opinions are required to be stated to a
19 reasonable degree of medical probability). The non sequitur in Plaintiff's argument is (1) that it
20 misapplies a medical negligence case to a general negligence case, and (2) that seeks to exclude
21 foundation evidence, without which the expert's conclusive opinions are inadmissible.

22 *Moriscato* requires that conclusive expert medical opinion on ultimate issues, such as
23 diagnosis and causation, be stated to a reasonable degree of medical probability. *Id.* at 157. Still,
24 *Moriscato* obliges medical experts to prove that the foundation for their opinion testimony is sound,
25 i.e., scientifically based. The method by which scientific foundation is tested and proved is the
26 elimination of differential diagnoses and potential unrelated causes. *Moriscato* demonstrably rejects
27 the Plaintiff's proposition that facts relevant to the foundation inquiry should be concealed from the
28 jury. In fact, in *Moriscato*, the expert whose conclusive opinion (on cause) was excluded was still

1 permitted to explain potential alternate causes; only his conclusive causation opinion was required
2 to be stated to a reasonable degree of medical probability. *Id.* at 156. *Moriscato* clarifies that "Not
3 all medical expert testimony must be stated with a reasonable degree of medical probability. The
4 standard for admissibility varies depending upon the expert opinion's nature and purpose." *Id.* at
5 157. The foundational testimony need not be stated to a medical probability; only the conclusive
6 opinion. Nevada law thus endorses the truth seeking function of the trial process.

7 A medical expert's opinion can only be stated to a reasonable degree of medical probability
8 if it is based on a differential diagnosis. *Turner v. Iowa Fire Equipment Co.*, 229 F.3d 1202 (8th Cir.,
9 2000); *Heller v. Shaw Industries Inc.*, 167 F.3d 146, 155 (3rd Cir., 1999); *Moore v. Ashland Chemical*
10 *Inc.*, 151 F.3d 267, 277 (5th Cir., 1998). Differential diagnosis is a process of elimination. The
11 medical expert makes a list of possible diagnoses. Testing and observation eliminate diagnoses from
12 the list until only one remains. The same process is applied to expert opinion on cause of the
13 condition/diagnosis. As *Moriscato* held, "We conclude that medical expert testimony regarding .
14 . . causation must be stated to a reasonable degree of medical probability." *Id.* at 157. The proposed
15 expert must provide foundation, i.e., prove that he "ruled out" other potential causes. *Id.* If the
16 medical expert fails to do so, his conclusive opinions are inadmissible because they are not proved
17 to a reasonable degree of medical probability.

18 The Plaintiff enlists the Court to remove the foundational requirement for expert opinion
19 testimony; in effect, to accept as true opinion evidence that is not yet proved. *Moriscato* makes it
20 clear that "I'm an expert and I say so" is "not foundation for an expert opinion." *Moriscato*. See,
21 also, *Hallmark v. Elridge*, 189 P.2d 646 (Nev. 2008).

22 On the issues of diagnosis (the alleged injury) and cause, the Plaintiff alone bears the burden
23 of proof. If the Plaintiff's medical experts fail to rule out differential diagnoses and potential
24 unrelated causes, the opinion testimony is not admissible. *Heller v. Shaw Industries, Inc.*, *supra*.
25 In holding the Plaintiff to his burden of proof, the Plaintiff's experts and medical providers must
26 prove that they ruled out alternate diagnoses and causes.

27 In this case, at least two of the Plaintiff's treating providers have testified that cause cannot
28 be isolated to the subject accident. If other providers intend to offer contrary opinion testimony, they

1 must lay the foundation. Naturally, the defense is entitled to explore their purported foundation. The
2 truth seeking process will include, among other things, ruling out the Plaintiff's history of similar
3 symptoms, explaining the absence of any signs of trauma or acute process in the six months
4 following the accident, ruling out the degenerative source of the Plaintiff's symptoms demonstrated
5 by MRI and injection therapy¹, unrelated injuries that may have contributed to the process, the
6 Plaintiff's ability to continue working in a labor-intensive occupation following the accident (floor
7 installation), and other evidence the Plaintiff's experts/medical providers must prove they ruled out
8 when formulating their expert opinions.

9 The Plaintiffs certainly intend to cross-examine the foundation for the defense medical
10 experts' opinions, to ensure that their opinions are supported by their given science. Their reports
11 have been produced. Doctors Winkler, Wang and Fish opine, among other things, that the subject
12 accident did not cause the conditions the Plaintiff attributes to this accident. The Plaintiff is free to
13 cross-examine their opinions. So, too, is the defense.

14 Say, for example, the Plaintiff's cross examination of the defense experts suggested there
15 were no unrelated injuries or conditions; that the Plaintiff lived a life without incident until the date
16 of the subject accident. The jury would be mislead. Certainly, that cannot be the Plaintiff's
17 intention.

18 In conclusion, the defense medical experts produced reports stating that they will testify to
19 reasonable degrees of medical probability that the cause of the Plaintiff's condition is unrelated to
20 the subject accident. The Plaintiff and the Court will hold their opinions to the standards of their
21 science. The Plaintiff's experts will be held to same standard.

22 **2. Reference to Malinger, Magnifying Symptoms or Secondary Gain**

23 The Plaintiff incorrectly argues "There is no evidence to support this theory [secondary gain]
24 other than pure speculation by the defense." On the contrary, the Plaintiff's own treating providers
25 testified that the Plaintiff exhibits secondary gain. This motion appears to have been used in a
26

27 ¹It goes without saying that a personal injury plaintiff cannot recover money for treatment
28 occasioned by a pre-existing condition. *Moorelock v. St. Paul Gaurdian Ins. Co.*, 650 N.W. 2d. 154
(Minnesota 2002).

1 different case, with different facts. Here, the Plaintiff's own pain management physician, Adam
2 Anita, M.D. testified, "I do think there's some secondary gain issue here." (See transcript of Dr.
3 Arita's deposition, pg. 80, lns. 9-10, attached as Exhibit "A.") Dr. Anita continued, "[T]here's more
4 issues than the physical things to explain it than the other issues as in psychological issues or these
5 legal issues and I think those are equally as important if not more important than the physical things."
6 (Exhibit "A," 80:24 - 81:1).

7 "A wide range of cross-examination is allowed to test a witness's motives, interest, animus,
8 accuracy, veracity and credibility." See *Lloyd v. State*, 85 Nev. 576 (1969). Courts allow physicians
9 to assist the trier of fact to understand evidence of potential malingering. See *EBI/Orion Group v.*
10 *Blythe*, 957 P.2d 1134 (Mont. 1998). See also *Lobato v. State*, 120 Nev. 512 (2004):

11 Extrinsic evidence relevant to prove a witness' motive to testify in a certain way, i.e.
12 bias, interest, corruption or prejudice, is never collateral to the controversy and not
subject to the limitations contained in NRS 50.085(3).

13 See also *McBride v. Quebe*, 2006 WL 2795174 (Ohio App. 2006):

14 As discussed above, there was substantial evidence from which Quebe could argue
15 that McBride and Murphy were not credible and had in fact mislead the jury about
16 the proximate cause of McBride's alleged injuries. A reasonable inference therefrom
17 is a motive of secondary gain. Given the evidence, it was also reasonable to infer
18 that McBride suffered from a pre-existing condition. McBride's testimony that she
19 did not have neck pain prior to the accident, and that her headaches resulted from
the accident, was contradicted by her own medical records. In our judgment, calling
upon the jury to make "the right decision" did not inflame the jury, was well within
the great latitude afforded counsel in closing argument and did not constitute
prejudice to McBride.

20 The Plaintiff effectively enlists the Court to exclude the expert opinion testimony of his own
21 medical providers who question his reliability, and to admit only the testimony favorable to his
22 claims. The Plaintiff cannot avoid the facts, particularly the medical opinions of his own treating
23 providers. Nevada law dictates that the evidence comes in, and that Defendant's counsel and experts
24 are permitted to question the bias, interest, and motives of the Plaintiff as well as his treating
25 providers. The Plaintiff's argument is without merit.

26 ///

27 ///

28 ///

1 **3. Treating Physicians Need Not Prepare Expert Reports In Addition to Their Medical**
2 **Records**

3 The Plaintiff is correct, insofar as the treating providers testify as treating providers, and not
4 as experts. *Piper v. Harnischfeger Corp*, 170 F.R.D. 173 (D. Nev. 1997) holds that treating providers
5 are not subject to expert disclosure requirements as long as they limit their testimony to matters
6 within the scope of their treatment. If, however, a treating provider intends to offer testimony outside
7 the scope of their treatment, including, as proposed by the Plaintiff, "the appropriateness of care from
8 other treating physicians," the provider then crosses the line into a specially retained expert, and is
9 subject to NRCP 16.1(a)(2)(B).

10 Simply stated, treating providers are fact witnesses. The scope of their testimony is limited.
11 In *Griffith v. Northeast Illinois Regional Commuter Railroad Corp.*, 233 F.R.D. 513 (N.D. Illinois,
12 2006), the court addressed the testimony of a treating physician who did not prepare a formal report.
13 The physician offered opinions on matters he did not address in the treatment or in his reports,
14 including disability and future treatment: that the plaintiff would eventually need surgery to work any
15 job "or quit working altogether." *Id.* at 517. Again, the physician's treatment records did not address
16 the job duties, disability or future surgery. The *Griffith* court ruled that the plaintiff's treating
17 physician should not have been permitted to offer opinions regarding issues **not specifically related**
18 **to the rendered treatment.**

19 The *Griffith* court articulated the distinction between medical experts and treating physicians,
20 and outlined the permissible scope of a treating physicians testimony:

21 [W]hen a treating physician opines as to causation, prognosis, or future disability, the
22 physician goes beyond what he saw and did, and why he did it. *He is going beyond*
23 *his personal involvement in the case and is giving an opinion formed because there*
is a lawsuit...

24 That does not mean that a treating physician cannot testify at trial; if the physician has
25 been disclosed...the physician may testify as to the nature and extent of the injury he
26 observed and diagnosed, and the treatment he rendered for that injury. *However,*
without a report to satisfy the requirements of Rule 26(a)(2)(B), the treating physician
cannot testify as to causation, prognosis, or future disability.

27 *Id.* at 518, 519 [emphasis added].
28

1 The United States District Court for the District of Nevada has likewise limited the testimony
2 of treating medical providers not designated as experts. In so doing, the court reiterated the long-
3 standing principle that "the reason for requiring expert reports is the elimination of unfair surprise
4 to the opposing party..." *Eglas v. Colorado Bell Corp.*, 179 F.R.D 296, 299 (D. Nev., 1998). In
5 *Eglas*, the plaintiff sought to have the director of the medical clinic testify regarding the plaintiff's
6 alleged injuries, as well as causation. In limiting the physician's testimony, the *Eglas* court noted that
7 "to the extent that [the physician] has knowledge of the plaintiff's medical condition through
8 consultation," he is not subject to the expert disclosure requirements. *Id.* However, the court limited
9 his testimony to first-hand knowledge of the plaintiff's medical condition, holding that he was not
10 "allowed to render a medical opinion based on factors that were not learned in the course of his
11 treatment." *Id.* at 300.

12 In summary, the testimony of the Plaintiff's treating providers is limited to their treatment of
13 the Plaintiff. *Id.* In the absence of an NRCP 16.1(a)(2)(B) expert report, they are limited to the
14 opinions disclosed in their treatment records and deposition testimony. They are not permitted to
15 comment on treatment rendered by other providers, or to offer testimony on issues not addressed in
16 their reports, e.g., future medical care and disability. *Id.* Also, pursuant to *Eglas* and NRCP 26(e),
17 no party is permitted to "unfairly surprise" another party by offering previously undisclosed opinion
18 testimony.

19 NRCP 26(e) *Supplemental of disclosures and responses*, provides:

- 20 (e) A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request
21 for discovery with a disclosure or response is under a duty to supplement or correct the
22 disclosure or response to include information thereafter acquired, if ordered by the
23 court or in the following circumstances:
- 24 (1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule
25 16.1(a) or 16.2(a) if the party learns that in some material respect the information
26 disclosed is incomplete or incorrect and if the additional or corrective information has
27 not otherwise been made known to the other parties during the discovery process or in
28 writing. . . .
- (2) A party is under a duty seasonably to amend a prior response to an interrogatory,
request for production or request for admission, if the party learns that the response is
in some material respect incomplete or incorrect and if the additional or corrective
information has not otherwise been made known to the other parties during the
discovery process or in writing.

1 The purpose of the Rules is to eliminate unfair surprise to all parties.

2 4. **References to Defense Medical Examiners as "Independent"**

3 Plaintiff moves to prohibit the defendant from referring to the defense medical experts as
4 "Independent." Plaintiff moves that the exam be called a "Defense medical exam." The Plaintiff can
5 call it that, if he chooses. If the Court imposes a formal limitation, by extension the examinations
6 performed by the Plaintiff's treating physicians and/or experts would, likewise, be branded "Plaintiff's
7 expert medical examinations."

8 5. **"Attorney Driven" or "Medical-Buildup" Case**

9 Plaintiff moves the Court to prohibit the defense from arguing that the medical treatment was
10 "attorney-driven," then extrapolates to a conclusion that the Court should prohibit the defendant from
11 disputing necessity of treatment. Setting aside the non sequitur, (1) attorney referrals are relevant to
12 bias (for both the party and the provider), and (2) the Plaintiff cannot enlist the Court to relieve him
13 of his burden of proof on necessity. In that regard, the Motion reads like a veiled motion for summary
14 judgment on necessity. If that is so, the Plaintiff failed to properly plead the issue. Regardless, the
15 motion would fail because there are genuine issues of material fact regarding necessity of care. As in
16 every trial, the Plaintiff must prove that his treatment is causally related to, and necessary because of
17 the subject accident. Plaintiff's implicit request that the Court remove his burden of proof subverts
18 the fundamental tenants of the adversarial process, thus will be denied.

19 A. **Plaintiff Waived Any Attorney-Client Privilege Regarding Attorney Referrals By**
20 **Communicating This Information to Third Parties**

21 Plaintiff waived any attorney client privilege regarding attorney referrals by communicating
22 this information to third parties, including defense counsel at his deposition.

23 B. **An Expert's Testimony History is Relevant**

24 Experts and treating providers must disclose their testimony history. The reason: Prior
25 litigation experience of witnesses is relevant. The Court will not conceal the testimony history of the
26 Plaintiff's or the Defendant's witnesses, whether it be with present counsel or anyone else.

27 The Nevada Supreme Court, citing the United States Supreme Court, rules that "exposure of
28 a witness's motivation in testifying at trial is a proper and important function of the constitutionally

1 protected right of cross-examination.” *Robinson v. G.G.C. Inc.*, 107 Nev. 135, 143, 808 P.2d 522, 527
2 (1991), citing 475 U.S. 673, 678-79, 106 S. Ct. 1431, 1435 (1986) [emphasis added]. The *Robinson*
3 Court held that “the jury should be given opportunity to judge for themselves the witness’s credibility
4 in light of the relationship between the parties, the witnesses motive for testifying, or any matter which
5 would tend to influence the testimony given by a witness.” *Id.*

6 In *Robinson*, the Supreme Court addressed whether the jury was entitled to information
7 regarding an expert witnesses’ prior dealings with counsel. The Supreme Court held that the trial court
8 abused its discretion in excluding this evidence.

9 The adversarial system encourages litigants to cross-examine witnesses in a search for the truth.
10 The Plaintiff asks the court to deprive Defendants of *constitutionally* protected rights. The Plaintiff
11 cannot pretend he will forego such examination of the defense experts.

12 In this particular case, the Plaintiff will call treating physicians and experts to the stand.
13 Pursuant to *Robinson*, cross-examination into their relationship with counsel, both prior and current,
14 is appropriate. Additionally, Plaintiff’s medical providers treated him on lien. Any interest in the
15 outcome of this case is relevant. Evidence of a relationship with counsel and of a lien falls within the
16 category of “any matter which would tend to influence the testimony given by a witness,” thus entitling
17 the jury to this information. *Id.*

18 **6. Medical liens are not evidence of a collateral source.**

19 Plaintiff’s motion confuses collateral source and lien. Health and auto insurance are collateral
20 sources, and are inadmissible under *Proctor v. Castelletti*, 112 Nev 88 (1996). A lien is not a collateral
21 source, and is admissible evidence of bias, prejudice, and interest in the outcome of the trial, which
22 are never collateral. See *Amlotte v. United States*, 292 F. Supp 2d 922 (Collateral sources do not
23 include entities entitled to a lien against recovery of the Plaintiff in an action for damages.) See also
24 *Sears v. Rutishauser*, 466 N.E. 2d 210, 213 (Ill. 1984) (“A medical expert can be questioned about fee
25 arrangements, prior testimony for the same party, and financial interests in the outcome of the case.”).

26 If a physician has an interest in the outcome of the litigation, evidence of a lien is relevant to
27 bias. See *Lobato v. State*, 120 Nev. 512 (2004):

1 Extrinsic evidence relevant to prove a witness' motive to testify in a certain way, i.e. bias,
2 interest, corruption or prejudice, is never collateral to the controversy and not subject to the
limitations contained in NRS 50.085(3).

3 In conclusion, collateral source evidence should be excluded, but there is no justification for
4 exclusion of evidence of medical liens. Plaintiff's motion is wholly without merit. There is no
5 justification whatsoever for exclusion of evidence of Plaintiff's medical liens. The financial interests
6 of Plaintiff's treating physicians are relevant for trial. Plaintiff's motion should be summarily denied.

7 **7. Attorney Retention and Referral is Admissible Evidence of Bias or Interest**

8 The Plaintiff testified that his attorney referred him to some of his providers. When the
9 Plaintiff retained counsel is relevant, and whether counsel referred the Plaintiff to a medical provider
10 is probative of the providers' bias or interest. See, e.g., *Washington v. Shing Ie Yen*, 215 Ill. App.
11 3d 797, 800 (Ill. App. Ct. 1st Dist. 1991) (a defendant has the right to cross-examine witnesses
12 concerning the bias, partnership and financial interest of an expert witness).

13 Courts have long held that the relationship between an expert witness and a lawyer is
14 admissible to show bias. *JS and CS vs. Wheltzel*, 860 A.2d 1112 (Pa. Sup. 2004); and *Kopytin v.*
15 *Aschinger*, 2007 Pa. Dist. & Cnty. Dec. LEXIS 170 (Pa. County Ct. 2007). Impeachment of an
16 expert witness by demonstrating partiality is permissible. It is proper to ask an expert witness' fee
17 for testifying, as well as whether he has a personal friendship with the party or counsel calling him.
18 *Id.*, citing *Smith vs. Celotex Corp.*, 564 A.2d 209 (Pa. Sup. 1989).

19 As stated by the Florida Supreme Court:

20 The more extensive the financial relationship between a party and a witness, the more
21 it is likely that the witness has a vested interest in that financially beneficial
22 relationship continuing. A jury is entitled to know the connection between a party and
23 a witness, and the cumulative amount a party has paid an expert during the
relationship. A party is entitled to argue to the jury that a witness might be more
likely to testify favorably on behalf of the party because of the witness' financial
incentive to continue the financially advantageous relationship.

24 Any limitation on this inquiry has the potential for thwarting the truth seeking
25 function of the trial process...[W]e take a strong stand against charades in trials. To
26 limit this discovery would potentially leave the jury with a false impression
27 concerning the extent of the relationship between the witness and the parties by
28 calling a party to present a witness as an independent witness when, in fact, there has
been an extensive financial relationship between the party and the expert. This
limitation thus has the potential for undermining the truth seeking function and
fairness of a trial.

1 *Allstate Insurance Company vs. Boecher*, 733 So.2d 993, 997, 998 (Fla. 1999).

2 The Defendant is entitled to question the evidence assembled against her. The relationship
3 between the lawyers and the providers is an admissible, and indeed indispensable part of the truth
4 seeking process.

5 A. Cross Examination Of Plaintiff's Expert Witnesses For Credibility Is A
6 Constitutional Right

7 Effective cross-examination is an essential element of the presentation of a full and fair defense
8 and is guaranteed by both the State and Federal Constitutions. See *City of Las Vegas v. Walsh*, 124
9 P.3d 203, 207 (2005). Cross-examination is the principal means by which believability of a witness
10 and the truth of his testimony are tested. *Snowden v. State*, 672 A.2d 1017, 1024 (1996) (quoting *Davis*
11 *v. Alaska*, 415 U.S. 308, 316, 39 L. Ed. 347, 94 S. Ct. 1105 (1974)). The cross-examiner must be given
12 a reasonable opportunity to explore and to establish any possible bias, prejudice, or ulterior motive that
13 a witness may possess that might affect the witness' testimony. There are wide latitudes to test
14 qualifications, credibility, skill or knowledge and value and accuracy of expert opinion. *Callahan*, 863
15 S.W. 2d at 869. Without it, the believability of a witness and the reliability of his testimony will go
16 untested.

17 Nevada rules of evidence permits a party to impeach the credibility of a witness. NRS §50.085
18 sets forth the manner by which a party may interrogate the credibility of a witness. NRS §50.085
19 permits inquiry into the witness' opinion, reputation, and specific instances of conduct.

20 NRS § 50.085 provides, in pertinent part:

- 21 (1) Opinion evidence as to the character of a witness is admissible to attack or support his
22 credibility but subject to these limitations: (a) opinions are limited to truthfulness or
23 untruthfulness; and (b) Opinions of truthful character are admissible only after the
24 introduction of opinion evidence of untruthfulness or other evidence impugning his
25 character for truthfulness.
- 26 (3) Specific instances of the conduct of a witness, for the purpose of attacking or
27 supporting his credibility other than conviction of crime, may not be proved by
28 extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on
cross-examination of the witness himself or on cross-examination of a witness who
testified to an opinion of his character for truthfulness or untruthfulness....

27 Thus, pursuant to NRS § 50.085(3), a party may impeach the credibility of a witness through
28 cross-examination of specific instances of conduct that are probative of truthfulness. Evidence that

1 physicians have testified in the past in personal injury litigation is clearly relevant to their credibility.
2 Certainly the Plaintiff intends to inquire into the defense experts' prior deposition and trial testimony.
3 The defense is permitted to do the same. Such evidence is not collateral. The jury must be advised
4 of facts sufficient to assess the witness' objectivity, reliability and truthfulness. *Weber*, 457 A.2d 682.
5 See, also, *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct 1105, 1110, 39 L. Ed. 2d 347, 354 (1974) (a
6 party may always attack a witness' credibility by cross-examination that tends to reveal biases,
7 prejudices or ulterior motives affecting the witness' testimony), and *Wischmeyer v. Schanz*, 449 Mich.
8 469, 474, 536 NW 2d. 760 (1995) (a broad range of evidence may be elicited on cross-examination
9 for the purpose of discrediting a witness).

10 The Plaintiff enlists the Court to conceal from the jury the information it must have to assess
11 the credibility of the witnesses. Plaintiff's Motion should be denied.

12 **8. Closing Argument**

13 Plaintiff's motion seeks to exclude argument that he may request an excessive amount of
14 money. Defendants do not know how much money the Plaintiff will request. If it is an excessive
15 amount, the defense is permitted to argue the issue:

16 We are of the opinion that it was permissible for defense counsel to state his
17 conclusion that plaintiff's claim was for a 'grossly exaggerated amount.' Such a
18 holding we believe is in consonance with the rule that wide latitude should be
afforded counsel in urging reasonable inferences and conclusions during closing
argument.

19 *Kallas v. Lee*, 317 N.E. 2d 704 (Ill. App. 1974).

20 The Plaintiff's motion thus should be denied.

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III.

Conclusion

For the reasons stated above, Defendant requests that this Honorable Court deny the Plaintiff's various (omnibus) Motions in Limine.

DATED this 4th day of February, 2011.

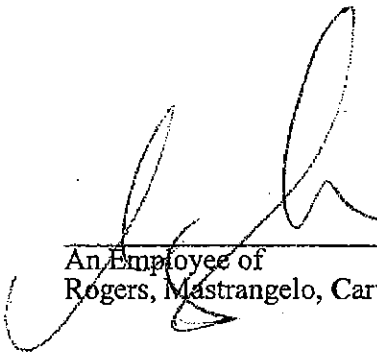
ROGERS, MASTRANGELO, CARVALHO &
MITCHELL

STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendant Jenny Rish

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of
3 ROGERS, MASTRANGELO, CARVALHO & MITCHELL, and on the 4th day of February,
4 2011, a true and correct copy of the foregoing **DEFENDANT JENNY RISH'S OPPOSITION TO**
5 **PLAINTIFF'S OMNIBUS MOTION IN LIMINE** was served via First Class, U.S. Mail, postage
6 prepaid, addressed as follows, upon the following counsel of record:

7
8 David T. Wall, Esq.
9 MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
10 Telephone: (702) 450-5400
Facsimile: (702) 450-5451
11 *Attorneys for Plaintiffs*

12
13 
14 An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell

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18 M:\Rogers\Rish adv. Simno\Pleadings\opp to omnibus mil5.wpd

EXHIBIT A

1	3																				
DISTRICT COURT CLARK COUNTY, NEVADA																					
WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, Plaintiffs, vs. JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive, Defendants.	Thereupon-- ADAM A. ARITA, M.D. was called as a witness by the Defendants, and having been first duly sworn, testified as follows: DIRECT EXAMINATION BY MR. ROGERS: Q. Would you state your name please. A. Yes, Adam Arita, A-r-i-t-a. Q. Okay. And you are a physician, correct? A. Yes. Q. What kind? A. A medical doctor, an M.D. Q. But what is your specialty? A. Anesthesiology and pain medicine. Q. You didn't bring a C.V. with you, did you? A. I don't have one with me, no. Q. Okay. Give me a breakdown then of your educational background? A. Okay. I finished college at University of Southern California in 1983, graduating with bachelor of science in business administration and I graduated from medical school also from the																				
DEPOSITION OF ADAM A. ARITA, M.D. Taken on Wednesday, November 5, 2008 At 4:28 o'clock p.m. At 300 South Fourth Street, Suite 710 Las Vegas, Nevada																					
Reported by: Katherine M. Silva, CCR #203																					
2	4																				
1 APPEARANCES: 2 For the plaintiff: 3 JOHN E. PALMERO, ESQ. 4 Aaron & Patemoster, Ltd. 5 2300 West Sahara Avenue 6 Suite 650 7 Las Vegas, Nevada 89102 8 For the defendants: 9 STEPHEN H. ROGERS, ESQ. 10 Rogers, Mastrangelo, Carvalho & 11 Mitchell 12 300 South Fourth Street 13 Suite 710 14 Las Vegas, Nevada 89101	1 same school, University of Southern California 2 1991 and an M.D. and then following that I 3 entered internship at the Los Angeles County 4 Medical Center which is also a USC-affiliated 5 facility and that was between 1991 and 1992 and 6 that was internal medicine. 7 And then in 1992 to 1995 I did my 8 anesthesiology residency at USC which is also at 9 the Los Angeles County Hospital and then 10 following that I entered private practice and I 11 worked in private practice for approximately one 12 year in San Diego and that was a Sharp facility, 13 Sharp Chula Vista. 14 And then following that I did a pain 15 management fellowship at U Mass, University of 16 Massachusetts, in Worcester and that was between 17 '96 and '97 and I entered private practice in '97 18 and worked in Alaska, it was Anchorage, Alaska, 19 Providence Alaska Medical Center and I did half 20 pain management and half anesthesia and I did 21 that until I did a cardiac anesthesia fellowship 22 which was in 2002 to 2003 and during that time I 23 was still employed at that facility but I went 24 and did this fellowship in Houston at Texas Heart 25 Institute so I finished that in 2003, went back																				
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<table border="0"> <thead> <tr> <th>Witness</th> <th>Direct</th> <th>Cross</th> <th>Red.</th> <th>Rec.</th> </tr> </thead> <tbody> <tr> <td>Adam A. Arita, M.D.</td> <td></td> <td></td> <td></td> <td></td> </tr> <tr> <td>(By Mr. Rogers)</td> <td>3</td> <td></td> <td></td> <td></td> </tr> <tr> <td>(By Mr. Palmero)</td> <td></td> <td>79</td> <td></td> <td></td> </tr> </tbody> </table>		Witness	Direct	Cross	Red.	Rec.	Adam A. Arita, M.D.					(By Mr. Rogers)	3				(By Mr. Palmero)		79		
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<p style="text-align: center;">5</p> <p>1 to the same practice in Anchorage, Alaska and I</p> <p>2 worked there until 2005 and then in 2005 I came</p> <p>3 to Las Vegas and I was employed by Southwest</p> <p>4 Medical Associates.</p> <p>5 Q. Okay.</p> <p>6 A. And then I worked there until 2007,</p> <p>7 August and then following that I entered private</p> <p>8 practice here in Las Vegas and now I work with</p> <p>9 Physician Billing Services which is an office</p> <p>10 that does the billing but what they do is they</p> <p>11 kind of overflow patients and we all kind of</p> <p>12 share a similar patient pool in this office but</p> <p>13 they are not a group. Everybody is an</p> <p>14 independent practitioner in this office and then</p> <p>15 we just kind of share things back and forth</p> <p>16 between the different providers.</p> <p>17 Q. Who are the other providers there?</p> <p>18 A. There's 49 or so other people in this</p> <p>19 particular office. I mean some of the people</p> <p>20 that I work with are like Greg Porteous is one of</p> <p>21 the anesthesiologists that does a fair amount of</p> <p>22 private practice that I get overflow from and</p> <p>23 another friend is Don Montero and there's several</p> <p>24 others. I mean I don't know all of them right</p> <p>25 off the top of my head but there's other people</p>	<p style="text-align: center;">7</p> <p>1 Q. Can you spell that for her?</p> <p>2 A. C-h-o-w-d-h-r-y and the first name is</p> <p>3 B-a-s-h-a-r.</p> <p>4 Q. Okay. And he's --</p> <p>5 A. Cardiovascular surgeon and his partner</p> <p>6 is Nauman Jahangir, J-a-h-a-n-g-i-r and then</p> <p>7 N-a-u-m-a-n.</p> <p>8 Q. How long -- what I've gotten so far is</p> <p>9 you work with an orthopedic surgeon who does</p> <p>10 mostly joints but he also does oncology work?</p> <p>11 A. Right.</p> <p>12 Q. A cardiovascular surgeon who you work</p> <p>13 with and any other kinds of surgeons?</p> <p>14 A. I work with the urologist, his name is</p> <p>15 Wise, W-i-s-e and his first name is William and</p> <p>16 he does the prostate surgeries, does the open</p> <p>17 prostate resections, radical prostatectomy,</p> <p>18 lipotripsy and laser and the ones that remove</p> <p>19 stones with baskets.</p> <p>20 Q. Do you do any work with spine surgeons?</p> <p>21 A. Sometimes like Daniel Lee, he's one of</p> <p>22 the ones that I've worked with and when I was</p> <p>23 work at Southwest Medical I worked with McNulty.</p> <p>24 Q. Okay.</p> <p>25 A. Patrick McNulty.</p>
<p style="text-align: center;">6</p> <p>1 that the office will say this person wants to ask</p> <p>2 you if you can cover this patient today, can you</p> <p>3 do that.</p> <p>4 Q. Okay. I know that in some cases</p> <p>5 anesthesiologists informally partner up with</p> <p>6 surgeons who they commonly do procedures with.</p> <p>7 Are there any surgeons you commonly work with?</p> <p>8 A. Yeah, there are a few that I have that</p> <p>9 I usually cover myself which is one that came to</p> <p>10 town about seven months ago his name is Ron</p> <p>11 Hillock, he's an orthopedic surgeon, he works</p> <p>12 with Desert Orthopedics.</p> <p>13 Q. What kind of surgeries does he do?</p> <p>14 A. His specialty is orthopedic oncology so</p> <p>15 he does cancer-related surgeries primarily but he</p> <p>16 does the regular orthopedic surgeries as well.</p> <p>17 Q. Like what kind?</p> <p>18 A. He does total knee replacement, total</p> <p>19 hip replacement and does the ACL reconstruction</p> <p>20 for knee injuries and does regular arthroscopies</p> <p>21 of the knee.</p> <p>22 Q. Mostly joints?</p> <p>23 A. Yeah.</p> <p>24 Q. Okay. Any other doctors?</p> <p>25 A. Yeah, cardiac surgeon Bashar Chowdhry.</p>	<p style="text-align: center;">8</p> <p>1 Q. And have you ever performed the</p> <p>2 anesthesia for a spine surgery?</p> <p>3 A. Yeah.</p> <p>4 Q. What kinds?</p> <p>5 A. The type that they do</p> <p>6 anterior/posterior fusion of the lumbar spine</p> <p>7 like L3 through S1 and some of those interbody</p> <p>8 fusions that they do, L4-5.</p> <p>9 Q. Any cervical?</p> <p>10 A. Some, like they do -- I've done both</p> <p>11 the laminectomies just for decompression as well</p> <p>12 as the ones they do reconstruction, they put in</p> <p>13 the hardware to fuse their necks.</p> <p>14 Q. Right. Have you done any of the pain</p> <p>15 management work such as discograms?</p> <p>16 A. Not in the cervical area but in the</p> <p>17 lumbar area I have.</p> <p>18 Q. Okay. Where did you get your training</p> <p>19 to do discography?</p> <p>20 A. It was University of Massachusetts in</p> <p>21 my pain fellowship and I also when I was in that</p> <p>22 pain fellowship I went three months at</p> <p>23 Providence, Rhode Island, I worked at Rhode</p> <p>24 Island Hospital with Fredrick Burgess,</p> <p>25 B-u-r-g-e-s-s, he's the pain management doctor</p>

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<p style="text-align: center;">9</p> <p>1 that worked there at that hospital and we worked</p> <p>2 our invasive training there so I did the</p> <p>3 discography primarily with him.</p> <p>4 Q. Okay. Did you guys follow a particular</p> <p>5 guideline in your -- in the discograms you</p> <p>6 performed?</p> <p>7 MR. PALMERO: Objection, vague and</p> <p>8 ambiguous. You can answer.</p> <p>9 THE WITNESS: So I -- there is some</p> <p>10 general guidelines like from ASA which we follow</p> <p>11 but, you know, those kind of guidelines that are</p> <p>12 published don't always mean that we follow</p> <p>13 everything according to that specific guideline.</p> <p>14 We just use that as a general approach to try to</p> <p>15 get the information from the discography.</p> <p>16 Q. (BY MR. ROGERS) Right. In other words,</p> <p>17 this is -- you regard ASA as sort of the</p> <p>18 foundation or the starting point?</p> <p>19 A. Right, and so what I'm saying is I</p> <p>20 don't follow it by the letter according to how</p> <p>21 they put the guidelines out but it's used as part</p> <p>22 of the approach to how you go about doing it and</p> <p>23 collecting information.</p> <p>24 Q. Okay. When did you last do</p> <p>25 discography?</p>	<p style="text-align: center;">11</p> <p>1 before we went on the record you said you hadn't</p> <p>2 ever gone through a deposition before, is that</p> <p>3 right?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. The main rule for a deposition</p> <p>6 is that you appreciate that the deposition or,</p> <p>7 pardon me, the oath that you just took is the</p> <p>8 same oath that you would take in court even</p> <p>9 though we are in my office, okay?</p> <p>10 A. Right.</p> <p>11 Q. Carries the obligation to tell the</p> <p>12 truth and penalties if you don't. Do you</p> <p>13 understand that?</p> <p>14 A. Yes.</p> <p>15 Q. All right. And you are doing a very</p> <p>16 good job so far in keeping your answers to a form</p> <p>17 that can be written.</p> <p>18 What I encounter many times in a</p> <p>19 deposition is that someone will get comfortable</p> <p>20 enough that they'll start responding by nodding</p> <p>21 their head or saying uh-huh or unt-uh and that</p> <p>22 doesn't work with the court reporter so keep her</p> <p>23 in mind as we go through.</p> <p>24 A. We actually talked about that before</p> <p>25 you came in the room.</p>
<p style="text-align: center;">10</p> <p>1 A. Probably in July of '07.</p> <p>2 Q. Okay. And your practice has simply</p> <p>3 taken a different turn since that time?</p> <p>4 A. It's primarily anesthesiology because</p> <p>5 when I left that practice with Southwest Medical</p> <p>6 it requires a fair amount of start up to open</p> <p>7 your own office and hire your own staff and I</p> <p>8 didn't really want to get into that right after</p> <p>9 leaving employment with Southwest Medical so I</p> <p>10 didn't really think about opening a pain</p> <p>11 management practice at that point.</p> <p>12 I considered joining another physician,</p> <p>13 Dr. Walter Kidwell, and I was going to go with</p> <p>14 him but then I decided it was probably better for</p> <p>15 me at that particular time when I left to just</p> <p>16 stick with anesthesia.</p> <p>17 Q. Okay.</p> <p>18 A. Because he wanted a pretty high</p> <p>19 percentage of the collection to pay for the</p> <p>20 office, that's why I decided not to go with him.</p> <p>21 He wanted 60 percent overhead.</p> <p>22 Q. Right. Okay. Now, that gives me a</p> <p>23 fairly good insight into your background, your</p> <p>24 qualifications. Let me go back and start with</p> <p>25 something I normally start with and that is</p>	<p style="text-align: center;">12</p> <p>1 Q. Okay. Good. And for now those are</p> <p>2 really the only ground rules that we need to</p> <p>3 cover. If something else comes up, I'll tell you</p> <p>4 as we go.</p> <p>5 Now, before we went on the record I</p> <p>6 also told you we are going to cover some</p> <p>7 background and then get into the treatment. I'm</p> <p>8 going to finish up the background now and you can</p> <p>9 see I just have a litany of questions here that I</p> <p>10 normally ask physicians whose depositions I take</p> <p>11 and one is did you review any documents to</p> <p>12 prepare for your deposition?</p> <p>13 A. No, I did not. I did not see any of</p> <p>14 these records that you put in front of me prior</p> <p>15 to today's date.</p> <p>16 Q. Okay. And for the record the documents</p> <p>17 that you have in front of you are contained in</p> <p>18 the plaintiff's early case conference document</p> <p>19 production, that's just for her reference.</p> <p>20 Did you meet or speak with any</p> <p>21 attorneys before today's deposition?</p> <p>22 A. Not in regards to this particular case</p> <p>23 that you've put in front of me.</p> <p>24 Q. Okay.</p> <p>25 A. This patient, no.</p>

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<p style="text-align: center;">13</p> <p>1 Q. Okay. Have you reviewed any documents 2 at all to prepare for the deposition, medical 3 records or otherwise? 4 A. No, not in regards to this patient and 5 the only reason I say that is because I'm part of 6 Consultants Medical Group which a legal medicine 7 practice with Dr. Hugh Selznick so I work with 8 attorneys and do some medical case reviews so I'm 9 saying I don't -- I have not seen this patient's 10 medical records but I have some experience in 11 doing some of these legal reviews. 12 Q. I see. 13 A. So that's why I say that specifically. 14 Q. And what kind of reviews have you done 15 in the past? Do you mean like records review? 16 A. Records review and I did have also -- 17 there was one -- also one court appearance that I 18 made in regards to being an expert witness for a 19 patient that I treated at Southwest Medical 20 before as well. 21 Q. So you were the treating physician and 22 the testifying expert -- 23 A. Correct. 24 Q. -- for that patient? 25 Is that the only time you've testified</p>	<p style="text-align: center;">15</p> <p>1 Q. So you performed two records reviews 2 all total? 3 A. Yes. 4 Q. Okay. 5 A. Not including those other two things 6 that I mentioned related to this practice of 7 Southwest Medical which had to do with the one I 8 made an appearance in court. 9 Q. Right, okay. 10 A. Because I had to review the records for 11 that prior to going to court. 12 Q. Okay. What was the injury claim in the 13 case that you did the records review for the 14 plaintiff? 15 A. That one had to do with whether or not 16 the injury in my opinion had something to do with 17 that patient's condition. In other words, did 18 the injury cause the patient's pain and suffering 19 problem. 20 Q. Was it a car accident or what was the 21 injury? 22 A. It was a car accident. 23 Q. Okay. And what was that patient's or 24 plaintiff's injury complaint? 25 A. Neck pain.</p>
<p style="text-align: center;">14</p> <p>1 in court? 2 A. Yes. 3 Q. Okay. When did you testify? 4 A. This was back I want to say June. I'm 5 not sure exactly the date. I could get it for 6 you if you need it but I think it was in June of 7 this year. 8 Q. So June of 2008, correct? 9 A. Uh-huh. 10 Q. Is that a yes? 11 A. Yes. 12 Q. Now, back to the medical expert reviews 13 you were referring to, have you ever conducted an 14 independent medical examination? 15 A. No. 16 Q. Okay. But you have reviewed medical 17 records and offered an opinion based on that 18 review? 19 A. Correct, yes. 20 Q. And what kind of case have you done 21 that? 22 A. One for a plaintiff and one was for a 23 defendant. 24 Q. In personal injury cases? 25 A. Yes.</p>	<p style="text-align: center;">16</p> <p>1 Q. Okay. And in that case what opinion 2 did you reach? Did the car accident cause the 3 neck pain or not? 4 A. This is defendant or the plaintiff? 5 Q. Actually I was asking about the 6 plaintiff case in which you reviewed records. 7 A. Yeah, the one that this particular 8 gentleman was involved in a car accident 9 complaining of neck pain as a plaintiff I felt in 10 my opinion that that person had too many 11 preexisting problems prior to his accident that 12 was probably the cause of his pain rather than 13 the accident itself. 14 Q. I see. 15 A. So I said it could be an exacerbation 16 of his chronic pain but it certainly was not the 17 cause of it. 18 Q. And what about the case where you 19 reviewed records for the plaintiff, in other 20 words, where the plaintiff retained you as an 21 expert, what was the injury claimed in that case? 22 A. That the car accident was the cause of 23 all his pain which wound up having him to go to 24 surgery for the cervical fusion that he had to 25 have.</p>

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<p style="text-align: center;">17</p> <p>1 Q. Who was the surgeon in that case?</p> <p>2 A. McNulty.</p> <p>3 Q. Do you remember who the attorney was</p> <p>4 who represented the plaintiff?</p> <p>5 A. Plaintiff's attorney. You know, I</p> <p>6 don't remember his name. I have all this</p> <p>7 information at home so if you would like to know</p> <p>8 it, I can look it up and get back to you on the</p> <p>9 information.</p> <p>10 Q. Okay. Did either of these cases go to</p> <p>11 trial?</p> <p>12 A. Not yet, no. I think -- one of them</p> <p>13 settled and I think the other one is still in the</p> <p>14 process of deciding if they are going to go to</p> <p>15 court or not.</p> <p>16 Q. I see. Do you have any intention of</p> <p>17 being an expert in this case?</p> <p>18 A. I'm not trying to recruit myself as</p> <p>19 being an expert but if you need me to be I can.</p> <p>20 Q. Just so you understand the roles, I'm</p> <p>21 not even permitted to speak to you unless the</p> <p>22 plaintiff's counsel is present because you are a</p> <p>23 treating physician in this case. So it wouldn't</p> <p>24 be me who would retain you as an expert in this</p> <p>25 case, it would be the plaintiff.</p>	<p style="text-align: center;">19</p> <p>1 Q. (BY MR. ROGERS) Who referred Mr. Simao,</p> <p>2 the plaintiff, to you?</p> <p>3 A. I believe it was one of the orthopedic</p> <p>4 surgeons but I don't remember specifically who it</p> <p>5 was. It was either McNulty -- I think it was</p> <p>6 McNulty that actually referred him.</p> <p>7 Q. Okay. Was your treatment done on a</p> <p>8 lien?</p> <p>9 A. No.</p> <p>10 Q. When was the last time you saw the</p> <p>11 plaintiff?</p> <p>12 A. I believe it was in August of 2007. It</p> <p>13 was right before I finished that. I'm pretty</p> <p>14 sure he came in the week right before I actually</p> <p>15 finished my time. I finished on August 10th and</p> <p>16 I think I saw him that week right before that.</p> <p>17 Q. So you left your employment at</p> <p>18 Southwest Medical on August 10, 2007?</p> <p>19 A. Correct.</p> <p>20 Q. Okay. Now, when was the first time you</p> <p>21 saw the plaintiff?</p> <p>22 A. I believe it was in October of 2006.</p> <p>23 There may have been somebody else that saw him in</p> <p>24 the office before me because they may -- for</p> <p>25 example, Doug Young may have actually seen the</p>
<p style="text-align: center;">18</p> <p>1 A. Okay.</p> <p>2 Q. It would be Mr. Simao or his counsel.</p> <p>3 Has Mr. Simao or his counsel asked you to be an</p> <p>4 expert in this case?</p> <p>5 A. No.</p> <p>6 Q. How many patients have you treated who</p> <p>7 are involved in personal injury claims?</p> <p>8 A. When I was with Southwest Medical or in</p> <p>9 general since I've finished my pain fellowship?</p> <p>10 Q. In general.</p> <p>11 A. Since I finished my pain fellowship?</p> <p>12 Q. Yes.</p> <p>13 A. I would estimate probably about a</p> <p>14 hundred and fifty cases but I don't have the</p> <p>15 exact numbers in a log to say this is the exact</p> <p>16 number.</p> <p>17 Q. And estimates are fine.</p> <p>18 A. Okay.</p> <p>19 Q. Okay. Have you ever treated a patient</p> <p>20 in a personal injury claim who was represented by</p> <p>21 the same law firm that represents Mr. Simao?</p> <p>22 A. Is this Glen?</p> <p>23 MR. PALMERO: Yes, Aaron and</p> <p>24 Paternoster.</p> <p>25 THE WITNESS: No, I have not.</p>	<p style="text-align: center;">20</p> <p>1 patient before in the office but I didn't see him</p> <p>2 before October of 2006.</p> <p>3 Q. Okay. Well, just in your review of the</p> <p>4 Southwest records which you have in front of you,</p> <p>5 you may have seen that the plaintiff treated</p> <p>6 there from April 15, 2005 up through roughly the</p> <p>7 last time you saw him and then he stopped</p> <p>8 treating there.</p> <p>9 Now, you testified a moment ago that an</p> <p>10 orthopedic surgeon, likely McNulty, referred the</p> <p>11 plaintiff to you. The records reflect that</p> <p>12 Dr. McNulty referred the plaintiff to pain</p> <p>13 management.</p> <p>14 A. Okay.</p> <p>15 Q. And that Southwest Medical had a pain</p> <p>16 management center that appears to be multi</p> <p>17 disciplinary in that the plaintiff went to a</p> <p>18 psychiatrist?</p> <p>19 A. Psychologist.</p> <p>20 Q. Okay. A psychologist?</p> <p>21 A. Yes.</p> <p>22 Q. And a pain management physician, is</p> <p>23 that correct?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. Have you ever worked with this</p>

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<p style="text-align: center;">21</p> <p>1 psychologist?</p> <p>2 A. Donna?</p> <p>3 Q. Donna, yes?</p> <p>4 A. Bar-Novon.</p> <p>5 Q. I got it as B-a-r-N-o-v-a-n?</p> <p>6 A. Yes.</p> <p>7 Q. What is her role in the pain management</p> <p>8 at Southwest Medical?</p> <p>9 A. She's the one that takes the</p> <p>10 psychological history of the patient to determine</p> <p>11 how many sort of other factors are involved in</p> <p>12 that patient's pain problem such as depression,</p> <p>13 anxiety, past psychiatric problems that may be</p> <p>14 influencing their current pain presentation.</p> <p>15 So she helps to determine if other</p> <p>16 means of treatment may be helpful in conjunction</p> <p>17 with medications and injections.</p> <p>18 Q. Okay. And this is stuff that would</p> <p>19 include biofeedback and things of that nature?</p> <p>20 A. She didn't do biofeedback because she</p> <p>21 didn't have the machine that have the lights that</p> <p>22 go off or did heart rate determination, she</p> <p>23 didn't have a machine that did that with her</p> <p>24 session so she didn't have biofeedback but she</p> <p>25 did do cognitive behavioral-type assessments,</p>	<p style="text-align: center;">23</p> <p>1 determine whether they would, A, like to have</p> <p>2 psychological sessions as part of their treatment</p> <p>3 and, B, whether they are at risk of committing</p> <p>4 suicide or are at risk of doing something to them</p> <p>5 self that may be harmful and if those things</p> <p>6 aren't present as in the patient doesn't want</p> <p>7 psychological sessions and they don't present a</p> <p>8 risk to themselves as in committing suicide or</p> <p>9 doing something harmful, then they have the</p> <p>10 option of not doing any further psychological</p> <p>11 sessions because it's up to them plus it's not a</p> <p>12 risk for them to go on with just the medical</p> <p>13 treatments as in, you know, prescribing</p> <p>14 medications or doing injections.</p> <p>15 Q. Right.</p> <p>16 A. So if this patient was a candidate</p> <p>17 meaning he, A, wants to have the treatment or was</p> <p>18 at some kind of psychological risk then obviously</p> <p>19 that would continue, the psychological treatment</p> <p>20 would continue.</p> <p>21 Q. Of the patients in Southwest Medical's</p> <p>22 pain management program at the time the plaintiff</p> <p>23 treated there, how many who were referred to the</p> <p>24 psychologist treated with that psychologist?</p> <p>25 A. It was a small percentage. I would say</p>
<p style="text-align: center;">22</p> <p>1 treatments, and she did relaxation training. So</p> <p>2 those are the kind of things she did more.</p> <p>3 Biofeedback is specifically when you</p> <p>4 hook somebody up to some kind of machine and help</p> <p>5 counsel them and work with them on controlling a</p> <p>6 physiological parameter such as heart rate,</p> <p>7 trying to keep it slower or within a certain</p> <p>8 range and then help relax the patient. That's</p> <p>9 the machine you use the biofeedback with.</p> <p>10 Q. Okay. And the object of a</p> <p>11 psychologist's work in the pain management field</p> <p>12 is to determine whether there are non physiologic</p> <p>13 ways to address pain or non physiologic causes of</p> <p>14 pain, is that right?</p> <p>15 A. Yeah, as in psychological, yes.</p> <p>16 Q. Yes.</p> <p>17 A. Correct.</p> <p>18 Q. Now, from the records that I've seen</p> <p>19 from that Southwest Medical, it appears that the</p> <p>20 plaintiff consulted with the psychologist once</p> <p>21 and then never returned. Am I correct?</p> <p>22 A. Yes.</p> <p>23 Q. Why is that?</p> <p>24 A. The purpose of having the psychologist</p> <p>25 in the clinic is to do an intake evaluation to</p>	<p style="text-align: center;">24</p> <p>1 out of a hundred patients that probably five to</p> <p>2 seven patients out of the hundred would actually</p> <p>3 continue seeing her on a regular basis of some</p> <p>4 kind and regular meaning it was possibly every</p> <p>5 month to two months, not necessarily every other</p> <p>6 day or every week.</p> <p>7 Q. I see.</p> <p>8 A. And that's because most of the patients</p> <p>9 that came to the clinic were specifically going</p> <p>10 to have an injection or they wanted some kind of</p> <p>11 medication-type treatment plan as opposed to</p> <p>12 anything psychological.</p> <p>13 Q. I see.</p> <p>14 In your experience did the</p> <p>15 psychological care offered at Southwest Medical</p> <p>16 prove beneficial to the patients who accepted it?</p> <p>17 A. I think it was a wonderful resource to</p> <p>18 have but I think in today's healthcare with</p> <p>19 expense being one of the issues I don't think</p> <p>20 that it's going to be something that can be long</p> <p>21 term offered. I don't think that basically most</p> <p>22 practices could afford a psychologist to be a</p> <p>23 part of their treatment on a regular basis.</p> <p>24 So I think it's a luxury more than it</p> <p>25 is a necessity and I think it's a great thing to</p>

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<p style="text-align: center;">25</p> <p>1 have as part of a multi-disciplinary practice but 2 in a private practice it's not something you 3 really are going to find is going to be very 4 characteristic. I mean I don't think it's 5 something you are going to see in most practices. 6 Q. Something that I've seen quite 7 regularly in Las Vegas is that spine surgeons 8 will refer patients for whom surgery is a 9 consideration to a psychologist for screening to 10 determine whether the patient is a good surgical 11 candidate. Have you observed this as well? 12 A. Yes. 13 Q. And is there a difference between that 14 pre surgical screening role of a psychologist 15 versus what Dr. Bar-Novon did? 16 A. Even though she could do that 17 specifically for McNulty, for example, because 18 McNulty is one of the providers for Southwest 19 Medical, he's one of the contracted providers for 20 spine surgery, he did rarely refer patients 21 specifically for that purpose. 22 If Dr. Bar-Novon was to see a patient, 23 it was generally part of that intake of new 24 patients that she saw and then the ones that 25 elected to see her on a regular basis because</p>	<p style="text-align: center;">27</p> <p>1 with Dr. Seibel, S-e-i-b-e-l? 2 A. Right. 3 Q. And then he started treating with you. 4 Why did he leave Seibel and go to you? 5 A. I don't think he necessarily left him, 6 I think what happened was Seibel was busy when he 7 needed another injection so he went and saw me 8 for the next one and then the following time I 9 saw him as a follow-up patient in the clinic 10 after he had the injection and then he said, 11 well, is it possible just to follow with you if 12 you are the one that can do both the injection 13 and the treatments because what he had seen 14 before me was he saw Doug Young the PA and then 15 he saw Seibel for the injection and then went 16 back to Doug Young as a follow up and he asked if 17 the physician could see both and I said yes, I 18 could do you as far as the procedures and the 19 follow up. 20 And then he said he would rather do 21 that than to see Seibel for the injection and 22 then Doug Young in the clinic as a follow up. 23 But I also told him he could have done that with 24 Seibel too but he said the last person he saw was 25 me so that's why he asked and requested that he</p>
<p style="text-align: center;">26</p> <p>1 they felt she would offer them a valuable 2 service. 3 So to answer your question it's not 4 something that this particular clinic that was 5 practiced in that way of screening for a specific 6 surgery but if the patients were -- decided upon 7 to become candidates for implantable devices such 8 as spinal cord stimulation implants, then that 9 patient would have to go see Dr. Bar-Novon to be 10 screened for that. 11 So in that way she was used 12 specifically for a implantable device but not 13 necessarily spine surgeon, you know, screening 14 them for surgery and it was very rare for this 15 particular practice to put implantable devices as 16 far as a spinal cord stimulator or pump because 17 most of the patients either wound up having 18 surgery or went somewhere else to get their 19 implants done, they didn't stay with the clinic 20 to do that because there's so many other patients 21 to be seen it couldn't be done specifically for 22 that purpose for the implant. 23 Q. Okay. All right. Now, shifting then 24 to the medical doctors in the Southwest Medical 25 pain management center, the plaintiff started</p>	<p style="text-align: center;">28</p> <p>1 see me specifically to do his injections and 2 follow up. 3 Q. Okay. Now, I see that on June 7, 2006 4 Dr. Seibel did a C3-4 epidural and the follow-up 5 report represented that he had a good response 6 and a decrease in his headaches and pain? 7 A. Okay. 8 Q. Now, when was the first time he saw you 9 again, in October? 10 A. He saw Doug Young as a follow up and 11 scheduled for a selected nerve root block and 12 that's when I saw him on October 3rd for a 13 selective nerve root block. 14 Q. That was your first visit with the 15 plaintiff? 16 A. Yes. 17 Q. Okay. Now, just before the plaintiff 18 comes to you he had a visit with a physician 19 assistant there? 20 A. Doug Young, yes. 21 Q. On August 24, 2006. 22 A. Yes. 23 Q. And there Mr. Young wrote that the 24 plaintiff had an exacerbation of his pain. Do 25 you know what the exacerbation was?</p>

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<p style="text-align: center;">29</p> <p>1 A. The left trapezial pain it says. 2 That's the exacerbation that he had. It was left 3 trapezial pain and according to this visit, it 4 says that sometimes you may get a worsening of 5 your pain problem from an injection and then it 6 may get better over a longer period of time so 7 what happens -- 8 I believe what this is referring to is 9 the steroid effect so when you inject a steroid 10 into an epidural space, it can work its way into 11 the nerve root and it can actually cause an 12 inflammatory reaction initially to the nerve 13 meaning the nerve will become more painful and 14 then after it becomes less inflamed because the 15 steroid works that it may come a period of time 16 where there's less pain. 17 Q. Right, now this report of August 24 is 18 two-and-a-half months after the last injection, 19 the epidural. So we are well past the original 20 inflammatory reaction, right? 21 A. Okay. Yes. Usually it's within the 22 first week after the injection that you get that 23 response so, you are right, this would probably 24 just be the pain has come back or it has gotten 25 worse since the injection.</p>	<p style="text-align: center;">31</p> <p>1 the initial visit was actually the injection but 2 did he give you a history? 3 A. That's one thing about this practice I 4 didn't like it was we were -- we were sort of 5 required as a mid-level provider to take the 6 information that most of the time they were able 7 to get but sometimes the details and the 8 specifics of a patient's problem were not relayed 9 to us. We are almost like technicians because 10 once we saw the patient we never really knew all 11 the details other than what was written in the 12 record. 13 So, for example, if this patient was 14 seen by me I may have been able to ask more 15 specific questions about what happened in the 16 past that may have related it to the injury and, 17 therefore, had a better idea of what specific 18 levels I may have injected and occasionally when 19 I would have the time I would go back and look at 20 the records that the mid levels would take like 21 Doug Young and figure out, well, is it really the 22 level that he scheduled the patient for to get 23 injected or do I want to do an additional level 24 besides the one that was scheduled or do I want 25 to change the level then the one that's</p>
<p style="text-align: center;">30</p> <p>1 Q. Okay. Well, the word exacerbation is 2 used differently by different people. In some 3 cases I've seen the word exacerbation used in the 4 context of a recent event, like an aggravating 5 event. 6 Do you know if the physician 7 assistant's use of exacerbation on August 24, 8 2006 is in reference to an event that caused 9 pain? 10 A. I don't know. I don't know what that 11 is reference to based on this note and I don't 12 think I remember anything specifically after 13 seeing the patient mention anything that I can 14 think of that might have exacerbated this. 15 So this August 24th that you are 16 referring to is prior to my seeing him and I 17 don't know anything after I saw him that this may 18 have been referred to as far as was it related to 19 an accident or something that happened after that 20 event where let's say, you know, his car accident 21 was August 15, 2005 did he have another event 22 since that time and that's what he's referring 23 to, I don't know. 24 Q. Okay. All right. Well, when the 25 plaintiff came to see you and I recognize that</p>	<p style="text-align: center;">32</p> <p>1 scheduled. 2 For example, if this left C4 nerve that 3 I did the procedure and injected was maybe not 4 necessarily the one that I would have felt based 5 on his history and his exam and his MRI results, 6 I may have felt differently about then had I 7 actually, you know, just gone there and did the 8 procedure that was scheduled but sometimes it 9 didn't work that way and I had to do just 10 basically what was scheduled because it was just 11 a long list of patients to see that day in the 12 surgery center and, therefore, some of the 13 details and some of the treatment may not have 14 been what I would have done had I saw that 15 patient in the beginning. 16 So when you are referring back to this 17 date August of 2006 when he came back for an 18 exacerbation, I may have changed the plan based 19 on information I took if I saw him versus what I 20 did on that October 3rd, the first time I did the 21 injection. 22 So I'm not saying that that is 23 specifically what would have happened in this 24 patient's care but I'm just telling you that on 25 this practice that we relied on mid-level</p>

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<p style="text-align: center;">33</p> <p>1 providers to take the information history wise, 2 do an exam and then collect the lab reports and 3 then come up with an idea of what should be done 4 as in doing one of these injections, it might 5 have been different had I been the one taking 6 that information rather than the mid-level 7 provider. 8 Q. I see. 9 Okay. In short you didn't get a 10 history from the plaintiff, you relied on the 11 history taken by the physician's assistant? 12 A. That's correct. 13 Q. Did you review the histories taken by 14 the physician assistants? 15 A. Yes, so I did look at the last note 16 that the patient was seen on the August 24th 17 prior to doing the injection on October 3rd and I 18 use that information to base my procedure on. 19 Q. All right. Did you ever go back in 20 time back to April of 2005 to look at the 21 histories the plaintiff had provided on the 22 previous visits with Southwest Medical? 23 A. Prior to -- on October 3rd or after 24 that or -- 25 Q. At any time?</p>	<p style="text-align: center;">35</p> <p>1 plaintiff did he ever tell you about the 2 April 15, 2005 motor vehicle accident? 3 A. The details, no. He mentioned at least 4 on one occasion that he was involved in a car 5 accident but that was about the extent of how 6 much information I had from him in regards to 7 that. I didn't know anything specifically about 8 him being hit or anything like that. 9 Q. So during the time that you treated the 10 plaintiff you didn't know whether he lost 11 consciousness as a result of that car accident? 12 A. That's correct. 13 Q. You didn't know whether he was taken by 14 ambulance? 15 A. Yes, I did not know that. 16 Q. You didn't know whether he had any 17 bumps or bruises? 18 A. No. 19 Q. Did he ever tell you whether he was in 20 any accidents before April 15, 2005? 21 A. He didn't tell me that nor did I ask 22 him about that. 23 Q. Did he ever tell you about any symptoms 24 he had before April of 2005? 25 A. He mentioned that he did have headaches</p>
<p style="text-align: center;">34</p> <p>1 MR. PALMERO: Objection, vague and 2 ambiguous, confusing. You can answer though. 3 THE WITNESS: I did not look at that 4 information prior to I believe even up to this 5 date to be honest. I don't think I actually saw 6 the specifics of that accident on October 15th, 7 2005 until you presented me with the records 8 today. 9 Q. (BY MR. ROGERS) Okay. 10 A. And the reason why I can tell you that 11 is some of that information even though it's in 12 our system in the computer is not always 13 accessible for various reasons or it could be 14 just the simple reason that there isn't enough 15 time to actually go back and check on that stuff 16 because supposedly it was the information that we 17 relied on from the mid level that we took the 18 information to begin with. 19 So specifically to answer about this 20 patient, no, I did not review any of the 21 information that was taken at the time of the 22 accident such as October 15th, 2005 when he was 23 seen in the urgent care center, I didn't see that 24 information before today. 25 Q. Okay. In the time that you treated the</p>	<p style="text-align: center;">36</p> <p>1 but he told me that the headaches were something 2 that came and went -- they come and go. They 3 weren't something that he said he had 4 continuously and that was a serious enough 5 problem that he had to seek medical treatment for 6 the headache that he had before the accident. 7 Q. You weren't aware then that he treated 8 for migraines at Southwest Medical Associates 9 before April 2005? 10 A. No, I was not aware of that. 11 Q. Did the plaintiff ever tell you about 12 any injuries he had after April 15, 2005? 13 A. No. 14 Q. What were the plaintiff's complaints to 15 you? 16 A. His main complaint was neck and arm 17 pain but he did mention he had headaches and back 18 pain but his chief complaint was neck pain and 19 arm pain. 20 Q. Which arm? 21 A. Left. 22 Q. How far down the arm? 23 A. He said that it was primarily the 24 shoulder blade and it went into his upper arm so 25 shoulder to upper arm, that was his main area of</p>

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<p style="text-align: center;">37</p> <p>1 complaint.</p> <p>2 Q. Okay. So basically the back of the</p> <p>3 shoulder around to the bicep area?</p> <p>4 A. Yes.</p> <p>5 Q. What was his reported pain level to you</p> <p>6 and for this question I want to focus on the</p> <p>7 first time you saw him in October of 2006.</p> <p>8 A. No, the pain level was not something I</p> <p>9 asked him about at that visit. They may have</p> <p>10 asked that question at the surgery center to get</p> <p>11 a baseline level of pain but I did not</p> <p>12 specifically ask him what his pain level was when</p> <p>13 I did the injection so on October 3rd, 2006 when</p> <p>14 he had the injection with me he did not report</p> <p>15 nor did I record a pain level. He may have given</p> <p>16 it to the pre-op nurse prior to the procedure.</p> <p>17 Q. All right. Look at the October 11</p> <p>18 note.</p> <p>19 A. He rated it seven to eight out of ten.</p> <p>20 Q. Was he rating it at seven to eight out</p> <p>21 of ten pre or post selective nerve root block?</p> <p>22 A. This would have been that day that he</p> <p>23 saw me on October 11th. So this is after the</p> <p>24 injection was done so this is about a week -- a</p> <p>25 little more than a week after the injection is</p>	<p style="text-align: center;">39</p> <p>1 rhizotomy-type procedure, it's more of a -- it's</p> <p>2 a little different than a steroid effect but it</p> <p>3 does work to minimize pain transmission of the</p> <p>4 nerve.</p> <p>5 Q. And did you decide to attempt this</p> <p>6 pulsed radiofrequency because the collective</p> <p>7 nerve root block provided only temporary relief?</p> <p>8 A. Right, because if he had a better</p> <p>9 result from the steroid affect I would have been</p> <p>10 more, you know, likely to continue that course of</p> <p>11 treatment where we just did the transforaminal</p> <p>12 epidural steroid injection but because he got</p> <p>13 only the immediate affect from the local</p> <p>14 anesthetic that we injected with the steroid at</p> <p>15 the time in the surgery center and it wore off</p> <p>16 after the initial steroid wore off, I figured it</p> <p>17 is going to be necessary to do something more to</p> <p>18 allow the nerve to decrease the transmission of</p> <p>19 pain other than with just treating him with</p> <p>20 steroid so that's why I elected to offer him that</p> <p>21 treatment the pulsed radiofrequency.</p> <p>22 Q. Now, the plaintiff seemed to have had</p> <p>23 a -- well, two months or more of pain relief from</p> <p>24 the C3-4 epidural that Dr. Seibel did on 6/7/06.</p> <p>25 Did you consider going back to doing epidurals?</p>
<p style="text-align: center;">38</p> <p>1 done that he's rating the pain at that level.</p> <p>2 Q. And at the same time he's telling you</p> <p>3 that the injection provided 50 to 75 percent</p> <p>4 relief?</p> <p>5 A. And what he's referring to is the</p> <p>6 immediate period of time following the injection</p> <p>7 on October 3rd, not that day that he saw me on</p> <p>8 October 11th. What he's relating is the</p> <p>9 information that he experienced this relief</p> <p>10 immediately following the injection on October</p> <p>11 3rd.</p> <p>12 Q. And then his pain returned?</p> <p>13 A. Yes.</p> <p>14 Q. And then you discussed was it</p> <p>15 rhizotomy?</p> <p>16 A. No, it was actually a pulsed</p> <p>17 radiofrequency -- it's a procedure that we warm</p> <p>18 the nerve basically to a temperature of about 40</p> <p>19 degrees, 41 degrees -- actually up to 43 but</p> <p>20 usually below 43 degrees Celsius and that will</p> <p>21 affect how the nerve transmits information so it</p> <p>22 tends to quiet the nerve down by pulsing it and</p> <p>23 warming it to a 43 degrees Celsius temperature.</p> <p>24 Q. Okay.</p> <p>25 A. So it's not an ablated procedure or</p>	<p style="text-align: center;">40</p> <p>1 A. It's certainly something you consider</p> <p>2 if you had an improvement from the procedure but</p> <p>3 when I did the procedure, that selective nerve</p> <p>4 root block, I was trying to be more specific than</p> <p>5 the C3-4 transforaminal epidural and the reason</p> <p>6 why I was being more specific is I was trying to</p> <p>7 numb one specific nerve root and not necessarily</p> <p>8 spread the medicine in the general area at that</p> <p>9 level and possibly involve more than just that</p> <p>10 nerve root itself.</p> <p>11 So my approach was to try to be as</p> <p>12 specific as I could be to say this is the exact</p> <p>13 level, this is the exact nerve and if it were,</p> <p>14 then that would be a more specific treatment than</p> <p>15 doing the C3-4 transforaminal epidural.</p> <p>16 Q. Right. No, I get that that's why you</p> <p>17 attempted the selective nerve root block but did</p> <p>18 you consider doing the epidural before suggesting</p> <p>19 the radiofrequency?</p> <p>20 A. Right, and the answer to that question</p> <p>21 is when I did the selective nerve root block I</p> <p>22 did put steroid in that level as well so not only</p> <p>23 did I do a selective nerve root block itself I</p> <p>24 did the steroid injection as in C3-4</p> <p>25 transforaminal epidural at the same time.</p>

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<p style="text-align: center;">41</p> <p>1 Q. I see. And also the radiofrequency?</p> <p>2 A. Yes.</p> <p>3 Q. So you did the three --</p> <p>4 A. For one, yes.</p> <p>5 Q. Okay. Got it.</p> <p>6 A. So I think that the pain problem was</p> <p>7 starting to progress as in it wasn't becoming as</p> <p>8 responsive to that type of treatment because it's</p> <p>9 not that I didn't do what he originally had good</p> <p>10 results with, I did that in addition to the</p> <p>11 specific treatment which was the selective nerve</p> <p>12 root block and the pulsed radiofrequency.</p> <p>13 Q. Got it.</p> <p>14 Now, when the plaintiff was treating</p> <p>15 with you, was he disabled?</p> <p>16 A. No.</p> <p>17 Q. What do you generally take a pain</p> <p>18 rating of seven to eight of ten to mean?</p> <p>19 A. It's severe and it is definitely a</p> <p>20 distraction to their every day living so they may</p> <p>21 not be able to function fully based on that level</p> <p>22 of pain.</p> <p>23 Q. Do you do anything to translate the</p> <p>24 numbers seven to eight of ten into the terms you</p> <p>25 just described so the patient understands, okay,</p>	<p style="text-align: center;">43</p> <p>1 See, sometimes I'll ask providers that</p> <p>2 same question and they will say, well, I might</p> <p>3 tell the patient that a zero means no pain and</p> <p>4 ten is unbearable and nine would be something</p> <p>5 like childbirth. In other words, they are giving</p> <p>6 the patient some sort of loose guideline. Do you</p> <p>7 ever do that with your patients?</p> <p>8 A. The first time I see a patient I will</p> <p>9 generally use some kind of scale and put some</p> <p>10 reference to it like you've described so what I</p> <p>11 usually tell patients is zero is no pain, ten is</p> <p>12 the most severe pain that you could possibly</p> <p>13 experience, five is sort of moderate or medium</p> <p>14 level of pain and I say where is your pain in</p> <p>15 this scale and that's pretty much how I do it.</p> <p>16 Q. I get it.</p> <p>17 You don't want to lead your patient,</p> <p>18 you just want to leave it up to them to give you</p> <p>19 their subjective --</p> <p>20 A. Correct.</p> <p>21 Q. -- independent response?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. But at the time that the</p> <p>24 plaintiff was treating with you he was still</p> <p>25 working?</p>
<p style="text-align: center;">42</p> <p>1 if I put my pain level at these numbers this is</p> <p>2 how it will be translated by my doctors?</p> <p>3 A. No, and the reason is it's a subjective</p> <p>4 rating and if you were to try to explain it in</p> <p>5 the terms I just gave to you on how disabling it</p> <p>6 is to somebody's function every day, it isn't</p> <p>7 something as subjective, it's more something that</p> <p>8 the physician is trying to put into some kind of</p> <p>9 relative scale that is different for a patient.</p> <p>10 So a patient gives you a self report of</p> <p>11 this and the physician is giving this idea of</p> <p>12 what that level really means to them as in this</p> <p>13 is an observation and that's different so you</p> <p>14 have to have a subjective pain rating and if you</p> <p>15 want to make some kind of observation, you can</p> <p>16 make that in your physical examination and then</p> <p>17 make an impression based on what your overall --</p> <p>18 you know, putting it together with their pain</p> <p>19 rating subjectively along with their actual</p> <p>20 physical ability along with what they are able to</p> <p>21 do at work and then you can make an impression to</p> <p>22 decide if they need more treatment or if they</p> <p>23 need, you know, a disability rating or some other</p> <p>24 kind of assessment or an evaluation.</p> <p>25 Q. I see.</p>	<p style="text-align: center;">44</p> <p>1 A. Yes, I believe he was working.</p> <p>2 Q. Do you know what kind of work he was</p> <p>3 doing?</p> <p>4 A. No, I don't.</p> <p>5 Q. Take a look at the notes and see if</p> <p>6 anything in there refreshes your memory on it.</p> <p>7 A. Bus management full time.</p> <p>8 Q. You mean business management?</p> <p>9 A. It's b-u-s management so it could mean</p> <p>10 business management but it says b-u-s management.</p> <p>11 MR. PALMERO: More like business</p> <p>12 management.</p> <p>13 Q. (BY MR. ROGERS) I recently took the</p> <p>14 plaintiff's deposition, his testimony that he</p> <p>15 works as a carpet and flooring cleaner.</p> <p>16 MR. PALMERO: I think he owns his own</p> <p>17 business or at some point remember he bought the</p> <p>18 business.</p> <p>19 MR. ROGERS: He owns it.</p> <p>20 MR. PALMERO: He may do some of the</p> <p>21 work but he had his son and some employees</p> <p>22 working, too.</p> <p>23 Q. (BY MR. ROGERS) True, true.</p> <p>24 But in other words, his isn't just a</p> <p>25 desk job, he's working as well as managing this</p>

<p style="text-align: center;">45</p> <p>1 business.</p> <p>2 Now, did you do a physical exam of the</p> <p>3 plaintiff?</p> <p>4 A. Not initially. I may have examined him</p> <p>5 on some of the follow ups and done a specific</p> <p>6 exam targeted to a neurological assessment but I</p> <p>7 didn't do a full physical so I would say, no, I</p> <p>8 have not done a full physical examination on him.</p> <p>9 The most I may have done is just limited</p> <p>10 neurological assessment. I think on January --</p> <p>11 on January 10th I did a neurological exam on him.</p> <p>12 Q. What did you find in the neurological</p> <p>13 exam?</p> <p>14 A. That basically he had some deficit on</p> <p>15 the C4 dermatome but otherwise it seemed to be</p> <p>16 improving and that was the overall assessment</p> <p>17 that I made on that visit on January 10th.</p> <p>18 Q. Reflecting on that same note there's a</p> <p>19 section of your report entitled physical exam and</p> <p>20 in there it reads no acute distress, exhibits no</p> <p>21 significant pain behaviors, he had no tenderness</p> <p>22 to palpation, he had I believe full cervical</p> <p>23 range of motion without pain.</p> <p>24 A. Right.</p> <p>25 Q. And axial loading did not illicit a</p>	<p style="text-align: center;">47</p> <p>1 So it's kind of like a habit. They</p> <p>2 say, okay, pain seven or eight instead of saying,</p> <p>3 well, today it's two or three but usually it's a</p> <p>4 seven/eight. For them it's very routine to come</p> <p>5 up to the number that they fix in their mind that</p> <p>6 this is how they feel overall, this is their kind</p> <p>7 of overall level that they feel in the day as</p> <p>8 opposed to what is it at this exact moment when I</p> <p>9 saw that patient at that time at eight a.m. on</p> <p>10 January 10th.</p> <p>11 So I don't take that too seriously but</p> <p>12 specifically your question was does that coincide</p> <p>13 with that level of pain, no. The answer is at</p> <p>14 this particular time his physical exam was</p> <p>15 relatively normal and his pain level was reported</p> <p>16 at that high level of seven to eight and I would</p> <p>17 not say based on that there's a consistency but</p> <p>18 I'm telling you the real thing of how patients</p> <p>19 will tell you a certain level and it's kind of</p> <p>20 fixed in their mind that this is what they</p> <p>21 experience and I don't take it too seriously.</p> <p>22 And I would say in this particular</p> <p>23 patient that it may not be that he really had the</p> <p>24 seven to eight level of pain at that time when I</p> <p>25 put that score in there as a recorded number but</p>
<p style="text-align: center;">46</p> <p>1 pain response.</p> <p>2 A. Right.</p> <p>3 Q. Despite those findings on physical</p> <p>4 exam, his subjective pain rating was again seven</p> <p>5 to eight of ten.</p> <p>6 A. Right.</p> <p>7 Q. Is there an inconsistency between the</p> <p>8 subjective complaint and your findings?</p> <p>9 A. Yes.</p> <p>10 Q. What is it?</p> <p>11 A. That basically all these things in the</p> <p>12 physical exam are pretty normal and the findings</p> <p>13 of having a slightly decreased dermatomal C4</p> <p>14 level is minor and would not explain on a</p> <p>15 physical how much pain he's reporting.</p> <p>16 So there is an inconsistency between</p> <p>17 the level of pain and the physical examination at</p> <p>18 that time but I could tell you that a lot of</p> <p>19 these patients come into the office and they give</p> <p>20 you a number and they tell you that number based</p> <p>21 on it's easier just to blurt that number out</p> <p>22 because they say it on each visit rather than</p> <p>23 giving you a true assessment of what they really</p> <p>24 feel at the exact instantaneous moment you ask</p> <p>25 the question.</p>	<p style="text-align: center;">48</p> <p>1 he -- you know, he's not somebody I would say is</p> <p>2 out of the ordinary to give you a higher number</p> <p>3 than what they are exactly experiencing at the</p> <p>4 moment you are seeing them in that office right</p> <p>5 then and there.</p> <p>6 Q. Okay. Well, at any time while the</p> <p>7 plaintiff was seeing you did he have less than</p> <p>8 full cervical range of motion?</p> <p>9 A. And I would have to say I don't</p> <p>10 remember if there was one specific time that he</p> <p>11 might have had less. The one that I can see</p> <p>12 there documented is that he had a full range but</p> <p>13 whether or not he had an actual limitation on a</p> <p>14 previous visit I don't know.</p> <p>15 Q. Well, take the time to look through</p> <p>16 your records so that you can answer that question</p> <p>17 based on what is found in the reports.</p> <p>18 A. Okay. Here's another thing I'll tell</p> <p>19 you about that particular practice. Sometimes</p> <p>20 you'll notice that there's no significant change</p> <p>21 and no significant change means they didn't have</p> <p>22 time to really do an exam so in actuality it may</p> <p>23 not have been that an exam was performed on that</p> <p>24 visit even though there's no significant change.</p> <p>25 So I could just tell you that there's a</p>

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1 lot of people that are seen in these type of
2 clinics at Southwest Medical and there's not a
3 lot of attention to detail that might or should
4 have been followed so I'm just telling you that
5 there may have been a time that there's
6 limitation and there may have been a report that
7 says no significant change and that may not be
8 true is what I'm telling you.

9 Q. Okay.

10 A. I cannot find any documented limitation
11 of his cervical range of motion on any of these
12 reports that I flipped through with the clinic
13 dated back to as far as May 10th, 2006 up to the
14 last of June of 2007.

15 Q. Well, can you find anywhere in the
16 records from Southwest Medical where the
17 plaintiff was found upon physical exam to have
18 any -- anything other than the findings that you
19 reached on January 10, 2007 which include, number
20 one, no acute distress; number two, no tenderness
21 in the cervical spine and; number three, normal
22 and painless cervical range of motion; number
23 four, no pain response to axial loading; number
24 five, normal motor exam; number six, normal deep
25 tendon reflexes; number seven, intact grip

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1 strength and, number eight, intact sensory exam?

2 MR. PALMERO: Objection, vague and
3 ambiguous, overbroad. You can answer.

4 Q. (BY MR. ROGERS) Now, with that,
5 Doctor, take your time. Just look through it
6 all. I just want to understand whether there was
7 a change in the plaintiff's presentation on
8 physical exam throughout the time he treated at
9 Southwest Medical.

10 MR. PALMERO: Same objection and
11 compound.

12 (Thereupon a recess was taken
13 after which the following
14 proceedings were had:)

15 Q. (BY MR. ROGERS) Let's go back on.

16 The question before we went off the
17 record, Doctor, was whether there was any
18 positive findings on physical exam throughout the
19 time that the plaintiff treated at Southwest
20 Medical Associates that were different from those
21 reported on January 10th.

22 A. 2007.

23 Q. And after looking at the records what
24 did you find?

25 A. After I reviewed everything from

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1 April 15th, 2005 to the January 10th, 2007, I
2 found no significant physical exam findings to
3 indicate that there was anything different than
4 January 10th, 2007.

5 Q. Okay. Now, when the plaintiff first
6 presented to you you said that he did have left
7 arm symptoms, right?

8 A. Correct.

9 Q. Now, did you recognize as you went
10 through the Southwest Medical records that that
11 was a fairly recent event? In other words, not
12 very long before he came to see you that he did
13 not have those symptoms before that time?

14 MR. PALMERO: Objection, vague and
15 ambiguous.

16 Q. (BY MR. ROGERS) You know what, I'm
17 going to ask the question again because it's not
18 going to read well on the record.

19 Did you see that the plaintiff did not
20 complain of arm symptoms until right about the
21 time that he started treating with the pain
22 management group at Southwest Medical?

23 MR. PALMERO: Same objection. You can
24 answer.

25 THE WITNESS: He complained of left

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1 shoulder pain or trapezial pain but did not
2 mention anything going into his arm as the bicep
3 area so it is somewhat different after seeing
4 pain management and it also may be specifically
5 we asked him about it whereas before he may not
6 have mentioned it or maybe they did not pick up
7 on it as a general provider may have seen there's
8 a dermatomal distribution meaning there was
9 something related to the nerve going into that
10 part of the body and that would have meant
11 something different once he got that information
12 because we asked him or prompted him about it as
13 opposed to what is your problem and he came up
14 with, well, my shoulder or trapezius hurts.

15 Q. Okay. What I'm referring to actually
16 is if you go back to the visits after April 15,
17 2005.

18 A. Okay.

19 Q. Which again is the date of the car
20 accident with my client.

21 A. Right, yes.

22 Q. That on the follow-up visits all the
23 way up through October 18, 2005 so the span of
24 six months, I don't see any record of neck or arm
25 complaints -- I'm sorry, October 6th, 2005.

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<p style="text-align: center;">53</p> <p>1 MR. PALMERO: What were the dates</p> <p>2 again?</p> <p>3 MR. ROGERS: April 15 to October 6.</p> <p>4 MR. PALMERO: I think there were</p> <p>5 complaints the first day.</p> <p>6 THE WITNESS: Yeah, on April 15th he</p> <p>7 did specifically mention neck and left shoulder</p> <p>8 pain.</p> <p>9 Q. (BY MR. ROGERS) Right, and if I didn't</p> <p>10 make it clear, that may be my fault.</p> <p>11 A. But following April 15th.</p> <p>12 Q. My question is following that date up</p> <p>13 through April 15th I don't think there's a record</p> <p>14 of neck or arm complaints.</p> <p>15 A. Well, on October 6, you are excluding</p> <p>16 that date?</p> <p>17 Q. That's the first date that I see it</p> <p>18 after the April 15 visit.</p> <p>19 A. Okay. So like on May 26th, 2005.</p> <p>20 Q. There's May 12, there's May 23,</p> <p>21 May 26 --</p> <p>22 A. Oh, yes. Okay. May 26, I'm looking at</p> <p>23 that right now. It doesn't mention anything</p> <p>24 about his neck or shoulder, it just says</p> <p>25 headaches and then on May 12th it says occipital</p>	<p style="text-align: center;">55</p> <p>1 Q. Okay.</p> <p>2 A. So when you ask about arm specifically</p> <p>3 as in bicep area I cannot explain that but if you</p> <p>4 are asking about why is he having trapezial pain</p> <p>5 I would say it's possibly due to compression of</p> <p>6 that C4 nerve root at C3-4 from the facet</p> <p>7 hypertrophy.</p> <p>8 Q. On the subject of the MRI studies,</p> <p>9 which one did you review or which ones, if more</p> <p>10 than one.</p> <p>11 A. I did see a copy of this report as</p> <p>12 well. Let me see if I can find it again. Okay.</p> <p>13 One of these MRIs are dated March 22nd, 2006.</p> <p>14 Q. Right, and actually you'll see that the</p> <p>15 findings on that MRI basically are exactly what</p> <p>16 you just said your opinion was.</p> <p>17 A. Yeah.</p> <p>18 Q. Now, did you see the September 24, 2007</p> <p>19 MRI?</p> <p>20 A. No. Let me see if I can find that</p> <p>21 report. That would have been after I saw him. I</p> <p>22 mean I would have never seen him, I would not</p> <p>23 have seen that because I was no longer employed</p> <p>24 by Southwest Medical so I wasn't seeing him.</p> <p>25 Q. Okay.</p>
<p style="text-align: center;">54</p> <p>1 headache. Yes, it doesn't mention any neck or</p> <p>2 shoulder on that date of May 12th. On May 4th,</p> <p>3 occipital headache, it does not mention any neck</p> <p>4 or shoulder.</p> <p>5 So that's correct, between those</p> <p>6 dates -- an April 15th. So the following visit</p> <p>7 he didn't say anything about a neck pain or a</p> <p>8 shoulder pain up until October 6th.</p> <p>9 Q. Right.</p> <p>10 A. Okay.</p> <p>11 Q. Do you know what was causing the arm</p> <p>12 symptoms?</p> <p>13 A. It's my impression from reviewing his</p> <p>14 information and his MRI findings that it may have</p> <p>15 been due to a facet hypertrophy at C3-4 causing</p> <p>16 some compression of the C4 nerve root, that's my</p> <p>17 impression and that would go along with the</p> <p>18 trapezial pain.</p> <p>19 C4 does not usually involve the biceps,</p> <p>20 that muscle is typically involved with C5 and so</p> <p>21 I can't explain the biceps being involved because</p> <p>22 it doesn't seem to be that C5 has any involvement</p> <p>23 as far as there being compression on the nerve</p> <p>24 root either by a disc or facet hypertrophy or</p> <p>25 some kind of degenerative change.</p>	<p style="text-align: center;">56</p> <p>1 A. Do you have a copy of that if I can</p> <p>2 look at? Here it is, is it September 24th?</p> <p>3 Q. Yes.</p> <p>4 A. MRI cervical spine.</p> <p>5 Q. Is there a difference in the findings</p> <p>6 in the September 2007 MRI than compared to the</p> <p>7 March 2006?</p> <p>8 A. Yes, I mean clearly because it's</p> <p>9 basically saying that it is a normal MRI, there's</p> <p>10 negative changes of the cervical spine it says</p> <p>11 here. It reads that C2-3, C3-4, C4-5, C5-6,</p> <p>12 C6-7, C7-T1 are unremarkable without evidence of</p> <p>13 disc herniation or spinal stenosis. There's no</p> <p>14 foraminal stenosis.</p> <p>15 So looking at this copy, you would say</p> <p>16 everything looks normal.</p> <p>17 Q. Well, in the year and a half since the</p> <p>18 March 2006 MRI, can those conditions observed</p> <p>19 heal?</p> <p>20 A. Sometimes you can get improvement in</p> <p>21 MRI findings so the answer is yes, you can get a</p> <p>22 disc herniation that may no longer appear to be</p> <p>23 herniated with time. It may actually normalize</p> <p>24 or heal so it can happen but typically facet</p> <p>25 hypertrophy and degenerative changes like that</p>

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<p style="text-align: center;">57</p> <p>1 don't necessarily get better and I would say it 2 would be unlikely to find one get better over 3 time. 4 Q. Okay. 5 A. So that would be something I would like 6 to see the two actual MRI -- 7 Q. Films? 8 A. Yes, as opposed to just reading a 9 report. 10 Q. Okay. 11 A. I mean this could be within a certain 12 variation about the radiologist, there may be a 13 little different view of one impression from one 14 radiologist versus another because it was read by 15 two different radiologists, too. 16 Q. Now, can the conditions seen on the 17 March 22, 2006 MRI, the one that appears to be 18 consistent with your opinion about the cause of 19 the symptoms, can those conditions be caused by 20 something other than a trauma? 21 A. Yes. 22 Q. What can it be caused by? 23 A. Degenerative changes in the spine can 24 lead to these kind of findings on his exam as 25 well as complaints which has nothing to do with</p>	<p style="text-align: center;">59</p> <p>1 problems as a result of these kind of findings so 2 that it may not be symptomatic is what I'm 3 saying. 4 Q. Right. The opinion that you expressed 5 earlier about the cause of pain being the facet 6 hypertrophy, was that based on the MRI and the 7 complaints of pain into the trapezius? 8 A. I try to put the two things together 9 and say how can I explain based on this patient's 10 complaint and the MRI findings on what is the 11 most likely reason and this is what I came up 12 with so putting the two things together is why I 13 made that impression. 14 Q. Okay. All right. Well, we covered 15 your October 3, 2006 injection and we briefly 16 touched on the October 11, 2006 plan for the 17 pulsed radiofrequency. 18 A. Right. 19 Q. And we didn't discuss the plaintiff's 20 response to that pulsed radiofrequency, what you 21 called the three for one. 22 A. Okay. 23 Q. What was the response? 24 A. Are we talking about January 10th, 25 2007?</p>
<p style="text-align: center;">58</p> <p>1 an accident or could have been due to something 2 unrelated to that specific accident or he could 3 be just born with that and it may have nothing to 4 do with an accident at all. 5 Q. Okay. Would it be fair to say that 6 given Mr. Simao's age that the findings in the 7 March 22, 2006 MRI are consistent with 8 age-appropriate degeneration? 9 MR. PALMERO: Objection, vague and 10 ambiguous as to form. You can answer. 11 THE WITNESS: I think that these kinds 12 of findings can be found in anyone in his age 13 group and not necessarily be a physical problem 14 as in causing these kind of findings that we find 15 with this particular patient. 16 So, in other words, if you scan a 17 hundred people as this gentleman 40 plus age 18 group you'll find these kind of findings pretty 19 typically. I mean maybe in about 15 percent of 20 the people you scan they'll come up with these 21 kind of findings that this March 22nd, 2006 22 findings show. But out of those 15 percent of 23 the people that come up with this kind of 24 evaluation on the MRI there may only be one or 25 two percent of people that have any kind of</p>	<p style="text-align: center;">60</p> <p>1 Q. Actually the follow-up record I have 2 after October 11 is the -- oh, no, you are right. 3 There was a follow up on November 8 and then the 4 procedure was done on November 18, correct? 5 A. Correct, yes. 6 Q. Yes, let's go I guess now to January 7 and there I guess we'll find what his response to 8 the injection was, right? 9 A. Right. So he did find it beneficial. 10 It did seem to help during that period of two 11 months from that pulsed radiofrequency procedure 12 and -- and the other things that we tried to 13 treat him with which included the antidepressant 14 called Cymbalta did not seem to make any 15 difference one way or the other and he has not 16 had any problems with the migraines or requiring 17 the usage of Fiorinal. 18 So actually on that last January 10th 19 visit that was the one that had the physical exam 20 which basically said that it was normal, that 21 there wasn't any significant findings on it. 22 Q. Okay. And at that time your plan was 23 to follow up in three months? 24 A. Uh-huh. 25 Q. And I see that he returned March 22,</p>

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<p style="text-align: center;">61</p> <p>1 2007.</p> <p>2 A. Right.</p> <p>3 Q. What happened at that visit?</p> <p>4 A. So it was a little sooner than three</p> <p>5 months but not unusual in the sense that</p> <p>6 typically these injections or these procedures --</p> <p>7 I should say the pulsed radiofrequency can last</p> <p>8 two or three months so that it's not surprising</p> <p>9 that it wore off after two months. Actually it</p> <p>10 lasted longer than two months because it was done</p> <p>11 in November so it was really quite good actually.</p> <p>12 Q. It was actually four months?</p> <p>13 A. Yeah.</p> <p>14 Q. So what happened on the March 22 visit?</p> <p>15 A. On March 22nd he said that basically he</p> <p>16 wants to try to repeat it, that procedure, the</p> <p>17 pulsed radiofrequency since it did work and if he</p> <p>18 didn't have any benefit he would consider having</p> <p>19 surgery to fix the problem but he didn't really</p> <p>20 want to have surgery so we went ahead and</p> <p>21 scheduled the pulsed radiofrequency procedure</p> <p>22 again and that was on March 27th, 2007.</p> <p>23 Q. All right. And what was the</p> <p>24 plaintiff's response to that repeat?</p> <p>25 A. He was seen in follow up on April 9th,</p>	<p style="text-align: center;">63</p> <p>1 hypertrophy, it may have nothing to do with that.</p> <p>2 It may just be he's got chronic tension in his</p> <p>3 neck and, therefore, those muscles became trigger</p> <p>4 points. So the short answer is I don't know.</p> <p>5 Q. Okay.</p> <p>6 A. The description of why it may be is</p> <p>7 because of that reason though is that he may have</p> <p>8 these points underlying the problem and it just</p> <p>9 became more clear to him that these were becoming</p> <p>10 a problem because the other pain was gone.</p> <p>11 Q. I see. All right. So you gave him the</p> <p>12 trigger point injections?</p> <p>13 A. And prescribed some pain medications.</p> <p>14 Q. And told him to follow up?</p> <p>15 A. Come back in two months so he did come</p> <p>16 back in two months on June 4th, 2007 and he said</p> <p>17 he stopped the pain medication because of side</p> <p>18 effects. Usually it's because of nausea or</p> <p>19 constipation or being confused, that's typically</p> <p>20 why people will stop and I think that's probably</p> <p>21 what he was experiencing, some or all of those</p> <p>22 symptoms, and he pretty much knew what to do as</p> <p>23 far as trying to do physical exercises because he</p> <p>24 didn't want to go back to physical therapy and</p> <p>25 the idea was to go ahead and schedule a repeat</p>
<p style="text-align: center;">62</p> <p>1 2007 and it improved his left shoulder and</p> <p>2 trapezial area. He rated his pain at three out</p> <p>3 of ten instead and now he specifically stated a</p> <p>4 very discreet area of pain along the left medial</p> <p>5 scapula and paravertebral area at C2 but I felt</p> <p>6 that that was unrelated to the C4 procedure that</p> <p>7 we did the pulsed radiofrequency, that it was</p> <p>8 more of a muscle problem as in a trigger point.</p> <p>9 Q. Okay. What was your plan after</p> <p>10 examining him?</p> <p>11 A. Well, we did go ahead and do the</p> <p>12 trigger point injection on that visit and I was</p> <p>13 going to go ahead and give him some medication to</p> <p>14 take care of other break-through pain he may have</p> <p>15 been experiencing besides that specific C4</p> <p>16 procedure pain or trapezial pain.</p> <p>17 Q. Do you know what caused that muscle</p> <p>18 pain?</p> <p>19 A. Sometimes it can be just by the fact</p> <p>20 that you relieve the other more significant</p> <p>21 intense pain that it comes out. It may have been</p> <p>22 there all long but he just didn't notice it</p> <p>23 because the other pain was so much stronger.</p> <p>24 So I don't know if it was anything to</p> <p>25 do with the initial impression of the C3-4 facet</p>	<p style="text-align: center;">64</p> <p>1 since it worked well and it was starting to wear</p> <p>2 off.</p> <p>3 Q. Repeat the --</p> <p>4 A. Pulsed radiofrequency left C4, yes.</p> <p>5 Q. Okay. And that was done --</p> <p>6 A. June 12th.</p> <p>7 Q. What was the plaintiff's response to</p> <p>8 the June 12 injection?</p> <p>9 A. According to the follow-up note it was</p> <p>10 better and supposedly according to this follow-up</p> <p>11 phone call it was 20 to 30 percent better on the</p> <p>12 June 13th and then he was seen it looks like</p> <p>13 June 18th he was complaining of four to five out</p> <p>14 of ten neck and shoulder pain on the left and it</p> <p>15 was decided that because the pain was coming back</p> <p>16 and, you know, he didn't want to keep doing these</p> <p>17 every two or three months that he would consider</p> <p>18 having surgery done so that's when Dr. McNulty's</p> <p>19 office was called back and he did have trigger</p> <p>20 point injection it looks like as well on that</p> <p>21 visit, June 18th, 2007.</p> <p>22 Q. Did you ever see him after the</p> <p>23 June 19th referral to McNulty?</p> <p>24 A. I thought I saw him in August before I</p> <p>25 left and I don't see the note from that and so</p>

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<p style="text-align: center;">65</p> <p>1 I'm not sure if he made it or not but I thought I</p> <p>2 saw him before I left so as far as the records go</p> <p>3 it stops there.</p> <p>4 Q. Okay.</p> <p>5 A. But I thought I had him scheduled there</p> <p>6 for the last day I was supposed to be there or</p> <p>7 the week before, I can't remember that exactly</p> <p>8 but I thought I had him scheduled for one more</p> <p>9 visit before I left in August. Do you have any</p> <p>10 more records?</p> <p>11 MR. PALMERO: That's what I have.</p> <p>12 THE WITNESS: Okay.</p> <p>13 Q. (BY MR. ROGERS) What can be done to</p> <p>14 repair facet hypertrophy?</p> <p>15 A. Nothing to repair it. Surgically you</p> <p>16 would basically remove it. You would take that</p> <p>17 facet out so you just cut the bone away and then</p> <p>18 you may or may not fuse that level depending on</p> <p>19 how much you have to remove and what the</p> <p>20 underlying disc is. If the disc is also bulging,</p> <p>21 they would typically do a disectomy and remove</p> <p>22 that facet and also do a fusion.</p> <p>23 Q. Okay.</p> <p>24 A. That gets into the orthopedic surgery</p> <p>25 or spine surgery specialty which I don't really</p>	<p style="text-align: center;">67</p> <p>1 enough that he didn't want to keep on doing</p> <p>2 injections or take medications and he wanted to</p> <p>3 try to get a fix and I said, well, the only</p> <p>4 chance there may be for a fix is surgery but</p> <p>5 again it still may not take care of the problem</p> <p>6 so that's what I did explain to him and exactly</p> <p>7 what he wound up doing I don't know but I did</p> <p>8 give him the option of going to see Dr. McNulty</p> <p>9 to see if there was a surgery that could fix the</p> <p>10 problem.</p> <p>11 Q. Okay. Now, at the outset of the</p> <p>12 deposition you commented that you've done</p> <p>13 discograms before but only on the lumbar spine.</p> <p>14 A. Yes.</p> <p>15 Q. Why not on the cervical spine?</p> <p>16 A. There's a significant amount of risk in</p> <p>17 doing a cervical discography in that the spinal</p> <p>18 cord is so much closer to that disc as opposed to</p> <p>19 the lumbar level.</p> <p>20 Anatomically there's much less room for</p> <p>21 error to put a needle in that space and I didn't</p> <p>22 get a lot of training in my fellowship program on</p> <p>23 doing that specific procedure nor did I seek</p> <p>24 additional course or seminar work to try to get</p> <p>25 that training. So I didn't feel that I would be</p>
<p style="text-align: center;">66</p> <p>1 have any expertise in but that's typically what</p> <p>2 is done.</p> <p>3 Q. Have you ever participated in a surgery</p> <p>4 in which part of the facet is removed without</p> <p>5 fusing the disc?</p> <p>6 A. No, I've not seen that ever done --</p> <p>7 Q. Okay.</p> <p>8 A. -- where they take just the facet out.</p> <p>9 I think it creates some instability in the neck</p> <p>10 and, therefore, they feel obligated to fuse it.</p> <p>11 Q. Okay. As of the last time you saw the</p> <p>12 plaintiff, what was your opinion about his future</p> <p>13 treatment?</p> <p>14 A. I warned him that if he has surgery it</p> <p>15 still may be a problem for him as in the pain,</p> <p>16 that it may not completely relieve the pain and I</p> <p>17 told him that I looked at his MRI and noticed</p> <p>18 that there were these findings but I again</p> <p>19 explained to him the same thing I told to you how</p> <p>20 these can be normal findings for people and not</p> <p>21 necessarily be problems and the best thing he</p> <p>22 could do is work through what pain he had rather</p> <p>23 than seeking a surgical option and he agreed to a</p> <p>24 certain extent.</p> <p>25 But then again he thought he was young</p>	<p style="text-align: center;">68</p> <p>1 qualified to do that procedure.</p> <p>2 Q. Are you aware of any studies that</p> <p>3 conclude that cervical discography is less</p> <p>4 reliable than lumbar discography?</p> <p>5 A. My partner or the director, Dr. Seibel,</p> <p>6 had the opinion that there was less likeliness to</p> <p>7 have a correlation between doing a discography in</p> <p>8 the neck and having an adequate result to</p> <p>9 indicate that surgery was a better option based</p> <p>10 on that result.</p> <p>11 So he did not believe that we should be</p> <p>12 doing cervical discography for the specific</p> <p>13 purpose of identifying levels for surgery to fuse</p> <p>14 because there was lack of evidence to support</p> <p>15 that those levels they have identified on</p> <p>16 cervical discography correlated with the levels</p> <p>17 that should be done surgically and long-term</p> <p>18 benefit from that result being that they</p> <p>19 identified the correct level and the patient</p> <p>20 didn't have a problem anymore after they fused</p> <p>21 that level.</p> <p>22 Q. Right. Are you aware of any similar</p> <p>23 opinions in studies published by ASA?</p> <p>24 A. I don't specifically read that</p> <p>25 literature anymore so I don't know those studies</p>

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<p style="text-align: center;">69</p> <p>1 well enough to say yes, I know that's true.</p> <p>2 Q. Are you aware of risk factors that a</p> <p>3 discographer should take into account before</p> <p>4 performing a procedure?</p> <p>5 A. Risk factors as in overall risk for</p> <p>6 having a procedure or specifically just for</p> <p>7 discography?</p> <p>8 Q. For discography?</p> <p>9 A. Well, you wouldn't want to do</p> <p>10 discography on a patient that had a metastatic</p> <p>11 vertebral-type lesion because that could</p> <p>12 potentially cause paraplegia, you could get a</p> <p>13 bleed in that level if you stick the needle close</p> <p>14 to that level that has cancer in it so that would</p> <p>15 be one risk factor that you would identify and</p> <p>16 wouldn't do discography.</p> <p>17 Q. Okay.</p> <p>18 A. The other risk factor may be bleeding</p> <p>19 where somebody has a bleeding disorder and cause</p> <p>20 that -- again could wind up causing paraplegia or</p> <p>21 quadriplegia because someone could bleed into the</p> <p>22 spine and cause lack of circulation in the spinal</p> <p>23 cord so that would be another factor that you</p> <p>24 wouldn't do discography.</p> <p>25 A local infection in the area that you</p>	<p style="text-align: center;">71</p> <p>1 based on that epidural?</p> <p>2 A. There's two ways to look at that. One</p> <p>3 way is to say it should be an independent</p> <p>4 provider that is uninfluenced by the outcome of</p> <p>5 that particular treatment modality as an epidural</p> <p>6 or discography or what have you.</p> <p>7 Other side of that is that the</p> <p>8 orthopedic surgeon may know that patient better</p> <p>9 than anyone else and if they are able to get the</p> <p>10 information directly based on their intervention</p> <p>11 of doing that epidural or discography, that may</p> <p>12 be a better indication of whether they should do</p> <p>13 the surgery to begin with or not. They may have</p> <p>14 a better appreciation of the result is what I'm</p> <p>15 saying based on their doing the procedure than</p> <p>16 having an independent person do the procedure.</p> <p>17 So that's the two sides and if you are</p> <p>18 asking my opinion about which way is the better</p> <p>19 way to do it I would have to say have an</p> <p>20 independent person that specializes in doing</p> <p>21 those procedures is a better way to do it than to</p> <p>22 have a person that may have an influence of doing</p> <p>23 it because it may be viewed as financially in</p> <p>24 their advantage to do the procedure itself</p> <p>25 because then they can justify them doing the</p>
<p style="text-align: center;">70</p> <p>1 are planning to do the discography would be</p> <p>2 another risk factor that you wouldn't do it.</p> <p>3 Some kind of skin or abscess at the back where</p> <p>4 that level is being targeted.</p> <p>5 Q. Let me redirect your attention to</p> <p>6 issues more akin to the case at hand.</p> <p>7 Are you aware of any studies of false</p> <p>8 positives among people involved in litigation</p> <p>9 when it comes to discography?</p> <p>10 A. From what I know in general about pain</p> <p>11 management I would say that there is a</p> <p>12 significant amount of secondary gain issues that</p> <p>13 can come into these kinds of cases where you do</p> <p>14 have a lawsuit and doing that procedure in</p> <p>15 support of doing surgery or something else to get</p> <p>16 some kind of settlement or some kind of outcome</p> <p>17 in favor of that patient's case, yes, I am</p> <p>18 familiar with some of those studies.</p> <p>19 Q. Okay. Were you doing discograms back</p> <p>20 at the time you were treating the plaintiff?</p> <p>21 A. Yes, in the lumbar area.</p> <p>22 Q. Is there any concern in the medical</p> <p>23 community with surgeons doing their own</p> <p>24 epidurals? I mean a surgeon doing an epidural on</p> <p>25 a patient and then making a surgical decision</p>	<p style="text-align: center;">72</p> <p>1 surgery.</p> <p>2 Q. Is there any code or rule of ethics in</p> <p>3 the medical community that would prohibit a</p> <p>4 surgeon from doing his own epidural to base his</p> <p>5 decision?</p> <p>6 A. I'm not aware of anything like that as</p> <p>7 far as a code of ethics in medicine that says</p> <p>8 they can't do it.</p> <p>9 Q. Okay.</p> <p>10 A. I know that lately Dr. McNulty has been</p> <p>11 doing some of his own discographies and epidural</p> <p>12 injections and facet joint injections and that</p> <p>13 topic was brought up but that was the response</p> <p>14 that he may know those patients better than the</p> <p>15 person that he refers them to to do those kind of</p> <p>16 procedures and they don't always do exactly what</p> <p>17 he asks them to do as far as the kind of</p> <p>18 procedure that's ordered.</p> <p>19 Q. Okay. All right. Now, I've asked you</p> <p>20 to look at the medical records that Southwest has</p> <p>21 and just so you know, since the plaintiff treated</p> <p>22 with you he went with Dr. McNulty for a time and</p> <p>23 then left him and went to Dr. Grover. Do you</p> <p>24 know Dr. Grover?</p> <p>25 A. I know -- I don't know him personally</p>

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<p style="text-align: center;">73</p> <p>1 but I know of him.</p> <p>2 Q. Okay.</p> <p>3 A. So I have not done anesthesia for him</p> <p>4 but I know he's a spine surgeon and I know --</p> <p>5 I've seen him around.</p> <p>6 Q. Okay. And the plaintiff testified</p> <p>7 recently that he isn't certain what his future</p> <p>8 plans are but that he will consider undergoing</p> <p>9 neck surgery and Dr. Grover has found that the</p> <p>10 plaintiff is a candidate for a two-level cervical</p> <p>11 fusion at C3-4 and C4-5. So at the time we are</p> <p>12 uncertain where the plaintiff is going to go.</p> <p>13 Now, based on the treatment that you've</p> <p>14 provided and you may have already answered this,</p> <p>15 would you have any concerns about recommending a</p> <p>16 two-level fusion to this patient being treated?</p> <p>17 A. Yes, because if that MRI that you</p> <p>18 showed the result for, September 2007, I think it</p> <p>19 was September 24th, that being a normal MRI would</p> <p>20 to me mean that there may be some question as to</p> <p>21 whether or not there really is any kind of</p> <p>22 pathology that can be remedied with surgery but</p> <p>23 again, there may be some interpretation</p> <p>24 differences between one radiologist and another</p> <p>25 and without seeing the films myself I couldn't</p>	<p style="text-align: center;">75</p> <p>1 surgical procedure.</p> <p>2 Q. And have you already given the bases</p> <p>3 for that opinion or is there something you would</p> <p>4 add to that in addition to what you already said?</p> <p>5 A. I think that having the benefit of</p> <p>6 knowing that this is a legal matter now would</p> <p>7 even more likely give -- would allow me to give</p> <p>8 the opinion that it would probably be in his best</p> <p>9 interest not to have surgery because I think that</p> <p>10 there are some secondary-type gains that are</p> <p>11 being sought by considering surgery in this</p> <p>12 particular legal case.</p> <p>13 It almost validates some kind of injury</p> <p>14 that took place as opposed to, well, this may</p> <p>15 have been something that he had all long and has</p> <p>16 nothing to do with this accident that took place</p> <p>17 on April 15, 2005.</p> <p>18 Q. On that front I want to ask you some</p> <p>19 questions about the incident itself. Do you know</p> <p>20 anything about the car accident?</p> <p>21 A. The details, no, other than him being</p> <p>22 struck from behind like it said in the note on</p> <p>23 April 15th, I don't know anything more than that.</p> <p>24 Q. Okay. Now, the records reflect the</p> <p>25 property damage to my client's car was roughly</p>
<p style="text-align: center;">74</p> <p>1 make an opinion like that but just going by what</p> <p>2 records you have shown me I would have some</p> <p>3 reservation about saying that that would be an</p> <p>4 appropriate surgery.</p> <p>5 Q. Now, you testified earlier about</p> <p>6 concerns you had about surgery in a more generic</p> <p>7 sense involving this plaintiff and your</p> <p>8 conversation with him near the end of treatment.</p> <p>9 Would those same concerns that you expressed to</p> <p>10 your patient apply to this two-level fusion --</p> <p>11 A. Yes.</p> <p>12 Q. -- as it would to any procedure?</p> <p>13 A. Especially this specific patient and</p> <p>14 the information that we've gone over, I would</p> <p>15 definitely have a reservation on recommending</p> <p>16 surgery to him.</p> <p>17 Q. Okay. There's some patients who</p> <p>18 medical providers deem to be more appropriately</p> <p>19 handled by ongoing pain management.</p> <p>20 A. Right.</p> <p>21 Q. When you last saw the plaintiff, what</p> <p>22 was your opinion about the appropriate future</p> <p>23 care?</p> <p>24 A. I think that pain management would</p> <p>25 probably be a better option for him than having a</p>	<p style="text-align: center;">76</p> <p>1 \$780 and consisted of a bent bumper.</p> <p>2 MR. PALMERO: Just for the record there</p> <p>3 was some -- we may not want to get into it just</p> <p>4 so it's not misleading remember the cage behind</p> <p>5 his car.</p> <p>6 MR. ROGERS: I'll get into it, I'm</p> <p>7 talking about my client's car here.</p> <p>8 MR. PALMERO: Okay.</p> <p>9 Q. (BY MR. ROGERS) And I'll add to this</p> <p>10 and include what plaintiff's counsel just</p> <p>11 mentioned. Now, the records further demonstrate</p> <p>12 that the plaintiff reports that nothing was</p> <p>13 broken in his car, no glass or anything like</p> <p>14 that, that he didn't lose consciousness, that he</p> <p>15 hit his head on a cage behind his seat in the car</p> <p>16 but the medical records show no signs of a scalp</p> <p>17 hematoma.</p> <p>18 MR. PALMERO: I'll object as far as</p> <p>19 misstating what the medical records are saying</p> <p>20 but you can answer.</p> <p>21 Q. (BY MR. ROGERS) All right. There's a</p> <p>22 CT of the head taken that was normal.</p> <p>23 A. Right.</p> <p>24 Q. You saw that --</p> <p>25 A. I saw that.</p>

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<p style="text-align: center;">77</p> <p>1 Q. -- in the Southwest records and then a 2 follow-up brain MRI that was normal? 3 A. Yes, I saw both those records. 4 Q. The cervical and shoulder x-rays that 5 were taken -- 6 A. Were normal. 7 Q. -- were normal. 8 And in your opinion -- oh, pardon me, 9 let me add to that, there's this delay in 10 reporting of these symptoms? 11 MR. PALMERO: I object to that as well 12 because testimony in the medical records are my 13 client's testimony and the medical records aren't 14 exactly the same. My client indicated that he 15 had pain but he was more worried about the 16 occipital pain in his head at that point and not 17 his neck pain. 18 Q. (BY MR. ROGERS) Okay. So the 19 plaintiff says. The medical records, however, 20 show that there were no complaints for that 21 six-month period we earlier discussed of neck and 22 shoulder symptoms. 23 Now, your opinion in this case is that 24 the plaintiff's complaints are likely related to 25 a facet hypertrophy?</p>	<p style="text-align: center;">79</p> <p>1 I think in the first presentation in 2 April and maybe even through May or later up 3 until maybe six months after that may have been 4 directly something related to the accident but 5 then after that first six months it didn't seem 6 to be as much of a problem, those occipital pains 7 that he first mentioned on that accident date. 8 So directly answering your question in 9 my opinion I don't believe that the facet 10 hypertrophy is the result of the accident itself 11 and I don't think that the pain that he was 12 having in his left shoulder and his neck was a 13 direct result of the accident. I think that it 14 may have exacerbated that problem but it 15 certainly didn't cause it and that's my opinion. 16 Q. Okay. Let me take a look here. 17 MR. PALMERO: Mind if I ask you a quick 18 question while you are reviewing? 19 MR. ROGERS: No, go ahead. 20 CROSS-EXAMINATION 21 BY MR. PALMERO: 22 Q. If he had this condition prior to the 23 accident, would you expect him to have pain prior 24 to the accident in his neck? 25 A. He may have been experiencing pain in</p>
<p style="text-align: center;">78</p> <p>1 A. Yes. 2 Q. Now, taking this information into 3 account in your opinion did this car accident 4 cause the facet hypertrophy? 5 A. No, it is in my opinion that his facet 6 hypertrophy was either preexisting or has no 7 relation to this particular accident. 8 Q. Okay. 9 A. And the reason that I think the facet 10 hypertrophy is not related to the accident is I 11 don't think you are going to find that kind of 12 degenerative change take place in such a short 13 period of time. I think that was already there 14 and I also think that if you want to explain the 15 occipital headache as a possibility of this 16 accident, there may be some cause and effect to 17 that. 18 I think there is some possibility that 19 he may have suffered the occipital lesion as a 20 result of hitting his head on the cage and, 21 therefore, that may have resulted in like I say 22 occipital neuralgia or something along those 23 lines but the fact is that was never really much 24 of a major complaint later in the times that I 25 saw him as opposed to when he first presented.</p>	<p style="text-align: center;">80</p> <p>1 his left shoulder and his neck even before this 2 accident but it may have never really been 3 brought to his attention to complain about it 4 until something that precipitated this particular 5 problem came about as in there can be some issues 6 here that he's going to gain something if he 7 mentions something with his neck and his arm 8 because of the accident than if he didn't bring 9 it up at all. I do think there's some secondary 10 gain issue here. 11 Q. Right, but people get injured all the 12 time and just because they seek recovery doesn't 13 mean they are being dishonest about stuff even if 14 they are going to gain or not gain. Wouldn't you 15 agree even a substantial amount of money isn't 16 worth having a significant pain or needing a 17 surgery or anything like that? 18 MR. ROGERS: Just one moment. 19 Objection, compound but go ahead and answer. 20 THE WITNESS: You are right that 21 somebody could not have a complaint and just say 22 it's because I want to complain or there's some 23 other kind of event to initiate the complaint 24 like an accident but I think that pain is -- is a 25 very complicated thing and there's more issues</p>

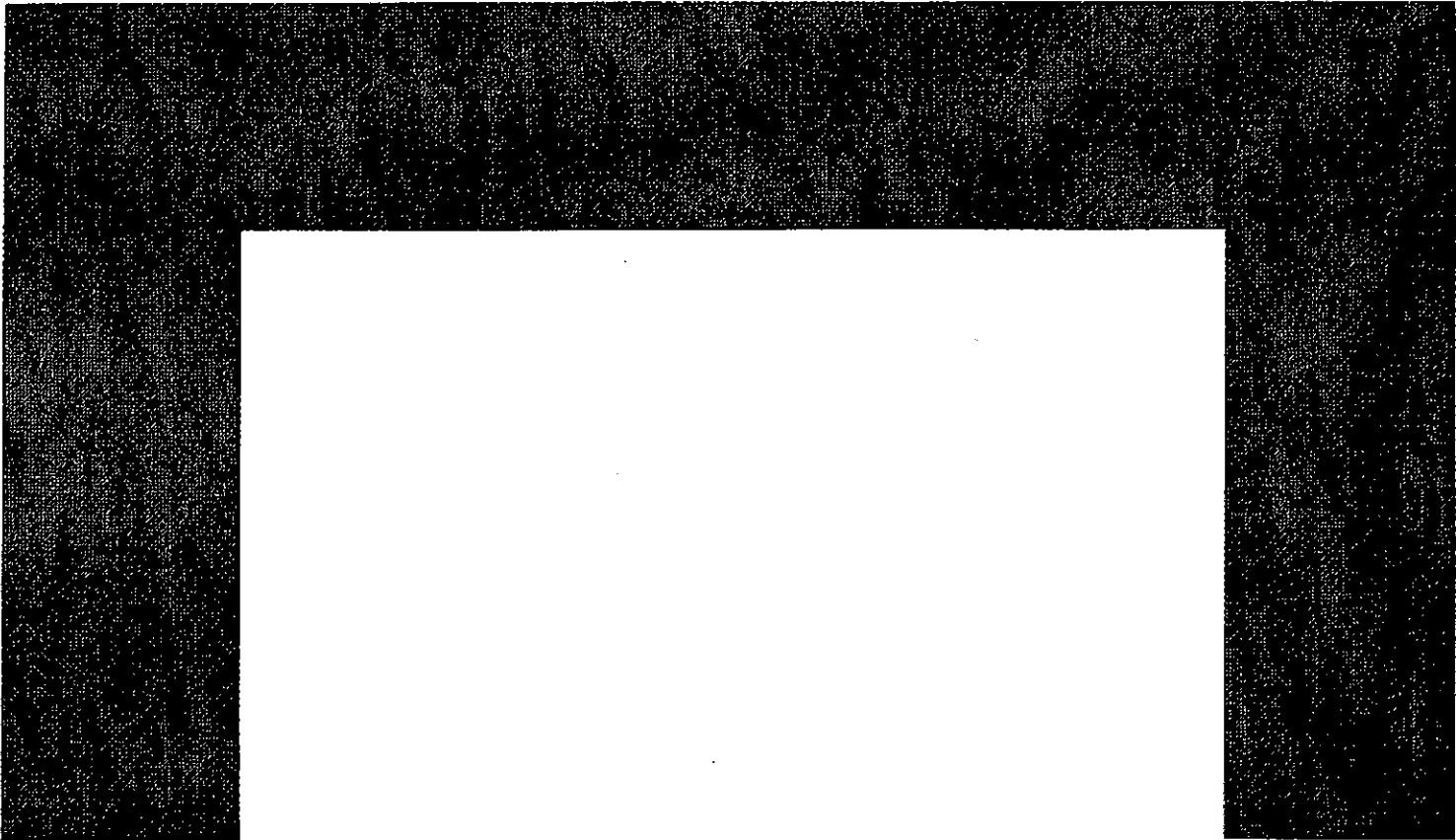
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<p style="text-align: center;">81</p> <p>1 than the physical things to explain it than the 2 other issues as in psychological issues or these 3 legal issues and I think those are equally as 4 important if not more important than the physical 5 things. 6 So when you say, okay, is this guy 7 complaining because he had the accident or is he 8 complaining because he's got some kind of 9 psychological problem in him that makes him 10 complain and my answer is it's both, it's because 11 you have the psychological drive to say there's 12 something to be gained like this accident and 13 there may be some physical thing such as this, 14 the facet hypertrophy that is causing the 15 problem. 16 But again when it comes down to what is 17 my opinion, my opinion is he didn't have this 18 facet hypertrophy as a result of this particular 19 accident that he was involved in in April of 2005 20 and I don't think that the pain problem was 21 something that he would have been bringing up had 22 he not had this accident, okay, but I think it's 23 not necessarily a direct result of the accident 24 is what I'm saying. 25 Q. Now, today you've only reviewed the</p>	<p style="text-align: center;">83</p> <p>1 Q. And you also indicated you didn't do a 2 full physical examination of my client, correct? 3 A. Yes. 4 MR. PALMERO: Okay. 5 MR. ROGERS: Yes, I don't have anymore 6 questions. So let's go off. That's it. 7 THE COURT REPORTER: Do you want a 8 copy? 9 MR. PALMERO: Yes, of course. 10 (Thereupon the taking of the 11 deposition was concluded at 6:32 12 o'clock p.m.) 13 * * * * 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: center;">82</p> <p>1 records of Southwest Medical, is that correct? 2 A. And that is limited, yeah, by what 3 happened right around April 15th, yes, Southwest 4 Medical. 5 MR. ROGERS: Let me just interject 6 really quickly that he's reviewed all of 7 exhibit -- 8 MR. PALMERO: Are we attaching it as an 9 exhibit? 10 MR. ROGERS: No, it's Exhibit 4 to the 11 plaintiff's ECC production. 12 MR. PALMERO: But he hasn't looked at 13 everything you've given him. 14 MR. ROGERS: Just Exhibit 4 I think. 15 THE WITNESS: Right. I don't know if 16 just Exhibit 4. 17 MR. ROGERS: So whatever radiology 18 reports and things are in there, too? 19 THE WITNESS: Right. 20 Q. (BY MR. PALMERO) And you indicated you 21 personally didn't take a history about this car 22 accident -- 23 A. Correct. 24 Q. -- of my client, correct? 25 A. Yes.</p>	<p style="text-align: center;">84</p> <p>1 CERTIFICATE OF DEPONENT 2 3 4 5 SIGNATURE WAIVED 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

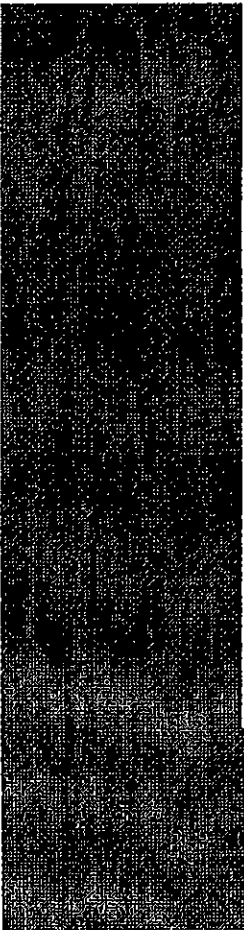
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1 CERTIFICATE OF REPORTER
2 STATE OF NEVADA)
SS:
3 COUNTY OF CLARK)
4 I, Katherine M. Silva, a certified court
5 reporter, Clark County, State of Nevada, do
6 hereby certify: That I reported the taking of the
7 deposition of the witness, Adam A. Arifa, M.D.,
8 commencing on Wednesday, November 5, 2008, at
9 4:28 o'clock p.m.
10 That prior to being examined the witness was
11 by me duly sworn to testify to the truth. That I
12 thereafter transcribed my said shorthand notes into
13 typewriting and that the typewritten transcript
14 of said deposition is a complete, true and
15 accurate transcription of said shorthand notes.
16 I further certify that I am not a relative
17 or employee of an attorney or counsel of any of
18 the parties, nor a relative or employee of an
19 attorney or counsel involved in said action, nor
20 a person financially interested in the action.
21 IN WITNESS WHEREOF, I have hereunto set my
22 hand in my office in the County of Clark, State of
23 Nevada, this 18th day of November, 2008.
24
25 _____
Katherine M. Silva, CCR #203

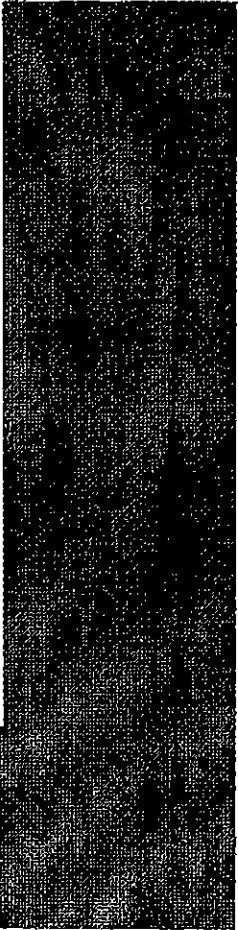
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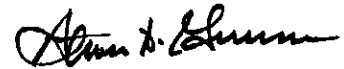
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Attorneys for Plaintiffs

**DISTRICT COURT
 CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A539455
 DEPT. NO.: X

PLAINTIFFS' OPPOSITION TO
DEFENDANT JENNY RISH'S
MOTION IN LIMINE ENFORCING
THE ABOLITION OF THE
TREATING PHYSICIAN RULE

Plaintiffs, WILLIAM AND CHERYL SIMAO, by and through their attorneys of record,
 ROBERT T. EGLET, ESQ., DAVID T. WALL, ESQ. and TRACY A. EGLET, ESQ. of the law

MAINOR EGLET

000213

1 firm of MAINOR EGLET, hereby file this Opposition to Defendant's Motion in Limine
2 Enforcing the Abolition of the Treating Physician Rule.

3
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I.**

6 **SUMMARY OF PERTINENT FACTS**

7 On or about April 15, 2005, Plaintiff, WILLIAM SIMAO, was driving his vehicle on
8 southbound Interstate 15 in the #1 travel lane near the Cheyenne interchange in Las Vegas,
9 Nevada. William had slowed his vehicle to a complete stop for congested traffic when
10 Defendant, JENNY RISH, failed to decrease her speed and collided with the rear end of
11 William's vehicle. As a result of the crash, William suffered severe and debilitating injuries.
12

13 **II.**

14 **ARGUMENT**

15 The "abolition" of the treating physician rule does not preclude Plaintiffs from arguing
16 that greater weight should be given to the evidence presented by Plaintiff's treating physicians
17 because of their care of William and their familiarity with him. The jury should be allowed to
18 allocate the weight of the evidence, and Plaintiff intends to present evidence regarding Plaintiff's
19 condition using the testimony of his treating physicians. "[W]eighing of conflicting evidence is
20 permissible and desirable . . . and *is not tantamount to applying the treating physician rule.*"
21 *McClanahan v. Raley's, Inc.*, 117 Nev. 921, 928 (2001) (emphasis added). Consequently, the
22 questioning of Defendant's medical experts regarding who is in a better position to comment in
23 regard to William's medical condition is not improper and does not contradict Plaintiff's
24 argument regarding the treating physician rule. Importantly, Nevada Law allows a treating
25 physician to testify to things such as causation, future care, and the extent of disability, as part of
26 the treating physician's ordinary care of the patient.
27
28

1 A decision of a United States District Court for the District of Nevada confirms this rule
2 by stating:

3 Since a treating physician's opinions on matters such as "causation, future
4 treatment, extent of disability and the like" are part of the ordinary care of a
5 patient, a treating physician may testify to such an opinion.

6 *Elgas v. Colorado Belle Corp.*, 179 F.R.D. 296, 298 (D. Nev. 1998) (citing *Piper v.*
7 *Harnischfeger Corp.*, 170 F.R.D. 173, 174-75 (D. Nev. 1997) (emphasis added).

8 Further, in *Piper v. Harnischfeger Corp.*, 170 F.R.D. 173 (D. Nev. 1997), the court stated:

9 It is common place for a treating physician, during, and as part of, the course of
10 treatment of a patient to consider things such as the cause of the medical
11 condition, the diagnosis, the prognosis and the extent of disability caused by the
12 condition, if any. Opinions such as at these are part of the ordinary care of the
13 patient

14 *Piper* at 174-75 (citing cases from other courts) (emphasis added).

15 Consequently, the law in Nevada is that a treating physician's opinion as to causation,
16 future treatment, or extent of disability is part of the ordinary care of the patient. In like manner,
17 a treating physician's opinions relating to the appropriateness of care from other treating
18 physicians, if essential to their treatment and care of the patient, should be admissible as
19 statements made in the course of medical care and treatment. The jury is entitled to hear and
20 weigh this evidence.

21 Treating physicians, unlike medical experts, determine the source of injury, and consider
22 the past care of the patient in formulating their initial diagnosis. For example, if a patient
23 presents to the doctor complaining of pain in his or her side, the doctor would want to know
24 whether the patient was subjected to any recent trauma, was treating with another physician for
25 the pain, if the prior treatment was appropriate or helpful, and/or had a prior history of side pain.
26 If the patient was not subjected to trauma, it is likely that the pain stemmed from an internal
27 source, perhaps kidney stones or kidney failure, and the physician would certainly use
28

1 information gathered regarding any prior care in order to render an appropriate and thorough
2 diagnosis based partially on the prior care and treatment.

3 As such, a treating physician gains insight in a patient's medical history, response to
4 treatment, and injuries, and is in a unique position to determine the appropriateness of care
5 rendered by another physician and would have opinions based on that care. A treating physician
6 is also in a unique position of evaluating all of the relevant factors and preparing a diagnosis.
7 Nevada law allows a treating physician to offer all opinions relating to that physician's care and
8 treatment rendered to a patient, including opinions regarding care rendered by other physicians.
9

10 It is a well established rule in Nevada that expert witnesses are granted reasonably wide
11 latitude in the opinions or conclusions he or she can state. *See* NRS 50.275; *Brown v. Capanna*,
12 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989). And, where medical opinions of other doctors
13 were essential to the treating physician's proper care and treatment of his patient, he may
14 comment on that care. Any opinions held by a treating physician that are necessary for proper
15 care and treatment of Plaintiff are appropriate to present to the jury. *Papa v. Brodsky*, 35 Phila.
16 501, 503 (Pa. C.P. 1998).
17

18 It is Plaintiffs' intention to elicit testimony from William's treating physicians in regard
19 to their treatment of him, what they relied upon in determining what care to provide to him and
20 their evaluation of the relevant factors in determining his diagnosis and the appropriate care that
21 should be rendered to him. Because of the unique position William's treating physicians are in, it
22 is completely appropriate under Nevada law to argue to the jury that it should afford greater
23 weight to this evidence than to Defendant's medical expert(s). As set forth in *McClanahan*,
24 "such weighing of conflicting evidence is permissible and desirable...and is not tantamount to
25 applying the treating physician rule." *McClanahan* at 928.
26
27
28

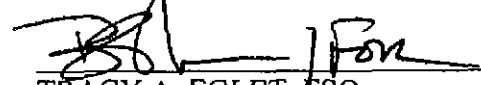
III.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that Defendants' Motion in Limine Enforcing the Abolition of the Treating Physician Rule be DENIED.

DATED this 9 day of February, 2011.

MAINOR EGLET


TRACY A. EGLET, ESQ.

CERTIFICATE OF SERVICE

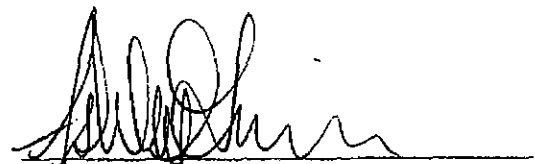
Pursuant to NRCP 5(b), I certify that I am an employee of Mainor Eglet, and that on this 4 day of February, 2011, service of PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION IN LIMINE ENFORCING THE ABOLITION OF THE TREATING

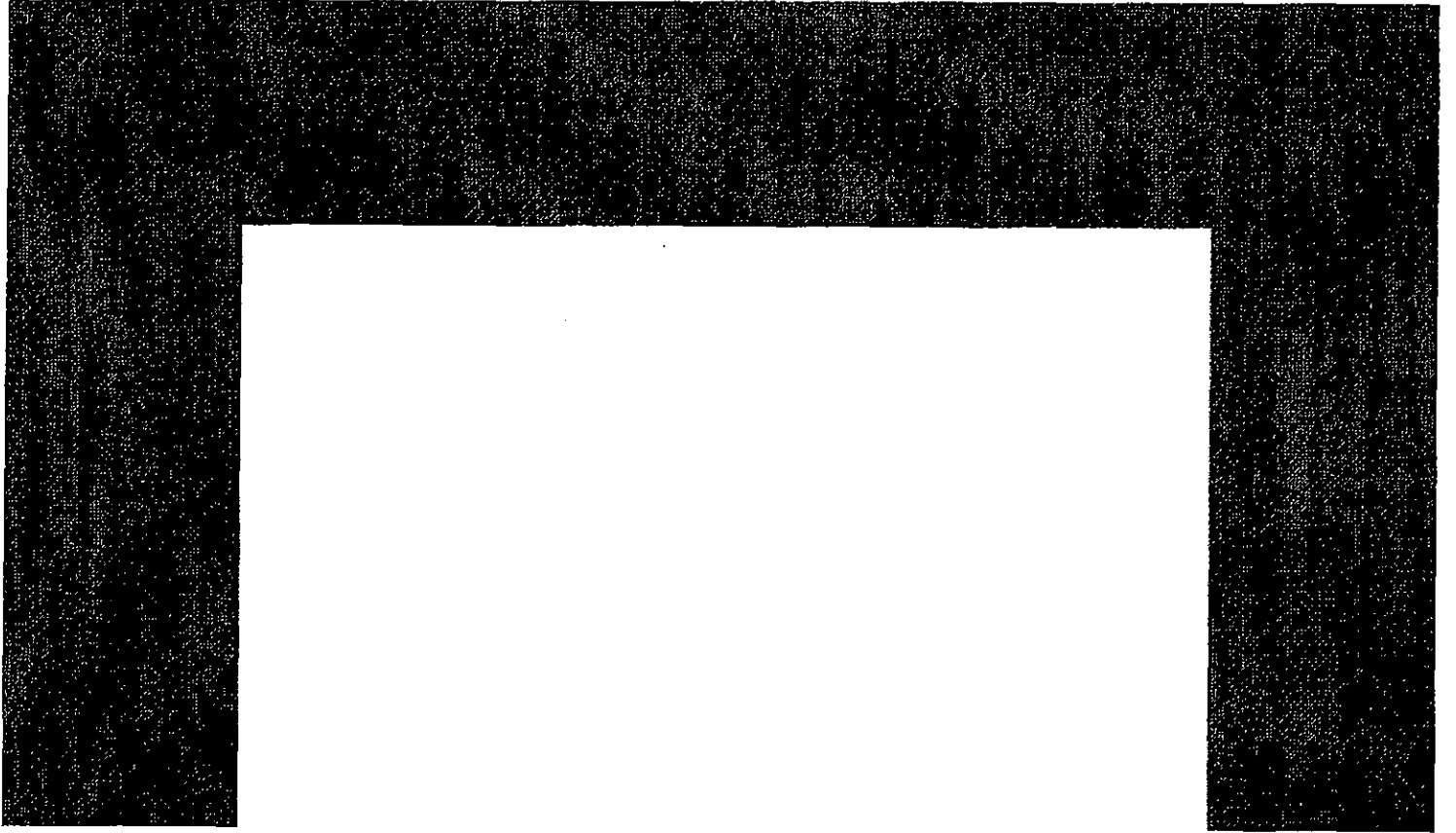
PHYSICIAN RULE was made by depositing a true and correct copy of same into the U.S.

Mail, with proper first-class postage affixed, pursuant to the amendment to the Eighth Judicial

District Court Rule 7.26, addressed as follows:

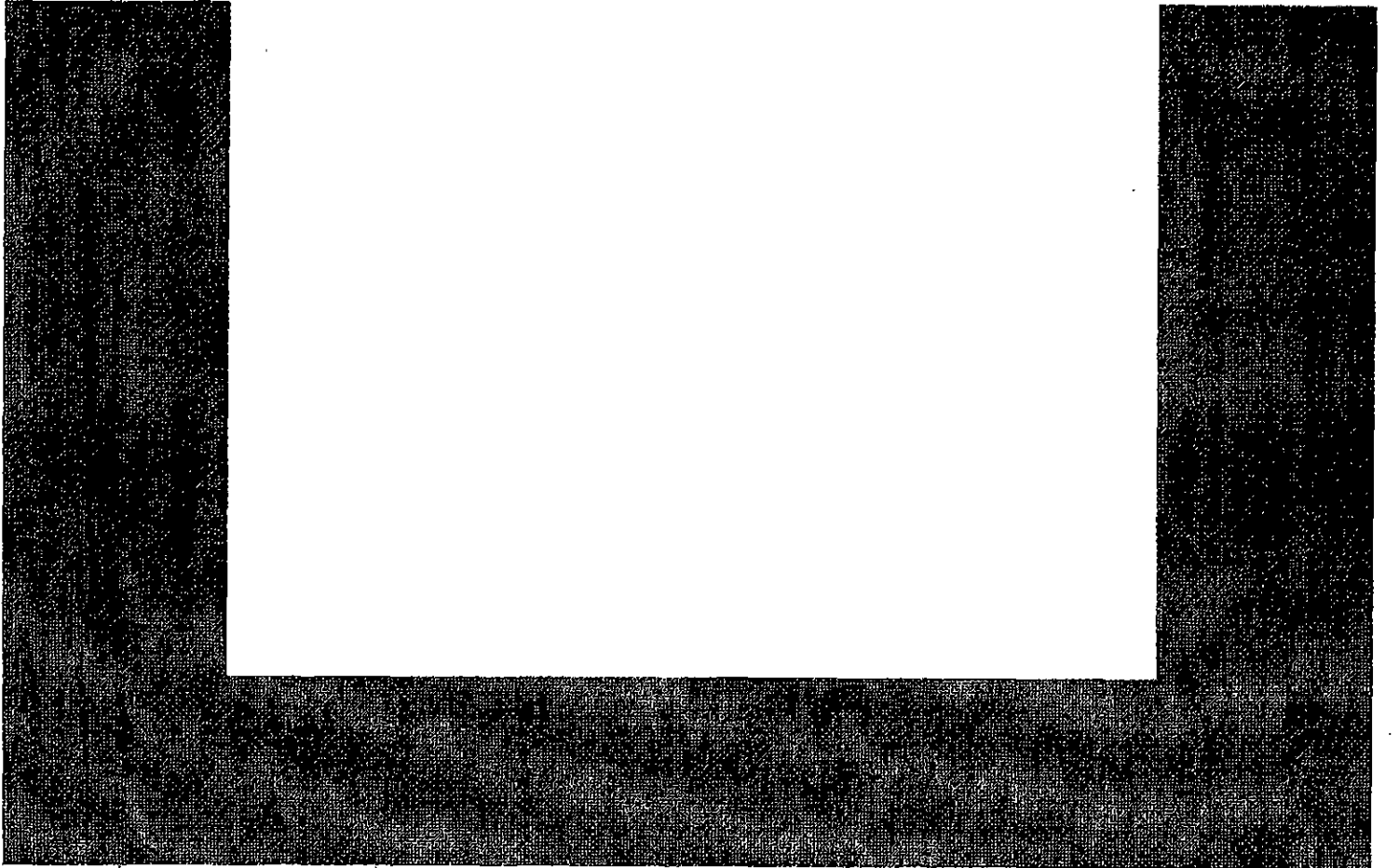
Stephen H. Rogers, Esq.
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An employee of MAINOR EGLET

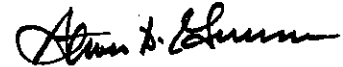


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**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A539455
DEPT. NO.: X

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION IN LIMINE
TO PRECLUDE PLAINTIFFS'
MEDICAL PROVIDERS AND
EXPERTS FROM TESTIFYING
REGARDING NEW OR
UNDISCLOSED MEDICAL
TREATMENT AND OPINIONS**

Plaintiffs, WILLIAM AND CHERYL SIMAO, by and through their attorneys of record,
ROBERT T. EGLET, ESQ., DAVID T. WALL, ESQ. and TRACY A. EGLET, ESQ. of the law

MAINOR EGLET

000219

1 firm of MAINOR EGLET, hereby file this Opposition to Defendant's Motion in Limine to
2 Preclude Plaintiffs' Medical Providers and Experts from Testifying Regarding New or
3 Undisclosed Medical Treatment and Opinions.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I.**

6 **SUMMARY OF PERTINENT FACTS**

7
8 On or about April 15, 2005, Plaintiff, WILLIAM SIMAO, was driving his vehicle on
9 southbound Interstate 15 in the #1 travel lane near the Cheyenne interchange in Las Vegas,
10 Nevada. William had slowed his vehicle to a complete stop for congested traffic when
11 Defendant, JENNY RISH, failed to decrease her speed and collided with the rear end of
12 William's vehicle. As a result of the crash, William suffered severe and debilitating injuries.

13 **II.**

14 **ARGUMENT**

15
16 Defendant's Motion in Limine should be denied because William continues to undergo
17 medical treatment. There is no "undisclosed" medical treatment for injuries of which Defendants
18 are not aware. If any records have not yet been disclosed, it is because the treatment is recent
19 and Plaintiffs are waiting for the records in order to produce them to the defense. Any records
20 and testimony regarding William's ongoing medical treatment are relevant to his past and future
21 damages, and are admissible at trial even if they are disclosed past the close of discovery.

22
23 Compensation for future medical expenses is a recoverable category of damages and
24 must be supported by sufficient and competent evidence. *Yamaha Motor Co., U.S.A. v. Arnoult*,
25 114 Nev. 233, 249, 955 P.2d 661, 671 (1998). Additionally, a plaintiff may recover damages for
26 future pain and suffering as well. *Sierra Pac. Power v. Anderson*, 77 Nev. 68, 75-76, 358 P.2d
27 892, 895-96 (1961) (finding that in order to recover for future pain and suffering, there must be
28

1 sufficient evidence from which the jury can arrive at the conclusion that the party will probably
2 suffer such damages in the future).

3 In *Yamaha*, the Nevada Supreme Court was faced with the issue of whether a jury award
4 for future medical expenses in the amount of \$500,000 was excessive. 114 Nev. at 249, 955 P.2d
5 at 671. The Court held that the award was supported by substantial evidence in the record. *Id.* at
6 249-50, 955 P.2d at 671. In so holding, the court found that plaintiff had presented competent
7 medical testimony as to the accrued medical costs sustained as of the date of trial and that her
8 injuries would require recurrent medical attention. *Id.* Thus, the Nevada Supreme Court found it
9 appropriate for the plaintiff to present evidence of medical costs as of the date of trial.
10

11 Over the course of this litigation, William's treating physicians have reviewed additional
12 medical information, performed additional procedures, physical examinations and diagnostic
13 testing upon William, and may be offering opinions at trial regarding this additional information.
14 William's medical problems are ongoing and he will continue to treat with physicians up to the
15 time of and during trial. As such, his physicians can provide testimony regarding his additional
16 examinations, diagnosis, and recommendations for future treatment, including potential surgery,
17 and prognosis of William.
18

19 Further, Defendants cite an excerpt of Dr. McNulty's deposition in support of their
20 argument. See **Exhibit "A"** to Defendants' Motion. However, the excerpt does not state that
21 William will *never* need surgery again. To the contrary, Dr. McNulty responded to the question
22 of whether William would need future treatment and testified that William needs to follow up
23 with him for *at least* two years. This statement alone indicates that William needs future
24 treatment. Whether or not such future treatment includes surgery has yet to be determined
25 because it depends on his recovery and the success of the previous surgery.
26

27 This is not a case of "ambushing" defense with medical treatment and opinions that have
28

1 never been disclosed. Defendants are clearly aware of the potential of William's future medical
2 treatment, as indicated by Dr. McNulty's deposition and their Motion. Further, William cannot
3 be expected to stop his treatment because discovery has closed and a trial is impending.



4 III.

5 CONCLUSION

6
7 For the reasons set forth above, Plaintiffs respectfully request that Defendants' Motion in
8 Limine to Preclude Plaintiffs' Medical Providers and Experts from Testifying Regarding New or
9 Undisclosed Medical Treatment and Opinions be DENIED.

10
11 DATED this 4 day of February, 2011.

12 MAINOR EGLET

13 
14 TRACY A. EGLET, ESQ. 

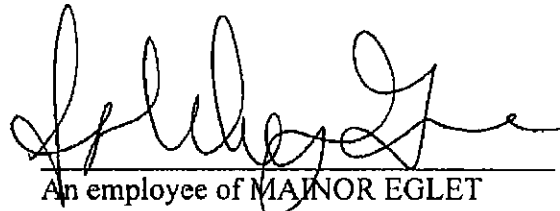
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MAINOR EGLET

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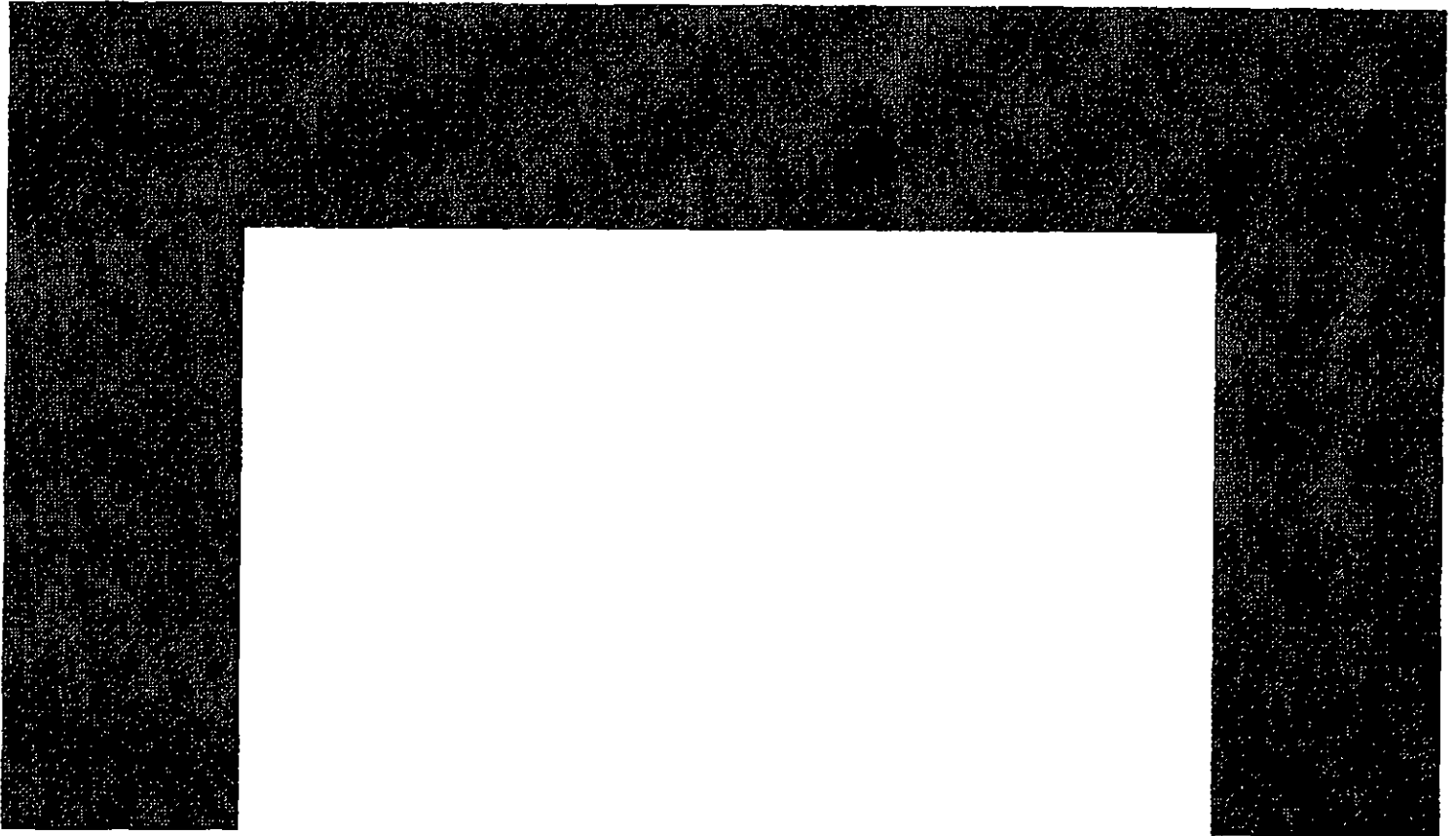
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Mainor Eglet, and that on this 4 day of February, 2011, service of **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO PRECLUDE PLAINTIFFS' MEDICAL PROVIDERS AND EXPERTS FROM TESTIFYING REGARDING NEW OR UNDISCLOSED MEDICAL TREATMENT** was made by depositing a true and correct copy of same into the U.S. Mail, with proper first-class postage affixed, pursuant to the amendment to the Eighth Judicial District Court Rule 7.26, addressed as follows:

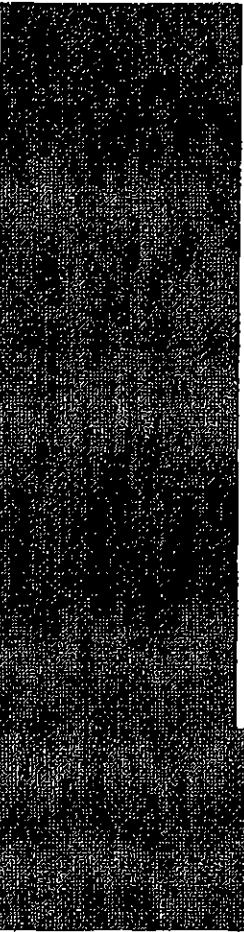
Stephen H. Rogers, Esq.
**ROGERS, MASTRANGELO,
CARVALHO & MITCHELL**
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendants



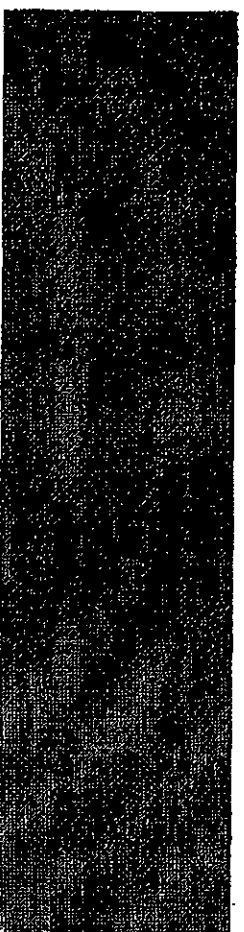
An employee of MAINOR EGLET



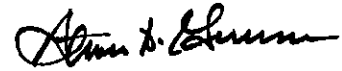
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CLERK OF THE COURT

OPPM

ROBERT T. EGLET, ESQ.

Nevada Bar No. 3402

DAVID T. WALL, ESQ.

Nevada Bar No. 2805

TRACY A. EGLET, ESQ.

Nevada Bar No. 6419

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Fx.: (702) 384-8222

Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A539455

DEPT. NO.: X

**PLAINTIFFS' OPPOSITION TO
DEFENDANT JENNY RISH'S
MOTION TO EXCLUDE THE
REPORT AND OPINIONS OF
PLAINTIFF'S ACCIDENT
RECONSTRUCTION EXPERT,
DAVID INGEBRETSEN**

Plaintiffs, WILLIAM AND CHERYL SIMAO, by and through their attorneys of record,

ROBERT T. EGLET, ESQ., DAVID T. WALL, ESQ. and TRACY A. EGLET, ESQ. of the law

MAINOR EGLET

000225

1 firm of MAINOR EGLET, hereby file Opposition to Defendant's Motion to Exclude the Report
2 and Opinions of Plaintiff's Accident Reconstruction Expert, David Ingebrechtsen.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I.**

5 **SUMMARY OF PERTINENT FACTS**

6 On or about April 15, 2005, Plaintiff, WILLIAM SIMAO, was driving his vehicle on
7 southbound Interstate 15 in the #1 travel lane near the Cheyenne interchange in Las Vegas,
8 Nevada. William had slowed his vehicle to a complete stop for congested traffic when
9 Defendant, JENNY RISH, failed to decrease her speed and collided with the rear end of
10 William's vehicle. As a result of the crash, William suffered severe and debilitating injuries.
11

12 **II.**

13 **ARGUMENT**

14 As set fourth in the attached professional profile of Mr. Ingebrechtsen, he has the following
15 undisputed credentials:
16

- 17 1. M.E. Bioengineering, University of Utah, 2001;
18 2. M.S. Physics, University of Utah, 1986;
19 3. B.S. Mechanical Engineering, University of Utah, 1983;
20 4. Lecture instructor: Physics of the Human Body at the University of Utah;
21 5. Lecture instructor: Modeling and Control of Dynamical Systems at Evans &
22 Sutherland;
23 6. Lab instructor: Ionizing Radiation Transducers at the University of Utah;
24 7. Teaching assistant: statistics at University of Utah;
25 8. Physicist, Mechanical/ Biomechanical Engineer/ Accident Reconstructionist,
26 Collision Forensics & Engineering, Inc., 1993- Present;
27
28

- 1 9. Engineer, Evans & Sutherland, 1986-1993;
- 2 10. Engineer, Hercules Aerospace, 1983-1986;
- 3 11. Engineer, Terra Teck Research, 1981-1983;
- 4 12. Member, The Society of Automotive Engineers;
- 5 13. Member, The National Association of Professional Accident Reconstruction
- 6 Specialists;
- 7
- 8 14. Member, International Society of Biomechanics;
- 9 15. Member, American Society for Testing and Materials; and
- 10 16. Member, American Society of Mechanical Engineers.

11 See Mr. Ingebretsen's CV attached hereto as Exhibit "1."

12 There is little question that Mr. Ingebretsen is a highly educated and qualified accident
13 reconstruction and biomechanical expert. Even Defendant's counsel does not argue that point,
14 instead focuses on the foundation and methodology of Mr. Ingebretsen's opinions. Mr.
15 Ingebretsen has the education, experience and qualifications to testify as an accident
16 reconstruction and biomechanical expert in connection with the instant case, and he used reliable
17 methodology in forming his opinions.
18

19
20 1. The Court Should Allow Scientific Testimony By Experts Where it Will
21 Assist the Trier of Fact to Understand the Evidence and Determine Facts in
22 Issue.

23 There are three requirements a witness must satisfy to testify as an expert: (1) The
24 expert "must be qualified in an area of scientific, technical or other specialized knowledge (the
25 qualification requirement);" (2) the expert's "specialized knowledge must assist the trier of fact
26 to understand the evidence or to determine a fact in issue (the assistance requirement);" and (3)
27 the expert's "testimony must be limited to matters within the scope of [his specialized]
28

1 knowledge (the limited scope requirement)." *Hallmark v. Eldridge*, 189 P.3d 646, 650, 124 Nev.
2 Adv. Rep. 48 (2008) (emphasis added) (citing to NRS 50.275).

3 An expert's opinion will only assist the trier of fact when the expert's opinion is based on
4 reliable methodology. *Id.* at 651. In evaluating reliability, a district court should consider
5 whether the opinion is "(1) within a recognized field of expertise; (2) testable and has been
6 tested; (3) published and subjected to peer review; (4) generally accepted in the scientific
7 community (not always determinative); and (5) based more on particularized facts rather than
8 assumption, conjecture, or generalization." *Id.* at 651-52. If the expert based his opinions upon
9 "the results of a technique, experiment, or calculation, then a district court should also consider
10 whether (1) the technique, experiment, or calculation was controlled by known standards; (2) the
11 testing conditions were similar to the conditions at the time of the incident; (3) the technique,
12 experiment, or calculation had a known error rate; and (4) it was developed by the proffered
13 expert for the purposes of the present dispute." *Id.* at 652.

14
15
16 Nevada law favors the admissibility of expert testimony at trial where it will assist the trier
17 of fact to understand the evidence and to determine facts in issue. In this case, there will be
18 disputed issues as to what injuries William suffered in the subject incident and what treatment he
19 should reasonably undergo for those injuries. This is subject matter which is well outside the ken
20 of a lay jury. Testimony of experts, including medical, biomechanical and accident
21 reconstruction experts, will undoubtedly be of assistance to the jury in deciding these issues. This
22 court should allow Mr. Ingebretsen's expert testimony to be presented to the jury as it is a result
23 of reliable methodology based on facts of the case, and also assists the jury with understanding
24 the case.
25
26
27
28

1 **II. Mr. Ingebretsen has Reviewed Extensive Documents in Connection With This**
2 **Case Which Give Him the Proper Foundation for Rendering Testimony.**

3 In connection with this case, Mr. Ingebretsen has reviewed extensive records including the
4 following:

- 5 1. Police report;
6 2. Complaint;
7 3. Photographs of the Ford Econoline and Chevrolet Suburban;
8 4. Some written discovery information
9 5. Repair invoice for the Ford Econoline
10 6. Deposition of William Simao; and
11 7. Deposition of Cheryl Simao

12 See Mr. Ingebretsen's report at **Exhibit "2."**

13 In addition, Mr. Ingebretsen examined both Mr. Simao's vehicle and Mr. Simao himself.
14 Id. Further, Mr. Ingebretsen has reviewed pertinent professional articles and studies, as well as
15 relied upon his extensive knowledge, training, and ongoing education in forming his expert
16 opinions in this case. Id. Mr. Ingebretsen has definitely reviewed and acquired sufficient
17 information in this case to provide him the necessary foundation for testifying.

18 **III. Mr. Ingebretsen Relied on Examination of the Plaintiff and Plaintiff's Vehicle**
19 **as Well as the Documents Listed Above and He Should be Allowed to Give**
20 **Testimony in That Area Based Upon His Work in This Case.**

21 Defense counsel relies upon the case of *Levine v. Remolif*, 80 Nev. 168 (1964) for
22 the position that Mr. Ingebretsen may not testify regarding the force of impact. As set
23 forth below, this case is inapplicable to the current situation to bar Mr. Ingebretsen's
24 testimony as the facts between these cases and the instant one are very different.

25 In the *Levine* case, supra, the court excluded the testimony of Plaintiff's accident
26 reconstruction expert because the only thing he relied on for his opinions were photographs of the
27
28

1 accident scene and vehicles after they had come to rest, as well as a diagram made by two police
2 officers who gave their version of the movements of the two vehicles prior to and after the
3 impact. Additionally, his testimony was based upon certain tests he made with a Ford car at the
4 scene of the accident several months after the accident. In rejecting the testimony of the accident
5 reconstruction expert, the court found that while the photographs might have accurately depicted
6 the outward appearance of the vehicles immediately after the accident, they did not disclose the
7 damage to the frames of the vehicles. Additionally, the court decided that the diagram drawn by
8 the police officer, was untenable as a basis for his opinion because the officer was inexperienced
9 and untrained in reconstructing automobile accidents.
10

11 The *Levine* case does not apply to the Plaintiff's instant case because Mr. Ingebretsen has
12 not only reviewed photographs, but he has physically inspected the Plaintiff's vehicle, reviewed
13 the repair invoice, which shows exactly the extent of damage that occurred, and read depositions
14 and written discover. Mr. Ingebretsen also met with and examined Plaintiff himself, considering
15 his height and seating position during the time of the crash. This provides substantially more
16 information to Mr. Ingebretsen than was provided to the accident reconstruction expert in the
17 *Levine* case. Therefore, *Levine* is inappropriate as a basis to bar the testimony of Mr. Ingebretsen.
18

19 Mr. Ingebretsen evaluated many different types of evidence in this case in order to gather
20 the facts and form his opinions. Therefore, Defendants' motion is baseless and should be denied.
21

22 III.

23 CONCLUSION

24 Mr. Ingebretsen has multiple opinions in this case, of which Defendant has been apprised
25 by way of his report (Defendant did not choose to take Mr. Ingebretsen's deposition prior to the
26 discovery deadline). His opinions relate to the fields of both accident reconstruction and
27 biomechanics, and his opinions are based upon a number of items: photographs, written
28

1 discovery, deposition testimony, examination of Plaintiff's vehicle and the Plaintiff himself, and
2 Plaintiff's vehicle repair invoice. If Mr. Ingebretsen had only considered one of these categories
3 of documents, perhaps that would not be enough to substantiate his testimony. However, a
4 combination of all the documents which he reviewed and examination of the Plaintiff and his
5 vehicle amply demonstrate that Mr. Ingebretsen has a substantial foundation for his opinions and
6 ability to testify at trial.
7

8 Fairness and justice dictate that Mr. Ingebretsen be allowed to testify at trial. The United
9 States Supreme Court has given its judicial guideline to the effect that judges, while still to be
10 considered as "gate keepers" regarding expert testimony sought to be admitted at trial, should
11 exercise their discretion liberally to allow such testimony to come into evidence. If the opposing
12 party has reservations or concerns about the expert testimony, it can and should be tested by
13 vigorous cross-examination rather than exclusion. In summary, Defendant's Motion to exclude
14 Mr. Ingebretsen should be denied in its entirety.
15

16 DATED this 4th day of February, 2011.
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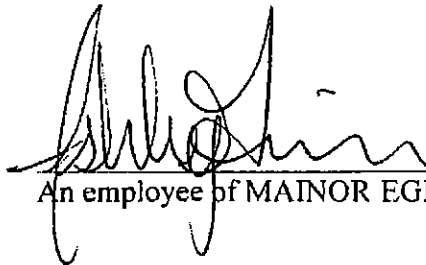
18 MAINOR EGLET

19 
20 TRACY A. EGLET, ESQ.
21
22
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Mainor Eglet, and that on this 4 day of February, 2011, service of **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE THE REPORT AND OPINIONS PLAINTIFF'S ACCIDENT RECONSTRUCTION EXPERT, DAVID INGEBRETSEN** was made by depositing a true and correct copy of same into the U.S. Mail, with proper first-class postage affixed, pursuant to the amendment to the Eighth Judicial District Court Rule 7.26, addressed as follows:

Stephen H. Rogers, Esq.
**ROGERS, MASTRANGELO,
CARVALHO & MITCHELL**
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendants



An employee of MAINOR EGLET

MAINOR EGLET

000232

EXHIBIT “1”

David M. Ingebretsen, M.S., M.E.
Collision Forensics & Engineering, Inc.
 2469 East Fort Union Boulevard, Suite 114
 Salt Lake City, UT 84121
 Telephone: (801) 733-5458
 Facsimile: (801) 733-5491
 Email: dingebr@3dphysics.net

ALL RATES SUBJECT TO CHANGE WITHOUT NOTICE

Rates: General consulting, analysis, trial/arbitration appearance, etc. - \$200.00 per hour plus expenses pro-rated in 0.1 hour increments.

Depositions: (may be conducted at my offices to avoid travel expenses):
 In state: \$250.00 p/hr, pro-rated in 1 hour increments, portal to portal plus mileage and any other travel expenses;
 Out of state: \$1000.00, plus all travel expenses portal to portal (payable in advance).

A 2 (two) hour cancellation fee, plus non-refundable expenses, plus preparation time will be assessed for canceled/changed trials, depositions, and arbitrations when the notice of cancellation/change is not received a minimum of 48 hours in advance of the scheduled appearance.

EDUCATION

University Degrees

- | | |
|-------------------------------|-------------------------|
| • M.E. Bioengineering | University of Utah 2001 |
| • M.S. Physics | University of Utah 1986 |
| • B.S. Mechanical Engineering | University of Utah 1983 |

Continuing Education

- | | | | |
|--|------------|-----------|------|
| • ARC - CSI Crash Conference | (21 CEU's) | ARC - CSI | 2003 |
| • 2001 Summer Bioengineering Conference | (24 hours) | ASME | 2001 |
| • Biomechanics for Collision Reconstruction | (40 hours) | Texas A&M | 1998 |
| • Injuries, Anatomy, Biomechanics & Fed. Regulation | (24 hours) | SAE | 1997 |
| • Special Problems in Accident Reconstruction | (40 hours) | IPTM | 1997 |
| • Computer Aided Multivariable Control System Design | (40 hours) | MIT | 1990 |
| • PC-Crash training | (16 hours) | MEA | 2008 |
| • Mathematica training | (16 hours) | Wolfram | 2008 |

Continuing Education and Experience in the Following Areas:

- Biomechanics, biomaterials, and the effect of dynamic loads and vibration on human tissue
- Failure analysis of human structures, mechanical, electro-mechanical, and electronic devices
- Accident reconstruction
- Anatomy / physiology
- Multibody dynamics
- Vehicle dynamics
- Human perception systems, physics, modeling, and physiology
- Mathematical modeling of dynamical systems

- Physics of imaging systems including use and applications
- Design and implementation of electronic hardware and firmware
- General electronics and electrical engineering principles

TEACHING EXPERIENCE

- Lecture instructor: Physics of the Human Body University of Utah
- Lecture instructor: Modeling and Control of Dynamical Systems Evans & Sutherland
- Lab instructor: Ionizing Radiation Transducers University of Utah
- Lab instructor: Physics of Photography University of Utah
- Teaching Assistant: Statics University of Utah
- Various presentations in the areas of accident reconstruction, investigation, and biomechanics

PROFESSIONAL EXPERIENCE

PHYSICIST

MECHANICAL / BIOMECHANICAL ENGINEER

ACCIDENT RECONSTRUCTIONIST

CF & E, Inc.

1993 - Present

- Evaluate injury claims, determine and analyze mechanisms of trauma from direct impact, vibration, and inertial forces.
- Reconstruct and investigate accidents, determine impact forces, accelerations, changes in velocity, and occupant dynamics.
- General product failure analysis and engineering consulting including automobile systems and other systems and products such as:
 - Investigate, analyze, and determine the failure mode(s) of various vehicle components such as airbags, tires, etc.
 - Investigate, analyze, and determine the failure mode(s) of various human structures.
 - Investigate, analyze, and determine the failure mode(s) of other mechanical and electronic devices such as: coffee makers, electric blankets, garage door openers, and other electric and mechanical devices
- Analyze, interpret, and report data from impact and vibration testing.
- Create 3D animated demonstrations for courtroom use.

ENGINEER

Evans & Sutherland 1986 - 1993

- Developed mathematical models of automobiles and tractor semi-trailer vehicles.
- Programmed these models into a computer for use in training and engineering simulator systems.
- Developed mathematical models of other dynamical systems.
- Developed software to allow communication between a vehicle simulator and an Alliant FX-80 mini super computer allowing an interactive link between the driver in the simulator, the vehicle dynamics model, and the 3D visualization system.
- Designed, developed, and implemented the instrumentation in a vehicle simulator to effect an interactive link between a driver in the vehicle simulator, the vehicle dynamics, and the

real-time 3D visual display.

- Co-authored a proposal, feasibility study, and preliminary budget for a complete truck driver training simulator system.
- Co-developed, designed, and implemented a complete "proof of concept" vehicle simulator system to prove the feasibility of our proposal. This simulator included a vehicle cab with full interactive controls and instruments, a vehicle dynamics model, and real-time 3D visual system.
- Developed and programmed software for a head tracking projection system.
- Developed and programmed mathematical models of a human perception system, including the vestibular and proprioceptive systems for research and control of a full motion simulator system.
- Developed and programmed software for an X-Windows based 3D modeling and rendering software.

ENGINEER

Hercules Aerospace 1983 - 1986

- Designed and developed software, electronic hardware, and mechanical tooling to perform dynamic impact testing of carbon composite Space Shuttle rocket motors. The testing determined the effects of impact loads on the carbon composite material and if the damage threatened the integrity of the rocket motor's structure and measured penetration, acceleration, and vibration.
- Developed and supervised various non-destructive test procedures for empty and loaded rocket motors and other missile components in order to determine failure mode(s) and structural integrity.
- Analyzed the data, and reported the results.
- Designed and implemented the electronic hardware, software, data acquisition systems, mechanical tooling, and documentation for these tests.
- Principle development engineer for the flight instrumentation for the Peacekeeper (MX) missile third stage rocket motor.
- Interpreted the acquired data from static testing of the Peacekeeper third stage to determine performance and structural response of the rocket motor.
- Extensive work regarding testing and analyzing the general integrity of the missile components built by Hercules Aerospace.

ENGINEER**Terra Tek Research 1981 - 1983**

- Supervised the Computer Controlled Testing area.
- Designed and programmed software to dynamically control the testing of re-constituted soil samples for the Defense Nuclear Agency. I compiled, interpreted, analyzed, and reported all the test results to the client.
- Designed and implemented the interface between the computer, servo system, and instrumentation.
- Compiled, interpreted, analyzed, and reported the results of other tests.
- Extensive work regarding mechanical failure analysis

OTHER EXPERIENCE

- Independent testing investigating occupant and vehicle dynamics during low speed rear end collisions.
- Testing investigating occupant and vehicle dynamics during high speed collisions.
- Read, write, and speak the french language.

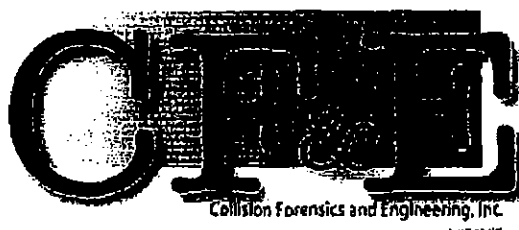
PAPERS

- Co-author "Notes on Real-Time Vehicle Simulation," a text book which accompanied a course taught at the 1989 SIGGRAPH conference.

PROFESSIONAL ORGANIZATION MEMBERSHIPS

- The Society of Automotive Engineers (SAE)
- The National Association of Professional Accident Reconstruction Specialists (NAPARS)
- International Society of Biomechanics
- American Society for Testing and Materials (ASTM)
 - Committee Member of:
 - E07 on Nondestructive Testing
 - E08 on Fatigue and Fracture
 - E28 on Mechanical Testing
 - E30 on Forensic Sciences
 - E48 on Biotechnology
 - E58 on Forensic Engineering
 - F09 on Tires
 - F13 on Pedestrian/Walkway Safety and Footwear
 - F24 on Amusement Rides and Devices
- American Society of Mechanical Engineers (ASME)

EXHIBIT “2”



Ronald L. Probert
Michael S. Anderson

David M. Ingebretsen

2469 E Fort Union Blvd, Suite 114 - Salt Lake City, UT 84121
(801) 733-5458 - FAX: (801) 733-5491 - Las Vegas, NV - (702) 249-1446
www.CFandE.com

April 15, 2009

John E. Palermo, Esq.
AARON & PATERNOSTER, LTD.
2300 West Sahara Avenue, Ste 650, Box 30
Las Vegas, NV 89102

RE: *Simao v. Rish*

Dear Mr. Palermo:

I completed my preliminary analysis of this incident and submit this preliminary report for your consideration. I used standard methods and techniques of investigation as well as applying fundamental principles of engineering, physics, and biomechanics. I drew on my education in mechanical engineering, bioengineering, and physics, and my experience in order to understand and interpret the evidence, facts, and results of this analysis and investigation. All opinions expressed herein are to a reasonable degree of scientific probability unless otherwise indicated.

I will supplement this report with more detail and opinions as appropriate and possible in a timely manner if other written discovery, such as deposition testimony of other individuals, medical records, expert reports from defense experts, and other information is provided.

As of this report, I have examined the following material:

- Police report
- Complaint
- Photographs of the Ford Econoline and Chevrolet Suburban
- Some written discovery information
- Repair invoice for the Ford Econoline
- Deposition of William Simao
- Deposition of Cheryl Ann Simao
- Mr. Simao's vehicle and Mr. Simao

I considered the facts and best evidence contained in the provided documentation as well as my own research in the context of my education and experience. I then performed calculations and analysis to determine the most likely impact speeds, changes in speeds, and accelerations for the vehicles. The analysis I performed relied on calculations made with PC-Crash software by DSD Engineering. This software is based on Newton's Impulse-Momentum method and has been verified against staged collisions and has been used by myself to support my testimony in courts in Utah, California, and Nevada. PC-Crash has been accepted in courts world-wide as a scientific tool for analyzing vehicle

John E. Palermo, Esq.
Simao v. Rish
 April 15, 2009
 Page 2

accidents. Some publications by the Society of Automotive Engineers are given here for reference.

- "Validation of PC Crash – A Momentum-Based Accident Reconstruction Program," Cliff, Montgomery, SAE 960885
- "Reconstruction of Twenty Staged Collisions With PC-Crash's Optimizer," Cliff, Moser, SAE 2001-01-0507
- "Validation of the Coupled PC-Crash-Madymo Occupant Simulation Model," Steffan, 2000-01-0471
- "Data From Five Staged Car-To-Car Collisions and Comparison With Simulations," Bailey, SAE 2000-01-0849
- "The Collision and Trajectory Models of PC-Crash," Steffan, Moser, SAE960886

Further, testing performed has shown that the actual impact during a rear end collision typically occurs over a time frame of between 0.1 and 0.2 seconds. Because of this short time period, the forces can be considered of short duration and impact dynamics methods may be accurately used to study the interaction. PC-Crash implements such a method using Newton's impulse momentum form of his equations. For example, see these papers published by the Society of Automotive Engineers.

- "Low Speed Collinear Impact Severity: A Comparison between Full Scale Testing and Analytical Prediction Tools with Restitution Analysts," Cipriani, Bayan, Woodhouse, Cornetto, Dalton, Tanner, Timbario, SAE 2002-01-0540
- "Modeling of Low-Speed, Front-to-Rear Vehicle Impacts," Brach, SAE 2003-01-0491
- "Rear-End Impact Testing with Human Test Subjects," Braun, Jhoun, Braun, Wong, Boster, Kobayashi, Perez, Hesler, SAE 2001-01-0168

The police report described a rear end accident with injuries and moderate damage to both vehicles which occurred on southbound Interstate 15 in the #1 travel lane on April 15, 2005 at approximately 1510 hours. No environmental, vehicle or roadway conditions were noted as contributing to this traffic accident, and I found no evidence of inappropriate action on the part of Mr. Simao, leaving driver error on the part of Ms. Rish as the sole contributing action to this traffic accident.

Mr. William Simao was driving a 1994 Ford Econoline cargo van and, "slowed down to a complete stop" for congested traffic. Ms. Jenny Rish was driving a 2001 Chevrolet K1500 Suburban behind the Ford and, "failed to decrease her speed and struck" the Ford. Both vehicle were moved prior to NHP arrival and both were retained by their respective drivers and driven from the scene. The police report lists a claimed injury for Mr. Simao in his neck, head, and upper extremity. The airbags did not deploy in the Suburban. The police report estimated an impact speed of 20 mph for the Suburban.

Considering the relative bumper heights and front end dipping due to braking on the Suburban, there was likely good bumper alignment. The damage on the front of the Suburban visible in the photographs

John E. Palermo, Esq.
Simao v. Risk
April 15, 2009
Page 3

is consistent with an aligned bumper to bumper contact, likely involving the trailer hitch on the Ford Econoline. I inspected the hitch assembly on the van and found it was between 17 and 20 inches from the ground. It was a very solid installation including welding of the hitch to the frame of the van. The Suburban front bumper top is 27 inches from the ground. Assuming 3 to 4 inches of front end dipping from braking, the hitch was most likely involved in the contact and therefore would account for reduced damage on the van. Mr. Simao represented to me he had some equipment racks and tools in the back of his van and showed me one of the racks (which had been removed at my inspection). Using the estimated impact speed from the police report of 20 mph, the resulting change in speed for the Ford Econoline was calculated to be 12 mph; 11 mph for the Suburban. An 11 mph change in speed for the Suburban is consistent with non-deployment of the airbag; the lower end of a "gray" region where deployment is possible, but not assured. The Ford would have moved forward approximately 15 feet at

this change in speed, approximately one small to medium car length, assuming moderate braking. It is not known how much space Mr. Simao represented to me he left a car length or more between his vehicle and the vehicle ahead of him and could see the asphalt between the vehicles, consistent this post impact motion. Based on this information and calculations, a 20 mph impact is most likely the upper limit for impact speed and 12 mph would therefore be the upper limit for the change in velocity for the Ford Van.

At the vehicle inspection, I observed Mr. Simao in his van and asked him to sit as he was at the time of the incident. He sat in his seat, leaned over the center console and rested his head in his hand. From this observation, it is clear how his head could, and most likely did strike the cage in this traffic accident. Leaning forward and to his right also places his neck in a position of greater potential harm. This is clearly an "out of position" configuration.

Mr. Simao is 6' 6" tall and was seated in his van, looking ahead, and was unaware of the imminent impact. At impact, he testified his head hit the "cage" behind him as well as his right arm. He is alleging he was injured in this traffic accident and described injury to his neck,



John E. Palermo, Esq.
Simao v. Rish
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Page 4

left shoulder, and the back of his head.

Bioengineering is an established scientific discipline with degrees offered at many accredited universities through out the United States. Biomechanics is a sub-specialty of bioengineering which studies the application of universal physical laws of motion to the human body and has its roots in work started by da Vinci with a mathematical framework provided by Newton. The 1700's and 1800's saw specific work pertaining to the motion of humans and animals with work by Marey, Muybridge, Braune, and Fisher still cited today. In the 1900's, the study of physics as applied to the human body was furthered and the term biomechanics was coined. In the early 1900's universities started to include biomechanics course work and in 1967, the first international seminar on biomechanics was held in Zürich, Switzerland. It was a physicist in the 1950's, A.F. Huxley who is credited with the still used and cited sliding filament model of human muscle.

The field of biomechanics as applied to the study of the mechanisms of injury is widely used and relied on by the US Government in understanding the cause of injury in auto accidents, by the auto manufacturers in designing restraint systems, and other safety components to protect individuals, by NASA and the military in designing and understanding how to protect and reduce injuries, by athletic equipment manufacturers and designers to design equipment to protect athletes. The results of biomechanical analyses play a role in most if not all areas in which we are subjected to or may be subjected to dynamic events which may lead to injury.

In considering the potential for injury for Mr. Simao or an individual substantially similar to Mr. Simao, I relied on the fact that humans are subject to the same universal physical laws described by Newton. In considering the vehicle dynamics and the occupant dynamics and the biomechanical effect of this event, I relied on my general research regarding data, studies, and other information provided in the papers published in the Society of Automotive Engineers, reference and text books on biomechanics of trauma by Nahum and Melvin, White and Panjabi, Yamada, Whiting and Zernicke, Nigg and Herzog, Nordin and Franken, Levine, and other text books and reference works. I relied on my education and experience in physics, dynamics, and multi-body dynamics, and reference and text books by Wong, Thomas and Gillespie, Greenwood, Goldstein, and other text and reference books.

His history is significant for a prior, distant, motor vehicle accident, a motorcycle accident in 2003 in which he injured his elbow, and a subsequent motor vehicle accident in 2008. He has a history of migraine headaches and denies prior injury to his head, neck, and shoulder. He treated for a "pulled muscle" in his low back from lifting a cooler at work.

The headrest in this vehicle is fixed to the cage immediately behind the driver's seat. However, as indicated above, Mr. Simao was out of position and his head restraint would not have played a part in this incident.

After this traffic accident, Mr. Simao testified he felt pain and the police report notes "claimed" injury

John E. Palermo, Esq.

Simao v. Rish

April 15, 2009

Page 5

to Mr. Simao. He went to the Urgent Care and reported pain in his neck, back, left elbow, and the back of his head. He testified he had a bump on the back of his head. While pain is subjective, it is an indication of injury and the pattern Mr. Simao reports is consistent with other's reported patterns after involvement in a rear end collision.

In a rear end collision, the transient dynamic response of the neck, prior to any macroscopic hyper extension (that is while the head is still undergoing macroscopic motion in a normal range of motion), is best described as a non-physiologic loading pattern in which the lower cervical spine (hyper)extends locally and the upper cervical spine (hyper)flexes locally. This is due to the multi-body nature of the spinal column and the physically based mechanical response to the inertial loading pattern imposed on the head/neck complex in a rear end collision. A rear end collision embodies the loading pattern which places these non-physiological loads on the soft tissues of the cervical spine and is mechanically consistent with soft tissue injury of varying degrees depending on the overall available energy which is dissipated by the occupant's cervical soft tissues. While some experts invoke staged collision and other controlled live subject testing to try to establish that injury should not occur in many rear end collisions, these tests are designed and controlled with the intent of not hurting the participants. It is not surprising when the subjects do not report injury. Statistical analysis of real world collisions support the conclusion there is a population which does experience some type and degree of soft tissue injury in rear end collisions at speeds lower than what has been calculated here. The degree of likely injury depends on the change in speed, age, gender, stature, pre-existing pathology which degrades the structural integrity of the stabilizing structures, and other geometric and physical parameters. In this case, using the calculated change in velocity, factoring in Mr. Simao's age (41 almost 42 years old), stature, and his claim he struck his head, cervical injury is a likely result.

Although some discussion of Mr. Simao's medical records was presented in Mr. Simao's deposition, the biomechanical analysis will be further pursued, if needed, after I have reviewed the medical records in a biomechanical context and other written discovery is obtained and examined.

In summary, my initial conclusions and opinions, to a reasonable degree of scientific certainty are:

- An impact speed of 20 mph and change in speed for the van of 12 mph is consistent with the facts and evidence as I have them and with the calculations I performed.
- Mr. Simao was out of position and unbraced for this impact and in a position which placed his cervical spine at particular risk.
- Mr. Simao's cervical spine was subjected to non-physiological loading and aggravating/exacerbating pre-existing mechanical damage (medically referred to as degenerative conditions or pathology) is consistent with the vehicle and occupant dynamics.
- Cervical tissue structural damage is a likely result of this traffic accident given my analysis, facts, and evidence of this accident.

John E. Palermo, Esq.

Simao v. Rish

April 15, 2009

Page 6

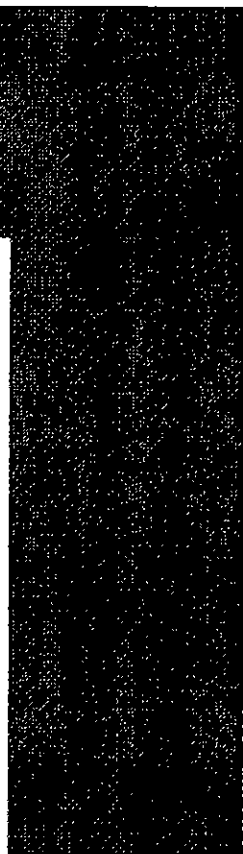
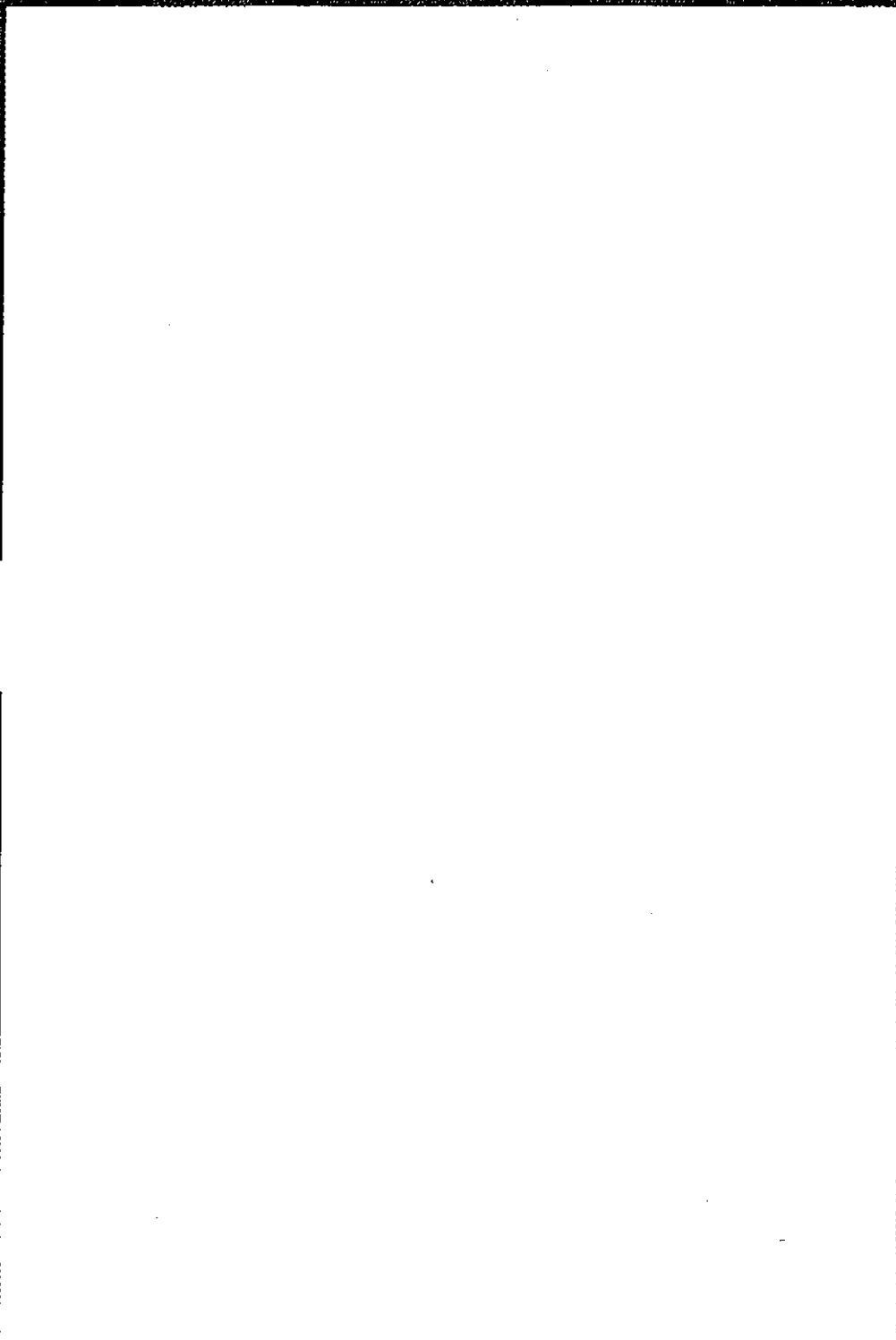
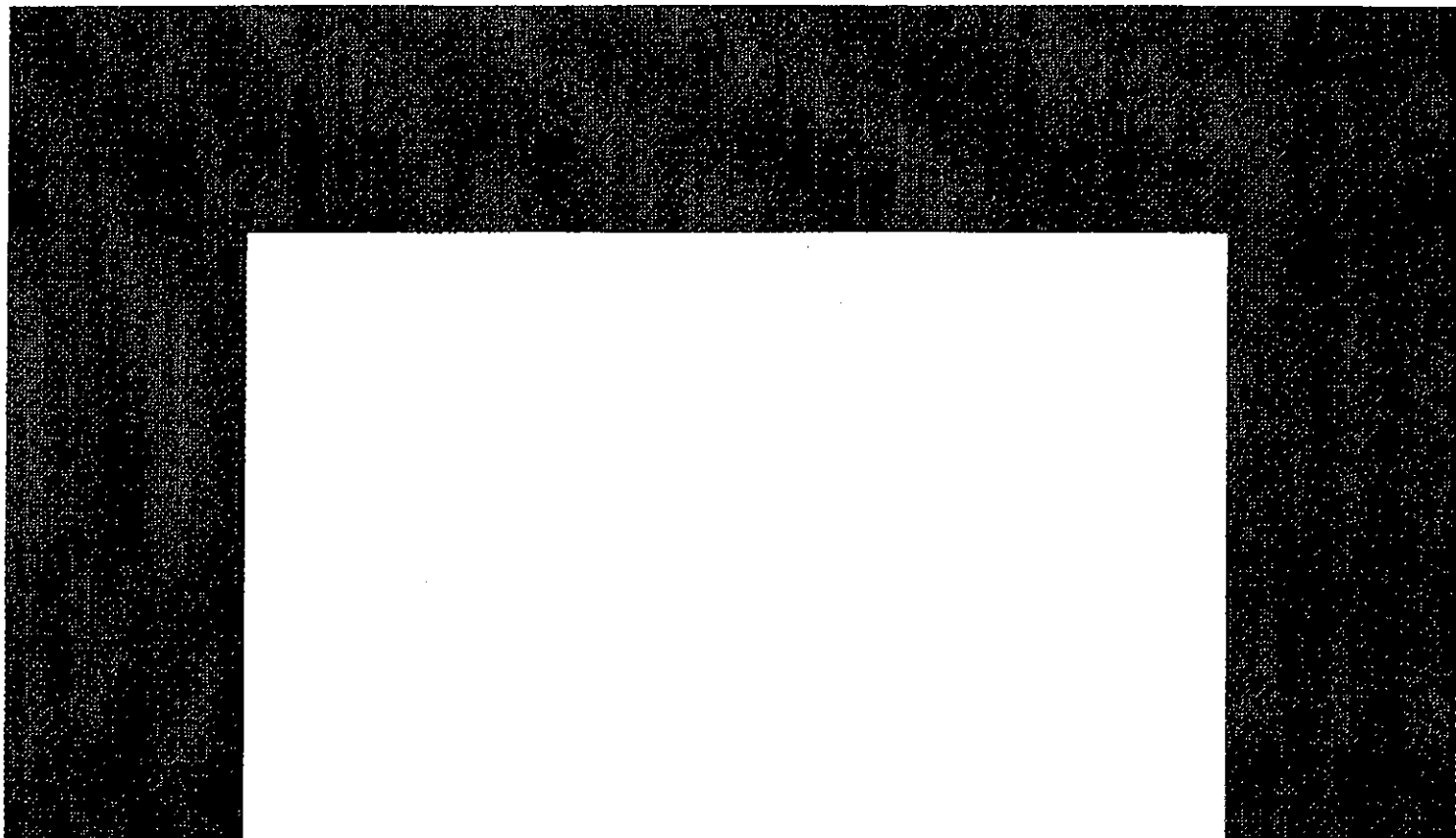
I reserve the right to amend and/or modify this report should further information, facts, or evidence be provided/discovered or additional analysis performed which warrants such action.

Sincerely,

A handwritten signature in black ink, appearing to read 'DM', with a long horizontal stroke extending to the right.

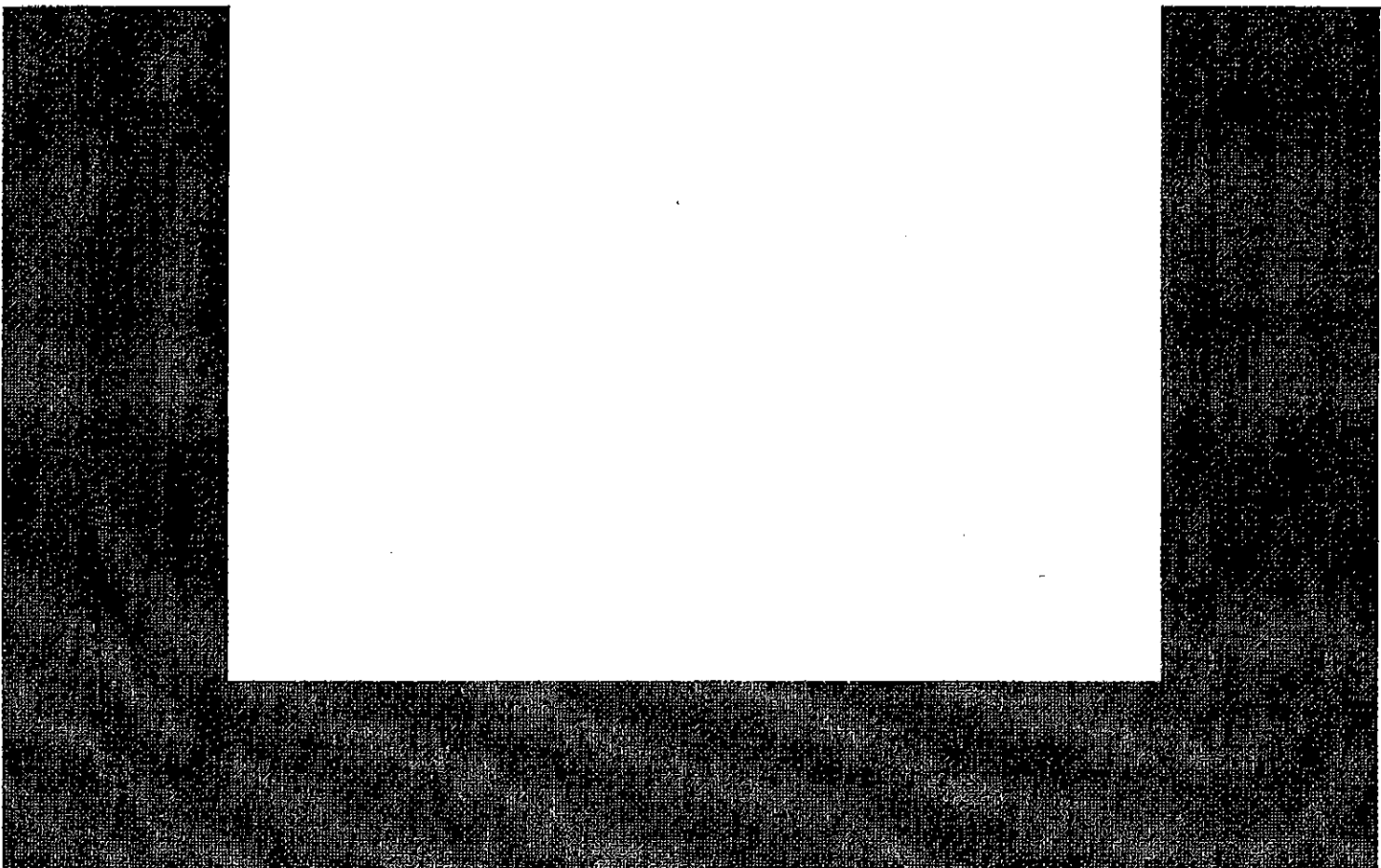
David M. Ingebretsen, M.S., M.E.

Mechanical-Biomechanical Engineer / Physicist



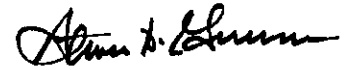
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6 Las Vegas, Nevada 89101
7 Phone (702) 383-3400
8 Fax (702) 384-1460
9 *Attorneys for Defendant Jenny Rish*



CLERK OF THE COURT

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

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

Plaintiff,)

13 v.)

14 JENNY RISH; JAMES RISH; LINDA RISH;)
15 DOES I - V; and ROE CORPORATIONS I - V,)
16 inclusive,)

Defendants.)

CASE NO. A539455

DEPT. NO X

17
18 **DEFENDANT JENNY RISH'S REPLY IN SUPPORT OF**
19 **MOTION TO EXCLUDE THE REPORT AND OPINIONS OF**
20 **PLAINTIFF'S ACCIDENT RECONSTRUCTION EXPERT**
21 **DAVID INGEBRETSEN**

21 COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H.
22 ROGERS, ESQ., and hereby submits the following Reply Brief in support an Order excluding
23 Plaintiff's Accident Reconstruction Expert, David Ingebretsen. The Reasons in support of said

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1 request are contained in the attached Memorandum of Points and Authorities, all pleadings and papers
2 on file, as well as arguments presented at the time of the hearing.

3 DATED this 8th day of February, 2011.

4 ROGERS, MASTRANGELO, CARVALHO &
5 MITCHELL

6
7 STEPHEN H. ROGERS, ESQ.
8 Nevada Bar No. 5755
9 300 South Fourth Street, Suite 710
10 Las Vegas, Nevada 89101
11 Attorneys for Defendant Jenny Rish

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. Law and Argument**

14 **A. Mr. Ingebretsen's Report Should Be Excluded Because He Did Not Inspect Plaintiff's Vehicle Until After It Was Repaired**

15 Plaintiff states Mr. Ingebretsen inspected Plaintiff's vehicle in preparation of his report.
16 Plaintiff omits the salient fact that he did not inspect the vehicle until after the Plaintiff's vehicle was
17 repaired. He never inspected the Defendant vehicle. The law in Nevada is clear. Inspection of only
18 one of the two vehicles, and, of that, after it was repaired, is insufficient. See *Levine v. Remolif*, 80
19 Nev. 168, 171 (1964). Mr. Ingebretsen must be excluded.

20 **B. Mr. Ingebretsen's Failure to Consider Co-Efficient of Friction Further Renders His Report and Opinions Inadmissible**

21
22 Mr. Ingebretsen did not consider co-efficient of friction. Long-standing Nevada case law holds
23 that any reconstruction and biomechanical opinions that do not incorporate co-efficient of friction are
24 not admissible. *Levine, supra*. The Plaintiff's Opposition does not dispute this requirement. Rather,
25 Plaintiff enlists this Court to disregard *Levine* and the other authorities cited in Defendant's Motion
26 because Mr. Ingebretsen "reviewed photographs..., physically inspected the Plaintiff's vehicle [after
27 it was repaired], reviewed the repair invoice..., and read depositions and written discover (sic)."
28 The Plaintiff misses the central holdings of *Levine*. First, vehicle inspection is a necessary pre-

1 condition to admissibility. Second, a co-efficient of friction analysis is necessary to offer expert
2 opinion regarding speed. One of Mr. Ingebretsen's primary conclusions is "an impact speed of 20
3 mph and change in speed of the van of 12 mph." (See David Ingebretsen Report, pg.5 pg. 5). Mr.
4 Ingebretsen's foundational deficiencies render his report and trial testimony inadmissible.

5 C. Mr. Ingebretsen Lacks Competency and Foundation to Opine Regarding the Cause
6 of Plaintiff's Injuries

7 Mr. Ingebretsen is not competent to offer any opinions regarding Plaintiff's alleged injuries
8 and their causal relationship to the subject accident. At pg. 5 of his report, Mr. Ingebretsen concludes
9 Plaintiff "likely" sustained a cervical injury as a result of the accident. Mr. Ingebretsen is not a
10 medical doctor. Nothing in his educational or professional background reflects medical training, much
11 less expertise. Thus, he is not competent to testify whether Plaintiff "likely" sustained an injury.
12 *Hallmark v. Ellridge* 189 P.3d 646 (2008).

13 Further, assuming Mr. Ingebretsen possessed sufficient competency, his opinions regarding
14 Plaintiff's alleged cervical injury lacks proper foundation. By his own admission, Mr. Ingebretsen
15 stated that further bio-mechanical analysis was necessary, and would take place after "he reviewed
16 the medical records in a bio-mechanical context and other written discovery is obtained and
17 examined." (See David Ingerbretsen Report, pg. 5). Mr. Ingebretsen thus explicitly acknowledges
18 his foundational shortcomings.

19 Further, Mr. Ingebretsen's knowledge of Plaintiff's pre-accident medical condition is limited
20 to Plaintiff's representation. Experts may not "vouch" for the credibility for witnesses, as Plaintiff
21 readily acknowledges (See Plaintiff's Non-Opposition to Defendant's Motion to Preclude Witnesses
22 From Offering Testimony Regarding the Credibility or Veracity of Other Witnesses).

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II. Conclusion

Mr. Ingebretsen lacks foundation to offer biomechanical opinion, and competence to offer medical opinion. Accordingly, his testimony is inadmissible.

DATED this 8 day of February, 2011.

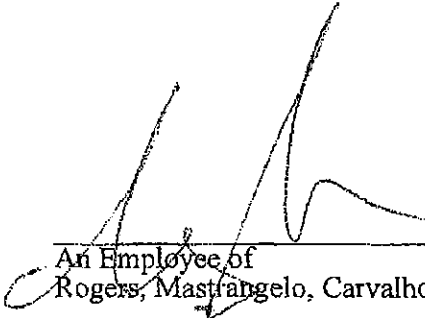
ROGERS, MASTRANGELO, CARVALHO &
MITCHELL

STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
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Attorneys for Defendant Jenny Rish

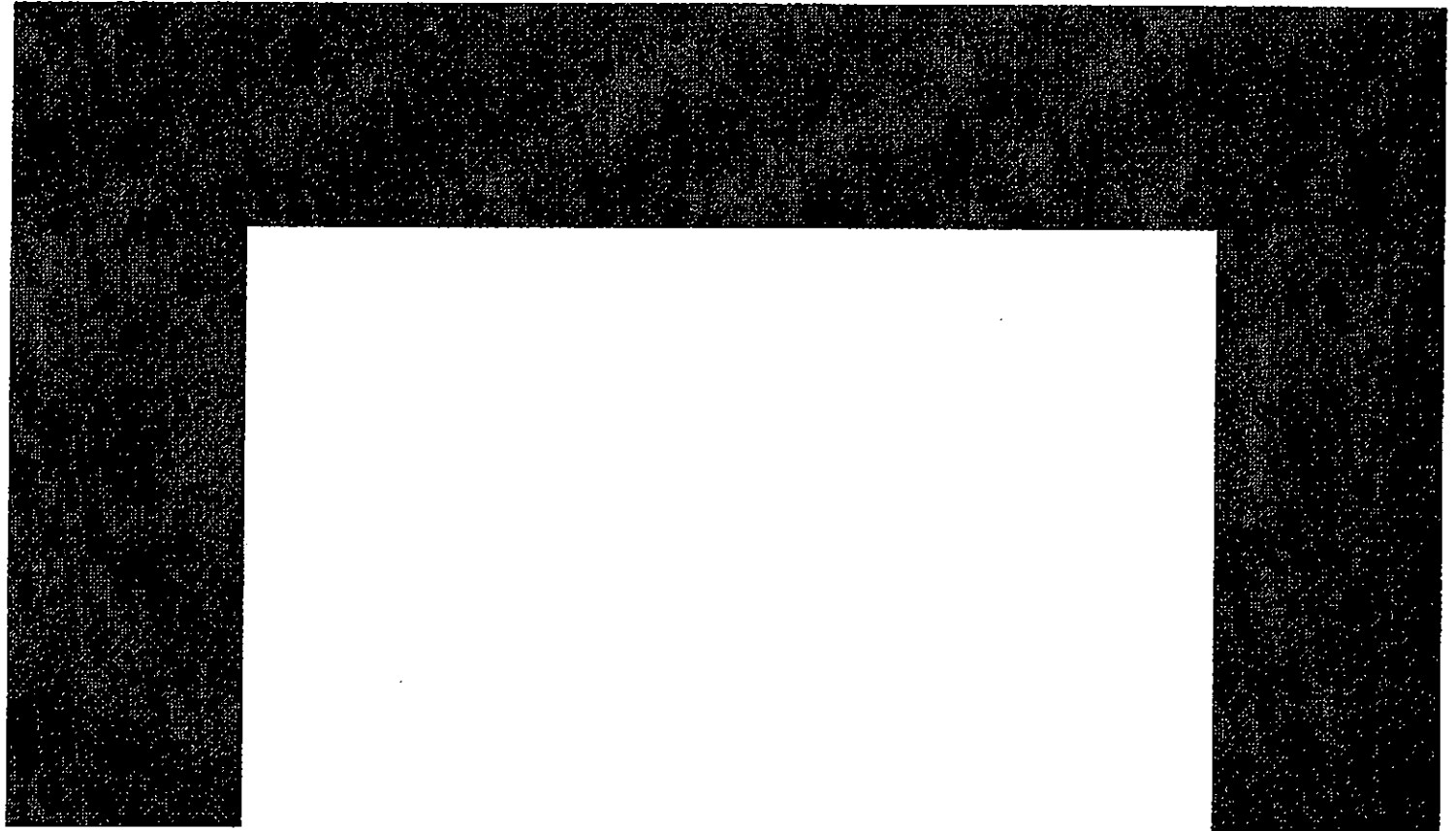
1 CERTIFICATE OF SERVICE

2 Pursuant to NRCp 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of ROGERS,
3 MASTRANGELO, CARVALHO & MITCHELL, and on the 27th day of February, 2011, a true
4 and correct copy of the foregoing DEFENDANT JENNY RISH'S REPLY IN SUPPORT OF
5 MOTION TO EXCLUDE THE REPORT AND OPINIONS OF PLAINTIFF'S ACCIDENT
6 RECONSTRUCTION EXPERT DAVID INGEBRETSEN was served via First Class, U.S. Mail,
7 postage prepaid, addressed as follows, upon the following counsel of record:

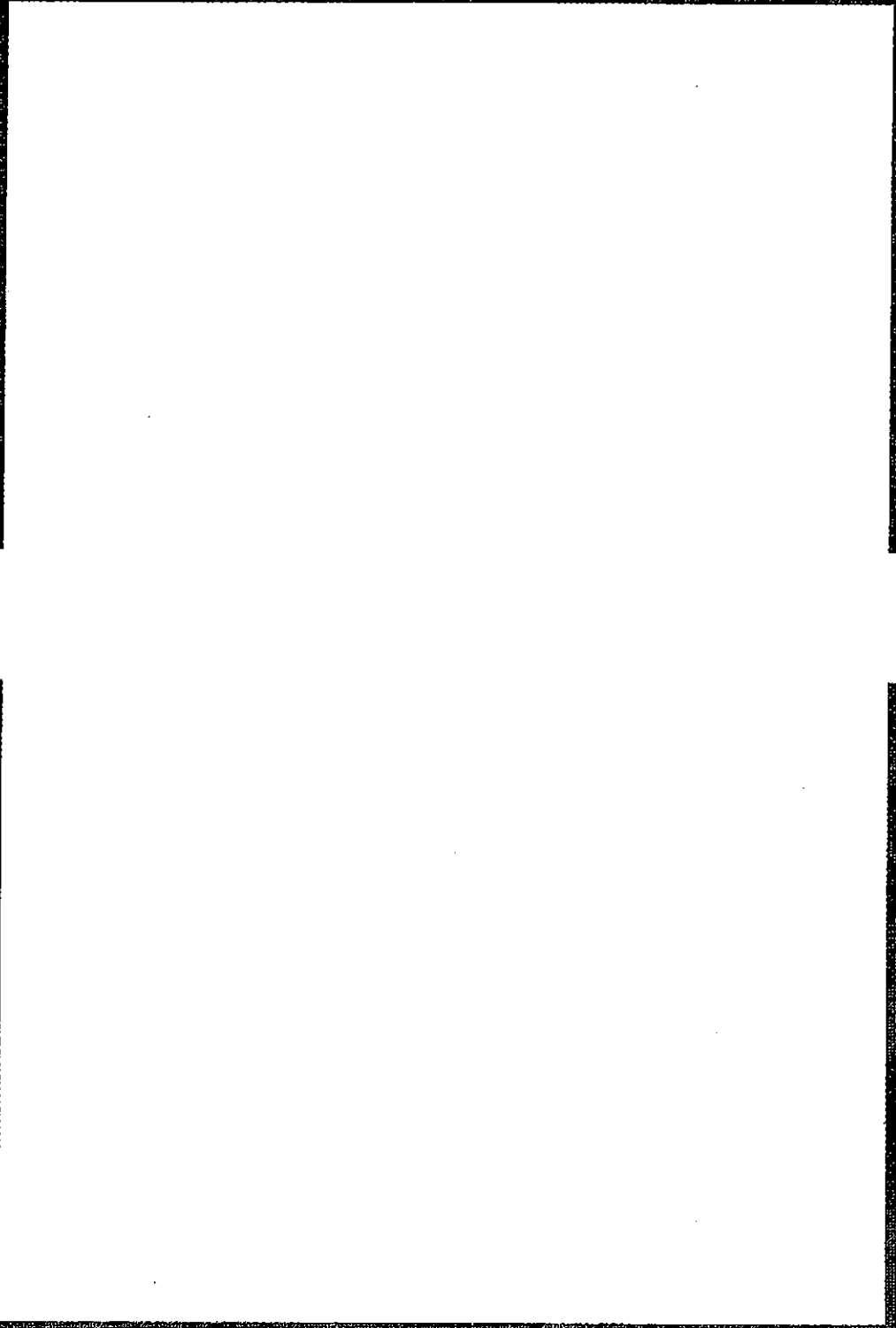
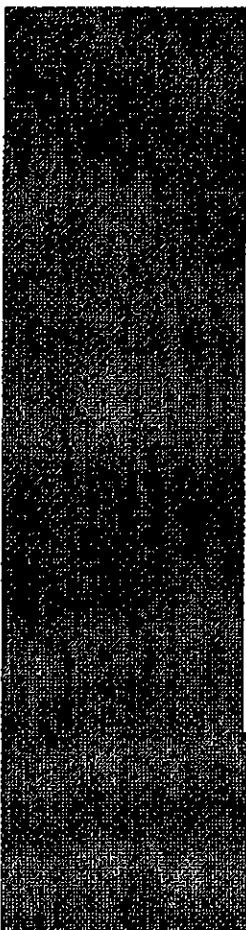
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9 David T. Wall, Esq.
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12 Las Vegas, Nevada 89101
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14 Facsimile: (702) 450-5451
15 *Attorneys for Plaintiffs*

16
17
18 
19 An Employee of
20 Rogers, Mastrangelo, Carvalho & Mitchell

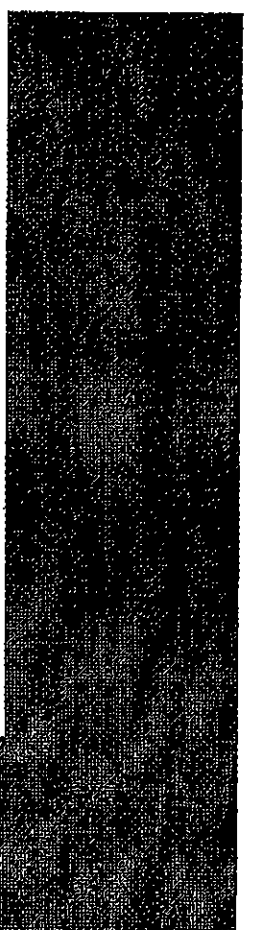
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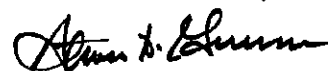
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CLERK OF THE COURT

1 **NEOJ**
2 **STEPHEN H. ROGERS, ESQ.**
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7 Phone (702) 383-3400
8 Fax (702) 384-1460
9 *Attorneys for Defendant Jenny Rish*

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

10 **WILLIAM JAY SIMAO, individually and**
11 **CHERYL ANN SIMAO, individually, and as**
12 **husband and wife,**

12 **Plaintiff,**

13 **v.**

14 **JENNY RISH; JAMES RISH; LINDA RISH;**
15 **DOES I - V; and ROE CORPORATIONS I - V,**
16 **inclusive,**

16 **Defendants.**

CASE NO. A539455

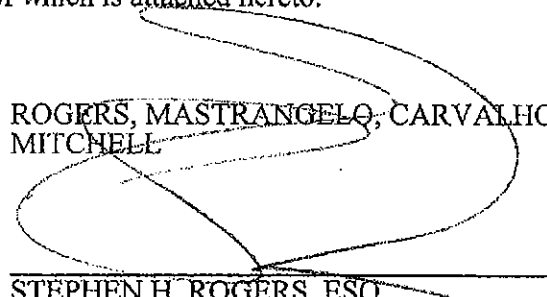
DEPT. NO X

18 **NOTICE OF ENTRY OF ORDER**

19 PLEASE TAKE NOTICE that an Order in the above-entitled action was entered and filed
20 on the 22nd day of December, 2010, a copy of which is attached hereto.

21 DATED this 4th day of January, 2011.

22 **ROGERS, MASTRANGELO, CARVALHO &**
23 **MITCHELL**

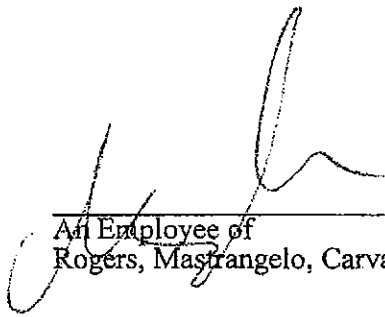
24 
25 **STEPHEN H. ROGERS, ESQ.**
26 Nevada Bar No. 5755
27 300 South Fourth Street, Suite 710
28 Las Vegas, Nevada 89101
Attorneys for Defendant Jenny Rish

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of ROGERS, MASTRANGELO, CARVALHO & MITCHELL, and on the 4TH day of January, 2011, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER (re: Continue Trial Date)** was served First Class, U.S. Mail, postage prepaid, addressed as follows, upon the following counsel of record:

Matthew E. Aaron, Esq.
John Palermo, Esq.
AARON & PATERNOSTER, LTD
2300 West Sahara Avenue, Suite 650
Las Vegas, Nevada 89102
Telephone: (702) 384-4111
Facsimile: (702) 387-9739
Attorney for Plaintiffs

Robert T. Eglet, Esq.
Robert M. Adams, Esq.
MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Telephone: (702) 450-5400
Facsimile: (702) 450-5451
Associated Counsel for Plaintiffs


An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell

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Alvin D. Schuman

CLERK OF THE COURT

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9 Attorneys for Defendant Jenny Rish

DISTRICT COURT

CLARK COUNTY, NEVADA

10 WILLIAM JAY SIMAO, individually and
11 CHERYL ANN SIMAO, individually, and as
12 husband and wife,
13 Plaintiff,
14 v.
15 JENNY RISH; JAMES RISH; LINDA RISH;
16 DOES I - V; and ROE CORPORATIONS I - V,
17 inclusive,
18 Defendants.

CASE NO. A539455
DEPT. NO X

STIPULATION AND ORDER TO CONTINUE TRIAL DATE

20 IT IS HEREBY STIPULATED by and between the parties, through their respective counsel,
21 that the trial date for the above-captioned matter which is currently set for January 24, 2011, be
22 continued and placed for a trial setting beginning 3/14/11 at 1:00 pm with a

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1 calendar call on 3/17/11 at 9:00 a.m. and the Pre-Trial Memorandums due on
 2 3/3/11.

3
 4 DATED this 16 day of December, 2010.

5 ROGERS, MASTRANGELO, CARVALHO
 6 & MITCHELL

7
 8 STEPHEN H. ROGERS, ESQ.
 9 Nevada Bar No. 5755
 10 300 South Fourth Street, Suite 710
 11 Las Vegas, Nevada 89101
 12 Attorneys for Defendant

DATED this 16 day of December, 2010.

MAINOR EGLET

David T. Wall
 DAVID T. WALL, ESQ.
 Nevada Bar No. 2805
 400 South Fourth Street, Suite 600
 Las Vegas, Nevada 89101
 Attorney for Plaintiffs

13 ORDER

14 IT IS SO ORDERED.

15 DATED this 20 day of Dec, 2010.

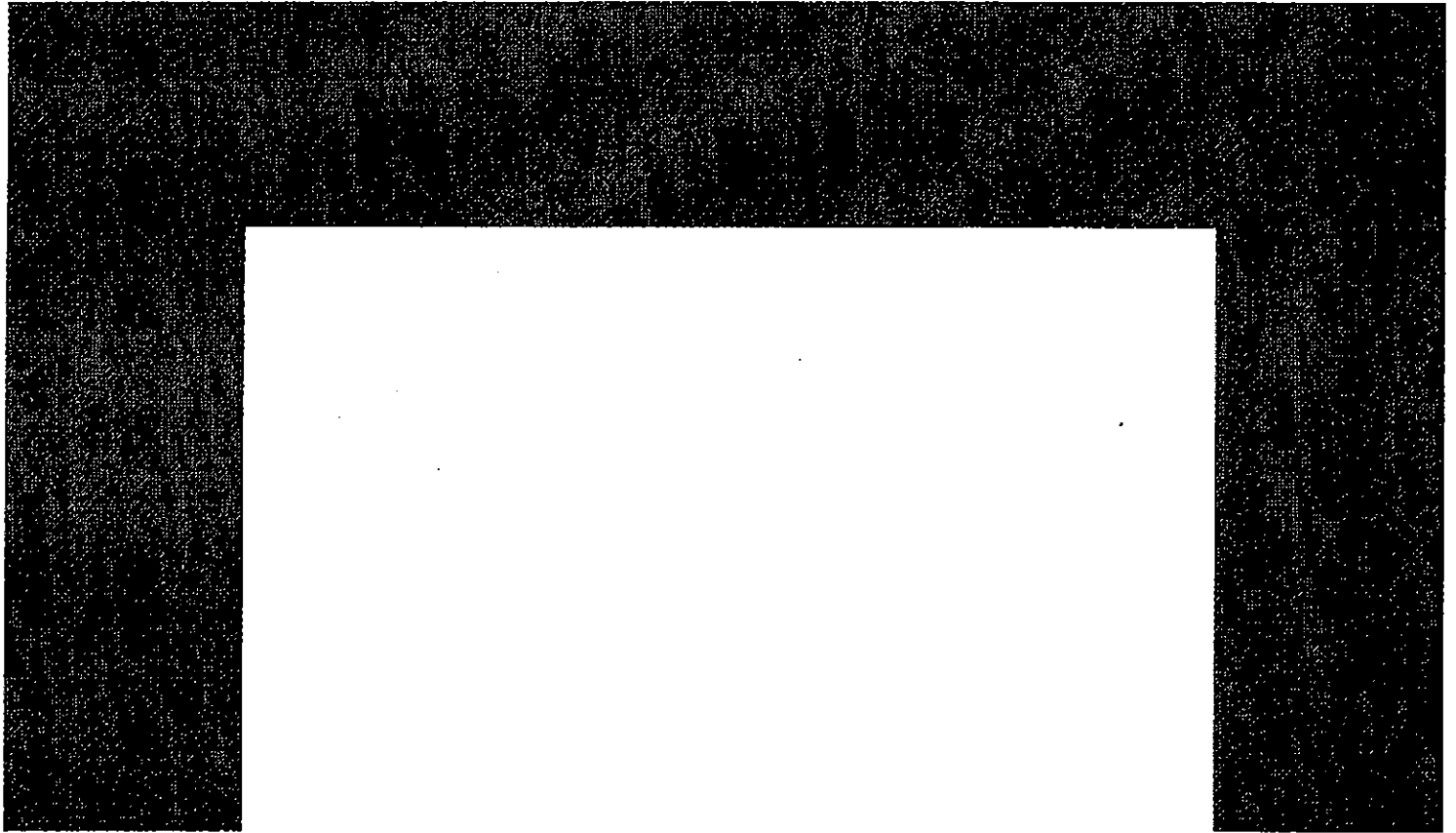
16 Jesse Walsh
 17 DISTRICT JUDGE

18 Submitted by:

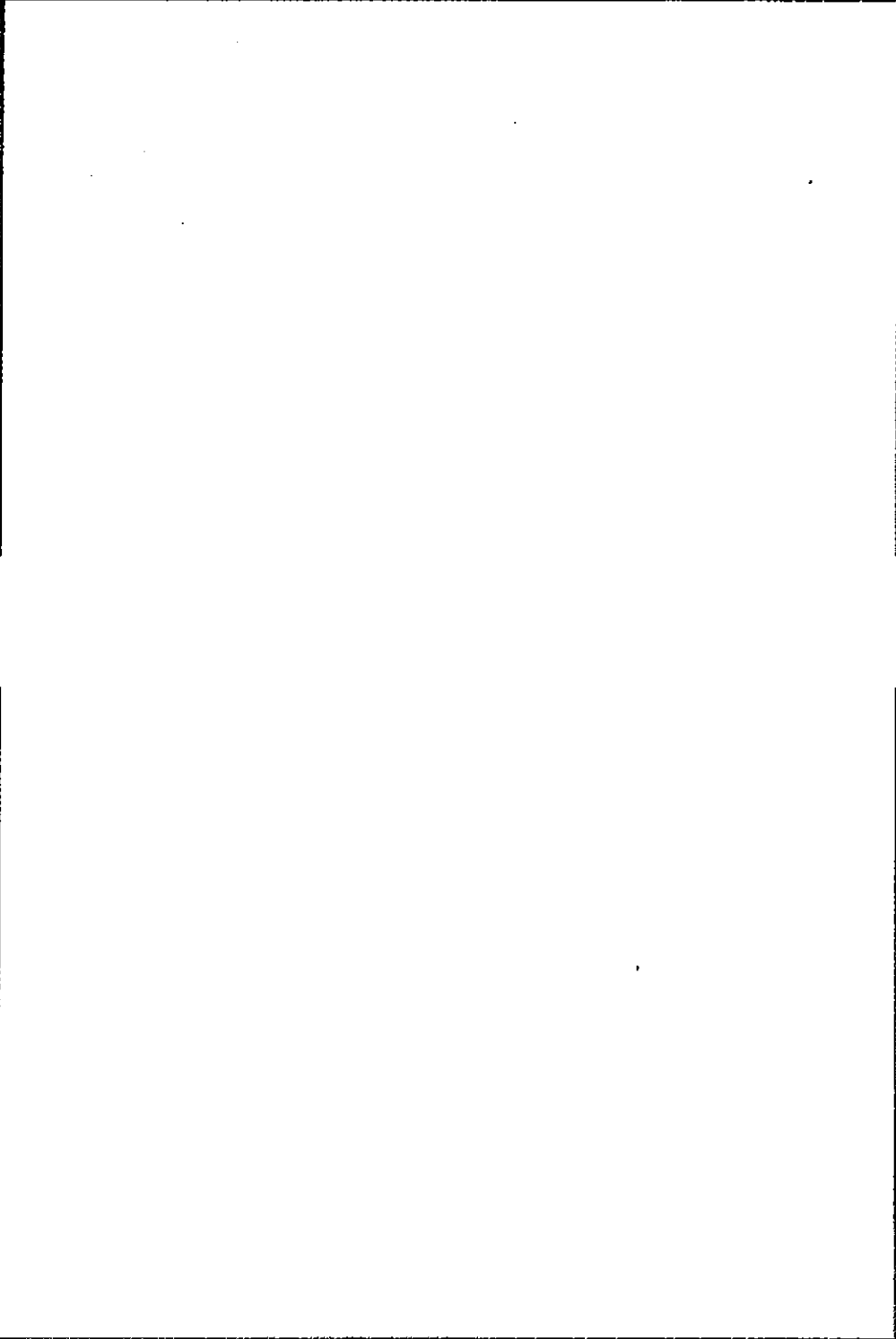
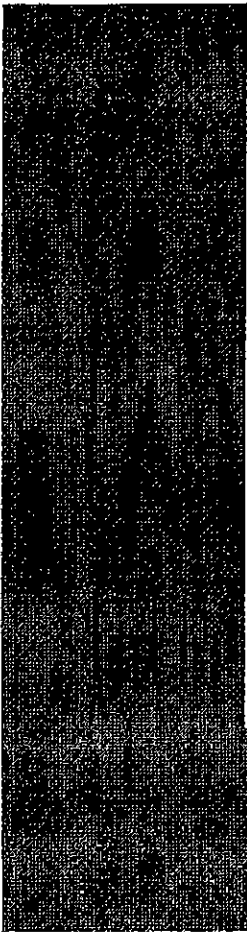
19 ROGERS, MASTRANGELO, CARVALHO &
 20 MITCHELL

21
 22 STEPHEN H. ROGERS, ESQ.
 23 Nevada Bar No. 5755
 24 300 South Fourth Street, Suite 710
 25 Las Vegas, Nevada 89101
 26 Attorneys for Defendant

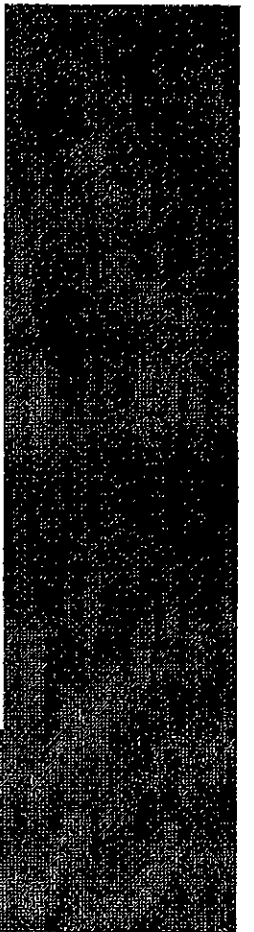
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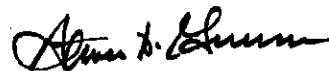
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9 *Attorneys for Defendant Jenny Rish*

6
7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**
9

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

13 Plaintiff,)

14 v.)

15 JENNY RISH; JAMES RISH; LINDA RISH;)
16 DOES I - V; and ROE CORPORATIONS I - V,)
17 inclusive,)

18 Defendants.)

CASE NO. A539455
DEPT. NO. ~~SS~~ X

DATE OF HEARING:
TIME OF HEARING:

19 **DEFENDANT JENNY RISH'S MOTION IN LIMINE TO LIMIT THE**
20 **TESTIMONY OF PLAINTIFF'S TREATING PHYSICIANS**

21 COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H.
22 ROGERS, ESQ., and hereby Moves this Court for an Order Limiting the Testimony of Plaintiff's
23 Treating Physicians. The Reasons in support of said request are contained in the attached
24 Memorandum of Points and Authorities, all pleadings and papers on file, as well as arguments
25 presented at the time of the hearing.
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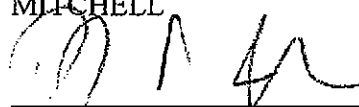
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1 This Motion is based upon the following Memorandum of Points and Authorities, the
2 pleadings and papers on file herein, and any argument the Court is willing to entertain at the time
3 of the hearing.

4 DATED this 1 day of January, 2011.

5 ROGERS, MASTRANGELO, CARVALHO &
6 MITCHELL

7 
8 STEPHEN H. ROGERS
9 Nevada Bar No. 5755
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorney for Defendant Jenny Rish


10 **NOTICE OF MOTION**

11 TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

12 PLEASE TAKE NOTICE that the foregoing **DEFENDANTS' MOTION IN LIMINE**
13 **TO LIMIT THE TESTIMONY OF PLAINTIFF'S TREATING PHYSICIANS** will come on
14 ^{10TH OF FEBRUARY, 2011, AT 9:30 AM,}
15 for hearing before the above-entitled court on the _____ day of _____, 2011,
16 at _____ a.m. in Department X.

17 DATED this 6th day of January, 2011.

18 ROGERS, MASTRANGELO, CARVALHO &
19 MITCHELL

20 
21 STEPHEN H. ROGERS
22 Nevada Bar No. 1122
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorney for Defendants

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. Statement of Facts**

25 This personal injury action arises out of a MVA that occurred April 15, 2005. Defendant
26 Jenny Rish rear-ended a vehicle driven by Plaintiff William Simao. Plaintiff alleges personal injuries
27 as a result, and ultimately had neck surgery which he relates to the accident.
28

1 Plaintiff's NRCP 16.1 production and supplements list Plaintiff's treating doctors as
2 witnesses. It is anticipated that Plaintiff will seek to have these witnesses provide expert testimony
3 regarding the nature of Plaintiff's injuries, causation, and the reasonableness of Plaintiff's
4 treatment. As demonstrated more fully below, this Court should limit the scope of testimony of
5 Plaintiff's treating physicians to their care and treatment of Plaintiff because these witnesses were
6 never properly designated as medical experts.

7 II. Law and Argument

8 A. This Court Should Limit the Testimony of Plaintiff's Treating Physicians 9 Because They Were Never Designated as Expert Witnesses, as Required by 10 NRCP 16.1(a)(2)(B).

11 NRCP 16.1(a)(2)(B) provides the requirements for disclosing expert witnesses. These
unambiguous requirements are as follows:

12 (2) *Disclosure of Expert Testimony*

13 (A) In addition to the disclosures required by paragraph (1), a party shall disclose to
14 other parties the identity of any person who may be used at trial to present evidence
under NRS 50.275, 50.285, and 50.305

15 (B) Except as shall be otherwise stipulated or directed by the court, this disclosure
16 shall, with respect to a witness who is retained or specifically employed to provide
expert testimony in the case or whose duties as an employee of the party regularly
17 involve giving expert testimony, be accompanied by a written report prepared and
signed by the witness. The court, upon good cause shown or by stipulation of the
18 parties, may relieve a party of the duty to prepare a written report in an appropriate
case. The report shall contain a complete statement of all opinions to be expressed
19 and the basis and reasons therefore; the data or other information considered by the
witness in forming the opinions; any qualifications of the witness, including a list
20 of all publications authored by the witness within the preceding 10 years; the
compensation to be paid for the study and testimony; and a listing of any cases in
which the witness has testified as an expert at trial or by deposition within the
preceding four years.

21 When designating an expert witness, a party must provide (1) a written report, (2) the
22 qualifications of the witness, (3) compensation to be paid, and (4) a listing of the other cases in which
23 the witness testified as an expert. If a party fails to comply with these mandatory requirements,
24 excluding the witness is mandated.

25 Here, Plaintiff unquestionably did not designate the treating physicians as expert witnesses;
26 i.e., did not comply with these provisions. Therefore, Plaintiff's treating physicians should be
27 precluded from offering any testimony outside of the scope of their treatment of Plaintiff. Simply
28

1 stated, Plaintiff's doctors are fact witnesses, and the scope of their testimony should be limited
2 accordingly.

3 **B. The Supreme Court's Recent Decision in *Hallmark v. Eldridge* Mandates**
4 **Limiting the Scope of Testimony Rendered by Treating Physicians.**

5 Expert opinions offered by Plaintiff's treating physicians lack sufficient foundation, and are
6 therefore inadmissible pursuant to *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008). In *Hallmark*, the
7 Nevada Supreme Court outlined the necessary requirements for expert testimony. The Supreme Court
8 held that expert opinions must be based "on particularized facts, rather than assumption, conjecture,
9 or generalization." *Id.* at 652. The *Hallmark* court instructed Nevada courts to look to the landmark
10 federal case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993) for
11 guidance regarding permissible expert testimony.

12 The majority of courts that have addressed this issue have precluded treating physicians from
13 offering expert testimony. For example, In *Griffith v. Northeast Illinois Regional Commuter*
14 *Railroad Corp.*, 233 F.R.D. 513 (N.D. Illinois, 2006), the court noted its role to act as a "gatekeeper"
15 regarding expert testimony, and to ensure that expert testimony is "based on sufficient facts or data."
16 The court then addressed the testimony of the plaintiff's treating physician, who did not prepare a
17 formal report. The physician opined that the plaintiff's injuries would impair his ability to return work,
18 and that plaintiff would eventually need surgery to work any job "or quit working altogether." *Id.* at
19 517. The doctor offered this opinion despite the fact that his treatment records did not discuss the
20 plaintiff's occupation or job duties.

21 In limiting the physicians testimony, the *Giffith* court premised its opinion by noting that all
22 experts must be held to the same standard set forth in the Rules of Civil Procedure. The court then
23 succinctly outlined the permissible scope of a treating physicians testimony:

24 [W]hen a treating physician opines as to causation, prognosis, or future disability, the
25 physician goes beyond what he saw and did, and why he did it. *He is going beyond his*
26 *personal involvement in the case and is giving an opinion formed because there is a*
27 *lawsuit...*

28 That does not mean that a treating physician cannot testify at trial; if the physician has
been disclosed...the physician may testify as to the nature and extent of the injury he
observed and diagnosed, and the treatment he rendered for that injury. *However,*
without a report to satisfy the requirements of Rule 26(a)(2)(B), the treating physician
cannot testify as to causation, prognosis, or future disability.
Id. at 518, 519[emphasis added].

1
2 The United States District Court for the District of Nevada has likewise limited the testimony
3 of treating medical providers not designated as experts. In so doing, the court reiterated the long-
4 standing principle that "the reason for requiring expert reports is the elimination of unfair surprise to
5 the opposing party..." *Eglas v. Colorado Bell Corp.*, 179 F.R.D 296, 299 (D. Nev., 1998). In *Eglas*,
6 the plaintiff sought to have the director of a medical clinic testify regarding the plaintiff's alleged
7 injuries, as well as causation. In limiting his physicians testimony, the *Eglas* court noted that "to the
8 extent that [the physician] has knowledge of the plaintiff's medical condition through consultation,"
9 he is not subject to the expert disclosure requirements. *Id.* However, the court specifically limited his
10 testimony to first-hand knowledge of the plaintiff's medical condition, holding that he was not
11 "allowed to render a medical opinion based on factors that were not learned in the course of his
12 treatment." *Id.* at 300.

13 Accordingly, the testimony of doctors is limited to information obtained during the course of
14 their treatment. Their testimony is limited to their specific treatment, and can not delve into treatment
15 rendered by other providers. Additionally, they are not be permitted to testify regarding future medical
16 care, job related issues, or causation. Plaintiff's doctors did not provide reports, and therefore do not
17 specify the foundation for such opinions, or the methodologies/procedures used to obtain any such
18 opinions.

19 Additionally, the purpose of the rule is to require disclosure of such expert opinions. The
20 disclosure of the necessary foundation, and the held opinions, in the medical records properly puts
21 defense counsel on notice that the treating physician has the adequate foundation necessary to testify
22 about those issues. Without the disclosure, however, the physician rule and the rules of discovery are
23 violated, causing significant prejudice to the defense of the case.

24 Defendant Jenny Rish is not asking this Court to preclude Plaintiff's treating physicians from
25 testifying at trial. Rather, Defendant merely seeks to limit the scope of their testimony to the care they
26 rendered during their treatment. Further, Plaintiff's treating physicians are not be permitted to offer
27 opinions regarding future care for two reasons. First, they did not produce a report outlining whether
28 future care is necessary, the etiology of such care, or how much it will cost. Second, they have not

1 testified, to a reasonable degree of medical probability, that the Plaintiff needs future care. To permit
2 treating physicians to change their previously stated opinions, on the eve of trial, without producing
3 a report, would be prejudice Defendant Jenny Rish.

4 **CONCLUSION**

5 For the reasons stated above, Defendant asks this Court to enter an Order limiting the
6 testimony of Plaintiff's treating physicians.

7 DATED this 6th day of January, 2011.

8 ROGERS, MASTRANGELO, CARVALHO &
9 MITCHELL

10 
11 STEPHEN H. ROGERS

12 Nevada Bar No. 5755
13 300 South Fourth Street, Suite 710
14 Las Vegas, Nevada 89101
15 Attorney for Defendant Jenny Rish
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2.47 AFFIDAVIT OF DANIEL A. INGRASSIA, ESQ.

STATE OF NEVADA)
) ss.
 COUNTY OF CLARK)

I, DANIEL INGRASSIA, being first duly sworn, deposes and says:

1. That your affiant is an attorney licensed to practice law in the State of Nevada, and is an associate attorney with the law firm of Rogers, Matrangelo, Carvalho & Mitchell.
2. That Rogers, Matrangelo, Carvalho & Mitchell is counsel of record for Defendant Jenny Rish in Clark County District Court Case No. A539455
3. That your affiant has filed the attached motion in limine.
4. That prior to filing said motions, counsel for Defendant Rish conducted a conference with Plaintiff's counsel and made a good-faith effort to resolve the evidentiary disputes addressed in the attached motion.
5. That the parties were unable to reach an agreement regarding the attached motion in limine, therefore necessitating the instant motion.


FURTHER AFFIANT SAYETH NOT.

DATED this 6th day of January, 2011.

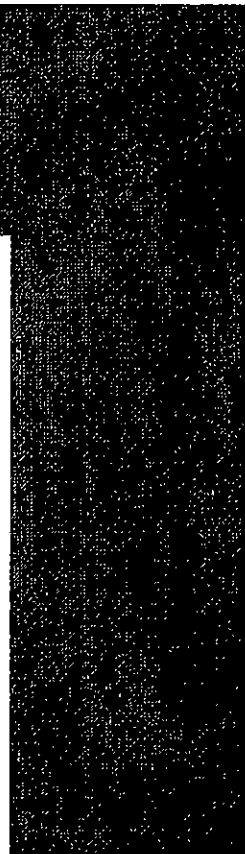
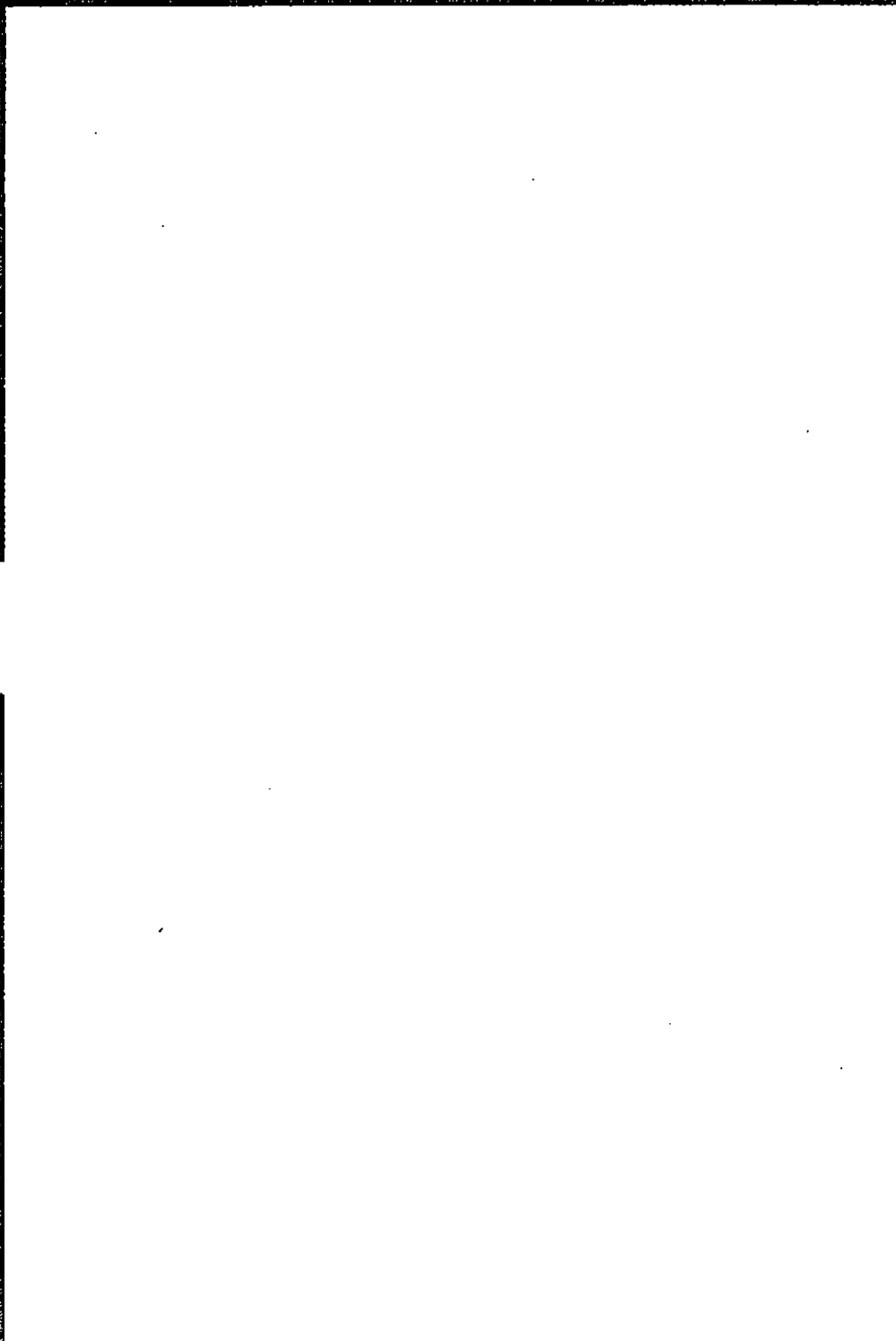
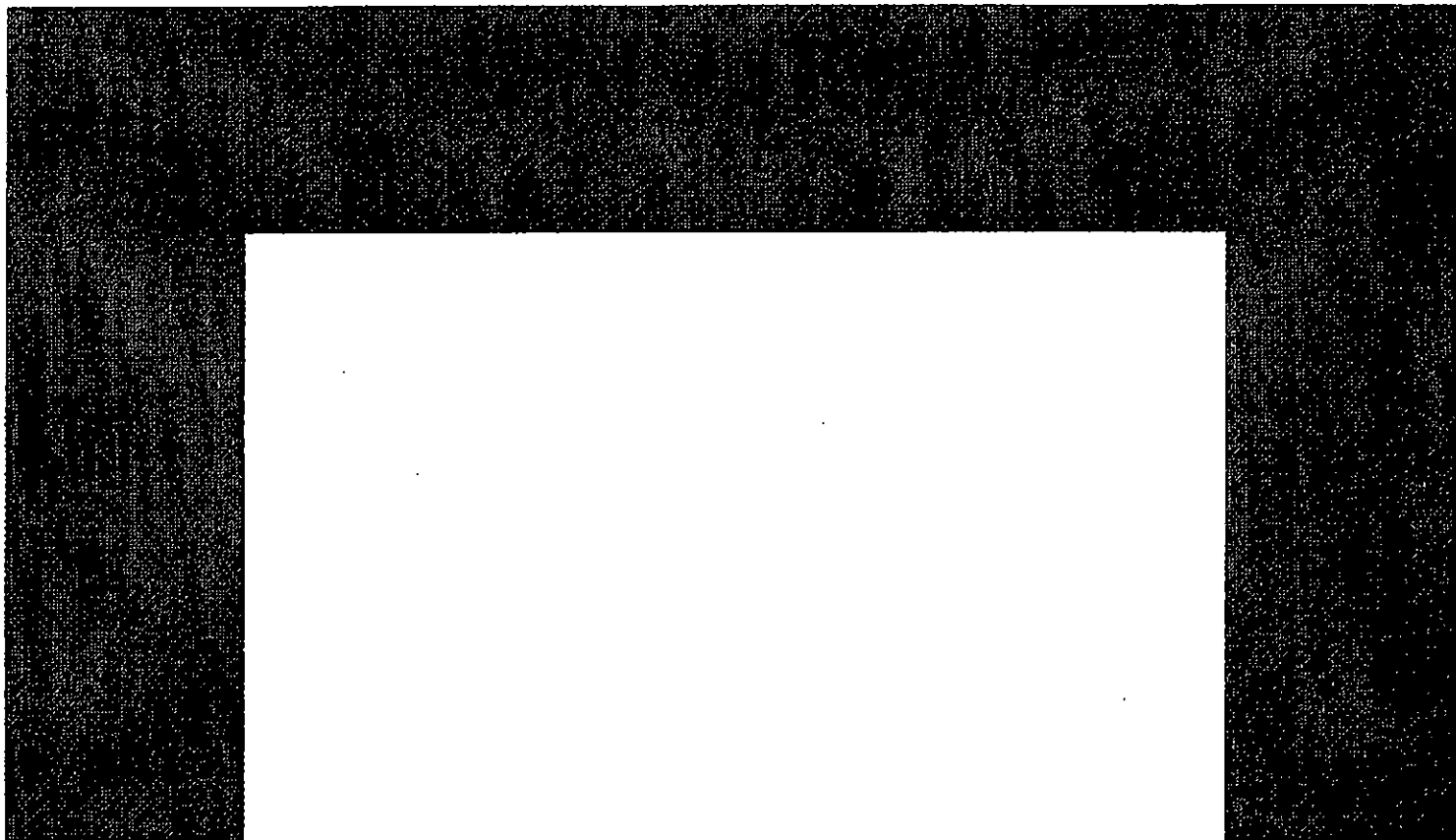

 DANIEL A. INGRASSIA

SUBSCRIBED AND SWORN to before me

this 6 day of January, 2011.

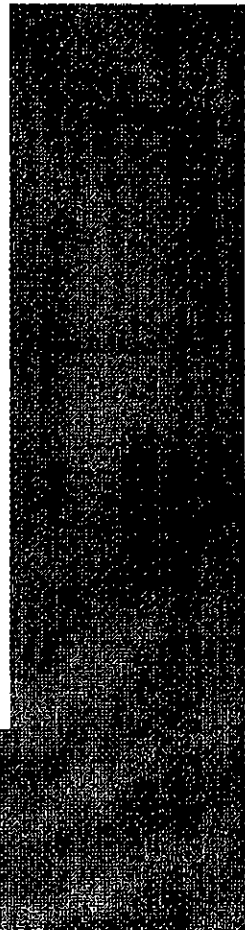
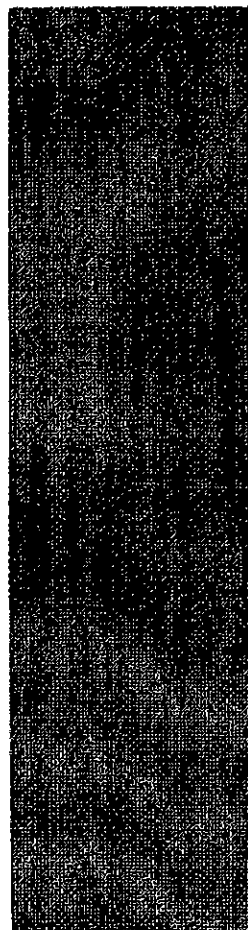

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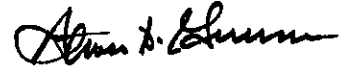


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CLERK OF THE COURT

1 **MLIM**
STEPHEN H. ROGERS, ESQ.
2 Nevada Bar No. 5755
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3 300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
4 Phone (702) 383-3400
Fax (702) 384-1460
5 *Attorneys for Defendant Jenny Rish*

6
7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**
9

10 WILLIAM JAY SIMAO, individually and)
11 CHERYL ANN SIMAO, individually, and as)
husband and wife,)
12)
Plaintiff,)
13)
v.)
14)
JENNY RISH; JAMES RISH; LINDA RISH;)
15 DOES I - V; and ROE CORPORATIONS I - V,)
inclusive,)
16)
Defendants.)
17

CASE NO. A539455
DEPT. NO X

DATE OF HEARING:
TIME OF HEARING:

18 **DEFENDANTS MOTION IN LIMINE TO PRECLUDE PLAINTIFFS' MEDICAL**
19 **PROVIDERS AND EXPERTS FROM TESTIFYING REGARDING NEW OR**
20 **UNDISCLOSED MEDICAL TREATMENT AND OPINIONS**

21 COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H.
22 ROGERS, ESQ., and hereby Moves this Court for an Order Precluding Plaintiffs' Medical Providers
23 and Experts from Testifying Regarding New or Previously Undisclosed Medical Treatment or
24 Opinions.

25 ///

26 ///

27 ///

28

1 The Reasons in support of said request are contained in the attached Memorandum of Points
2 and Authorities, all pleadings and papers on file, as well as arguments presented at the time of the
3 hearing.

4 DATED this 10th day of January, 2011.

5 ROGERS, MASTRANGELO, CARVALHO &
6 MITCHELL

7
8 STEPHEN H. ROGERS, ESQ.
9 Nevada Bar No. 5755
10 300 South Fourth Street, Suite 710
11 Las Vegas, Nevada 89101
12 *Attorneys for Defendant Jenny Rish*

13 **NOTICE OF MOTION**

14 TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

15 PLEASE TAKE NOTICE that the foregoing **DEFENDANT JENNY RISH'S MOTION IN**
16 **LIMINE TO LIMIT TO PRECLUDE PLAINTIFFS' MEDICAL PROVIDERS AND**
17 **EXPERTS FROM TESTIFYING REGARDING NEW OR PREVIOUSLY UNDISCLOSED**
18 **MEDICAL OPINIONS** will come on for hearing before the above-entitled court on the 10TH OF FEBRUARY, 2011 AT 9:30 AM

19 day of _____, 2011, at _____ a.m. in Department X.

20 DATED this 10th day of January, 2011.

21 ROGERS, MASTRANGELO, CARVALHO &
22 MITCHELL

23 STEPHEN H. ROGERS, ESQ.
24 Nevada Bar No. 5755
25 300 South Fourth Street, Suite 710
26 Las Vegas, Nevada 89101
27 *Attorneys for Defendant Jenny Rish*
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of Facts

This personal injury action arises out of a MVA that occurred April 15, 2005. Defendant Jenny Rish rear-ended a vehicle driven by Plaintiff William Simao. Plaintiff further alleges personal injuries as a result, and ultimately had neck surgery which he relates to the accident. Defendant anticipates that Plaintiff may allege he needs future treatment which has not been disclosed. For example, Plaintiffs produced a life care plan that includes a future cervical fusion. However, Dr. McNulty has not recommended the surgery. During his deposition, Dr. McNulty testified as follows:

Q: When you last saw the Plaintiff, did you see any need for future treatment?

A: Well, he is going to follow up. My routine is I follow up my fusions for at least two years. So typically he'll come back in four months and then I'll see him back in a year if he is doing well.

Q: Okay. Then there's no more after that if he's doing well?

A: No more.

(See deposition of Dr. McNulty, pg. 87, lns. 16-25, attached as Exhibit "A").

To date, Plaintiffs have produced no medical reports or records indicating a future spine surgery is indicated.

The Plaintiffs' treating medical providers and experts are not permitted to offer from new, previously undisclosed opinions at trial.

II. Law and Argument

A. The Nevada Rules of Civil Procedure and Nevada Case Law Require the Exclusion of Information Not Disclosed Before Trial, And Any Alleged Damages Not Contained in Plaintiff's Computation of Damages.

NRCP 26(b)(4) requires a litigant to provide a description of the subject matter each expert will testify, a statement of the substance of facts and opinions to which the expert is expected to testify, and all basis for such opinions. The Court prohibits parties from updating or changing opinions regarding medical treatment at the time of trial, and Nevada law clearly prohibits such tactics.

Other jurisdictions have echoed this principle. In *Tetrault v. Fairchild*, 799 So.2d 226 (Fla App. 2001) the Florida Court of Appeals reversed a verdict and remanded for a new trial when the

1 Plaintiff gave new medical records to his expert witness and sought to elicit opinions based on those
2 records. just before trial. In that case, one of the Plaintiff's witnesses was given some MRI's which
3 he had never seen at the time of his deposition. *Id.* In filing a concurring opinion, Justice Harris
4 noted:

5 The primary obligation of any trial court, *indeed its most basic responsibility, is to*
6 *conduct a fair trial.* It has no discretion to do otherwise. A ruling by the trial court
7 which denies either party a fair trial cannot be excused based upon the proposition that
8 trial court has exercised its broad discretion.

9 Similarly, in the case of *Office Depot Inc. v. Miller*, 584 So.2d 587 (Fla App, 1991), the court held it
10 was reversible error to allow one party's expert witness to ambush the other party with new opinions
11 at the time of trial.

12 The Appellate Court of Illinois echoed this principle of fairness in *Clayton v. Cook County*,
13 805 N.E. 222 (Ill. App. 2004), when it held it was reversible error to allow one party to produce
14 previously undisclosed opinions at trial. In that case, the Plaintiff's expert reviewed additional
15 materials after her deposition, and rendered new opinions at trial that had not been disclosed, resulting
16 in unfair prejudice. *Id.* at 231. The court noted:

17 Discovery rules allow litigants to ascertain and rely upon the opinions of experts
18 retained by their adversaries. Parties have a duty to supplement or amend prior
19 answers or responses whenever new or additional information subsequently becomes
20 known to that party. To allow either side to ignore the plain language of [the expert
21 disclosure rule] defeats its purpose and encourages tactical gamemanship.

22 In no case should "tactical gamemanship" be employed to reveal the opinions of experts
23 piecemeal, violating the clear mandates of the discovery rules. When a party violates the expert
24 discovery rules, the opposing party has the option of moving to strike the portion of the testimony that
25 violates the rules, strike the witnesses' entire testimony and bar the witness from testifying any further,
26 or have a mistrial declared. *Id.* See also *Copeland v. Stbco Products Corp.*, 738 N.E.2d 1199 (Ill.
27 2000).

28 In this case, Plaintiff has presented no evidence that Plaintiff William Simao needs future
surgery. Dr. McNulty has testified that Mr. Simao's will follow up two times over four years, after
which he will be discharged. If Dr. McNulty's opinions changed, Plaintiffs had the obligation to put
Defendant Rish on notice. It would be an "ambush" and "tactical gamemanship" to allow Dr.

1 McNulty, or any other doctor, to testify, the Plaintiff needs future surgery. By not advising of
2 Defendants of this alleged future surgery, Plaintiffs deprived the independent medical experts the
3 opportunity to review and respond to such new opinions.

4 Undisclosed evidence is never harmless if the evidence would necessitate "a new discovery
5 order" and "re-open" discovery. *Hoffman*, 541 F.3d at 1180. In this case, permitting such testimony
6 would necessitate new discovery to permit Defendant's experts the opportunity to review Dr.
7 McNulty's new opinions. This new evidence is not harmless and should be excluded, as should any
8 new or previously undisclosed opinion of any medical provider or expert.

9 **III. Conclusion**

10 For the reasons set forth above, Defendants ask this Honorable Court to grant the instant
11 Motion in Limine, and enter an Order precluding Plaintiffs' medical providers and experts from
12 testifying regarding new, previously undisclosed opinions. It would be unfair to the Plaintiffs if the
13 Defendant's medical experts offered new opinions at trial. Defendant Rish simply asks the Court to
14 hold Plaintiff's medical providers and experts to the same standard of fairness.

15 DATED this 12th day of January, 2011.

16 ROGERS, MASTRANGELO, CARVALHO &
17 MITCHELL

18
19 STEPHEN H. ROGERS, ESQ.
20 Nevada Bar No. 5755
21 300 South Fourth Street, Suite 710
22 Las Vegas, Nevada 89101
23 Attorneys for Defendant Jenny Rish

24 M:\Rogers\Rish adv. Simao\Pleadings\MIL previously undisclosed medical opinions

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EXHIBIT A

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

COPY

Case No.: A539455

Volume II

DEPOSITION OF PATRICK S. MCNULTY, M.D.

Taken on Monday, June 29, 2009

7:50 o'clock A.M.

At 2650 North Tenaya Way

Las Vegas, Nevada

Reported By: Sandy A. Dahlheimer, CCR 431

ably set the mobiles and do a good job of not being jerked around.

Q. I mean that can be in the cards then? You can go back to what you were before?

A. It depends on what they do. So if I know you're a good skier and you love skiing, I'll probably let you go back to skiing, but roller-coasters are different.

You're being jerked around and the disclaimer on the sign says if you have neck or back problems, don't do it so wake boarding, jet skiing, those are things that are more unpredictable.

So the simple concept is ideally I just don't want you doing high risk activities where you're suddenly jerking your head and neck around. Sure you can fall in the pool, but you can also trip on the stairs.

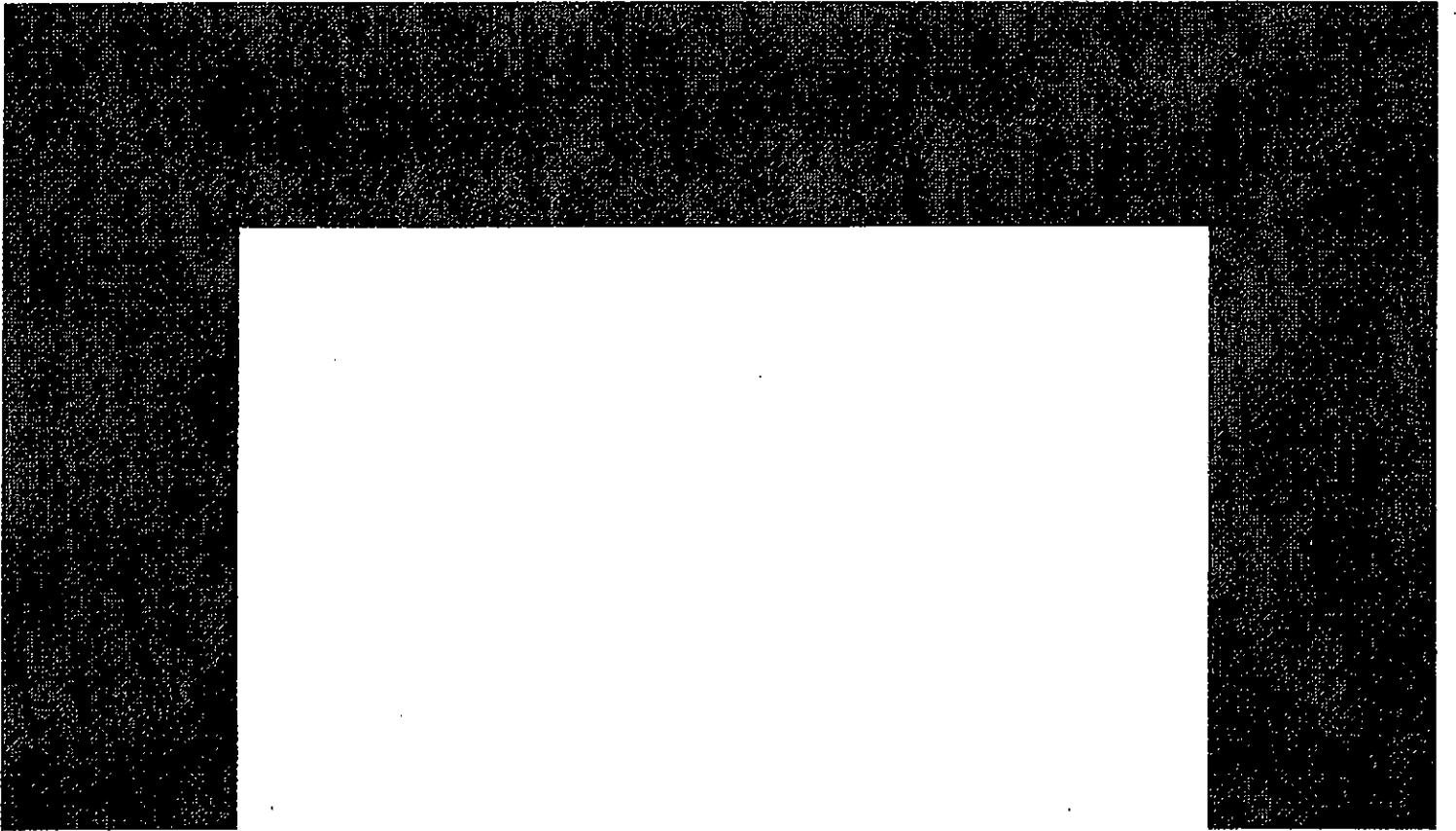
Q. Now, when you last saw the plaintiff, did you see any need for future treatment?

A. Well, he's going to continue to follow up.

My routine is I follow up my fusions for at least two years. So typically he'll come back in four months and then I'll see him back in a year if he's doing well.

Q. Okay. Then there's no more thereafter if he's doing well?

A. No more.

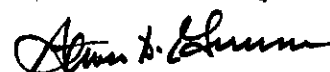


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CLERK OF THE COURT

1 **MLIM**
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8 Fax (702) 384-1460
9 *Attorneys for Defendant Jenny Rish*

DISTRICT COURT

CLARK COUNTY, NEVADA

8 **WILLIAM JAY SIMAO, individually and**)
9 **CHERYL ANN SIMAO, individually, and as**)
10 **husband and wife,**)
11 **Plaintiff,**)
12 **v.**)
13 **JENNY RISH; JAMES RISH; LINDA RISH;**)
14 **DOES I - V; and ROE CORPORATIONS I - V,**)
15 **inclusive,**)
16 **Defendants.**)

CASE NO. A539455
DEPT. NO X

DATE OF HEARING:
TIME OF HEARING:

DEFENDANT JENNY RISH'S MOTION TO EXCLUDE THE
REPORT AND OPINIONS PLAINTIFF'S ACCIDENT
RECONSTRUCTION EXPERT, DAVID INGEBRETSEN.

17 COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H.
18 ROGERS, ESQ., and hereby Moves this Court for an Order excluding Plaintiff's Accident
19 Reconstruction Expert, David Ingebretsen. The Reasons in support of said request are contained in
20 the attached Memorandum of Points and Authorities, all pleadings and papers on file, as well as
21 arguments presented at the time of the hearing.

22 DATED this 6th day of January, 2011.

23 **ROGERS, MASTRANGELO, CARVALHO &**
24 **MITCHELL**

25 **STEPHEN H. ROGERS, ESQ.**
26 Nevada Bar No. 5755
27 300 South Fourth Street, Suite 710
28 Las Vegas, Nevada 89101
Attorneys for Defendant Jenny Rish


1 **NOTICE OF MOTION**

2 TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that the foregoing **DEFENDANT JENNY RISH'S MOTION IN**
 4 **LIMINE TO PLAINTIFF'S ACCIDENT RECONSTRUCTION EXPERT, DAVID**
 5 **INGEBRETSEN** will come on for hearing before the above-entitled court on the _____ day of
 6 **10TH OF FEBRUARY, 2011, AT 9:30 AM**
 6 _____, 2011, at _____ a.m. in Department X.

7 DATED this 12th day of January, 2011.

8 **ROGERS, MASTRANGELO, CARVALHO &**
 9 **MITCHELL**

10 
 11 **STEPHEN H. ROGERS, ESQ.**
 12 Nevada Bar No. 5755
 12 300 South Fourth Street, Suite 710
 13 Las Vegas, Nevada 89101
 13 *Attorneys for Defendant Jenny Rish*

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. Statement of Facts**

16 This personal injury action arises out of a MVA that occurred April 15, 2005. Defendant
 17 Jenny Rish rear-ended a vehicle driven by Plaintiff William Simao. Plaintiff alleges personal injuries
 18 as a result, and ultimately had neck surgery which he relates to the accident.

19 In support of his damages claim, Plaintiff disclosed several experts including a bio-mechanical
 20 and accident reconstruction expert, David Ingebretsen. Mr. Ingebretsen's report and opinions should
 21 be excluded from trial because of Mr. Ingebretsen lacks sufficient foundation to satisfy Nevada's
 22 expert admissibility standard

23 **II. Law and Argument**

24 **A. Nevada Prohibits Expert Accident Reconstruction Opinion Testimony That**
 25 **Lacks Foundation.**

26 Plaintiff's accident reconstruction expert fails to meet the admissibility requirements set
 27 forth by the Nevada Supreme Court. Under NRS 50.275, an expert witness must satisfy the
 28 following three requirements in order to testify:

1 (1) he or she must be qualified in an area of "scientific, technical or other specialized
2 knowledge" (the qualification requirement); (2) his specialized knowledge must "assist the trier of
3 fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and
4 (3) his testimony must be limited "to matters within the scope of his specialized knowledge" (the
5 limited scope requirement).

6 In *Hallmark*, the Nevada Supreme Court stated that, in order to be admissible, an expert
7 opinion must be based on **reliable methodology**. The Supreme Court then instructed trial courts
8 to consider the following five (5) factors to determine the reliability of an expert's methods: (1)
9 whether the opinion is within a recognized field of expertise; (2) whether the opinion is testable
10 and has been tested; (3) whether the opinion is published and subject to peer review; (4) whether
11 the opinion is generally accepted in the scientific community; and (5) whether the opinion is based
12 more on particularized facts rather than assumption, conjecture or generalization. Further, while
13 not adopting Federal standard set forth in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579,
14 113 S.Ct. 2786, 125 L.Ed. 2d. 1469 (1993), the Nevada Supreme court reiterated in *Hallmark*
15 that the Nevada standard "tracks" FRE 702, and *Daubert* is "persuasive authority" regarding
16 expert admissibility. *Hallmark*, 189 Nev. at 650. Importantly, the *Hallmark* court specifically
17 addressed the opinions of a bio-mechanical/accident reconstruction expert. In so doing, the Court
18 noted that it was unable to judge the reliability of the report because the expert did not attempt to
19 re-create the accident.

20 In addition to *Hallmark*, Nevada has long held certain criteria must be met for an accident
21 reconstructionist to establish sufficient foundation. In *Levine v. Remolif*, 80 Nev. 168, 390 P.2d
22 168 (1964), the Supreme Court excluded the findings of an accident reconstruction expert who did
23 not inspect the vehicles, and instead relied on photographs. The *Levine* court further emphasized
24 that an accident reconstruction report that does not consider the co-efficient of friction lacks
25 foundation to provide a credible estimate regarding vehicle speed.

26 In *Gordon v. Hurtado*, 91 Nev. 641, 541 P.2d 533 (1975), the Supreme Court held that the
27 trial court abused its discretion in admitting accident reconstruction testimony when the expert did
28 not consider co-efficient of friction, did not inspect the vehicles, and relied on diagrams contained
in the police report. *Id* at 644, 536. In holding that the testimony and report should have been
excluded, the Supreme Court noted that the expert opinions were based on "...assumption,

1 speculation, conjecture, and having no support in the record." *Id.* at 642, 534 [emphasis added].

2 This Court should exclude Mr. Ingebretsen's report because he did not inspect the vehicles,
3 and instead relied on photographs of only one of the vehicles. Further, he did not attempt to re-
4 create the accident, and did not test the co-efficient of friction. Thus, his report lacks foundation.

5 **B. Mr. Ingebretsen Lacks Foundation; Therefore, His Report and Testimony**
6 **Should be Excluded.**

7 Mr. Ingebretsen did not establish sufficient foundation to formulate reliable opinions. He
8 acknowledges he did not inspect the subject vehicles. Rather, his opinion is based on the
9 following information: (1) the police report, (2) Complaint, (3) vehicle photographs, (4) "some"
10 written discovery, (5) repair invoice for Plaintiff's vehicle, (4) Plaintiffs' depositions.¹ The
11 vehicles were not inspected, and the existence or absence of frame damage could not be assessed.
12 As the *Levine* court noted, frame damage "could only be revealed from an examination." *Levine*,
13 80 Nev. at 171. This information clearly fails to establish reliable foundation.

14 In summary, Mr. Ingebretsen failed to establish sufficient foundation because he relied on
15 photographs of one vehicle instead of inspecting both vehicles; he did not assess the co-efficient of
16 friction at the accident scene; and he did not attempt to reconstruct the accident. His report and
17 opinion testimony should be excluded from evidence.

18 **Conclusion**

19 Plaintiffs' accident reconstruction expert lacks to offer opinion testimony. He should be
20 precluded from testifying at trial.

21 DATED this 6th day of January, 2011.

22 ROGERS, MASTRANGELO, CARVALHO &
23 MITCHELL

24 STEPHEN H. ROGERS, ESQ.
25 Nevada Bar No. 5755
26 300 South Fourth Street, Suite 710
27 Las Vegas, Nevada 89101
28 Attorneys for Defendant Jenny Rish

29 ¹Mr. Ingebretsen did inspect Plaintiff's vehicle *after it had been repaired*. As discussed,
proper foundation requires inspections to occur prior to repair in order to verify frame damage, if
any.

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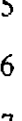
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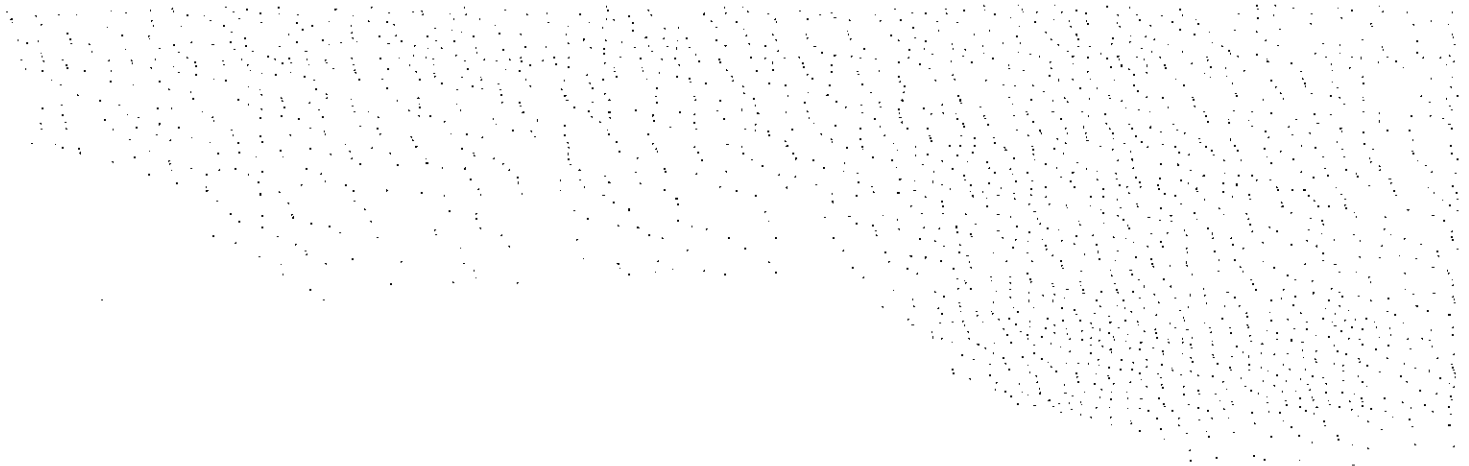
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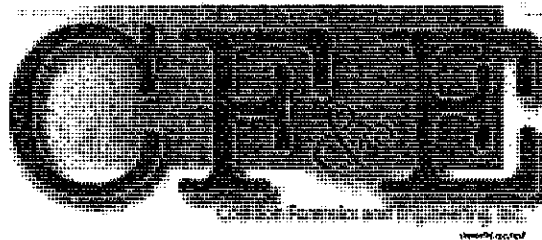




000108

EXHIBIT A

Ronald L. Probert
Michael S. Anderson



David M. Ingebretsen

2469 B. Fort Union Blvd., Suite 114 - Salt Lake City, UT 84121
(801) 733-5458 -- FAX: (801) 733-5491 - Las Vegas, NV - (702) 249-1446
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April 15, 2009

John E. Palermo, Esq.
AARON & PATERNOSTER, LTD.
2300 West Sahara Avenue, Ste 650, Box 30
Las Vegas, NV 89102

RE: *Simao v. Rish*

Dear Mr. Palermo:

I completed my preliminary analysis of this incident and submit this preliminary report for your consideration. I used standard methods and techniques of investigation as well as applying fundamental principles of engineering, physics, and biomechanics. I drew on my education in mechanical engineering, bioengineering, and physics, and my experience in order to understand and interpret the evidence, facts, and results of this analysis and investigation. All opinions expressed herein are to a reasonable degree of scientific probability unless otherwise indicated.

I will supplement this report with more detail and opinions as appropriate and possible in a timely manner if other written discovery, such as deposition testimony of other individuals, medical records, expert reports from defense experts, and other information is provided.

As of this report, I have examined the following material:

- Police report
- Complaint
- Photographs of the Ford Econoline and Chevrolet Suburban
- Some written discovery information
- Repair invoice for the Ford Econoline
- Deposition of William Simao
- Deposition of Cheryl Ann Simao
- Mr. Simao's vehicle and Mr. Simao

I considered the facts and best evidence contained in the provided documentation as well as my own research in the context of my education and experience. I then performed calculations and analysis to determine the most likely impact speeds, changes in speeds, and accelerations for the vehicles. The analysis I performed relied on calculations made with PC-Crash software by DSD Engineering. This software is based on Newton's Impulse-Momentum method and has been verified against staged collisions and has been used by myself to support my testimony in courts in Utah, California, and Nevada. PC-Crash has been accepted in courts world-wide as a scientific tool for analyzing vehicle

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accidents. Some publications by the Society of Automotive Engineers are given here for reference,

- *"Validation of PC Crash – A Momentum-Based Accident Reconstruction Program,"* Cliff, Montgomery, SAE 960885
- *"Reconstruction of Twenty Staged Collisions With PC-Crash's Optimizer,"* Cliff, Moser, SAE 2001-01-0507
- *"Validation of the Coupled PC-Crash-Madymo Occupant Simulation Model,"* Steffan, 2000-01-0471
- *"Data From Five Staged Car-To-Car Collisions and Comparison With Simulations,"* Bailey, SAE 2000-01-0849
- *"The Collision and Trajectory Models of PC-Crash,"* Steffan, Moser, SAE960886

Further, testing performed has shown that the actual impact during a rear end collision typically occurs over a time frame of between 0.1 and 0.2 seconds. Because of this short time period, the forces can be considered of short duration and impact dynamics methods may be accurately used to study the interaction. PC-Crash implements such a method using Newton's impulse momentum form of his equations. For example, see these papers published by the Society of Automotive Engineers,

- *"Low Speed Collinear Impact Severity: A Comparison between Full Scale Testing and Analytical Prediction Tools with Restitution Analysis,"* Cipriani, Bayan, Woodhouse, Cornetto, Dalton, Tanner, Timbarjo, SAE 2002-01-0540
- *"Modeling of Low-Speed, Front-to-Rear Vehicle Impacts,"* Brach, SAE 2003-01-0491
- *"Rear-End Impact Testing with Human Test Subjects,"* Braun, Jhoun, Braun, Wong, Boster, Kobayashi, Perez, Hesler, SAE 2001-01-0168

The police report described a rear end accident with injuries and moderate damage to both vehicles which occurred on southbound Interstate 15 in the #1 travel lane on April 15, 2005 at approximately 1510 hours. No environmental, vehicle or roadway conditions were noted as contributing to this traffic accident, and I found no evidence of inappropriate action on the part of Mr. Simao, leaving driver error on the part of Ms. Rish as the sole contributing action to this traffic accident.

Mr. William Simao was driving a 1994 Ford Econoline cargo van and, "slowed down to a complete stop" for congested traffic. Ms. Jenny Rish was driving a 2001 Chevrolet K1500 Suburban behind the Ford and, "failed to decrease her speed and struck" the Ford. Both vehicle were moved prior to NHP arrival and both were retained by their respective drivers and driven from the scene. The police report lists a claimed injury for Mr. Simao in his neck, head, and upper extremity. The airbags did not deploy in the Suburban. The police report estimated an impact speed of 20 mph for the Suburban.

Considering the relative bumper heights and front end dipping due to braking on the Suburban, there was likely good bumper alignment. The damage on the front of the Suburban visible in the photographs

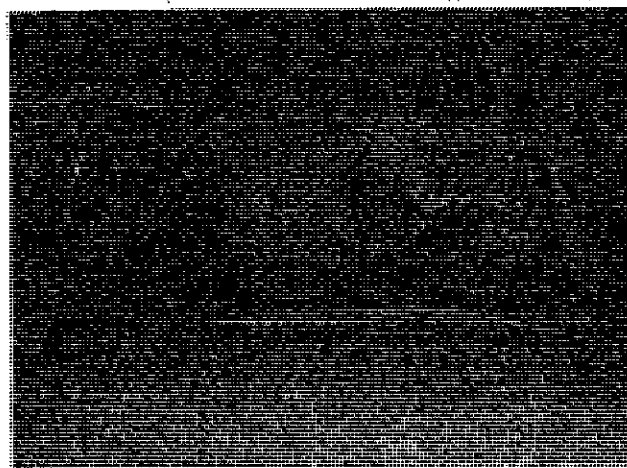
John E. Palermo, Esq.
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is consistent with an aligned bumper to bumper contact, likely involving the trailer hitch on the Ford Econoline. I inspected the hitch assembly on the van and found it was between 17 and 20 inches from the ground. It was a very solid installation including welding of the hitch to the frame of the van. The Suburban front bumper top is 27 inches from the ground. Assuming 3 to 4 inches of front end dipping from braking, the hitch was most likely involved in the contact and therefore would account for reduced damage on the van. Mr. Simao represented to me he had some equipment racks and tools in the back of his van and showed me one of the racks (which had been removed at my inspection). Using the estimated impact speed from the police report of 20 mph, the resulting change in speed for the Ford Econoline was calculated to be 12 mph; 11 mph for the Suburban. An 11 mph change in speed for the Suburban is consistent with non-deployment of the airbag; the lower end of a "gray" region where deployment is possible, but not assured. The Ford would have moved forward approximately 15 feet at

this change in speed, approximately one small to medium car length, assuming moderate braking. It is not known how much space Mr. Simao represented to me he left a car length or more between his vehicle and the vehicle ahead of him and could see the asphalt between the vehicles, consistent this post impact motion. Based on this information and calculations, a 20 mph impact is most likely the upper limit for impact speed and 12 mph would therefore be the upper limit for the change in velocity for the Ford Van.

At the vehicle inspection, I observed Mr. Simao in his van and asked him to sit as he was at the time of the incident. He sat in his seat, leaned over the center console and rested his head in his hand. From this observation, it is clear how his head could, and most likely did strike the cage in this traffic accident. Leaning forward and to his right also places his neck in a position of greater potential harm. This is clearly an "out of position" configuration.

Mr. Simao is 6' 6" tall and was seated in his van, looking ahead, and was unaware of the imminent impact. At impact, he testified his head hit the "cage" behind him as well as his right arm. He is alleging he was injured in this traffic accident and described injury to his neck,



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April 15, 2009

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left shoulder, and the back of his head.

Bioengineering is an established scientific discipline with degrees offered at many accredited universities through out the United States. Biomechanics is a sub-specialty of bioengineering which studies the application of universal physical laws of motion to the human body and has its roots in work started by da Vinci with a mathematical framework provided by Newton. The 1700's and 1800's saw specific work pertaining to the motion of humans and animals with work by Marey, Muybridge, Braune, and Fisher still cited today. In the 1900's, the study of physics as applied to the human body was furthered and the term biomechanics was coined. In the early 1900's universities started to include biomechanics course work and in 1967, the first international seminar on biomechanics was held in Zürich, Switzerland. It was a physicist in the 1950's, A.F. Huxley who is credited with the still used and cited sliding filament model of human muscle.

The field of biomechanics as applied to the study of the mechanisms of injury is widely used and relied on by the US Government in understanding the cause of injury in auto accidents, by the auto manufacturers in designing restraint systems, and other safety components to protect individuals, by NASA and the military in designing and understanding how to protect and reduce injuries, by athletic equipment manufacturers and designers to design equipment to protect athletes. The results of biomechanical analyses play a role in most if not all areas in which we are subjected to or may be subjected to dynamic events which may lead to injury.

In considering the potential for injury for Mr. Simao or an individual substantially similar to Mr. Simao, I relied on the fact that humans are subject to the same universal physical laws described by Newton. In considering the vehicle dynamics and the occupant dynamics and the biomechanical effect of this event, I relied on my general research regarding data, studies, and other information provided in the papers published in the Society of Automotive Engineers, reference and text books on biomechanics of trauma by Nahum and Melvin, White and Panjabi, Yamada, Whiting and Zernicke, Nigg and Herzog, Nordin and Franken, Levine, and other text books and reference works. I relied on my education and experience in physics, dynamics, and multi-body dynamics, and reference and text books by Wong, Thomas and Gilespe, Greenwood, Goldstein, and other text and reference books.

His history is significant for a prior, distant, motor vehicle accident, a motorcycle accident in 2003 in which he injured his elbow, and a subsequent motor vehicle accident in 2008. He has a history of migraine headaches and denies prior injury to his head, neck, and shoulder. He treated for a "pulled muscle" in his low back from lifting a cooler at work.

The headrest in this vehicle is fixed to the cage immediately behind the driver's seat. However, as indicated above, Mr. Simao was out of position and his head restraint would not have played a part in this incident.

After this traffic accident, Mr. Simao testified he felt pain and the police report notes "claimed" injury

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to Mr. Simao. He went to the Urgent Care and reported pain in his neck, back, left elbow, and the back of his head. He testified he had a bump on the back of his head. While pain is subjective, it is an indication of injury and the pattern Mr. Simao reports is consistent with other's reported patterns after involvement in a rear end collision.

In a rear end collision, the transient dynamic response of the neck, prior to any macroscopic hyper extension (that is while the head is still undergoing macroscopic motion in a normal range of motion), is best described as a non-physiologic loading pattern in which the lower cervical spine (hyper)extends locally and the upper cervical spine (hyper)flexes locally. This is due to the multi-body nature of the spinal column and the physically based mechanical response to the inertial loading pattern imposed on the head/neck complex in a rear end collision. A rear end collision embodies the loading pattern which places these non-physiological loads on the soft tissues of the cervical spine and is mechanically consistent with soft tissue injury of varying degrees depending on the overall available energy which is dissipated by the occupant's cervical soft tissues. While some experts invoke staged collision and other controlled live subject testing to try to establish that injury should not occur in many rear end collisions, these tests are designed and controlled with the intent of not hurting the participants. It is not surprising when the subjects do not report injury. Statistical analysis of real world collisions support the conclusion there is a population which does experience some type and degree of soft tissue injury in rear end collisions at speeds lower than what has been calculated here. The degree of likely injury depends on the change in speed, age, gender, stature, pre-existing pathology which degrades the structural integrity of the stabilizing structures, and other geometric and physical parameters. In this case, using the calculated change in velocity, factoring in Mr. Simao's age (41 almost 42 years old), stature, and his claim he struck his head, cervical injury is a likely result.

Although some discussion of Mr. Simao's medical records was presented in Mr. Simao's deposition, the biomechanical analysis will be further pursued, if needed, after I have reviewed the medical records in a biomechanical context and other written discovery is obtained and examined.

In summary, my initial conclusions and opinions, to a reasonable degree of scientific certainty are:

- An impact speed of 20 mph and change in speed for the van of 12 mph is consistent with the facts and evidence as I have them and with the calculations I performed.
- Mr. Simao was out of position and unbraced for this impact and in a position which placed his cervical spine at particular risk.
- Mr. Simao's cervical spine was subjected to non-physiological loading and aggravating/exacerbating pre-existing mechanical damage (medically referred to as degenerative conditions or pathology) is consistent with the vehicle and occupant dynamics.
- Cervical tissue structural damage is a likely result of this traffic accident given my analysis, facts, and evidence of this accident.

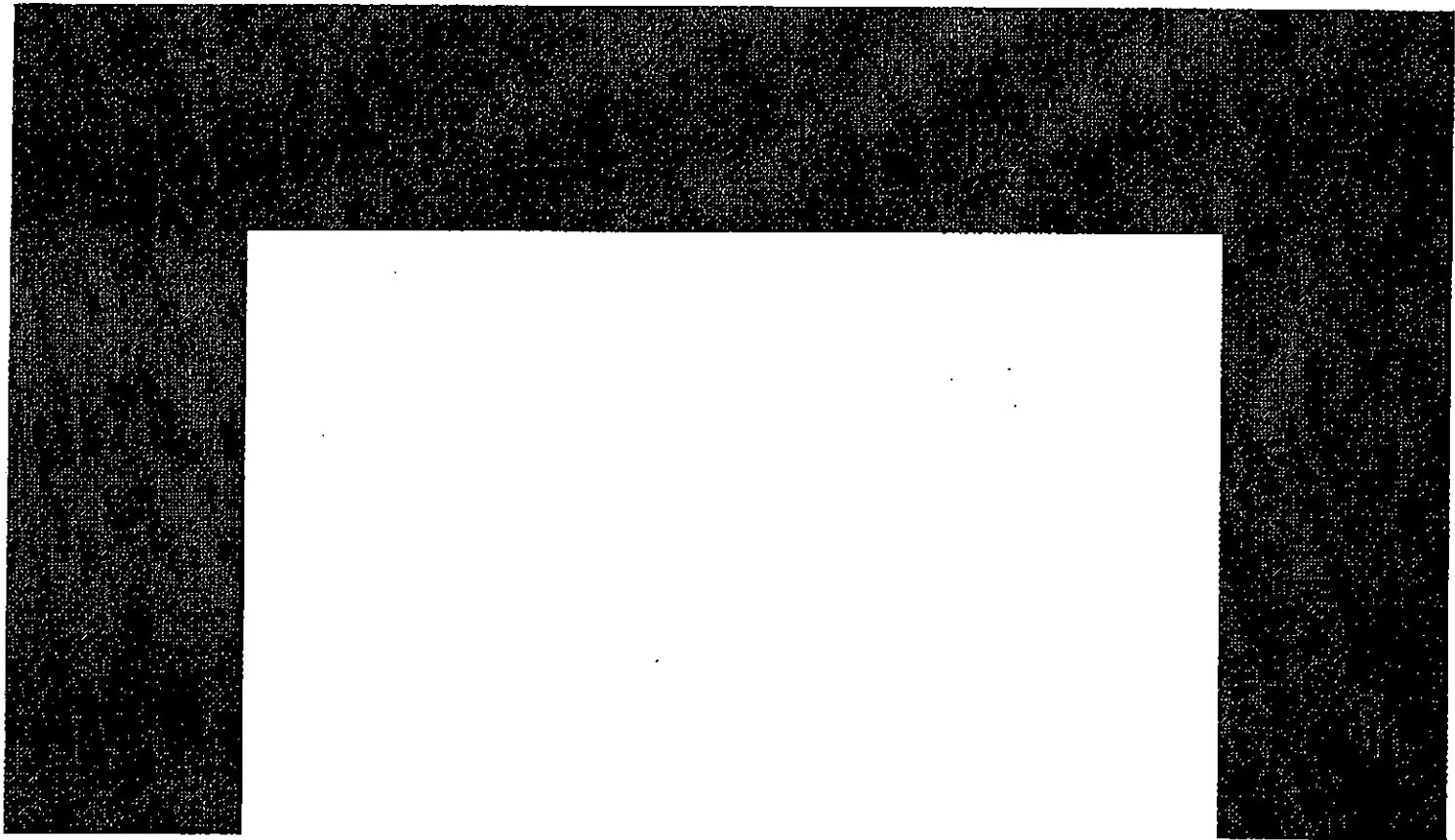
John E. Palermo, Esq.
Simao v. Rish
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I reserve the right to amend and/or modify this report should further information, facts, or evidence be provided/discovered or additional analysis performed which warrants such action.

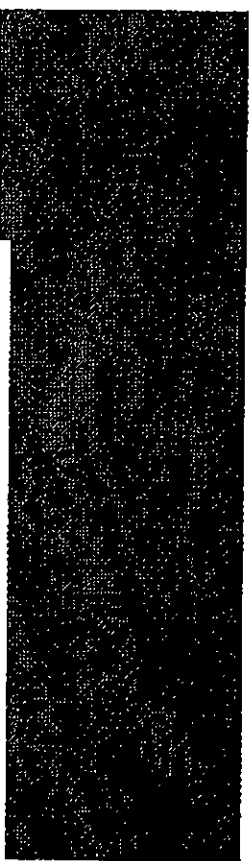
Sincerely,

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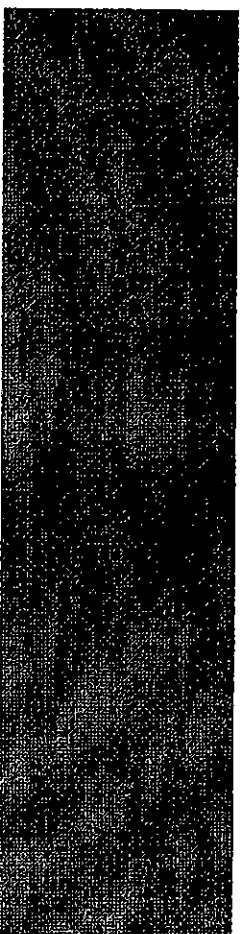
David M. Ingebretsen, M.S., M.E.
Mechanical-Biomechanical Engineer / Physicist



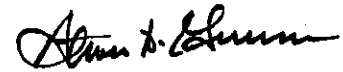
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CLERK OF THE COURT

OLIM

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402

DAVID T. WALL, ESQ.

Nevada Bar No. 2805

ROBERT M. ADAMS, ESQ.

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Las Vegas, Nevada 89102

Ph.: (702) 384-4111

Fx.: (702) 384-8222

Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A539455

DEPT. NO.: X

**PLAINTIFF'S OMNIBUS MOTION IN
LIMINE**

COMES NOW Plaintiff, WILLIAM SIMAO, by and through his attorneys, ROBERT T.

MAINOR EGLET


000116

EGLET, ESQ., DAVID T. WALL, ESQ. and ROBERT A. ADAMS of the law firm of MAINOR
EGLET, and hereby files his Omnibus Motion in Limine.

This Motion is made and based upon the pleadings and papers on file herein, the attached
Points and Authorities, and any argument made by counsel at the hearing of this matter.

DATED this 7 day of January, 2011.

MAINOR EGLET

By: 
DAVID T. WALL, ESQ.

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **PLAINTIFFS'**
OMNIBUS MOTION IN LIMINE, ^{10TH OF FEBRUARY, 2011, 9:30 AM} on for hearing on the ___ day of ___, 2011, at the hour of
___, in Department X or as soon thereafter as counsel may be heard.

Dated this ___ day of January, 2011

DISTRICT COURT JUDGE

Respectfully submitted by:


DAVID T. WALL, ESQ.


AFFIDAVIT OF DAVID T. WALL, ESQ. IN COMPLIANCE WITH EDCR 2.47

1 STATE OF NEVADA)
 2) ss.:
 3 COUNTY OF CLARK)

4 DAVID T. WALL, ESQ., being first duly sworn, under oath, deposes and says that:

- 5 1. Affiant is an attorney licensed to practice law in the State of Nevada and partner with
 6 the law firm of **MAINOR EGLET**, co-counsel for Plaintiffs in this matter;
 7
 8 2. Trial of this matter is scheduled to begin on March 14 2011;
 9
 10 3. That pursuant to EDCR 2.47, Affiant and Defendants' counsel discussed the merits of
 11 the instant Motion in good faith on January 4, 2011, but have been unable to resolve this matter
 12 satisfactorily, thereby necessitating the filing of the instant Motion.

13 FURTHER, AFFIANT SAYETH NAUGHT.

14 
 15 DAVID T. WALL, ESQ.

16 SUBSCRIBED AND SWORN to before me

17 This ____ day of January, 2011.

18
 19 _____
 20 NOTARY PUBLIC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

On or about April 15, 2005, Plaintiff, WILLIAM SIMAO, was driving his vehicle on southbound Interstate 15 in the #1 travel lane near the Cheyenne interchange in Las Vegas, Nevada. William had slowed his vehicle to a complete stop for congested traffic when Defendant, JENNY RISH, failed to decrease her speed and collided with the rear end of William's vehicle. As a result of the crash, William suffered severe and debilitating injuries.

II. RELIEF REQUESTED

Plaintiffs request that the Court enter an Order before selection of the jury, instructing Defendants, their attorneys and witnesses, not to directly or indirectly mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner any of the facts indicated below without first obtaining the permission of the Court outside the presence and hearing of the jury and further instructing the defense attorney to warn and caution his clients and each and every witness to strictly follow any Order entered by the Court in connection with this matter.

III. LEGAL AUTHORITY

The primary purpose of a motion in limine is to prevent prejudice at trial. Hess v. Inland

1 Asphalt Co., 1990 U.S. Dist. Lexis 6465, 1990-1 Trade Cases (CCH) P68, 954 (ED. Wash., Feb. 20,
2 1990). The court has authority to issue a preliminary ruling on the admissibility of evidence. The
3 decision to do so is vested to the sound discretion of this court. See State v. Teters, 2004 MT 137, 91
4 P.3d 559, 563 (Sp. Ct. Mont. 2004). The court's discretion will not be overturned on appeal absent a
5 showing of a clear abuse-of-discretion. See Gagan v. American Cablevision, Inc., 77 F.3d 951, 966-
6 67 (7th Cir. 1996); United States v. Brady, 595 F.2d 359, 361 (6th Cir.), cert. denied, 444 U.S. 862,
7 100 S.Ct. 129, 62 L.Ed.2d 84 (1979); United States v. Robinson, 560 F.2d 507, 513-515 (2d Cir.
8 1977), cert. denied, 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978); United States v. Hall, 565
9 F.2d 1052, 1055 (8th Cir. 1977); Texas Eastern Transmission v. Marine Office-ARPleton & Cox
10 Com., 579 F.2d 561, 567 (10th Cir. 1978); Rozier v. Ford Motor Co., 573 F.2d 1332, 1347 (5th Cir.
11 1978); Longenecker v. General Motors Corp., 594 F.2d 1283, 1286 (9th Cir. 1979); United States v.
12 D'Alora, 585 F.2d 16, 21 (1st Cir. 1978); United States v. Juarez, 561 F.2d 65, 70-71 (7th Cir. 1977).
13
14 Such motions are designed to simplify the trial and avoid prejudice that often occurs when a party is
15 forced to object in the presence of the jury, to the introduction of evidence. Fenimore v. Drake
16 Construction Co., 87 Wn.2d 85, 549 P.2d 483 (1976).
17

18 NRS 48.035(2) states that "[a]lthough relevant, evidence may be excluded if its probative
19 value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or
20 misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of
21 cumulative evidence." When the proffered testimony or evidence is not relevant, its prejudicial effect
22 outweighs its relevance, the substance of the proffered testimony or evidence is collateral to the
23 issues of this trial and would only serve to confuse and mislead the jury, the evidence must be
24 excluded. See e.g., Uniroyal Goodrich Tire Co. v. Mercer, III Nev. 318, 890 P.2d 785 (1995); Larsen
25 v. State, 102 Nev. 448, 725 P.2d 1214 (1986).
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IV. ITEMS SUBJECT TO EXCLUSION

1 **1. Prior and Subsequent Unrelated Accidents, Injuries and Medical Conditions and**
2 **Prior and Subsequent Claims or Lawsuits.** Any evidence or reference to any prior and/or
3 subsequent unrelated accidents and injuries or conditions must be excluded unless (a) such
4 condition was symptomatic at the time of the injury at issue here, or was (b) a latent pre-existing
5 condition that was made symptomatic by the injury. It is well settled that causation of injury and
6 damages must be established by medical expert testimony to a reasonable degree of medical
7 probability. *See Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157, 111 P.3d 1112 (2005);
8 *Layton v. Yankee Caithness Joint Venture*, 774 F.Supp. 576 (1991); *Fernandez v. Admirand*, 108
9 Nev. 963, 973, 843 P.2d 354 (1993); *Brown v. Capanna*, 105 Nev. 665, 671-72, 782 P.2d 1299
10 (1989). "A verdict may not be based on speculation, whether the testimony comes from the mouth
11 of a lay witness or an expert. *Gramanz v. T-Shirts & Souvenirs*, 111 Nev. 478, 894 P.2d 342 (1995)
12 (citing *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 682 (3d Cir. 1991)). Thus, prior and/or
13 subsequent accidents and injuries may only be admissible if a medical expert testifies to a
14 reasonable degree of medical probability that such prior and/or subsequent accidents and injuries are
15 causally related to the injuries the Plaintiff sustained in the subject crash.
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20 In *Morsicato*, the Plaintiff was diagnosed with scabies, which the Plaintiff claimed was
21 caused by overexposure to lindane lotion. *Morsicato*, 121 Nev. at 156. The Plaintiff claimed that the
22 multiple applications of lindane were used due to improper labeling at the phannacy. *Id.* At trial, the
23 Plaintiff presented several experts who testified to a reasonable degree of medical probability that
24 Plaintiff Morsicato's injuries were caused by the lindane lotion. *Id.* Defendant, Sav-On, offered the
25 testimony of a neurologist, Dr. Michael Schneck. *Id.* Although Dr. Schneck acknowledged the
26 theory that lindane exposure caused Morsicato's injuries, he opined that other theories, including an
27
28

1 autoimmune response, could possibly explain the injury. *Id.* After Plaintiff's counsel objected to the
2 speculative nature of Dr. Schneck's testimony, the court explained that medical opinions regarding
3 causation must state that the particular form of causation was more likely than not, or more than 50
4 percent likely. *Id.* Dr. Schneck then testified that his autoimmune theory was not more likely than
5 the other causes but that he would rank his theory as the most likely medical cause. *Id.* The court
6 further explained the evidentiary standard and clarified that his opinion must be more than 50 percent
7 likely or it would be stricken. *Id.* Dr. Schneck then stated that the autoimmune phenomenon was the
8 most likely cause. *Id.*

9
10 The jury returned a unanimous defense verdict, finding that Sav-On's negligence did not
11 cause Morsicato's skin condition. On appeal, Morsicato argued that Dr. Schneck's expert testimony
12 on causation was speculation and conjecture that failed to meet the requisite standard for expert
13 testimony and should have, therefore, been stricken. *Id.*, at 157. The Supreme Court agreed. In
14 reaching its decision, the Court relied upon prior Nevada Supreme Court precedent, explaining that
15 the Supreme Court has previously held that "physicians must state to a degree of reasonable medical
16 probability that the condition in question was caused by the industrial injury, or sufficient facts must
17 be shown so that the trier of fact can make the reasonable conclusion that the condition was caused
18 by the industrial injury." *Morsicato*, 121 Nev. 153, 157, 111 P.3d 1112 (2005) (citing *United*
19 *Exposition Service Co. v. SIIS*, 109 Nev. 421, 424, 851 P.2d 423, 425 (1993)). The *Morsicato* Court
20 further stated that: "[t]he speculative nature of an opinion that an injury **possibly** could have been a
21 precipitating factor was insufficient to support a finding of causation; specifically, we stated, 'A
22 **possibility is not the same as a probability**.'" *Id.* [Emphasis Added].
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26 The Court then explained the history and rationale for the rule that expert testimony be stated
27 to a reasonable degree of medical probability, as follows:
28

1 Since 1989, this court has held that 'a medical expert is expected to testify only to
2 matters that conform to the reasonable degree of medical probability standard.'
3 Furthermore, in dictum, this court has observed that expert testimony regarding
4 causation must also rise to this level of certainty. As the Pennsylvania Supreme
5 Court has recognized, one rationale for requiring such specificity with expert opinions
6 is that "if the plaintiff's medical expert cannot form an opinion with sufficient
7 certainty so as to make a medical judgment, there is nothing on the record with which
8 a jury can make a decision with sufficient certainty so as to make a legal judgment."

9 *Id.*, (citing *McMahon v. Young*, 442 Pa. 484, 276 A.2d 534, 535 (Pa. 1971)).

10 Sav-On argued that even though Dr. Schneck's testimony was not made to a reasonable
11 degree of medical probability, it was nevertheless admissible under the general standard of NRS
12 50.275 because it did not address an ultimate finding of fact. The Court disagreed. The Court
13 reiterated the rule that "medical expert testimony regarding standard of care and causation must be
14 stated to a reasonable degree of medical probability." *Morsicato*, supra at 158. The Court concluded
15 that Dr. Schneck testified concerning an ultimate issue in the case, causation, that Dr. Schneck was
16 not certain what caused Morsicato's injuries, but simply stated that he could offer a theory that was
17 just as plausible as the theory that lindane caused the injury. *Id.* The Court found that Dr. Schneck
18 never stated his opinion to a reasonable degree of medical probability and that his testimony was
19 "highly speculative and failed to meet the admissibility standard". *Id.*, at 159. The Court held that
20 the district court abused its discretion in failing to strike the testimony, reversed the court's judgment
21 and remanded for a new trial on the issues of causation, contributory negligence and damages. *Id.*

22 Consequently, as applied to the instant matter, any prior and/or subsequent accidents, injuries
23 and/or medical conditions which the defense's medical expert does not causally relate to a reasonable
24 degree of medical probability to the injuries William sustained as a result of the subject motor vehicle
25 crash are irrelevant and must be excluded. These include, but are not necessarily limited to:

- 26 1) A minor motorcycle accident in 2003 wherein a vehicle came into William's lane and
27 caused his motorcycle to tip over onto the median. William sustained soft tissue injuries
28 and abrasions to his right elbow. Not only are these injuries irrelevant to the injuries he

1 sustained in the subject motor vehicle crash, but they had fully healed when the 2005
2 crash occurred. See Plaintiff's Deposition at Exhibit "1," p.21-24.

- 3 2) William having high blood pressure and/or high cholesterol. These medical conditions
4 are irrelevant to the instant case and should be excluded.

5 Any reference to any other claims or lawsuits involving the Plaintiff, either prior to or
6 subsequent to the instant action, whether the claim or suit arose out of this incident or some other
7 claim or lawsuit, is irrelevant to the issues in this case and presents the danger of unfair prejudice and
8 confusion of the issues.

9 **2. Reference to William Being a Malingerer, Magnifying Symptoms or Manifesting**
10 **Secondary Gain Motives Should Be Excluded.** Plaintiff's counsel anticipates that counsel for
11 Defendants will seek to proffer the theory that William is a malingerer, that he is magnifying
12 symptoms, or that he has secondary gain motives. There is no evidence to support this theory other
13 than pure speculation by defense. The complete lack of reliable evidence to support this condition
14 warrants that it be excluded because it is not a relevant condition in this case. NRS § 48.035 (even
15 relevant evidence inadmissible without probative value).
16

17 Moreover, the relevance of a condition like malingering must be established by competent
18 medical evidence by an expert qualified to testify to the relatedness of the condition to the injuries in
19 question. Defendant has no such expert. See *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008); NRS
20 50.275. As such, any and all reference of William being a malingerer or having a secondary gain
21 motive is not relevant to the instant case.
22

23 Furthermore, any argument or commentary by the defense and/or their experts regarding the
24 William's credibility, including but not limited to, whether he is honest about his injuries and
25 symptoms, is exaggerating his symptoms, is malingering (which means lying about symptoms),
26 or has secondary gain motivations (which means lying about or exaggerating symptoms for monetary
27
28

gain), must not be permitted. Such testimony invades the province of the jury and is improper. Further, because such testimony concerns the Plaintiff's state of mind, the testimony would be entirely speculative and improper under NRS 50.025, which requires a witness have personal knowledge to testify about a particular matter. Additionally, defense counsel must not be permitted to make any comments concerning the credibility and believability of William per Nevada Rule of Professional Conduct 3.4(e) which prohibits counsel from stating a personal opinion as to the credibility of a witness. See also *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008).

Expert testimony should not invade the province of the jury. *United States v. Rahm*, 993 F.2d 1405, 1413 (9th Cir. 1993). "Hypothetical question which calls upon a witness to determine the credibility of other witnesses or to pass upon conflicts in the testimony invades the province of the jury, whose duty it is to determine where the truth lay in cases of conflicts in the evidence." *Dexter v. Hall*, 82 U.S. 9, 21 L.Ed. 73 (1873); *Brendaes on Evidence*, vol. 2 § 372; *Estate of Gould*, 188 Cal. 353, 205 P. 457 (1922); 22 C.J. § 807, p. 720. As stated in *Brendaes on Evidence*, vol. 2, § 372. *United States v. Stephens*, 73 F.2d 695, 703 (9th Cir. 1934). "All questions calling for their [expert] opinion should be so framed as not to call upon them to determine controverted questions of fact or to pass upon a preponderance of testimony. When the question is so framed as to call upon the expert to determine as to which side of the evidence preponderates, or to reconcile conflicting statements, he is in effect asked to decide the merits of the case, which is a duty wholly beyond his province." *United States v. Stephens*, 73 F.2d 695, 703 (9th Cir. 1934). "Expert testimony should not be permitted if it concerns a subject improper for expert testimony, for example, one that invades the province of the jury. *United States v. Amaral*, 488 F.2d 1148 at 1153 (expert testimony on the unreliability of eyewitness testimony properly excluded). "Credibility is a matter to be decided by the jury." *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985).

1 "Although cases almost without limit might be cited which recognize the principle that an
2 expert cannot be called upon to give an opinion determining the merits of the case or to weigh
3 conflicting evidence, or to judge credibility of the testimony, such witnesses are constantly allowed to
4 state their opinions based upon facts within their own knowledge or facts assumed in hypothetical
5 questions. If the hypothetical question properly presents the fact which the evidence tends to prove,
6 and does not call upon the witness to reconcile conflicting evidence or pass upon the merits of the
7 case, a wide range may be given by the court and a liberal allowance as to its form." *Stephens*, supra
8 at 703.

9
10 **Credibility, however, is for the jury -- the jury is the lie detector in the**
11 **courtroom.** Judges frequently instruct juries about factors that the jury may or
12 should consider in weighing the veracity of a witness. In this respect it can be
13 said that judges assume that they have certain expertise in the matter, and that
14 juries have less of that expertise than judges. It is now suggested that
15 psychiatrists and psychologists have more of this expertise than either judges or
16 juries, and that their opinions can be of value to both judges and juries in
17 determining the veracity of witnesses. Perhaps. The effect of receiving such
18 testimony, however, may be two-fold: first, it may cause juries to surrender
19 their own common sense in weighing testimony; second, it may produce a trial
20 within a trial on what is a collateral but still an important matter. For these
21 reasons we, like other courts that have considered the matter, are unwilling to
22 say that when such testimony is offered, the judge must admit it.

23
24 *See United States v. Rosenberg*, 168 F.Supp 798, 806 (S.D.N.Y. 1952); *United States v. Daileida*, 229
25 F.Supp 148, 153-4 (M.D.Pa. 1964).

26
27 In this case, the court should not allow the defense and/or their experts to judge the credibility
28 of William. Pain is almost entirely subjective. Allowing an expert to testify that William is not
really having pain, not only invades the province of the jury (which is to determine whether William
is telling the truth), but would be improper, speculative testimony regarding the Plaintiff's state of
mind in violation of NRS 50.025, which requires a witness to have personal knowledge to testify
about a particular matter. Certainly, no defense expert could possibly have personal knowledge about

1 whether the Plaintiff is being untruthful about his pain. The determination of whether the Plaintiff is
2 or is not being truthful about his pain is an issue left for the jury. Even if such testimony is relevant,
3 which it is not, the probative value of such testimony (which is zero), is "substantially outweighed by
4 the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035.

5 Additionally, defense counsel must be prohibited from making any comments that the
6 Plaintiff is not being truthful about his pain, including but not limited to, any statements that
7 William has "secondary gain motivations", is a "symptom magnifier", is "amplifying
8 symptoms", and/or is "malingering". Nevada Rule of Professional Conduct
9 3.4(e) specifically prohibits counsel from stating a personal opinion as to the justness of a cause and
10 the credibility of a witness. See NRPC 3.4(e). Just as the defense's experts are prohibited from
11 stating opinions concerning a witness' credibility of William, so too is defense counsel prohibited
12 from stating personal opinions regarding the Plaintiff's credibility. See also *Lioce v. Cohen*, 124 Nev.
13 1, 174 P.3d 970 (2008). Allowing counsel to make such comments would be grounds for a new
14 trial. *Id.*

17 **3. Treating Physicians Do Not Need to Prepare Expert Reports Separate From and**
18 **in Addition to Their Medical Records and Dictated Reports.** Nevada Law allows a treating
19 physician to testify to matters such as causation, future care, and the extent of disability, etc. as part
20 of the treating physician's ordinary care of the patient, thus, exempting them from the reporting
21 requirements of NRCP 16.1(a)(2)(B).
22

23 A decision of a United States District Court for the District of Nevada confirms this rule by
24 stating as follows with respect to the nearly identical Federal rule:
25

26 Since a treating physician's opinions on matters such as "causation, future
27 treatment, extent of disability and the like" are part of the ordinary care of
28 a patient, a treating physician may testify to such an opinion without being
subject to the extensive reporting requirements of Rule 26(a)(2)(B).

1 *Elgas v. Colorado Belle Corp.*, 179 F.R.D. 296, 298 (D. Nev. 1998) (citing *Piper v. Harnischfeger*
2 *Corp.*, 170 F.R.D. 173, 174-75 (D. Nev. 1997). [Emphasis added].

3 The Nevada Rules of Civil Procedure were amended in 2004 and require that specially
4 retained expert witnesses, like defense experts prepare timely written reports. See NRCP
5 16.1(a)(2)(B). This requirement, however, does not extend to treating physicians. In this regard, the
6
7 Drafter's Note to the 2004 amendment of Nev. R. Civ. Pro. 16.1 provides as follows:

8 The requirement of a written report applies only to an expert who is retained or
9 specially employed to provide expert testimony in the case or whose duties as
10 an employee of the party regularly involve giving expert testimony. Given this
11 limitation, a treating physician could be deposed or called to testify without
any requirement for a written report.

12 See Nev. R. Civ. Pro. 16.1 Drafter's Note (citing Fed.R.Civ.P. 26(a) advisory committee note
13 (2000)). [Emphasis added].

14 Further, in *Piper v. Harnischfeger Corp.*, 170 F.R.D. 173 (D.Nev. 1997), the defendant
15 argued that plaintiff's treating physicians should not be permitted to give opinion testimony at trial
16 because they had not been disclosed as experts, produced reports, and otherwise complied with the
17 requirements imposed as to retained experts. The *Piper* court rejected this contention and stated:

18
19 It is common place for a treating physician, during, and as part of, the
20 course of treatment of a patient to consider things such as the cause of the
21 medical condition, the diagnosis, the prognosis and the extent of disability
22 caused by the condition, if any. Opinions such as at these are part of the
23 ordinary care of the patient and do not subject the treating physician to
24 the extensive reporting requirements of Fed.R.Civ.P. 26(a)(2)(B).

25 *Piper*, at 174-75, citing cases from four other courts. [Emphasis added].

26 Consequently, there is no question that the law in Nevada is that a treating physician's
27 opinion as to the Plaintiff's treatment, injuries, causation, future treatment, prognosis, and extent of
28 disability, etc. is part of the ordinary care of the patient. In like manner, a treating physician's

1 opinions relating to the appropriateness of care from other treating physicians, if pertinent to their
2 own treatment and care of the patient, is admissible as statements made in the course of medical care
3 and treatment.

4 In this case, some of William's treating physicians have not been specially retained as
5 medical experts in this case, but are, in fact, his treating physicians. Consequently, Defendants have
6 the medical records pertaining to William's injuries and treatment, along with medical records from
7 his other medical providers. Defendants have had, or will have, the opportunity to depose William's
8 treating physicians and have been informed of these physicians' opinions regarding William's
9 treatment. Defendants' anticipated argument that they would somehow be substantially prejudiced
10 since they did not receive separate expert reports, or any potential argument concerning surprise, is
11 unfounded since Defendants are well aware of these physicians' opinions and there is no risk of
12 unfair surprise.

13
14 Therefore, under Nevada law, William's treating physicians are permitted to testify regarding
15 their treatment, the treatment of other treating physicians, the reasonableness and necessity of same,
16 the reasonableness of the costs of all treatment provided to William, the nature of his injuries, his
17 response to conservative care, causation of his injuries, anticipated future treatment and the costs
18 therefore, William's prognosis, extent of disability, and any other matters pertinent to their treatment
19 and evaluation of William.

20
21
22 **4. References to Defense Medical Examiners as "Independent."** Plaintiffs request an
23 Order instructing counsel and its witnesses to refrain from referencing the examination of the
24 William by Defendants' experts as "Independent". This examination should be referred to as
25 "Defense" medical examination because that is what it is. To suggest that this examination is
26 "independent" is not an accurate characterization of this examination, as the examination was
27
28

1 conducted by an expert retained and paid for by the defense. If the examination is called
2 "independent," the jury may get the impression that the examination was conducted by a court-
3 appointed physician or examiner. This is certainly not the case. To call these examinations
4 "independent" has no basis in reality.

5 **5. Argument That This Case is "Attorney Driven" or a "Medical-Buildup" Case.**

6 Plaintiffs anticipate that Defendants may argue at trial that Plaintiffs' attorneys directed William's
7 medical care, and that William's physicians performed, or will perform, unnecessary, unwarranted
8 and non-indicated medical procedures. This is simply a fabricated argument, however, to poison the
9 jury. There is no evidence to suggest otherwise. In fact, William's treatment has been deemed
10 medically necessary by all of his treating physicians in this case. Therefore, allowing Defendants to
11 argue that his treatment was "litigation driven," "attorney driven," or some fictitious "medical
12 buildup" is tantamount to arguing that William's treating physicians' committed medical malpractice
13 – an allegation neither Defendants nor Defendants' experts ever made.

14
15
16 It is commonly known that the victims of personal injuries caused by the negligence of others
17 often do not know what to do following an injury causing event. Most often, these victims are in
18 pain, confused, and are without transportation. Very often, these victims do not have insurance or
19 family doctors. Very often, even when the victim has a family doctor, their doctor refuses to treat
20 them for their injuries resulting from the negligent acts of a third party because the physicians do not
21 want to be involved in the litigation process.

22
23 In personal injury litigation, the use of medical liens also confirms how the victims of
24 personal injury accidents often face great difficulty in obtaining necessary medical treatment. If they
25 are fortunate enough to have health insurance, their insurance companies often will not pay for the
26 medical treatment. If it was not for the willingness of certain physicians to accept medical liens,
27
28

these victims might not be able to obtain necessary medical treatment.

1 Instead of applauding a system that enables the victims of personal injury accidents to obtain
2 necessary medical treatment, Insurance Defense attorneys will often present unsupported argument
3 that this process of assisting in securing medical care for the injured is instead some sort of vast
4 conspiracy to defraud the insurance companies and those individuals whose wrongful, careless, and
5 negligent conduct causes injury. (See *Lioce v. Cohen*, 149 P.3d 916.)
6

7 In spite of it not only being appropriate, but necessary for attorneys to refer their clients to
8 medical doctors to ensure their clients receive appropriate care, there is not a shred of evidence that
9 suggests Plaintiff's counsel, past or present, directed William's physicians to perform any medical
10 procedures.
11

12 Also, there is no rule of trial practice more universally accepted and applied than the rule that
13 counsel may not introduce into his argument to the jury statements unsupported by evidence
14 produced in the trial. *State of Nevada v. Kassabian*, 69 Nev. 146, 149 (1952); *Lioce v. Cohen*, 124
15 Nev. 1, 174 P.3d 970 (2008). While counsel may enjoy wide latitude in arguing facts and drawing
16 inferences from the evidence during closing argument, *Silver v. McFarland*, 109 Nev. 465, 476
17 (1993) counsel "may not state facts which are not in evidence." *Williams v. State of Nevada*, 103
18 Nev. 106, 110 (1987). Counsel is limited to arguing "any reasonable inferences from the evidence
19 the parties have presented at trial". *Silver* at 476. However "courts will ban closing arguments
20 which go beyond the inferences the evidence in the case will bear." *Wickliffe v. Sunrise Hospital,*
21 *Inc.*, 104 Nev. 777, 781 (1988). The Nevada Supreme Court has ruled in multiple cases that it is
22 reversible error for an attorney to make a statement of fact beyond the scope of the records in closing
23 arguments. *Kassabian*, supra at 151-52.
24
25

26 The Defense may not suggest, imply or argue that William's medical treatment was "attorney
27
28

1 driven" or that Plaintiffs' attorney conspired with his medical providers to "build-up" her treatment
2 or medical expenses. To allow counsel to present such a defense would be an irreversible error.

3 **6. References to Collateral Sources of Payment of Medical Bills and All Other**
4 **Expenses, Including Health Insurance, Liens and/or Medicare.** Any evidence or reference to
5 medical and other treating expenses paid by William's health insurance or lien is not relevant. Such
6 evidence violates the collateral source rule, would be unduly prejudicial to Plaintiffs and would not
7 assist the trier of fact to any appropriate determination in the subject case.

8 The collateral source rule does not permit the tortfeasor to deduct damages paid to the injured
9 party by an independent source. See, *Proctor v. Castelletti*, 112 Nev. 88 (1996). The obligation to
10 pay for medical services rests with Plaintiffs regardless of the outcome of trial. A lien merely allows
11 Plaintiffs to wait until after trial to make payments. Information about any liens, therefore, is not so
12 much relevant as prejudicial to Plaintiffs' case because a jury could erroneously conclude that a
13 doctor could reduce the lien or entirely waive it.
14

15 In *Proctor*, the Nevada Supreme Court held that the admission of a collateral source of
16 payment for an injury into evidence for any purpose is improper. *Id.* at 90. The court further held:
17

18 We now adopt a per se rule barring the admission of a collateral source of payment
19 for an injury into evidence for any purpose. Collateral source evidence inevitably
20 prejudices the jury because it greatly increases the likelihood that a jury will reduce a
21 plaintiff's award of damages because it knows the plaintiff is already receiving
22 compensation. *Id.*

23 The *Proctor* court made clear that there are no circumstances under which a district court may
24 properly exercise discretion to find that relevant collateral source evidence outweighs its prejudicial
25 effect. See, *Id.*

26 Certainly, evidence or testimony relating to whether or not William received medical care on
27 a lien, falls within the same collateral source prohibition relating to insurance payments, and should
28

1 be excluded as evidence of whether or not a he had insurance cannot be presented to a jury under
2 Nevada law. *See, e.g., Matlock v. Greyhound Lines, Inc.*, 2010 U.S. Dist. LEXIS 92359 (Nev. 2010).
3 (granting motion in limine to exclude reference to liens).

4 7. **Evidence of When Plaintiff Retained Counsel.** Evidence or reference regarding
5 when or why Plaintiffs retained counsel for this matter should be excluded at trial on relevancy
6 grounds. *See* NRS § 48.025.

7 Plaintiffs believes that Defendants will attempt to poison the jury at trial by suggesting that
8 Plaintiffs' retention of an attorney after the subject motor vehicle crash suggests a secondary gain
9 motive. Such an argument, however, is highly prejudicial. Parties have a right to legal counsel
10 following a personal injury incident. The insurance carrier has an agreement with the defendants to
11 defend and indemnify and immediately provide counsel subsequent to a lawsuit. Plaintiffs seek legal
12 counsel to recover damages related to medical bills and pain and suffering. The defendants' rights
13 are contractual under the terms of the insurance policy. The plaintiffs' right to remuneration stems
14 from statute and case law.
15

16 To allow the Defendants to attack the Plaintiffs' credibility/motive simply because the
17 Plaintiffs sought counsel pursuant to a legal right should not be condoned by the Court. This would
18 be no different than allowing the plaintiffs to question the defendants as to when the insurance carrier
19 agreed to indemnify and defend – a topic that is clearly prohibited by law. Thus, the when and why
20 of counsel's retention should be inadmissible.
21

22 Furthermore, Nevada's attorney/client privilege is largely governed by statute. NRS 49.095
23 sets forth the general rule of the attorney/client privilege and provides, as follows:
24

25 A client has a privilege to refuse to disclose, and to prevent any other person
26 from disclosing, confidential communications:
27

28 1. Between himself or his representative and his lawyer or his lawyer's

representative.

2. Between his lawyer and the lawyer's representative.
3. Made for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest.

All confidential communications between a client and his or her attorney are considered "privileged," and the client, or the attorney acting on behalf of the client, may refuse to divulge the nature of the communication. *Sloan v. State Bar*, 102 Nev. 436, 726 P.2d 330, 1986 Nev. LEXIS 1584 (1986).

When a client consults with an attorney, those communications are protected. A client's communication to his or her attorney that they want the attorney to represent them is a confidential communication that is protected by law. It would be absolutely improper for the Defendants to inquire as to when the Plaintiffs retained their counsel as the answer would require the Plaintiffs to violate the attorney client privilege. The Plaintiffs' counsel could only have been retained with the authority of the Plaintiffs, and asking the Plaintiffs to divulge when they retained their counsel would violate the attorney client privilege. In essence, the Defendants would be asking the Plaintiffs to testify as to when they **told** their attorneys they wanted to retain them.

Although acts or services performed by an attorney for his or her client in the course of employment and which are accessible to the public do not fall within the attorney-client privilege because no private communication is involved, here, when the Plaintiffs retained counsel is not a public matter and is protected by the privilege. *Cheyenne Constr., Inc. v. Hozz*, 102 Nev. 308, 720 P.2d 1224 (1986). This information is not even discoverable, let alone admissible at trial.

By way of example, assume in a criminal case that immediately after a crime, an accused goes directly to an attorney's office for consultation and retains the attorney. That consultation and retention of the attorney by the accused would absolutely be inadmissible in a subsequent criminal

trial because of the attorney client privilege.

1 Similarly here, when Plaintiffs retained their counsel in this case is protected by the attorney
2 client privilege and is not admissible for any purpose. It is even more critical that the attorney client
3 privilege be upheld, in light of the improper purpose for which the Defendants may seek to use the
4 information (having a lay witness testify regarding causation).
5


6 8. **Closing Argument.** Plaintiffs intend to ask for a sizeable award at trial. Plaintiffs
7 believe that because of this substantial damage request, Defendants will allege that Plaintiffs are
8 asking for more damages than they expect to receive. Any reference or insinuation that Plaintiffs are
9 asking for an amount greater than they anticipate receiving is improper. *See Cancio v. White*, 697
10 N.E.2d 749, 757 (Ill. App. 1 Dist. 1998). Further, see section ten (14) above for *Lioce v. Cohen*
11 compliance request.
12

13
14 V. **CONCLUSION**

15 Therefore, Plaintiffs respectfully request that this Omnibus Motion in Limine be granted in its
16 entirety.

17 DATED this 7 day of January, 2011.

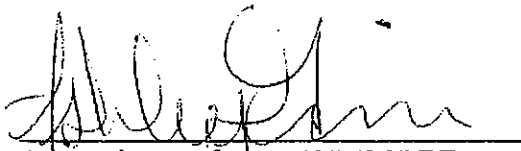
18
19 MAINOR EGLET

20 By: 
21 DAVID T. WALL, ESQ.
22
23
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CERTIFICATE OF SERVICE

1 Pursuant to NRCP 5(b), I certify that I am an employee of Mainor Eglet, and that on this
2 1 day of January, 2011, service of PLAINTIFFS' OMNIBUS MOTION IN LIMINE was
3
4 made by depositing a true and correct copy of same into the U.S. Mail, with proper first-class postage
5 affixed, pursuant to the amendment to the Eighth Judicial District Court Rule 7.26, addressed as
6 follows:

7 Stephen H. Rogers, Esq.
8 300 South Fourth Street, Suite 710
9 Las Vegas, Nevada 89101
10 *Attorneys for Defendants*

11 
12 An employee of MAINOR EGLET

MAINOR EGLET

EXHIBIT "1"

<p style="text-align: right;">Page 1</p> <p>DISTRICT COURT CLARK COUNTY, NEVADA ***** WILLIAM JAY SIMAO,) individually, and CHERYL) ANN SIMAO, individually,) Case No. A539455 and as husband and wife,) Dept. No. X Plaintiffs,) vs.) JENNY RISH; JAMES RISH;) LINDA RISH; DOES I through) V; and ROE CORPORATIONS) through V, inclusive,) Defendants.)</p> <p>DEPOSITION OF WILLIAM SIMAO</p> <p>Taken on Thursday, October 23, 2008 At 1:50 P.M.</p> <p>At Rogers, Mastrangelo, Carvalho & Mitchell 300 South Fourth Street Suite 710 Las Vegas, Nevada</p> <p>Reported by: CAMEO KAYSER, RPR, CCR No. 569</p>	<p style="text-align: right;">Page 3</p> <p>(Thereupon, Rule 30(b)(4) was waived prior to the commencement of the deposition proceedings.) Thereupon -- WILLIAM SIMAO was called as a witness by the Defendants, and having been first duly sworn, testified as follows: EXAMINATION BY MR. ROGERS: Q. Would you state your name, please. A. William J. Simao. Q. Now, you were present for your wife's deposition yesterday; right? A. Yes. Q. And you heard the ground rules that I gave her before the deposition began. I will repeat the most important one, and that is that the oath that you just took carries the obligation to tell the truth and the penalties if you do not. Do you understand that? A. Yes. Q. Is there any reason that you would be unable to testify truthfully? A. No. Q. Well, did you review any documents in</p>										
<p style="text-align: right;">Page 2</p> <p>APPEARANCES: For the Plaintiffs: JOHN E. PALERMO, ESQ. Aaron & Paternoster, Ltd. 2300 West Sahara Avenue Suite 650 Las Vegas, Nevada 89102 For the Defendants: STEPHEN H. ROGERS, ESQ. Rogers, Mastrangelo, Carvalho & Mitchell 300 South Fourth Street Suite 710 Las Vegas, Nevada 89101</p> <p style="text-align: center;">I N D E X</p> <table border="0"> <tr> <td>WITNESS</td> <td style="text-align: right;">PAGE</td> </tr> <tr> <td>WILLIAM SIMAO</td> <td></td> </tr> <tr> <td>EXAMINATION BY MR. ROGERS</td> <td style="text-align: right;">3</td> </tr> </table> <p style="text-align: center;">E X H I B I T S</p> <table border="0"> <tr> <td>EXHIBITS</td> <td style="text-align: right;">PAGE</td> </tr> <tr> <td>Exh. No. A Plaintiff William Jay Simao's Answers to Defendant Jenny Rish's Interrogatories</td> <td style="text-align: right;">4</td> </tr> </table>	WITNESS	PAGE	WILLIAM SIMAO		EXAMINATION BY MR. ROGERS	3	EXHIBITS	PAGE	Exh. No. A Plaintiff William Jay Simao's Answers to Defendant Jenny Rish's Interrogatories	4	<p style="text-align: right;">Page 4</p> <p>preparation for your deposition? A. Just the one -- I guess it was some deposition that I gave a while back. MR. PALERMO: Interrogatories? THE WITNESS: Yes. BY MR. ROGERS: Q. Let me show them to you and tell me if this is it. Was it this document? A. Yes, I believe it was. Q. And you just looked at your answers to interrogatories. We will attach a copy of these as Exhibit A. (Defendants' Exhibit A was marked for identification.) BY MR. ROGERS: Q. Did you review any other documents? A. I did not. Q. Do you have any changes that you would make to your answers to interrogatories? A. I would have to read through it. I don't believe so, no. Q. Did you read through all of your answers to interrogatories today? A. I did not. Q. When did you?</p>
WITNESS	PAGE										
WILLIAM SIMAO											
EXAMINATION BY MR. ROGERS	3										
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Exh. No. A Plaintiff William Jay Simao's Answers to Defendant Jenny Rish's Interrogatories	4										

1 (Pages 1 to 4)

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

2 (Pages 5 to 8)

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

3 (Pages 9 to 12)

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

4 (Pages 13 to 16)

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<p style="text-align: right;">Page 17</p> <p>1 Q. Did you treat with any medical providers 2 other than a chiropractor? 3 A. I do not remember. 4 Q. Did you make any workers' compensation 5 claim? 6 A. I don't understand the question. The 7 workers' compensation claim would be -- did I get 8 paid while I was off the job? 9 Q. That would be part of it, yes. There are 10 all sorts of claims that can be made in the guise of 11 workers' compensation that can be simple 12 reimbursement of medical expenses. It could be 13 payment for time off. It could be a disability 14 rating like a permanent partial disability or a 15 total disability. It could be all sorts of things 16 like that. 17 A. So would it be the weekly check that I 18 would not get while I was working? 19 Q. Well, if you did not get reimbursed for 20 it, that probably suggests that you did not make a 21 claim? 22 A. I still do not understand. Now, what I'm 23 asking is while I was off work, I do believe that I 24 received a check. I don't know who it was from. 25 I'm not sure. I don't think this was from the</p>	<p style="text-align: right;">Page 19</p> <p>1 it settle? 2 A. I believe they settled. 3 Q. Was the settlement a repair of your home 4 or was it a cash settlement? 5 A. It was a cash settlement which did not 6 cover the repairs that were needed for the home. 7 Q. Have you settled with a company for a 8 claim of any kind other than this construction 9 defect claim? 10 MR. PALERMO: Objection; vague and 11 ambiguous as to form. 12 You can answer. 13 THE WITNESS: No. 14 BY MR. ROGERS: 15 Q. Now, I want to talk about other car 16 accidents you have been involved in. Your answers 17 to interrogatories mention a motorcycle accident in 18 2003. We will get to that in a moment. 19 Have you been in any motor vehicle 20 accidents other than the April 2005 accident and the 21 2003 motorcycle accident? 22 A. I have. 23 MR. PALERMO: I was going to say the time 24 frame before or after? 25 MR. ROGERS: Just any.</p>
<p style="text-align: right;">Page 18</p> <p>1 company. It could have been from workmen's comp or 2 disability. I do not know. So, no. Did I make a 3 claim, no. Other than the time I was off, I 4 received like a portion of what I used to get paid, 5 yes. 6 Q. Have you ever made a workers' 7 compensation claim? 8 A. I have no idea. 9 Q. Have you ever been involved in a personal 10 injury claim? 11 A. I have not. 12 Q. Have you ever been involved in a lawsuit 13 other than this one? 14 A. Personal injury? 15 Q. Any kind. 16 A. I have. 17 Q. For what? 18 A. For my home. 19 Q. What happened? 20 A. There was a class action defect. 21 Q. What was the defect? 22 A. There were a lot of them. 23 Q. Was this in this Jewel Canyon home? 24 A. It was. 25 Q. And did that lawsuit go to trial or did</p>	<p style="text-align: right;">Page 20</p> <p>1 MR. PALERMO: Then I will issue an 2 objection. Overbroad, vague and ambiguous as to 3 form. 4 But you can answer. 5 THE WITNESS: Yes, I have. 6 BY MR. ROGERS: 7 Q. Okay. When? 8 A. I will guess, but I'm probably pretty 9 close. May 22nd of this year. 10 Q. What happened? 11 A. I was driving down the freeway. There 12 was a car in front of me, a car in front of the car 13 in front of me, and a truck pulling a trailer, and 14 the tire popped off of the trailer and flew across 15 the road and then the three of us went to stop 16 and -- I do not believe that the car in front of me 17 hit anyone, but I stopped and barely touched it to 18 the back of their car. 19 Q. So you rear-ended the vehicle in front of 20 you? 21 A. I did. 22 Q. Has anybody made an injury claim from 23 that accident? 24 A. No. 25 Q. Did you sustain any property damage?</p>

5 (Pages 17 to 20)

<p style="text-align: right;">Page 21</p> <p>1 A. No, none at all whatsoever. Not a dent. 2 Not a ding, no. 3 Q. Any other car accidents? 4 A. No. 5 Q. Let's discuss the 2003 motorcycle 6 accident. Your wife said it happened there on 7 Sunset and Sunset. Describe what happened? 8 A. Sunset and Sunset, it is where -- going 9 east on Sunset -- I believe it is Sunset Way and 10 Sunset, but anyway, it turns to the right to go 11 down the hill towards the mall and continued to be 12 Sunset, and there is -- as you turn to the right 13 there is a curb. On your left-hand side, there is 14 like a turn lane; it is kind of hard to explain, but 15 when I went to go around the turn, there was a 16 little white pickup and it started coming over to my 17 lane, and I was -- I was not going too fast, I do 18 not think, but I popped up onto the curb, and got 19 the bike almost to a stop and then laid it down. 20 So it is still on that curb right there 21 where the turn lane is. 22 Q. Did you lay it down on the sidewalk or on 23 the street? 24 A. Yes. On the sidewalk. I did not let it 25 get to the street, no. There is like an island in</p>	<p style="text-align: right;">Page 23</p> <p>1 island? 2 A. Yes. 3 Q. What kind of right elbow injury did you 4 have? 5 A. When I laid it down, it was still sliding 6 forward and like a rock, piece of gravel went into 7 my arm. 8 Q. It was just embedded up there? 9 A. Yes. I mean, it was not real deep. You 10 can only go so deep, because the elbow -- it kind of 11 ripped it open. 12 Q. Any other injuries? 13 A. I might have had a scrape or two on my 14 arm. I probably did, but no, that was it. 15 Q. And your wife mentioned someone on the 16 bike with you? 17 A. My daughter, Amanda. 18 Q. Was she injured? 19 A. Her elbow. 20 Q. Right elbow? 21 A. Right elbow, yes. 22 Q. What injury did she have? 23 A. It is about the same as mine, because 24 when we went down onto the ground, we slid a little 25 bit, probably half a foot or a foot, so I think she</p>
<p style="text-align: right;">Page 22</p> <p>1 the center. 2 Q. Right. Like a designated right turn lane 3 with an island on the left side of it? 4 A. Yes. 5 Q. Did your bike end up on the island or on 6 the sidewalk? 7 A. It was on the island, because I was in 8 the left turn lane. There are two lanes there, and 9 I was on the left lane, so I popped up onto the curb 10 and then just kind of laid it down. 11 Q. Your wife mentioned some kind of injury. 12 What was it? 13 A. My elbow. 14 Q. Which elbow? 15 A. My right elbow. 16 Q. So you were turning right in the left of 17 two right turn lanes? 18 A. Yes. 19 Q. And a vehicle in the right of the two 20 right turn lanes merged into your right-of-way? 21 A. Yes. 22 Q. And to avoid that vehicle you went up on 23 the island to your left? 24 A. Yes. 25 Q. And you laid your bike down on the</p>	<p style="text-align: right;">Page 24</p> <p>1 picked up a rock or a little bit of gravel that, you 2 know, kind of gravel and a cut. 3 Q. And you underwent some treatment for it? 4 A. I went to -- just went to the 5 Urgent Care, and they cleaned my arm and Amanda's 6 arm, and that was it, I believe. 7 Q. How did you get to the Urgent Care? 8 A. I think Cheryl took us. 9 Q. Did you drive your bike to your house? 10 A. I did not. I do remember -- we were 11 right there on Sunset and the Harley-Davidson 12 dealer. It was about a block and a half down from 13 where it happened, so we did get back on the 14 motorcycle and ride it, and I believe I left it 15 there for them to look at it, because the front 16 fender was -- the front fender had scraped the 17 ground when it went down, and Cheryl picked us up 18 from there. 19 Q. So far as far as motor vehicle accidents 20 are concerned, I know of three, the 2003 motorcycle 21 accident, the accident with my client on April 15th, 22 2005, and then the May 2008 incident on the freeway. 23 Are there any other motor vehicle accidents? 24 A. In my whole life? 25 Q. Yes.</p>

6 (Pages 21 to 24)

<p style="text-align: right;">Page 25</p> <p>1 A. There is one where I was pulling my boat. 2 I had a pickup truck pulling my boat. This was 3 probably 25 years ago, and as I was going across the 4 street, a car -- I cannot remember if they pulled 5 out of the gas station, I believe, and as I was 6 going down the street, they hit the boat and knocked 7 it off of the trailer. It did not hit the vehicle 8 or anything. I think that is the only other 9 accident I have been in. 10 Q. Have you been involved in any other kinds 11 of accidents, meaning nonmotor vehicle accidents in 12 which you sustained injury? And by that I mean, you 13 know, a fall or a sports incident, anything like 14 that where you had medical treatment afterwards? 15 MR. PALERMO: Object. Vague and 16 ambiguous as to form. 17 You can answer. Compound. 18 THE WITNESS: I have not. 19 BY MR. ROGERS: 20 Q. Who was your family doctor on the date of 21 this car accident with my client? 22 A. I believe it was Britt Hill. 23 Q. I want to discuss conditions that you had 24 prior to the car accident. Your wife mentioned 25 migraines. We deposed Mr. Hill the other day, and</p>	<p style="text-align: right;">Page 27</p> <p>1 A. Before the accident or -- 2 Q. Let's start with before the accident? 3 A. I don't believe I have. 4 Q. And since the accident? 5 A. I have been to like injections and stuff, 6 if those are -- I think they considered those like 7 minor surgeries. 8 Q. Did you treat with a chiropractor at any 9 time before the accident other than that two or 10 three months for low back pain? 11 A. I did not. 12 Q. What were your injuries from the 13 accident? 14 A. The back of my head, my neck, and my 15 shoulder, my left shoulder. 16 Q. Now, as you were saying left shoulder, 17 you were pointing to this muscle that runs between 18 your neck and your shoulder. Is that the trapezius? 19 Have you ever heard that word before, the 20 "trapezius"? 21 A. I have not. No. Not that I recall, no. 22 Q. Is that the location of the pain, is 23 right there between the neck and the shoulder? 24 A. Actually, no. Actually, it starts down 25 in my shoulder down here and goes up to like the</p>
<p style="text-align: right;">Page 26</p> <p>1 he did as well. Did you have any other prior 2 conditions for which you were undergoing medical 3 care? 4 MR. PALERMO: Objection. Vague and 5 ambiguous as to form. 6 You can answer. 7 THE WITNESS: High blood pressure and 8 high cholesterol. 9 BY MR. ROGERS: 10 Q. After moving to Las Vegas in 2002, did 11 you treat with medical providers for any reason 12 other than migraines, high cholesterol, and high 13 blood pressure? 14 A. I do not believe so. 15 MR. PALERMO: Pursuant to; prior to the 16 accident; right? 17 MR. ROGERS: No. Any time since 2002. 18 MR. PALERMO: Including the treatment for 19 the accident? 20 MR. ROGERS: You're right then. It would 21 be between the accident and moving here. 22 BY MR. ROGERS: 23 Q. The answer is still the same? 24 A. Yes, I do believe so. 25 Q. And have you ever undergone surgery?</p>	<p style="text-align: right;">Page 28</p> <p>1 back of my head. 2 Q. So right on the back of your left 3 shoulder and then goes up to about the base of your 4 skull on the left side? 5 A. Yes. It was kind of more on the side 6 almost on the top than on the back, because it was 7 like the side of my neck and to -- like the back of 8 my head here. 9 Q. I'm trying to clarify for the record 10 where you're pointing to, and tell me if I'm getting 11 it right. You're pointing primarily to the -- the 12 area I would say, basically, from the back of your 13 shoulder, the shoulder blade, up to the base of your 14 skull on the back left side? 15 A. Right. And that is the shoulder pain. 16 Q. Have you ever injured the back of your 17 head, your neck, or your left shoulder before the 18 car accident? 19 A. No. 20 Q. Did you ever have pain in the back of 21 your head before the car accident? 22 A. Not that I recall, no. 23 Q. When you had migraines, where did you 24 feel them? 25 A. Migraines were up under like the front</p>

7 (Pages 25 to 28)

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<p style="text-align: right;">Page 29</p> <p>1 part of your face, your eye, your forehead. Mostly</p> <p>2 on the left side, on one side. I had had them on</p> <p>3 the right before.</p> <p>4 Q. Pardon me?</p> <p>5 A. I have had them on the right side before,</p> <p>6 migraines.</p> <p>7 Q. Had you ever had neck pain before the car</p> <p>8 accident?</p> <p>9 A. I have not.</p> <p>10 Q. Had you ever had pain in the left</p> <p>11 shoulder area before the car accident?</p> <p>12 A. I have not, no.</p> <p>13 Q. Let's talk about the car accident. As I</p> <p>14 understand it again, it happened on April 15th,</p> <p>15 2005, somewhere right around 3:00 o'clock?</p> <p>16 A. Yes.</p> <p>17 Q. Where were you driving from and to?</p> <p>18 A. I was driving from up north. I had just</p> <p>19 stopped by -- one of the guys that worked for me,</p> <p>20 just stopped on a job to see how he was doing, and</p> <p>21 he was actually just finishing up, and then I was on</p> <p>22 my way home. That would be Michael.</p> <p>23 Q. And your answers to interrogatories,</p> <p>24 describe the traffic as stop and go. When you said</p> <p>25 stop and go, did you mean literally stopping or did</p>	<p style="text-align: right;">Page 31</p> <p>1 some time it is stop and go traffic, and then the</p> <p>2 accident happens; right?</p> <p>3 A. I do not remember. I do not recall.</p> <p>4 Q. You do not remember how long a time it</p> <p>5 was stop and go?</p> <p>6 A. Stop and go; right.</p> <p>7 Q. It sounded like you wanted to jump in and</p> <p>8 say something.</p> <p>9 A. I do not remember if I had just stopped</p> <p>10 or it was stop and go. I do not even have an idea.</p> <p>11 I would just be guessing.</p> <p>12 Q. Were you stopped when the accident</p> <p>13 happened?</p> <p>14 A. Yes.</p> <p>15 Q. How long were you stopped? Was it a</p> <p>16 split second or was it something longer than that?</p> <p>17 A. No. It was a little bit longer than</p> <p>18 that.</p> <p>19 Q. A few seconds?</p> <p>20 A. I do not know. I would say yes. It</p> <p>21 would have been a few seconds.</p> <p>22 Q. And did you have to come to a quick stop</p> <p>23 because of traffic in front of you or was it all</p> <p>24 going slow that nobody was moving quickly to begin</p> <p>25 with?</p>
<p style="text-align: right;">Page 30</p> <p>1 you mean simply slow traffic?</p> <p>2 A. No, it was stopping.</p> <p>3 Q. And this happened around the Sahara</p> <p>4 off-ramp; right?</p> <p>5 A. I do not believe so. I think it was</p> <p>6 Cheyenne.</p> <p>7 Q. You're right. So which lane were you in?</p> <p>8 A. I guess it is a number one lane.</p> <p>9 Q. Is it the fast lane?</p> <p>10 A. The fast lane, yes.</p> <p>11 Q. So you're going in this stop and go</p> <p>12 traffic. How long was traffic stopping and going</p> <p>13 before the accident happened from the time you got</p> <p>14 on the freeway?</p> <p>15 A. I believe I had just got on the freeway</p> <p>16 maybe a couple of exits before. I'm not sure.</p> <p>17 Basically that is where it had congested at the area</p> <p>18 where I was stopped.</p> <p>19 Q. But was it stop and go traffic from the</p> <p>20 moment you got on the freeway.</p> <p>21 A. I do not recall, honestly. I don't</p> <p>22 remember.</p> <p>23 Q. But you get on the freeway roughly a</p> <p>24 couple of exits before the area where the accident</p> <p>25 happens. You get over to the fast lane and then for</p>	<p style="text-align: right;">Page 32</p> <p>1 A. It was going pretty slow.</p> <p>2 Q. So it was not as if you just drove up on</p> <p>3 a line of stopped cars and stopped and then got</p> <p>4 rear-ended? Traffic was already --</p> <p>5 A. I believe it was.</p> <p>6 MR. PALERMO: Let him finish his</p> <p>7 question.</p> <p>8 THE WITNESS: I'm sorry.</p> <p>9 BY MR. ROGERS:</p> <p>10 Q. The end of it was simply that traffic was</p> <p>11 already slow, and you were in the slow part of it</p> <p>12 before the accident happened?</p> <p>13 MR. PALERMO: Objection as to form.</p> <p>14 Vague and ambiguous.</p> <p>15 You can answer.</p> <p>16 THE WITNESS: I believe when I got on --</p> <p>17 and I'm not even positive. You can see that it</p> <p>18 slows down ahead of you, so I slowed and I slowed to</p> <p>19 a stop, and I did -- I sat there a couple of</p> <p>20 seconds, and then the car hit me.</p> <p>21 BY MR. ROGERS:</p> <p>22 Q. Were you aware that you were going to be</p> <p>23 hit before it happened?</p> <p>24 A. No.</p> <p>25 Q. You did not hear any brakes or anything</p>

8 (Pages 29 to 32)

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1 like that?
 2 A. No.
 3 Q. Did you have your radio on?
 4 A. I do not remember. But no, I don't
 5 listen to loud music. I listen to news radio.
 6 Q. So do you know if your windows were down?
 7 A. I don't remember.
 8 Q. But you do not think there was loud noise
 9 inside of your van just because you don't listen
 10 to --
 11 A. I don't believe so, no.
 12 Q. Was your van pushed forward as a result
 13 of the accident?
 14 A. I believe it was, yes.
 15 Q. Did your van hit the car in front of you?
 16 A. It did not.
 17 Q. You do not know how far forward your van
 18 was you pushed in?
 19 A. I have no idea.
 20 Q. Was there anymore than just the one
 21 impact?
 22 MR. PALERMO: Objection. Vague as to
 23 form.
 24 You can answer.
 25 BY MR. ROGERS:

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1 Q. In other words, did your vehicle hit
 2 anything other than -- well, did it hit anything at
 3 all?
 4 A. No.
 5 Q. So there was the rear-end impact and no
 6 other impacts?
 7 A. And no other impact.
 8 Q. Did your seat break upon impact?
 9 A. The vehicle seat?
 10 Q. Yes.
 11 A. No.
 12 Q. Were you seat-belted?
 13 A. Yes.
 14 Q. Was the van equipped with air bags?
 15 A. No. It did not come out. That is why I
 16 am saying no. So I don't think so. I do not
 17 believe it was.
 18 Q. Do you wear glasses?
 19 A. No.
 20 Q. Were you wearing a hat when this
 21 happened? Anything on your face or your head?
 22 A. No.
 23 Q. Now, when the accident happened, did
 24 anything fly off the seat?
 25 A. Yes.

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1 Q. What was it?
 2 A. I imagine it would have been like the
 3 clipboards or -- normal stuff that I carry, soda
 4 spilled. Different papers or whatever was laying on
 5 the seat that leaked fluid all over.
 6 Q. Did you have a soda in -- like a cup
 7 holder in there?
 8 A. Yes.
 9 Q. Was it like this, like a cup you would
 10 buy at a convenience store and fill up at a fountain
 11 or was it like a can of Coke?
 12 A. No. It was a cup.
 13 Q. It did not have a top on it then?
 14 A. No, it did not.
 15 Q. And it spilled?
 16 A. It flew out of the cup holder, yes.
 17 Q. Did your body hit anything inside of the
 18 car?
 19 A. Yes.
 20 Q. What?
 21 A. There is a cage -- or I call it a cage.
 22 There is a cage behind the driver's seat that is
 23 steel.
 24 Q. Actually, I want to get into that. What
 25 I meant was any part of your body other than your

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1 head hit anything in the car?
 2 A. I think I hit my arm on the steering
 3 wheel. I do not remember.
 4 Q. Which arm?
 5 A. I believe my left hand and I hit my right
 6 elbow on the cage, but it was not bad when I hit my
 7 elbow, really.
 8 Q. Any other part of your body hit anything
 9 in the car?
 10 A. I do not believe so.
 11 Q. You were talking about your head. You
 12 said that you hit the cage behind your seat; right?
 13 A. Yes.
 14 Q. How tall are you?
 15 A. Six-six.
 16 Q. And is the seat in that van equipped with
 17 an adjustable headrest?
 18 A. No.
 19 Q. That headrest does not go up higher than
 20 your head?
 21 A. I don't believe it does. I believe it
 22 probably comes right about here.
 23 Q. So below the base of your skull, right
 24 about the middle of your neck?
 25 A. Probably.

9 (Pages 33 to 36)

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

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1 rearview mirror you can actually see all through the
 2 holes.
 3 The air conditioning does not work so
 4 good with those holes and a big van like that, so
 5 you put Plexiglass on it, so there is Plexiglass
 6 anywhere where those holes there.
 7 Q. Are there holes in that portion of the
 8 cage that your head struck?
 9 A. I don't know.
 10 Q. Well, where your head struck, is there a
 11 plastic surface or a steel surface?
 12 A. I believe it would be steel. I would
 13 have to see it, though. I believe it would be
 14 steel, but it would be where the plastic is. It is
 15 bolted to the steel.
 16 Q. And is the steel a solid sheet or is it
 17 like woven threads of steel?
 18 MR. PALERMO: Objection. Vague and
 19 ambiguous as to form.
 20 You can answer.
 21 THE WITNESS: It is a solid sheet of
 22 steel.
 23 BY MR. ROGERS
 24 Q. So it does not look like a steel fence
 25 around a construction area?

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1 A. No.
 2 Q. Were you knocked unconscious in this
 3 accident?
 4 A. Not unconscious, no.
 5 Q. Were you dazed or stunned?
 6 A. I was.
 7 Q. Were you able to get out of your van
 8 without assistance?
 9 A. I sat there for probably -- I don't know,
 10 three or four or five minutes before I got out.
 11 Q. Were you bleeding?
 12 A. I don't remember. Not from the head.
 13 I'm not sure if my elbow was or not.
 14 Q. Well, did you sustain any cuts?
 15 A. I do not remember.
 16 Q. Any bruises?
 17 A. I believe I had bruises on my right arm.
 18 Q. Where?
 19 A. Up above where the elbow is right here.
 20 Q. Were you seated in some position other
 21 than just looking straight forward when this
 22 accident happened? Do you know how you are sitting
 23 in your car and your back is to the seat back, and
 24 you have your hands on the steering wheel, is that
 25 how you were sitting when this accident happened?

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

10 (Pages 37 to 40)

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

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

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1 Q. That is right. But the impact was at the
 2 front?
 3 A. Yes.
 4 Q. And the damage to the van as a result of
 5 the April 2005 accident was to the rear?
 6 A. Yes.
 7 Q. And your counsel has produced an invoice
 8 for repair of your van from Frank's Auto Body. Is
 9 that where it was repaired?
 10 A. Yes, I believe so.
 11 Q. And the invoice was for \$577.64. Is that
 12 what it cost to repair the van?
 13 A. I have no idea.
 14 Q. The repair was paid for by an insurance
 15 company, Liberty Mutual?
 16 A. Yes.
 17 Q. Did you pay for it?
 18 A. No.
 19 Q. The Liberty Mutual check was paid to you,
 20 which made me wonder if you had paid for it and then
 21 got reimbursed?
 22 A. No. I believe I just gave them a check
 23 from the insurance company?
 24 Q. And the check is dated June 28th of 2005,
 25 and the invoice is June 27th. So was the van

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1 repaired on the 27th or 28th of June?
 2 A. I do not remember.
 3 Q. Roughly a couple of months after the
 4 accident?
 5 A. I honestly do not remember.
 6 Q. Were you able to drive the van before
 7 having it repaired?
 8 A. Yes.
 9 Q. Was the damage to the van, did it affect
 10 the mechanics of it or was it a cosmetic damage like
 11 to the bumper?
 12 MR. PALERMO: Objection. Vague as to
 13 form and compound.
 14 You can answer.
 15 THE WITNESS: It was to the bumper and
 16 the back door.
 17 BY MR. ROGERS:
 18 Q. Did the repairs fix all of the problems
 19 or were there problems that were not repaired?
 20 A. At first there was a problem that was not
 21 repaired when I went to pick up the vehicle. They
 22 had not fixed the back door. I guess they just
 23 replaced the bumper. They did not do any work to
 24 the back door, so they actually kept it an extra day
 25 or two and it did not work.

11 (Pages 41 to 44)

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<p style="text-align: right;">Page 45</p> <p>1 Q. And then after they did that follow-up 2 work, was all of the damage repaired? 3 A. Yes. I believe it was, yes. 4 Q. So let me get back to that earlier 5 question. The van was drivable between the date of 6 the accident and the date that it was repaired? 7 A. Yes. 8 Q. Who referred you to Frank's Auto Body? 9 A. I do not know. 10 Q. Did you know the folks over there? 11 A. No. 12 Q. So it was like an Insurance company? 13 A. It was probably Liberty Mutual. 14 MR. PALERMO: Is this a good time for a 15 break. 16 (Off the record.) 17 BY MR. ROGERS: 18 Q. Let's go back to the car accident scene. 19 You said that you stayed in your car for a few 20 minutes and then you got out. What did you do when 21 you got out? 22 A. I went back to see if the other people 23 were okay. 24 Q. And what did you find out when you went 25 back there?</p>	<p style="text-align: right;">Page 47</p> <p>1 A. I don't know how long it took. It did 2 not seem like a long time. I guess it always does. 3 I'm not sure how long it took, though. 4 Q. What kind of a vehicle was the policeman 5 driving? Was it a motorcycle or a car? 6 A. I don't recall. I don't remember. 7 Q. Do you remember talking to the police 8 officer? 9 A. Absolutely. 10 Q. What did you discuss? 11 A. Actually, I was sitting in my van, and he 12 came up to the window and I think he asked if I 13 needed to make a report, and I think he actually 14 said, No, not really, and I guess he had gotten the 15 report from him. I am not sure. That is kind of 16 what I remember, but I'm not sure. I'm not 17 positive. 18 Q. Did the policemen ask if you were 19 injured? 20 A. They did. There was an ambulance there 21 too. They asked me if I wanted to go in the 22 ambulance, and I told them no. 23 Q. Who got there first, the paramedics or 24 the police? 25 A. I'm not sure. It could have been the</p>
<p style="text-align: right;">Page 46</p> <p>1 A. That they were okay. 2 Q. Who did you talk to? 3 A. The driver of the vehicle. 4 Q. Anybody else in the vehicle? 5 A. Yes. There were a few people in the 6 vehicle. 7 Q. Right. I mean I know there were. There 8 were I think a total of six people in there, but did 9 you talk to anybody else in there? 10 A. I don't believe so. 11 Q. What all did you discuss with the driver? 12 A. I think I just asked them if they were 13 all right. That was it. 14 Q. Did they say anything to you like to 15 apologize? Anything? Did you discuss anything 16 else? 17 A. I do not remember. 18 Q. And then after talking with the driver, 19 what did you do? 20 A. I think I went back to my vehicle. 21 Q. And did you get back in it or just stand 22 there and wait? 23 A. I'm not sure. I'm not sure. 24 Q. Well, did it take a long time for the 25 police to get there?</p>	<p style="text-align: right;">Page 48</p> <p>1 paramedics. 2 Q. And did the paramedics tend to anybody in 3 the car? 4 A. I don't believe so. 5 Q. Did you discuss anything with the police 6 officer that you have not told me about? 7 A. I do not remember. 8 Q. And did you have any discussions with the 9 folks in the car that was behind you other than what 10 you have told me? 11 A. I do not remember. 12 Q. Did anybody in that other vehicle get out 13 or did they all remain inside? 14 A. I'm not sure. I know they were not out 15 when I walked back to see if they were okay. They 16 were all inside. I believe so. 17 Q. Well, did you experience pain while you 18 were there at the accident scene? 19 A. Yes. I had just hit my head, yes. 20 Q. Anywhere other than to your head? 21 A. I believe my elbow. 22 Q. And what did you do after the policeman 23 was done with his work? 24 A. What do you mean? 25 Q. Well, you did not take an ambulance, so</p>

12 (Pages 45 to 48)

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1 you drove from the scene?
 2 A. Yes.
 3 Q. Where did you go?
 4 A. I'm not sure if I went home or if I met
 5 my wife at the Urgent Care. I'm not sure.
 6 Q. The Southwest Medical Associates' record,
 7 on the date of the incident, reflects that you
 8 arrived there at 6:36 p.m., and according to the
 9 police, the car accident happened at 3:00 o'clock
 10 p.m. Does that three and a half hour difference
 11 tell you when you drove home?
 12 A. It tells me that I probably went home and
 13 waited for my wife to get home from work.
 14 Q. What time did she normally get home from
 15 work?
 16 A. I believe at that time it was between
 17 5:30 and 6:00. She starts earlier now and gets off
 18 earlier now.
 19 Q. Now, at the Urgent Care, the note reads
 20 that your chief complaint when you went there was
 21 left elbow pain and tenderness in the back of his
 22 head.
 23 So far today you have told me that you
 24 thought it was your right elbow?
 25 A. Yes. I remember.

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1 Q. Does this entry here a typo or might it
 2 have been your left elbow?
 3 A. It could have been my left elbow.
 4 Absolutely.
 5 Q. And it says here that you were
 6 seat-belted and that is true; right?
 7 A. Yes.
 8 Q. And there was no air bag deployment?
 9 A. No.
 10 Q. You already said that was true. There
 11 was no glass breakage, it says; is that correct?
 12 A. No. No, there was no breakage.
 13 Q. What did the folks do for you there at
 14 the Urgent Care?
 15 A. On the first visit?
 16 Q. Yes.
 17 A. Basically, they would not even listen to
 18 me.
 19 Q. What did you say that they did not listen
 20 to?
 21 A. I told them that my head hurt, the back
 22 of my head, and I had pressure in the back of my
 23 head, and that was it. That is what it seemed like
 24 to me, that they did not listen. They did not do
 25 any tests or do anything or even go any deeper with

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1 that except for writing down my complaint.
 2 Q. Now, the records here reflect that X-rays
 3 were taken of your neck and left elbow. Do you
 4 remember that?
 5 A. On that first visit?
 6 Q. Yes. On April 15th.
 7 A. No, not really. I remember taking
 8 X-rays. I do not remember if it was during that
 9 visit or a different visit. I had a lot of X-rays
 10 since then. And at that time the back of my head
 11 hurt, and I had pressure on the back of my head.
 12 Q. It says here that the current medications
 13 that you were taking in April of 2005 were -- I'm
 14 not sure if I'm pronouncing this right --
 15 Amitriptyline?
 16 A. Yes. I did take that. I do not know if
 17 I was taking it at that time.
 18 Q. What for?
 19 A. Migraines.
 20 Q. And Butalbital?
 21 A. Migraines.
 22 Q. And Enalapril?
 23 A. That is for high blood pressure.
 24 Q. Clarinex?
 25 A. Allergies. I do not know.

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1 Q. Rhinocort?
 2 A. I don't know.
 3 Q. Did you have a sinus condition at that
 4 time?
 5 A. No.
 6 Q. Cromolyn, it was an eyedrop?
 7 A. I have no idea. For migraines, probably.
 8 I tried a lot of things for migraines over the
 9 years.
 10 Q. Well, it sounds like your experience
 11 there was unsatisfactory?
 12 A. As far as the pain in my head, yes,
 13 definitely. It just seemed like they were not
 14 listening, and I told them that I had pressure on
 15 the back of my head in this area right here and at
 16 that time there was a lump and a bruise, so maybe
 17 they figured that was what it was, and it continued
 18 to bother me.
 19 Q. There was a lump there?
 20 A. Yes.
 21 Q. And when you say there was a bruise, do
 22 you just mean it was sore to the touch?
 23 A. Right.
 24 Q. Because you could not see it, obviously?
 25 A. No.

13 (Pages 49 to 52)

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<p style="text-align: right;">Page 53</p> <p>1 Q. How big was the lump?</p> <p>2 A. I do not know. I do not remember at all.</p> <p>3 Q. Did you play sports growing up?</p> <p>4 A. I did not.</p> <p>5 Q. Had you ever had a concussion growing up?</p> <p>6 A. No.</p> <p>7 Q. Well, let me see what my records show.</p> <p>8 After that first visit you returned again a couple</p> <p>9 of weeks later on May 4th, 2005 to check up on your</p> <p>10 headaches. Do you remember that?</p> <p>11 A. To the Urgent Care?</p> <p>12 Q. It was to Southwest Medical, and I</p> <p>13 believe that one -- that next visit might have been</p> <p>14 with Mr. Hill. Do you remember the first time you</p> <p>15 saw him after the accident?</p> <p>16 A. I do not. I do not remember the first</p> <p>17 time. I have seen him several times.</p> <p>18 Q. Now, you had seen him before the accident</p> <p>19 too; right?</p> <p>20 A. Yes.</p> <p>21 Q. And the first time you went to</p> <p>22 Southwest Medical on the date of the incident, you</p> <p>23 saw someone other than Mr. Hill?</p> <p>24 A. Yes. That was the Urgent Care that we</p> <p>25 went to.</p>	<p style="text-align: right;">Page 55</p> <p>1 scan done on May 11th, and you returned to</p> <p>2 Southwest Medical the following day, May the 12th.</p> <p>3 And the physician's assistant that day was</p> <p>4 Nancy Bahnsen, B-a-h-n-s-e-n.</p> <p>5 Do you remember speaking with Ms. Bahnsen</p> <p>6 regarding the CT scan?</p> <p>7 A. Where was that visit at?</p> <p>8 Q. At Urgent Care.</p> <p>9 A. So that was -- I did go to Urgent Care in</p> <p>10 between the visits again. Again between the first</p> <p>11 Urgent Care visit and the visit to Britt Hill?</p> <p>12 Q. No. Let me give you the chronology</p> <p>13 again.</p> <p>14 A. Because I'm not understanding.</p> <p>15 Q. The date of the incident is April 15th.</p> <p>16 A. Yes.</p> <p>17 Q. You go to Urgent Care that day?</p> <p>18 A. Yes.</p> <p>19 Q. And they take some X-rays, and then the</p> <p>20 next time you treated was on May 4th, and on May 4th</p> <p>21 you saw Mr. Hill.</p> <p>22 A. Okay.</p> <p>23 Q. And then the next time you treated was to</p> <p>24 get the CT scan on May 11th. And then on May 12th,</p> <p>25 the day after the CT scan, you went to the</p>
<p style="text-align: right;">Page 54</p> <p>1 Q. And then a couple of weeks later you went</p> <p>2 back to Southwest Medical and you saw Mr. Hill</p> <p>3 and --</p> <p>4 A. Did I go to Urgent Care again?</p> <p>5 Q. No. Just Southwest Medical. If you did,</p> <p>6 I do not know about it.</p> <p>7 Now, at that time, Mr. Hill wrote that</p> <p>8 there was no evidence of a scalp hematoma. This</p> <p>9 lump that you described earlier, it went away by</p> <p>10 that time?</p> <p>11 A. I don't remember.</p> <p>12 Q. Do you remember him referring you out for</p> <p>13 a CT scan of the head?</p> <p>14 A. Yes. He referred me to a CT scan.</p> <p>15 Q. Now, did you work in that roughly</p> <p>16 two-week period between the date of the incident and</p> <p>17 the time that you returned to Southwest Medical?</p> <p>18 A. I did work. I'm not sure if I went the</p> <p>19 next day or two, but I did.</p> <p>20 Q. And then after the CT scan was done, you</p> <p>21 met with Mr. Hill. Do you remember what he told you</p> <p>22 about the findings on the CT scan?</p> <p>23 A. I do not remember.</p> <p>24 Q. Now, here he reported that -- I'm sorry.</p> <p>25 It actually was not with Mr. Hill. You had the CT</p>	<p style="text-align: right;">Page 56</p> <p>1 Urgent Care.</p> <p>2 A. Okay.</p> <p>3 Q. And that is where you saw Ms. Bahnsen who</p> <p>4 was the physician's assistant you saw back on</p> <p>5 April 15th.</p> <p>6 A. Okay.</p> <p>7 Q. Do you remember talking with her about</p> <p>8 it?</p> <p>9 A. I knew I had been to the Urgent Care</p> <p>10 twice. I'm not sure if I saw Brett Hill in between</p> <p>11 or after that. I thought it was after that. It was</p> <p>12 a mistake.</p> <p>13 Q. Well, the physician's assistant note of</p> <p>14 May 12th reports that the radiologist read the</p> <p>15 CT scan as negative. It did not show any findings.</p> <p>16 Do you remember having a discussion with anybody</p> <p>17 about that?</p> <p>18 A. I probably did. I do not remember.</p> <p>19 Q. Well, at this visit the physician's</p> <p>20 assistant wrote that you were not satisfied with the</p> <p>21 negative CT results and requested a referral for an</p> <p>22 MRI. Do you remember this discussion?</p> <p>23 A. I kind of do, yes. Because I knew I</p> <p>24 still had pain, and they did not come up with</p> <p>25 anything.</p>

14 (Pages 53 to 56)

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1 Q. And then you were referred out for the
2 brain MRI. And do you remember speaking with anyone
3 about the findings of that study?

4 A. I don't.

5 Q. Well, the radiologist reported that the
6 brain MRI was normal and you saw Britt Hill a couple
7 of days after the brain MRI, and he reported that he
8 advised you of that, but you do not remember that
9 discussion?

10 A. I have had so many discussions. I mean,
11 seriously.

12 Q. Now, at this point, treatment stops for
13 about four and a half months after the brain MRI.
14 What happened during that four and a half months?

15 A. Well, what happened was they told me
16 that, like you said, that they take the CT scan and
17 MRI and nothing was wrong, and so I figured that I
18 would -- that they were the doctors, there was
19 nothing wrong. So I went home and the pain got
20 progressively worse and the symptoms did not go
21 away. So I made an appointment and started going
22 again.

23 Q. When did you start experiencing neck
24 pain?

25 A. I don't remember.

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1 Q. Because according to the records, it was
2 not in the months immediately following the
3 accident, because the reports here suggest that you
4 were complaining of migraines?

5 MR. PALERMO: I will issue an objection
6 as to misleading. There is a mention of neck pain
7 in the first report.

8 BY MR. ROGERS:

9 Q. Well, after the date of the incident, did
10 the neck pain stop?

11 A. I do not understand what you mean.

12 Q. As your counsel pointed out, the
13 Urgent Care record, the complaints listed are neck,
14 back, left shoulder, left elbow, and back of the
15 head. And the left elbow and the back of the head
16 were listed as the chief complaints, and then after
17 that there is no mention of neck pain on the
18 following visits.

19 So did you have no neck pain at that
20 time?

21 A. The head pain was -- I had so much
22 pressure on the back of my head, and the head pain,
23 I was so worried about that. So, no, I still had
24 shoulder pain and neck pain, but they could not do
25 anything for the head pain, the pressure.

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1 Q. Well, did the head pain later subside
2 then?

3 A. No. I still have that too.

4 Q. Is it the same as it was on the date of
5 the incident or is it less or more, for that matter?

6 A. I don't know. It is either the same or
7 more.

8 Q. And what of the neck pain, is it the same
9 or different?

10 A. It is worse. It is way worse.

11 Q. Now, Mr. Hill advised you to quit smoking
12 due to the migraines. Did you ever quit?

13 A. I did not.

14 Q. How much do you smoke a day?

15 A. On average probably somewhere around half
16 a pack.

17 Q. Now, so far what we have covered is that
18 initial treatment right after the accident. You had
19 the CT scan and the MRI, and then you stopped
20 treating for a season, and then you returned. And
21 then you treated a couple of times and then came --
22 there came another gap in treatment of a couple of
23 months. You came back and treated for about a week
24 and then stopped again for a while. Why did you
25 stop again?

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1 MR. PALERMO: I will object as to vague
2 and ambiguous and as to form.

3 But you can answer.

4 THE WITNESS: Because I just felt that I
5 was not getting any kind of results. And I wanted
6 to know what the problem was and why I had the pain,
7 and I just felt that it was -- you know, and they
8 told me with the scans there was nothing wrong, and
9 I just assumed that everything would get better and
10 not worse.

11 BY MR. ROGERS

12 Q. Then after you returned to treatment, the
13 folks at Southwest Medical referred you to physical
14 therapy?

15 A. Yes.

16 Q. Did that help?

17 A. Like for temporary relief.

18 Q. By temporary, do you mean an hour a day,
19 a week?

20 A. The physical therapy, it was an hour a
21 day, yes. The physical therapy.

22 Q. Then after physical therapy, you returned
23 to Southwest Medical and treated with Dr. Tsai,
24 T-s-a-i.

25 Do you remember him?

15 (Pages 57 to 60)

<p style="text-align: right;">Page 61</p> <p>1 A. I'm not sure.</p> <p>2 Q. Now, we're around 11 months after the car</p> <p>3 accident, so in March of 2006 and at this point the</p> <p>4 folks there at Southwest Medical refer you for a</p> <p>5 cervical MRI. Did you ever talk with anyone about</p> <p>6 the findings on that neck MRI?</p> <p>7 A. I'm not sure which one it is or which</p> <p>8 doctor I went to.</p> <p>9 Q. Well, this is still at Southwest Medical,</p> <p>10 so it is Mr. Hill or the physician he is working</p> <p>11 with.</p> <p>12 A. I would imagine I talked to the physician</p> <p>13 about it.</p> <p>14 Q. Do you remember talking with the</p> <p>15 physician about it?</p> <p>16 A. I am not really sure exactly what test we</p> <p>17 are talking about.</p> <p>18 Q. The neck MRI.</p> <p>19 MR. PALERMO: I think he has had a lot.</p> <p>20 That is probably why he was confused.</p> <p>21 BY MR. ROGERS:</p> <p>22 Q. As I said, this was in March of 2006, so</p> <p>23 this is about a year after the accident.</p> <p>24 A. I have no idea who I saw and at what</p> <p>25 time. I really do not.</p>	<p style="text-align: right;">Page 63</p> <p>1 Q. Well, anyway, right after you see</p> <p>2 Dr. McNulty for the first time, and this is a year</p> <p>3 after the accident now, you go back to</p> <p>4 Southwest Medical to this pain management center.</p> <p>5 Do you remember treating there?</p> <p>6 A. Uh-huh.</p> <p>7 Q. Is that yes?</p> <p>8 A. Yes.</p> <p>9 Q. Do you remember who you treated with</p> <p>10 there?</p> <p>11 A. I do not.</p> <p>12 Q. There are two providers who are mentioned</p> <p>13 at the outset. One is Adam Arite, A-r-i-t-e, and</p> <p>14 the other is Donna Barnavon, B-a-r-n-a-v-o-n. Do</p> <p>15 you remember either of them?</p> <p>16 A. I remember names, yes.</p> <p>17 Q. Do you remember what kind of treatment</p> <p>18 they provided?</p> <p>19 A. I believe that it was Donna -- correct?</p> <p>20 Q. Yes.</p> <p>21 A. I believe Donna was the physical</p> <p>22 therapist like with the TENS. They -- the TENS</p> <p>23 unit, massage, whatever the therapy was at the time,</p> <p>24 and I believe Dr. Arite was for the injections.</p> <p>25 Q. Now, Donna wrote about psychological</p>
<p style="text-align: right;">Page 62</p> <p>1 Q. Well, it was shortly after this MRI that</p> <p>2 Mr. Hill referred you to Nevada Orthopedic where you</p> <p>3 saw Dr. McNulty?</p> <p>4 A. Yes.</p> <p>5 Q. Does that jog your memory about that MRI</p> <p>6 or about what he told you?</p> <p>7 A. I talked to Dr. McNulty about it.</p> <p>8 Q. Most likely, but what did Dr. McNulty</p> <p>9 tell you about it?</p> <p>10 A. Dr. McNulty had few words for me. He</p> <p>11 just told me that I needed surgery when I went in</p> <p>12 for the visit.</p> <p>13 Q. Is that what he told you at the first</p> <p>14 visit?</p> <p>15 A. I do not know which visit it was. I'm</p> <p>16 not sure what test you are talking about. I imagine</p> <p>17 there were not any tests done in my first visit to</p> <p>18 him, so, no. It would not be the first visit. I</p> <p>19 imagine he would have had the request test. I don't</p> <p>20 know. That is usually how it went.</p> <p>21 Q. Well, at the first visit, at least his</p> <p>22 record of the first visit, he discusses surgery. Do</p> <p>23 you remember whether Dr. McNulty discussed surgery</p> <p>24 with you at your first visit with him?</p> <p>25 A. I don't remember.</p>	<p style="text-align: right;">Page 64</p> <p>1 therapy for pain. Do you remember speaking with</p> <p>2 anyone about psychological treatment?</p> <p>3 A. I spoke to a couple of people over the</p> <p>4 years now. I'm sure.</p> <p>5 Q. Who else?</p> <p>6 A. I do not recall. I don't remember.</p> <p>7 Q. Did you treat with Donna anymore than</p> <p>8 once?</p> <p>9 A. I did.</p> <p>10 Q. And she did the TENS unit and those</p> <p>11 things that you described a moment ago?</p> <p>12 A. Yes.</p> <p>13 Q. Let's shift to the injections. Actually,</p> <p>14 according to the medical records, the doctor did the</p> <p>15 first epidural injections in your neck. It was not</p> <p>16 Dr. Arite. It was a fellow named Ross S-c-i-b-e-l.</p> <p>17 Do you remember him?</p> <p>18 A. Not right offhand, no.</p> <p>19 Q. Do you remember the first time you had an</p> <p>20 epidural injection in your neck?</p> <p>21 A. I do not. I do not remember.</p> <p>22 Q. Well, according to the records, you had</p> <p>23 this first injection and the injection decreased</p> <p>24 your pain and according to the provider, you were</p> <p>25 very satisfied with the outcome, but then -- and</p>

16 (Pages 61 to 64)

<p style="text-align: right;">Page 65</p> <p>1 this is in July of 2006 -- and then the following</p> <p>2 month in August, you reported an exacerbation of</p> <p>3 pain. What happened? What was the exacerbation?</p> <p>4 A. What do you mean?</p> <p>5 Q. In August 2006.</p> <p>6 A. It would just be the regular pain, I</p> <p>7 would imagine. I don't know.</p> <p>8 Q. Well, do you remember any of the</p> <p>9 injections that Dr. Arite or Dr. Scibel did?</p> <p>10 A. Absolutely.</p> <p>11 Q. What do you remember of them?</p> <p>12 MR. PALERMO: Objection. Vague and</p> <p>13 ambiguous. Overbroad.</p> <p>14 You can answer.</p> <p>15 THE WITNESS: That I went to several</p> <p>16 different places and got injections.</p> <p>17 BY MR. ROGERS:</p> <p>18 Q. What were the results of the injections?</p> <p>19 A. The results were the shoulder pain that</p> <p>20 we talked about earlier, the shoulder pain had</p> <p>21 lightened up quite a bit anywhere from a day to a</p> <p>22 week with the injections. It did not do anything</p> <p>23 for the head or the neck, though. It was nice to</p> <p>24 just get rid of the shoulder pain.</p> <p>25 Q. Do you remember undergoing different</p>	<p style="text-align: right;">Page 67</p> <p>1 A. No.</p> <p>2 Q. Now, over the course of your treatment</p> <p>3 you have undergone three cervical MRIs. Have you</p> <p>4 talked with your doctors about any of them?</p> <p>5 A. I'm sure I have. I don't remember the</p> <p>6 exact conversations of any of them.</p> <p>7 Q. You do not remember any of your providers</p> <p>8 saying, Okay, the films from these tests show</p> <p>9 negative or positive findings?</p> <p>10 A. I do not recall which ones or which, no.</p> <p>11 Q. Well, there was actually a fourth kind of</p> <p>12 injection that was done, but it was not done in your</p> <p>13 neck, at least not to the cervical spine. It is</p> <p>14 called a trigger point injection.</p> <p>15 Do you remember ever hearing that phrase</p> <p>16 "trigger point injection"?</p> <p>17 A. I have.</p> <p>18 Q. Now, was it the trigger point injections</p> <p>19 that they were doing along your left shoulder?</p> <p>20 A. I'm not sure.</p> <p>21 Q. Do you know if was the trigger point</p> <p>22 injections that were relieving the left shoulder</p> <p>23 pain?</p> <p>24 A. I'm not sure which ones they were.</p> <p>25 Q. Then after undergoing these various</p>
<p style="text-align: right;">Page 66</p> <p>1 kinds of injections in the neck?</p> <p>2 A. I have gone through a couple of different</p> <p>3 kinds, yes.</p> <p>4 Q. The ones that I see referenced in the</p> <p>5 records are epidurals, selective nerve root blocks,</p> <p>6 and radiofrequency. Sometimes it is referred to as</p> <p>7 rhizotomy.</p> <p>8 A. Okay.</p> <p>9 Q. Did one of those injections provide more</p> <p>10 relief than the others?</p> <p>11 A. I do not remember.</p> <p>12 Q. Did any of those injections provide</p> <p>13 relief of your pain for longer than a day or I think</p> <p>14 you said a day to a week?</p> <p>15 A. Yes. Some of them. I'm not sure which</p> <p>16 ones said a day to a week.</p> <p>17 Q. But did any of the injections --</p> <p>18 A. It did not take the pain away. It</p> <p>19 lightened it up. I mean a lot, the shoulder pain,</p> <p>20 yes.</p> <p>21 Q. Did any of the injections relieve your</p> <p>22 neck pain?</p> <p>23 A. I do not believe so.</p> <p>24 Q. Did any of the injections relieve your</p> <p>25 head pain?</p>	<p style="text-align: right;">Page 68</p> <p>1 injections with Southwest Medical's Pain Management</p> <p>2 Center, you went back to Dr. McNulty.</p> <p>3 A. Okay.</p> <p>4 Q. This takes us up to September 2007. So,</p> <p>5 in other words, you had been undergoing treatment at</p> <p>6 the Southwest Pain Management Center for a year and</p> <p>7 a half from March 2006 up until roughly</p> <p>8 September 2007.</p> <p>9 Do you remember going back to Dr. McNulty</p> <p>10 after that year and a half away from him?</p> <p>11 A. I do remember going back.</p> <p>12 Q. What happened when you went back to him?</p> <p>13 A. As far as -- I believe he ordered a test</p> <p>14 or something, X-ray. I'm not sure. I know the pain</p> <p>15 management, because I wanted to find out what the</p> <p>16 problem was. The pain management referred me back</p> <p>17 to him, I believe.</p> <p>18 Q. Did you get the impression that</p> <p>19 Southwest Medical Pain Management providers failed</p> <p>20 to figure out what the problem was?</p> <p>21 A. I got the impression that the problem was</p> <p>22 not figured out, because if it was, then the pain</p> <p>23 would be gone. A solution could be found and the</p> <p>24 pain would be gone.</p> <p>25 Q. Did Dr. McNulty do injections on you?</p>

17 (Pages 65 to 68)

<p style="text-align: right;">Page 69</p> <p>1 A. I believe he did, yes.</p> <p>2 Q. Did he recommend surgery when you went</p> <p>3 back to him after that year and a half away?</p> <p>4 A. Yes.</p> <p>5 Q. Did Dr. McNulty tell you what he saw on</p> <p>6 the MRIs?</p> <p>7 A. He did, but I did not understand at the</p> <p>8 time. I do not remember exactly. Something C3-C4</p> <p>9 or something. I did not understand at the time.</p> <p>10 Q. Do you understand now what he said?</p> <p>11 A. I understand now what needs to be done,</p> <p>12 yes.</p> <p>13 Q. What is it?</p> <p>14 A. It is surgery to replace a couple of</p> <p>15 discs.</p> <p>16 Q. Has someone talked with you about disc</p> <p>17 replacement or disc removal?</p> <p>18 A. Removal. I'm not sure.</p> <p>19 Q. Has anyone talked about artificial discs</p> <p>20 in your neck?</p> <p>21 A. I do not recall. I talked about a lot of</p> <p>22 things. I asked a lot of questions, but I do not --</p> <p>23 Q. So just to clarify, you do not know if a</p> <p>24 doctor has suggested disc replacement or disc</p> <p>25 removal?</p>	<p style="text-align: right;">Page 71</p> <p>1 discogram.</p> <p>2 A. So it is generally to relieve pain; it is</p> <p>3 the one that they do that they have you sit in their</p> <p>4 office after they do it, and they try to find out if</p> <p>5 the pain is gone in the area where they gave you the</p> <p>6 shot?</p> <p>7 Q. Yes.</p> <p>8 A. I have had that done several times.</p> <p>9 Q. Right. Do you remember what the results</p> <p>10 of Dr. McNulty's epidural was? Did it relieve pain?</p> <p>11 A. I do not remember.</p> <p>12 Q. Now, earlier you testified that the</p> <p>13 epidurals -- let me start over.</p> <p>14 Earlier you testified that none of the</p> <p>15 injections relieved your neck pain. None of them</p> <p>16 relieved your head pain; that some of them relieved</p> <p>17 your left shoulder pain for a day to a week?</p> <p>18 A. Right.</p> <p>19 Q. And that applies to all of the</p> <p>20 injections; right?</p> <p>21 MR. PALERMO: I don't know if that was</p> <p>22 addressed.</p> <p>23 But you can answer.</p> <p>24 BY MR. ROGERS:</p> <p>25 Q. That is my question.</p>
<p style="text-align: right;">Page 70</p> <p>1 A. I believe -- for McNulty?</p> <p>2 Q. For any doctor at this point. And then</p> <p>3 we will narrow it down to who?</p> <p>4 A. The understanding I have from Dr. Grover</p> <p>5 was that the discs would be removed, and I guess the</p> <p>6 bones would be fused. That is the understanding I</p> <p>7 have, but I talked to a lot of people, and I</p> <p>8 really -- I don't know.</p> <p>9 Q. Let's get back to the question I had</p> <p>10 earlier, and that is the injections that Dr. McNulty</p> <p>11 did. I have a record of epidural injections. Do</p> <p>12 you remember those?</p> <p>13 A. I had injections with him, yes.</p> <p>14 Q. Do you remember what the results of that</p> <p>15 epidural were?</p> <p>16 A. Which one was the epidural?</p> <p>17 Q. The one that was done in November of</p> <p>18 2007.</p> <p>19 A. What does it consist of?</p> <p>20 Q. Where they inject steroids and anesthesia</p> <p>21 onto the disc.</p> <p>22 A. Is that done through the front or the</p> <p>23 back?</p> <p>24 Q. They could do it either way. This is</p> <p>25 generally just to relieve pain. It is not the</p>	<p style="text-align: right;">Page 72</p> <p>1 A. I don't know. No. I mean there is -- I</p> <p>2 mean, I really do not understand the question. When</p> <p>3 you go in with Dr. McNulty, the one that you are</p> <p>4 talking about, is a temporary thing. Does it</p> <p>5 relieve it? I believe the areas of injection, I'm</p> <p>6 not sure if it did or not. I believe that that is</p> <p>7 why the test is taken because they do it, and if it</p> <p>8 relieves it, then they know where to X-ray and where</p> <p>9 to look at, whatever. I understand that, but I do</p> <p>10 not remember -- I do not remember which ones did</p> <p>11 what. I do not know the names of the shots, if</p> <p>12 there were four different names that you are giving</p> <p>13 me.</p> <p>14 Q. Right. So let's not complicate it like</p> <p>15 that.</p> <p>16 A. I have no idea on some of the tests you</p> <p>17 are asking me. Just bottom line is bottom line.</p> <p>18 Q. And the bottom line is -- and I'm trying</p> <p>19 to pull out all of those technical medical phrases</p> <p>20 and stuff. The bottom line is that as you look back</p> <p>21 over the injections that you have undergone, they</p> <p>22 did not provide relief of neck pain. They did not</p> <p>23 provide relief of head pain, but they did provide</p> <p>24 temporary relief of left shoulder pain?</p> <p>25 A. Pretty much, yes.</p>

18 (Pages 69 to 72)

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1 Q. Now, did Dr. McNulty do a discogram on
2 you?
3 A. I do not remember.
4 Q. You had a discogram not long ago?
5 A. Uh-huh.
6 Q. Do you remember that with Dr. Rosler?
7 A. Yes.
8 Q. And that is the one where they inflate
9 the disc with dye and pressurize it to see if it
10 elicits pain. They are not trying to relieve your
11 pain. They are trying to cause pain?
12 A. Right.
13 Q. So that is a different injection from all
14 of the other ones that you have had?
15 A. Yes.
16 Q. Did you undergo a discogram back in
17 December 2007?
18 A. I do not remember.
19 Q. All right. Well, there is a record from
20 Dr. McNulty that, in fact, reports that he did do a
21 discogram in December 2007. And the records reflect
22 that that was the last time you saw him. Why did
23 you leave McNulty?
24 A. I guess my wife and I went to the
25 appointment for the results of the test that they

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

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

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1 Q. Did you undergo an operative procedure
2 for the tumor?
3 A. I did.
4 Q. What did they do?
5 A. They just cut it open, looked at it, and
6 pulled it out, I guess.
7 Q. Were you unconscious during the procedure
8 or were you just sitting in the dentist chair awake
9 and numbed?
10 A. I was awake. It was not a dentist. It
11 was a surgeon who did it.
12 Q. Who was it? Was it a guy named Glyman?
13 A. Yes.
14 Q. But you did not go to a surgical center
15 or a hospital for the surgery?
16 A. I went to his office. I do not know if
17 it was a surgical center or not.
18 Q. And they did not put you under general
19 anesthesia?
20 A. Where I go to sleep?
21 Q. Right.
22 A. No.
23 Q. Let me make sure that I understand. You
24 stopped seeing McNulty, because you wanted to get a
25 second opinion about his recommendation for surgery;

19 (Pages 73 to 76)

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1 right?

2 A. Yes. Part of it, yes.

3 Q. And coincidentally right around that same

4 time you had a scare about a tumor in your mouth?

5 A. Yes.

6 Q. And after that scare was resolved, you

7 went and got a second opinion with Dr. Grover?

8 A. Yes.

9 Q. Now, who referred you to Dr. Grover?

10 A. I had asked around and talked to a lot of

11 people and his name had come up several times, and

12 then I called Jerry at the attorney's office,

13 because obviously, I do not have the money to do it,

14 and found out he would work with me for --

15 MR. PALERMO: Do not go into any details

16 about attorney-office conversation.

17 THE WITNESS: Absolutely. And that is

18 how I ended up there.

19 BY MR. ROGERS:

20 Q. You said you talked with several people

21 and that Dr. Grover's name came up more than once?

22 A. Yes.

23 Q. Who recommended Grover to you?

24 A. I don't even know his name, an older

25 gentleman that had had a neck and some kind of lower

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1 back or hip or something surgery, so one of them. I

2 talked to my customers and the people I worked with.

3 The other names came up too, and people I worked

4 with, but most of them are like in L.A. or

5 something, and I cannot go that way.

6 Q. Did any other surgeons' names come up in

7 these discussions with friends and co-workers?

8 A. Yes. Absolutely.

9 Q. Who else?

10 A. I do not remember.

11 Q. And you said that you cannot afford the

12 treatment. By that did you mean that you have

13 treated with Dr. Grover on a lien?

14 A. Yes.

15 Q. Did you ask around for any surgeons who

16 would accept your insurance?

17 A. I was under the understanding that I had

18 to get a referral and this and that, and I was not

19 sure if they would go with the same records or same

20 pictures that were already taken, so it was a

21 personal thing too that I wanted to go outside of

22 Southwest Medical, because it is more like going

23 to -- I just look at it like they all kind of work

24 together. I did not want any shared information or

25 anything. I just wanted to know from someone else,

Page 79

1 separate, that I did have problems.

2 Q. Well, then you go to Dr. Grover?

3 A. Uh-huh.

4 Q. And describe your treatment with him?

5 A. I just went back for several different

6 appointments for different tests, and I'm not even

7 sure. And I did go in for some of the shots that

8 they do.

9 Q. And that was with Dr. Rosler?

10 A. And Grover; same office, yes.

11 Q. And did you get the same results from the

12 injections that Dr. Rosler did as you did with the

13 ones done by Drs. McNulty and Arite?

14 A. That is all of the shots -- there were

15 different kind of shots that I had.

16 Q. Right. But earlier you testified that

17 the shots really did not relieve your neck pain.

18 That all they relieved was the shoulder pain

19 temporarily. Was it the same result with Dr. Rosler

20 as it was with the others?

21 A. I don't believe it was the same kind of

22 shots that I got.

23 Q. Well, did you get a different result from

24 Dr. Rosler?

25 A. No, not really. Any result, I do not

Page 80

1 think. I don't remember. I mean, I'm not sure when

2 they were doing the tests. Like, I guess, they try

3 to numb parts so they know where to X-ray from what

4 I understand or where to look for the problem.

5 Q. Well, I mean, Dr. Rosler did one of those

6 injections that numbs the area back in July of 2008,

7 so just a couple of months ago. And he wrote, No

8 significant improvement with your neck pain, and

9 that report suggests that that injection was the

10 same as the ones that came before. It did not

11 really relieve your neck pain.

12 A. But there are different kinds of

13 injections. The ones that relieve the shoulder pain

14 I got like 20 shots at one time.

15 Q. That is called a trigger point injection.

16 A. Okay. I don't know the difference in

17 what they are called. That is what I was telling

18 you earlier. I'm not sure, and I believe you are

19 confusing all of the shots with the different --

20 Q. It does sound like we're not really on

21 the same page. Let me put it to you this way. The

22 trigger point injection, the one where they can do

23 20 of them at the same time and they can do it in

24 their clinic, that is the one I understood relieved

25 your shoulder pain?

20 (Pages 77 to 80)

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

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1 the neck and not on the shoulder with no significant
 2 improvement.
 3 A. Okay.
 4 Q. Does that sound correct?
 5 A. It sounds correct.
 6 Q. Well, anyway, we got onto Rosler really
 7 just on a tangent there. You went to see
 8 Dr. Grover. I know that he did the injections. But
 9 what else? What other kind of treatment did he
 10 provide?
 11 A. Basically, he was just trying to run
 12 tests and find out what the problem was and that was
 13 about it.
 14 Q. Did he ever find what the problem was?
 15 A. I believe he did, yes.
 16 Q. What did he tell you the problem was?
 17 A. I think it is just the term "fissures."
 18 Q. Did he tell you where the fissures were?
 19 A. Into the discs in my neck.
 20 Q. Did he say which discs?
 21 A. I believe C3-C4.
 22 Q. Just the one level?
 23 A. I think there were two levels. I'm not
 24 sure.
 25 Q. Did he tell you which was the other

Page 83

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

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

21 (Pages 81 to 84)

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1 MR. PALERMO: Objection. Vague and
2 ambiguous as to form.
3 You can answer.
4 THE WITNESS: It was like a test. I
5 guess they -- from what I understand, they shot dye,
6 I guess, into the discs, and then I went somewhere
7 else, and they did some kind of scan.
8 BY MR. ROGERS:
9 Q. Well, did they give you medication
10 beforehand?
11 A. Before?
12 Q. Before injecting the dye?
13 A. Yes. I believe so.
14 Q. Were you awake?
15 A. No.
16 Q. Somewhat impaired?
17 A. I think I was asleep when they did it. I
18 do not remember.
19 Q. Do you remember speaking with the
20 physician who was injecting the dye while the
21 procedure was being done?
22 A. No, I don't remember.
23 Q. Just describe how it was done at their
24 center. You go in and you check in and generally
25 they will begin by giving the patient some kind of

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1 sedative. Do you remember them giving you a pill or
2 maybe gas or something like that?
3 A. I think it was gas. I did not get a pill
4 or anything, and it was when I was laying down.
5 Q. You were with your wife before you go in
6 to the OR, right?
7 A. Uh-huh.
8 Q. Take me then from what you can remember
9 from when you are sitting with your wife and you are
10 still coherent up until the time that you leave the
11 center.
12 A. We were in the waiting room, and then
13 they called my name, and then we walked into one of
14 the small offices and my wife came in and sat there.
15 I guess they took my blood pressure, whatever, and
16 then I went to another room, and I do not know if my
17 wife sat in the small room or went back out to the
18 waiting room. I'm not sure. And I think there were
19 three or four or five people. I'm not sure how many
20 were in there, and I laid down on the table and yes,
21 I believe it was something that I breathed in that
22 they gave me. And he was explaining, you know, what
23 he was going to do all of the way, and that that was
24 it, really.
25 Q. And you woke up after it was done?

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1 A. Pretty much, I believe so.
2 Q. Was it Dr. Rosler who did that procedure?
3 A. Yes. I believe it was, yes.
4 Q. Did you talk with any of those providers
5 in the recovery room?
6 A. Any of the providers?
7 Q. Rosler or any of the other -- I think you
8 said four or five people were in the operating room?
9 A. That I talked to in the recovery room?
10 Q. Yes. As I understand it, they wheel you
11 into the operating room, and they give you gas, you
12 go to sleep, and then the next coherent moment you
13 have is when it is over and you are in the recovery
14 room?
15 A. I believe I talked to Dr. Rosler after.
16 Q. In the recovery room or when you returned
17 to his office sometime later?
18 A. I do not remember.
19 Q. Now, this was done a couple of months
20 ago, right?
21 A. Yes.
22 Q. Do you think you do not remember this
23 thing that happened a couple of months ago simply
24 because you were -- well, gassed? You were
25 incoherent?

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1 A. No. I think it was because all of these
2 tests and everything just kind of run together and
3 I'm looking for the results to get rid of the pain
4 and I was kind of more focused on what I could do to
5 get rid of that permanently than everything else,
6 you know.
7 Q. Well, what did Dr. Rosler tell you was
8 the finding from that discography?
9 A. On that visit?
10 Q. Whenever you talked to him about what the
11 result was of that test.
12 A. I guess that there were fissures or
13 cracks or whatever. They did explain it to me.
14 Q. Was it Dr. Grover who explained it to you
15 or Dr. Rosler?
16 A. It was Dr. Grover.
17 Q. So Dr. Rosler did not explain it to you?
18 A. No.
19 Q. Did Dr. Grover ever discuss with you
20 concerns about potential false positives on a
21 discogram study?
22 A. I do not recall.
23 Q. In other words, did he ever tell you,
24 Look, this is a test that is not always reliable;
25 that it can have some problems?

22 (Pages 85 to 88)

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1 A. I do not remember if he said that or not.

2 Q. Have you ever heard anybody say that
3 before me saying it today?

4 A. Probably not.

5 Q. What did Dr. Grover tell you about the
6 success rate of a two-level cervical fusion?

7 A. I don't know if we got into any exacts,
8 but I did ask him. And he said that most of them go
9 very well *and people can live normal lives, and*
10 *there is not a lot of difference and some of them*
11 *obviously do not. That is what I took from that.*

12 Q. So, in other words, he said that the
13 greater likelihood of this two-level fusion would
14 relieve your pain, but that there was a chance that
15 it would not?

16 A. He did say there was a chance that it
17 would not.

18 Q. And when he said go onto lead normal
19 lives, did he tell you that that would mean --
20 *(Telephonic Interruption.)*

21 BY MR. ROGERS:

22 Q. Did he tell you that that would mean that
23 the pain would be resolved?

24 MR. PALERMO: Objection. Vague and
25 ambiguous.

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1 You can answer.

2 THE WITNESS: No. I have asked the
3 question of everyone I have seen and nobody can
4 *guarantee everything, and I understand that.*

5 BY MR. ROGERS:

6 Q. What did he tell you about what the pain
7 would be like, if any, after the surgery?

8 A. It varies. That it varies. Some people
9 have discomfort. Some people I think did go through
10 a lot with everybody that I talked to.

11 Q. You mentioned one man you spoke with who
12 had surgery with Dr. Grover on his neck; right?

13 A. Yes.

14 Q. What did he tell you his neck was like?

15 A. He was happy with it, and one of the
16 other guys at work had neck surgery and he was
17 really happy with it, and I have talked to people;
18 one of the gals at work that she was very unhappy
19 with her neck surgery. I have met people along the
20 way, customers that I have talked to, this and that,
21 that some are happy and some are not.

22 Q. Well, you are going to go back to see
23 Dr. Grover in roughly a week, and what is your plan
24 at that meeting?

25 A. I do not know. I would imagine to make a

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1 decision on the surgery or not.

2 Q. So as you sit here today, you do not
3 really know what kind of future treatment you will
4 plan to undergo?

5 A. Not really.

6 Q. Well, let's take about your present
7 condition then. You have already provided some
8 insight into it. You said that your head pain is
9 the same or worse, that your neck pain is worse than
10 it was back when the accident happened. What about
11 your left shoulder?

12 A. It is the same or worse. It is constant.
13 It is all constant pain, never ever stops. It is
14 always there.

15 Q. Do you have any restrictions in your
16 normal activities?

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

19 You can answer.

20 THE WITNESS: I imagine there is a lot of
21 them. I can still lift 100 pounds. I mean, I have
22 not lost any of my strength, but there were a lot of
23 things that I do not do now. I sold my motorcycle,
24 because I cannot sit and ride that.

25 BY MR. ROGERS:

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1 Q. When did you sell it?

2 A. Probably about six or seven months ago.
3 I mean, I do not even know. It is just little
4 things. I don't know.

5 Q. Are there any activities that you used to
6 do that you can no longer do at all?

7 A. Yes. Sit in a chair.

8 Q. Well, when I say not at all, I mean
9 period, because you have sat in a chair today for
10 quite a while.

11 A. Right. I cannot sit still. I have to
12 keep adjusting to be comfortable, so anything that I
13 have to sit for a long time is pretty much out of
14 the question.

15 Q. Well, let me be more specific about the
16 question. I want to start with activities that you
17 cannot do, period, and then I want to get into a
18 discussion of activities that you're limited in, but
19 you can still do it.

20 So are there any activities that you used
21 to do that you cannot do at all?

22 A. No.

23 Q. Now let's discuss those activities that
24 you used to do that you can still do, but that you
25 have some limitations in. Sitting you have said is

23 (Pages 89 to 92)

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1 one. What else?

2 A. I do not know. I really do not have any
3 idea. It is a day-by-day thing that I notice.

4 Q. And can you think of anything that you
5 have limitations in doing other than sitting for
6 prolonged periods of time?

7 A. Yes. My work. If we have buffers that
8 we have to run, like a standup buffer that you have
9 to run with the arms, I cannot run those for as long
10 as I used to; carpet cleaning, I cannot do it
11 anymore. It is mostly what my company does. That
12 is pretty much my daily activities. I don't know.

13 Q. So you can run the buffer, but not as
14 long as you used to?

15 A. Yes.

16 Q. What is the difference in time? Like you
17 used to do it for how long and how long do you do it
18 now?

19 A. I do not know. I used to do it as long
20 as I needed, to take more breaks now or I will bring
21 someone to help me. Time wise, I don't know the
22 difference.

23 Q. Now, what is the difference between
24 operating a buffer and carpet cleaning?

25 A. I can stand up straighter with the

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1 buffer, and I do not have to hunch over with the —
2 like you do with the carpet cleaner. There is not a
3 lot of arm movement with the carpet cleaner. You
4 have to go back and forth constantly with your arms.
5 With the buffer, you pretty much stand still, and it
6 does all of the work. That is a big difference.

7 Q. And you cannot operate the carpet cleaner
8 machine at all?

9 A. I try my hardest not to. Very, very
10 seldom. I doubt if I do a job in a month now. I
11 knew that much.

12 Q. Your son does that work now?

13 A. Yes. He does all of it.

14 Q. When you go out on a job then, do you
15 just run the buffer machine?

16 A. Most of those jobs I do not go out to. I
17 only go out when I have to. Most of what I do is
18 sealing grout.

19 Q. Have you seen any doctors that we have
20 not discussed today?

21 A. I think we discussed a lot of doctors. I
22 have no idea.

23 Q. Are you seeing any doctors today other
24 than Rosier and Grover?

25 A. No.

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1 Q. And have you seen any surgeons other than
2 Grover and McNulty?

3 A. No. Not to my knowledge I have not, no.

4 Q. Now, when we started out this deposition,
5 I asked you some questions about your company and
6 about your income.

7 A. Yes.

8 Q. Are you bringing a claim for lost income
9 as a result of this car accident?

10 A. At this point, I do not know how much
11 time I have lost.

12 Q. So you're claiming that you lost time
13 from work?

14 A. I lost a lot of time from work, a lot.
15 Just from a year of physical therapy, I lost a lot
16 of time from that.

17 Q. You mean going to the appointments?

18 A. Yes. I lost a lot of time. I go home
19 half day now sometimes. In fact, I used to go out
20 and help William finish. There is a big difference.
21 There is a huge difference.

22 Q. How much income have you lost as a result
23 of the accident?

24 A. I cannot even tell you. It is my
25 business, so it is what I schedule or do not

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1 schedule, what I think I can handle or what I do not
2 think I can handle. If I have to send someone else,
3 I will not take the job. It is accounts that I
4 cannot go out and get, because I won't go do the
5 work. It is a family business. I don't trust a lot
6 of people to work for me. It is different.

7 Q. Now, you did not own this business until
8 about two and a half years after the accident;
9 right?

10 A. Yes.

11 Q. Is that yes?

12 A. Yes.

13 Q. Did you lose income between the date of
14 the accident and the date that you bought the
15 business?

16 A. Yes.

17 Q. How much?

18 A. Again, I would not know.

19 Q. How would you know? I mean what would
20 you research to figure it out?

21 A. I would have to research a lot of things.
22 I probably would go through the schedule book and
23 see what days I had appointments at different places
24 or the work that we review is kind of tough. You
25 can not take on a big new account if you cannot do

24 (Pages 93 to 96)

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

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

6 A. Uh-huh.

7 Q. Is that right?

8 A. Yes.

9 Q. Did you lose any of your salary --

10 A. I did not.

11 Q. -- after the accident?

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

13 Q. Now let's focus on this specific

14 question. If you did not lose salary, what income
15 did you lose after the accident before you bought
16 the business?

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

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

25 A. My salary, right.

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

4 A. I believe so.

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

7 A. I do not know.

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

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

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

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

25 Q. Have you ever asked your son or

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

3 A. Actually, William has gotten a couple.

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

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

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

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

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

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

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

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

10 Q. Have you looked into hiring anybody else?

11 A. I might have had other employees since
12 then.

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

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

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

23 A. I have no idea.

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

25 (Pages 97 to 100)

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

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

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

11 A. Yes.

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

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

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

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

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

3 A. Right.

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

7 A. It is everything.

8 Q. Has it changed in any other particulars?

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

23 Q. Did your wife own a motorcycle too?

24 A. Yes.

25 Q. Did she sell hers?

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1 A. Yes.

2 Q. When?

3 A. Same time as mine.

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

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

8 Q. How frequently did you ride?

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

11 Q. Was it like a weekly occurrence?

12 A. Oh, yes.

13 Q. A monthly occurrence?

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

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

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

22 Q. Have you considered going to counseling
23 over this?

24 A. For my neck and back problem, no.

25 Q. That is a smart point. My question,

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1 though, was to the issue of marriage counseling.

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

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

12 Have you followed up with anyone on that
13 approach?

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

16 You can answer.

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

21 BY MR. ROGERS:

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

26 (Pages 101 to 104)

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1	functioning, our nervous system, our belief system,	1	CERTIFICATE OF DEPONENT
2	our emotions, our stress level, our psychosocial	2	
3	situation, and our thoughts.	3	PAGE LINE CHANGE REASON
4	Have you spoken with anybody about	4	
5	addressing your neck pain through counseling with	5	
6	belief system, emotions, psychosocial situations,	6	
7	and things like that?	7	
8	MR. PALERMO: Objection. Compound as to	8	
9	form.	9	
10	You can answer.	10	
11	BY MR. ROGERS:	11	
12	Q. Does any of what I just read to you from	12	
13	Donna's notes ring a bell? Do you remember ever	13	
14	having that discussion?	14	
15	A. I'm not sure. Maybe kind of. I'm not	15	*****
16	sure.	16	DECLARATION OF DEPONENT
17	Q. But it is safe to say it is something	17	I, WILLIAM SIMAO, deponent herein, do hereby
18	that you have not followed up on?	18	certify and declare the within and foregoing
19	A. As far as seeing a counselor?	19	transcription to be my deposition in said action;
20	Q. Right.	20	that I have read, corrected, and do hereby affix my
21	A. No, I have not. I have not seen a	21	signature to said deposition this _____ day of
22	counselor, besides her, if she is one.	22	_____, 2008.
23	Q. What are you doing then to address this	23	WILLIAM SIMAO
24	hardship that you have discussed in your marriage?	24	
25	A. Living through it, trying to find how I	25	

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1	can get rid of the pain, and everything can just go	1	REPORTER'S DECLARATION
2	back.	2	STATE OF NEVADA)
3	Q. Is there anything else that you would add	3) ss.
4	to what your wife testified to about the consortium	4	COUNTY OF CLARK)
5	claim?	5	I, CAMEO L. KAYSER, CCR No. 569, declare
6	MR. PALERMO: Objection. Overbroad.	6	as follows:
7	Vague and ambiguous.	7	That I reported the taking of the
8	You can answer.	8	deposition of the witness, WILLIAM SIMAO, commencing
9	THE WITNESS: No.	9	on Thursday, October 23, 2008 at 1:50 p.m.
10	BY MR. ROGERS: Well, here is what I will	10	That prior to being examined, the witness
11	do then. I will adjourn today's deposition and	11	was by me duly sworn to testify to the truth, the
12	reserve the right to come back with you and discuss	12	whole truth, and nothing but the truth; that before
13	whatever your plan is in the future once you	13	the proceedings' completion, the reading and signing
14	formulate that plan, whether it be surgery or some	14	of the deposition has been requested by the deponent
15	other kind of medical care.	15	or a party.
16	And that is all I have then for the day.	16	That I thereafter transcribed my said
17	MR. PALERMO: I guess we're done then.	17	shorthand notes into typewriting and that the
18	(Thereupon the taking of the deposition	18	typewritten transcript of said deposition is a
19	was concluded at 5:35 p.m.)	19	complete, true, and accurate transcription of said
20		20	shorthand notes taken down at said time.
21		21	I further declare that I am not a
22		22	relative or employee of any party involved in said
23		23	action, nor a person financially interested in the
24		24	action.
25		25	Dated at Las Vegas, Nevada this 3rd day
			of November, 2008.
			CAMEO L. KAYSER, RPR, CCR No. 560

27 (Pages 105 to 108)

CAMEO KAYSER & ASSOCIATES (702) 655-5092

In the Supreme Court of Nevada

Case Nos. 58504, 59208 and 59423

Electronically Filed
Aug 14 2012 03:53 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

JENNY RISH,

Appellant,

vs.

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

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JESSIE WALSH, District Judge
District Court Case No. A539455

**APPELLANT'S APPENDIX
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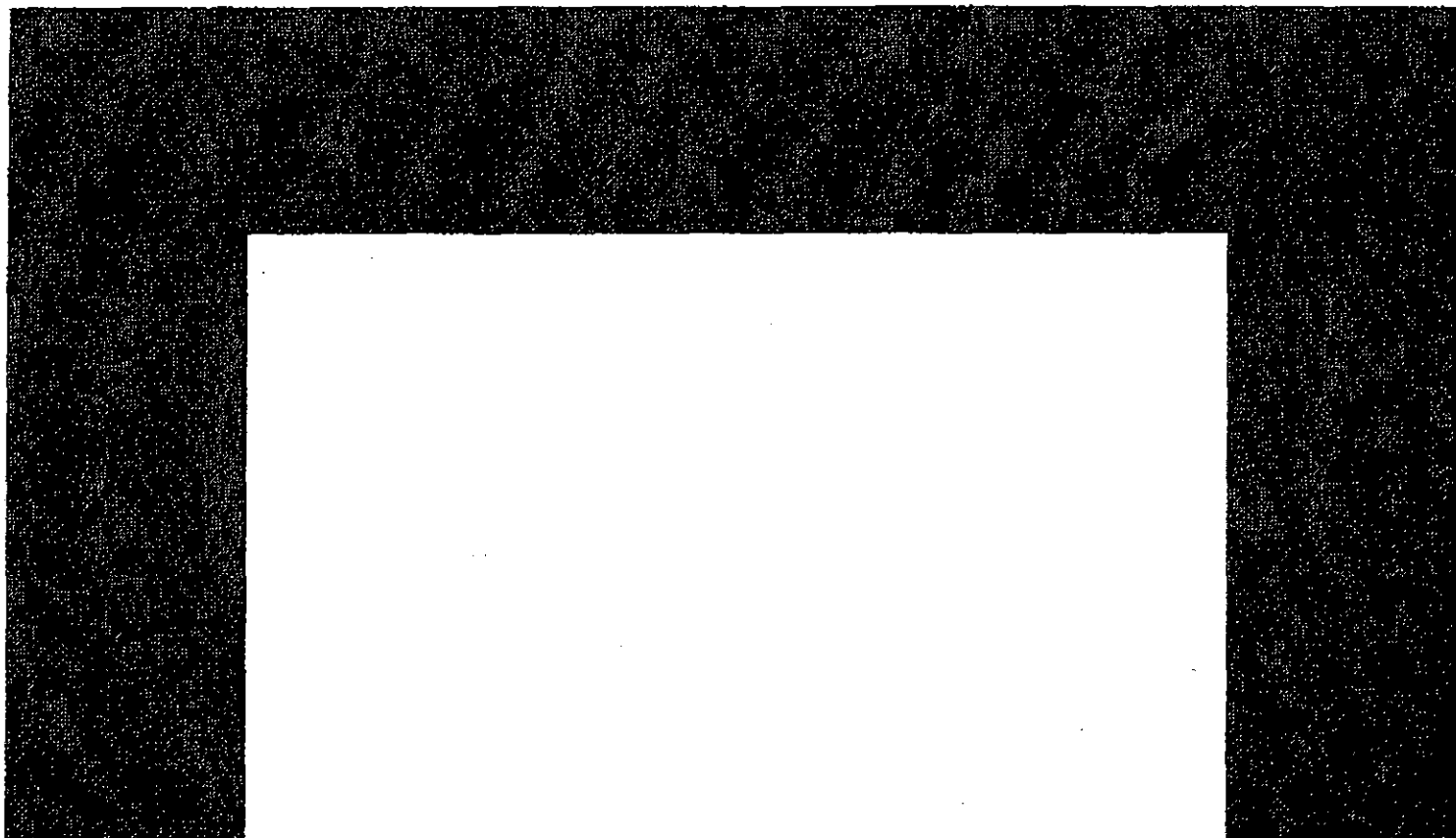
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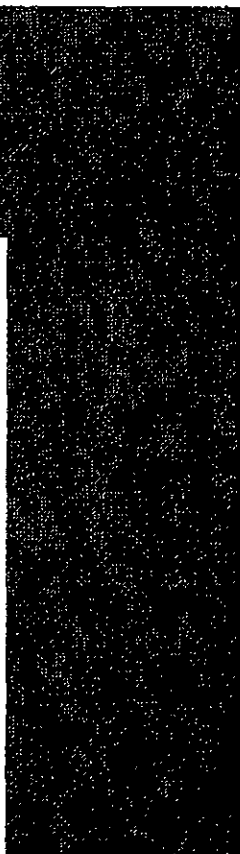
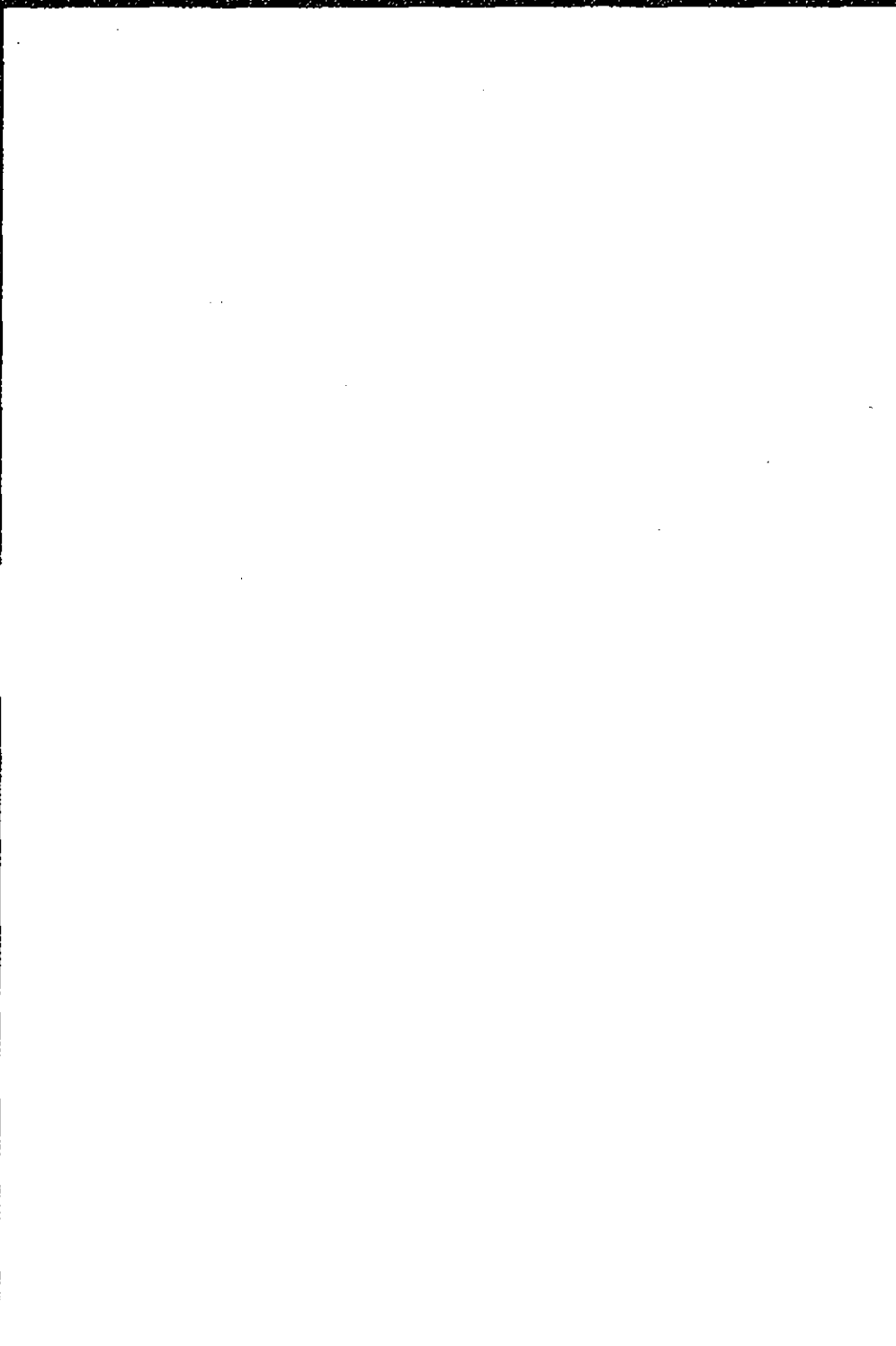
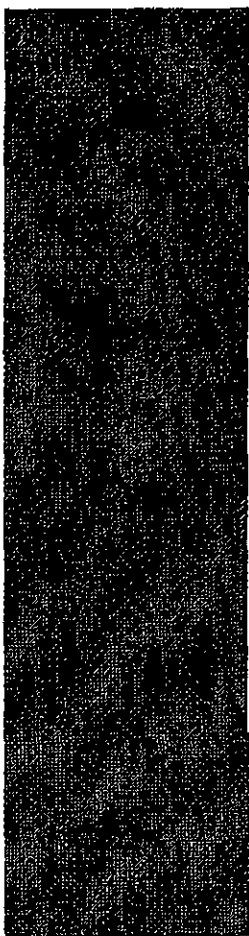
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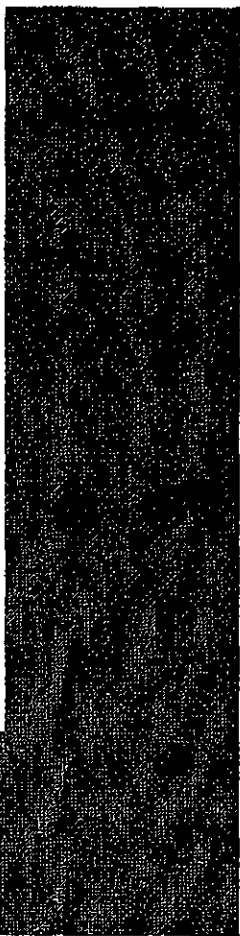
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148	Portion of Jury Trial - Day 6 (Bench Conferences)	03/21/11	21	4870-4883
149	Portion of Jury Trial - Day 7 (Bench Conferences)	03/22/11	21	4884-4900
150	Portion of Jury Trial - Day 8 (Bench Conferences)	03/23/11	21	4901-4920
151	Portion of Jury Trial - Day 9 (Bench Conferences)	03/24/11	21	4921-4957
152	Portion of Jury Trial - Day 10 (Bench Conferences)	03/25/11	21	4958-4998
153	Portion of Jury Trial - Day 11 (Bench Conferences)	03/28/11	21	4999-5016
154	Portion of Jury Trial - Day 12 (Bench Conferences)	03/29/11	22	5017-5056
155	Portion of Jury Trial - Day 13 (Bench Conferences)	03/30/11	22	5057-5089
156	Portion of Jury Trial - Day 14 (Bench Conferences)	03/31/11	22	5090-5105



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ORIGINAL

1 **COMP**

2 MATTHEW E. AARON, ESQ.

3 Nevada Bar No. 4900

4 AARON & PATERNOSTER, LTD.

5 2300 West Sahara Avenue, Suite 650

6 Las Vegas, Nevada 89102

7 (702) 384-4111

8 Attorneys for Plaintiffs

CLERK OF THE COURT

APR 13 4 40 PM '07

FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

9 WILLIAM JAY SIMAO, individually and
 10 CHERYL ANN SIMAO, individually, and as
 11 husband and wife,

12 Plaintiffs,

13 vs.

14 JENNY RISH; JAMES RISH; LINDA RISH;
 15 DOES I through V; and ROE CORPORATIONS I
 16 through V, inclusive.

17 Defendants.

Case No.: A539455

Dept. No.: X

COMPLAINT FOR PERSONAL INJURIES

18 COMES NOW, Plaintiffs, WILLIAM JAY SIMAO and CHERYL ANN SIMAO, by and through
 19 their attorney Matthew E. Aaron, Esq., of the law firm of AARON & PATERNOSTER, LTD., and for their
 20 claims against the Defendants, and each of them, alleges as follows:

BACKGROUND FACTS

21 1. Upon information and belief, at all times relevant to this action, Plaintiffs, WILLIAM JAY
 22 SIMAO and CHERYL ANN SIMAO were and are residents of the County of Clark, State of Nevada and
 23 are legally married.

24 2. Upon information and belief, at all times relevant to this action, Defendant, JENNY RISH,
 25 was and is a resident of Gilbert, State of Arizona.

1 3. Upon information and belief, at all times relevant to this action, Defendants, JAMES RISH
2 and LINDA RISH, were and are residents of Hill AFB, State of Utah.

3 4. That the true names or capacities, whether individual, corporate, associate or otherwise of
4 Defendants DOES I through V and ROE CORPORATIONS I through V are unknown to Plaintiffs who
5 therefore sue said Defendants by such fictitious names. Plaintiffs are informed and believe and thereon
6 alleges that each of the Defendants designated herein as DOE and ROE CORPORATION are responsible
7 in some manner for the events and happenings herein referred to and caused damage proximately to
8 Plaintiffs as herein alleged; and Plaintiffs will ask leave of this Court to amend this Complaint to insert the
9 true names and capacities of DOES I through V and ROE CORPORATIONS I through V, when the same
10 have been ascertained and to join such Defendants in this action.

11 5. Upon information and belief, at all times mentioned herein, Plaintiff, WILLIAM JAY
12 SIMAO, was the owner and operator of a certain 1994 Ford Econoline van bearing Nevada license plate
13 573NHG herein after referred to as Plaintiff's vehicle.

14 6. Upon information and belief, at all times mentioned herein, Defendant, JENNY RISH was
15 the operator of a certain 2001 Chevrolet automobile bearing Utah license plate 886VDX, hereinafter
16 referred to as Defendants' vehicle.

17 7. Upon information and belief, at all times mentioned herein, Defendants, JAMES RISH and
18 LINDA RISH, were the owners of a certain 2001 Chevrolet automobile bearing Utah license plate
19 886VDX, hereinafter referred to as Defendants' vehicle.

20 8. Upon information and belief, at all times mentioned herein, Defendant, JENNY RISH, was
21 the operator of Defendants' vehicle and was doing so with consent, knowledge and permission of it's
22 owner.

1 9. At all times mentioned herein, IR-15 near the Cheyenne interchange, runs in a generally
2 north/south direction. IR-15 and Cheyenne are generally traveled public streets or highways within the
3 County of Clark, State of Nevada.

4
5 **FIRST CLAIM FOR RELIEF**
6 (Negligence of JENNY RISH, Negligence of JAMES RISH, Negligence of LINDA RISH)

7 10. Plaintiffs repeat and reallege paragraphs 1 through 9, and incorporates the same herein by
8 reference as though fully set forth herein.

9 11. On or about the 15th day of April, 2005, Defendant's vehicle was traveling southbound on
10 IR-15 north of the Cheyenne interchange. Plaintiff's vehicle was traveling southbound on IR-15 directly in
11 front of Defendants' vehicle. Defendant's vehicle struck the rear end of Plaintiff's vehicle.

12 12. At the time of the collision herein complained of and immediately prior thereto, Defendant,
13 JENNY RISH, was negligent and careless in the following particulars:

- 14 a. In failing to maintain a proper lookout for other vehicles on the roadway and more
15 particularly the Plaintiff's vehicle;
16 b. In operating the Defendant's vehicle without due caution and with disregard for the
17 rights of Plaintiff herein;
18 c. In failing to maintain a safe distance behind Plaintiff's vehicle;
19 d. In failing to keep Defendant's vehicle under proper control; and
20 e. In operating Defendant's vehicle without paying full time and attention to said
21 operation.
22 operation.

23 13. At the time of the collision herein complained of and immediately prior thereto, Defendants,
24 JAMES RISH and LINDA RISH were negligent and careless in allowing a person to operate a vehicle who
25 is not qualified to do so.
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28 **(General Damages)**

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1 18. Prior to the injuries complained of herein, Plaintiff, WILLIAM JAY SIMAO, was an able-
2 bodied male regularly and gainfully employed and physically capable of engaging in all other activities for
3 which he was otherwise suited. By reason of the premises and as a direct and proximate result therefore,
4 Plaintiff was required to and did lose time from his employment, continues to and shall continue to be
5 limited in his activities and occupations which has caused and shall continue to cause to Plaintiff a loss of
6 earning and earning capacity to his damages in a presently unascertainable amount, the allegations of which
7 Plaintiff prays leave of this Court to insert herein.
8

9 19. Plaintiff has been required to retain the services of an attorney to prosecute this action and is
10 entitled to an award of reasonable attorneys' fees.
11

12 **SECOND CLAIM FOR RELIEF**
13 **(Negligence Per Se of JENNY RISH)**

14 20. Plaintiffs repeat and reallege Paragraphs 1 through 19 and incorporate the same by reference
15 as though fully set forth herein.

16 21. Defendant, JENNY RISH, in operating the Defendants' vehicle on April 15th 2005, violated
17 one or more of the Nevada Revised Statutes, including N.R.S. 484.363, which regulates the duty of a driver
18 to decrease speed under adverse circumstances, and use due care. The violations of said Statutes were the
19 direct and proximate cause of the injuries previously alleged to have been suffered by Plaintiff.
20

21 22. Defendant, JENNY RISH, in operating Defendants' vehicle on April 15th, 2005, violated
22 one or more of the Clark County Codes. The violations of said Codes were the direct and proximate cause
23 of the injuries previously alleged to have been suffered by Plaintiff.

24 23. The Plaintiff is a member of the class of persons these Statutes and/or Codes were intended
25 to protect and the injuries the Plaintiff suffered were of the type theses Statutes and/or Codes were intended
26 to prevent.
27

28 24. Plaintiff has been required to retain the services of an attorney to prosecute this action and is
entitled to an award of reasonable attorneys' fees.

THIRD CLAIM FOR RELIEF
(Negligence of JAMES RISH and LINDA RISH)

25. Plaintiff repeats and realleges Paragraphs 1 through 24 and incorporates the same herein by reference as though fully set forth herein.

26. Defendant, JENNY RISH, was operating the subject vehicle with the permission of Defendants, JAMES RISH and LINDA RISH.

27. Defendants, JAMES RISH and LINDA RISH are liable for the negligent acts of Defendant, JENNY RISH, under N.R.S. 41.440 and 41.450.

28. Plaintiff has been required to retain the services of an attorney to prosecute this action and is entitled to an award of reasonable attorneys' fees.

FOURTH CLAIM FOR RELIEF
(Loss of Consortium)

29. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 28, as though fully set forth herein.

30. By reason of the premises and as a direct and proximate result thereof, Plaintiff, CHERYL ANN SIMAO, has been deprived of and has suffered the loss of services, companionship, society and consortium of her husband, Plaintiff, WILLIAM JAY SIMAO, all to her damage in an amount in excess of \$10,000.00.

31. Plaintiffs have been required to retain the services of an attorney to prosecute this action and is entitled to an award of reasonable attorneys' fees.

WHEREFORE, Plaintiffs, WILLIAM JAY SIMAO and CHERYL ANN SIMAO, expressly reserving their right to amend this Complaint at the time of trial of this action to include all items of damages not yet ascertained, demands judgment against the Defendants, and each of them, as follows:

FIRST SECOND AND THIRD CLAIMS FOR RELIEF:

1. General damages in excess of TEN THOUSAND DOLLARS (\$10,000.00);

- 1 2. Special damages for medical care and treatment and costs incidental thereto, when
- 2 the same have been fully ascertained;
- 3 3. Property damage and costs incidental thereto, when the same have been fully
- 4 ascertained;
- 5 4. Compensation for the loss of use of vehicle and its use and enjoyment thereto, when
- 6 the same have been fully ascertained;
- 7 5. Damages for loss of earnings and earning capacity, when the same have been fully
- 8 ascertained;
- 9 6. Prejudgment interest;
- 10 7. Reasonable attorney's fees;
- 11 8. Costs of suit herein; and
- 12 9. For such other and further relief as the Court may deem proper.
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FOURTH CLAIM FOR RELIEF:

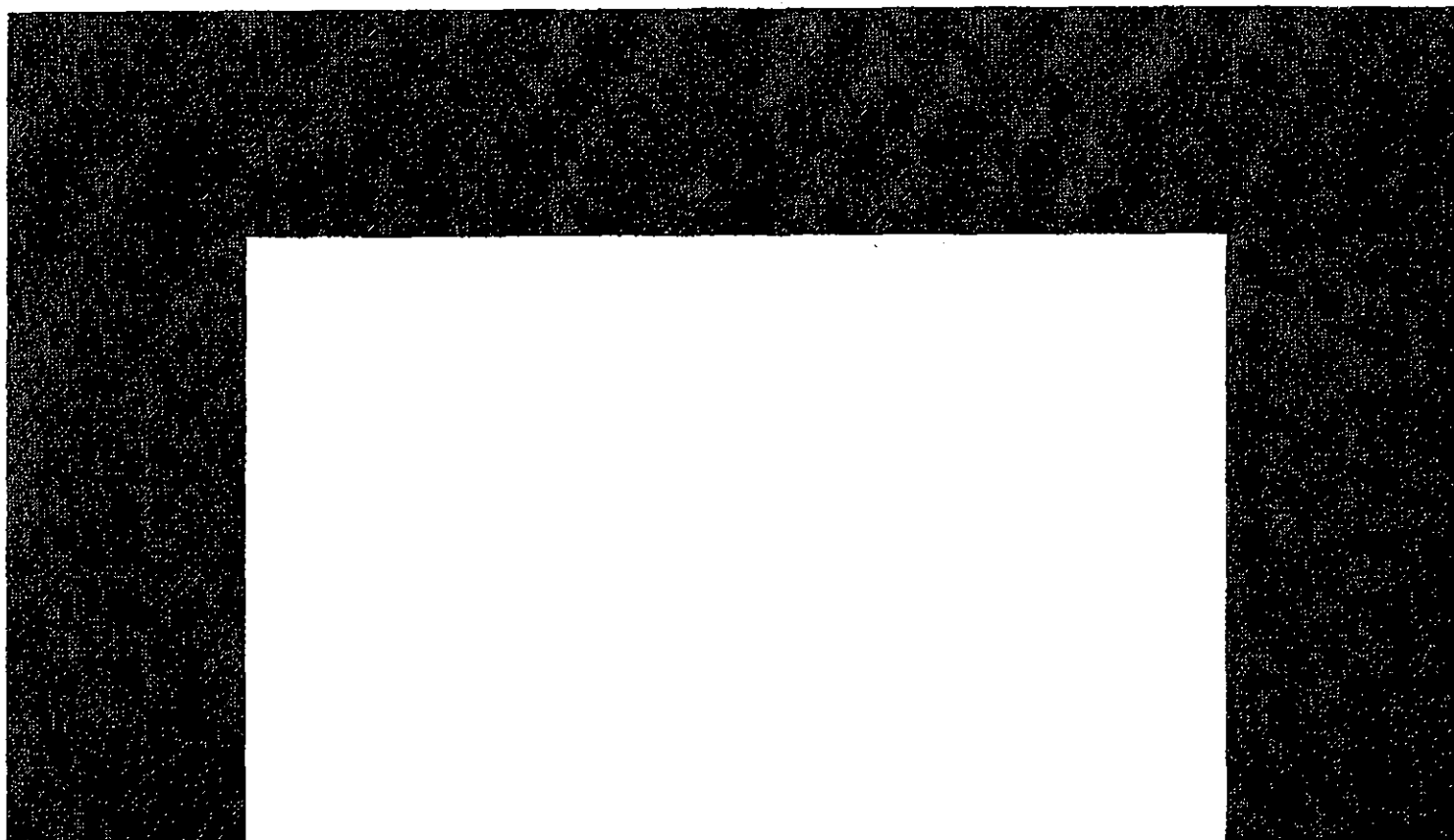
1. For damages for loss of services, companionship, society and consortium of her
husband in an amount in excess of \$10,000.00;
2. Reasonable attorney's fees;
3. Costs of suit herein; and
4. For such other and further relief as the Court may deem proper.

DATED this 17 day of April, 2007.

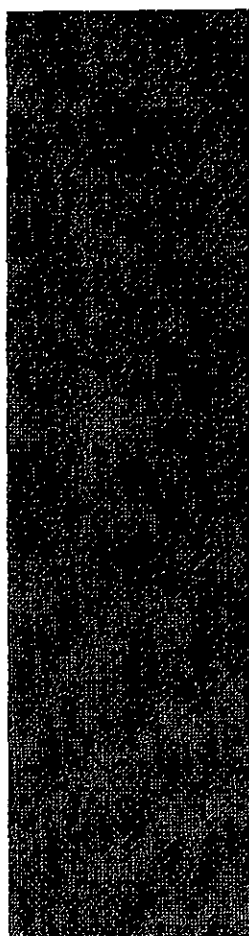
AARON & PATERNOSTER, LTD.


MATTHEW E. AARON, ESQ.

Nevada Bar No. 4900
2300 West Sahara Avenue, Suite 650
Las Vegas, Nevada 89102
Attorneys for Plaintiffs



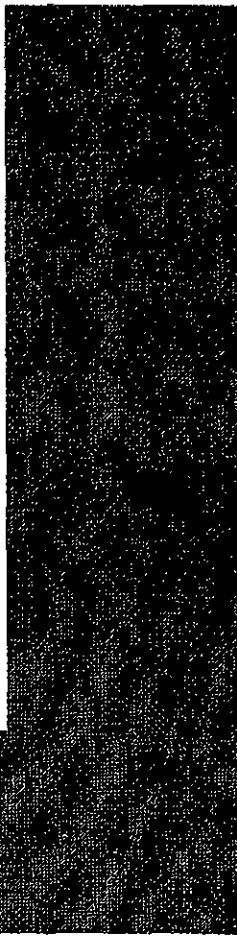
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SUM

ORIGINAL

District Court

CLARK COUNTY, NEVADA

CLERK OF THE COURT

Aug 10 12 07 PM '07

FILED

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

Plaintiffs,

vs.

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

Defendants.

SUMMONS

CASE NO.

Dept. NO.

A 5 3 9 4 5 5

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT. A Civil Complaint has been filed by the plaintiff against you for the relief set forth in the Complaint.

JENNY RISH
223 NORTH COTTONWOOD DRIVE
GILBERT, ARIZONA 85234

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you exclusive of the day of service, you must do the following:

- File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.
- Serve a copy of your response upon the attorney whose name and address is shown below

2. Unless you respond, your default will be entered upon application of the plaintiff and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

Issued at the direction of:

AARON & PATERNOSTER, LTD.

CHARLES J. SHORT, CLERK OF COURT

By:

Matthew E. Aaron, Esq.
 Nevada Bar No. 4900
 AARON & PATERNOSTER
 2300 West Sahara, Suite 650
 Attorneys for Plaintiffs

By:

Deputy Clerk
 County Courthouse
 200 South Third Street
 Las Vegas, NV 89155

PATRICIA BOGGESS

RECEIVED

AUG 10 2007

CLERK OF THE COURT

APR 13 2007

CLARK COUNTY DISTRICT COURT
In And For The County Of Maricopa, State Of Arizona

**WILLIAM JAY SIMAO AND CHERYL ANN
SIMAO**

Plaintiff(s), Represented By THE PLAINTIFF

vs.

JENN RISH, JAMES RISH, LINDA RISH

Defendant(s), In Propria Persona

A 539455

Declaration Of Service

I, TYLER TREECE, being qualified under ARCP, 4(d) and 4(e), to serve legal process within the State of Arizona and having been so appointed by Maricopa County Superior Court, did receive on July 12, 2007 from THE PLAINTIFF, Attorney For The Plaintiff, the following Court issued documents:

SUMMONS AND COMPLAINT

On Monday, July 23, 2007 at 7:10 PM, I personally served true copies of these documents as follows:

**JENNY RISH BY LEAVIN COPIES WITH HER DAUGHTER, ARLENE VILLA AN OCCUPANT OF
SUITABLE AGE AND DISCRETION WHO RESIDES THEREIN.**

Description of Person Served:	H	F	30-40	5'6	160	BRN	
	Race	Sex	DOB or Approx Age	Height	Weight	Hair	Eyes

Documents Were Served At The **223 N COTTONWOOD DR**
 Place Of at the place of abode **GILBERT, AZ 85234**
 Located at:

SECURED



I declare under penalty of perjury that
 the foregoing is true and correct and
 was executed on this date.

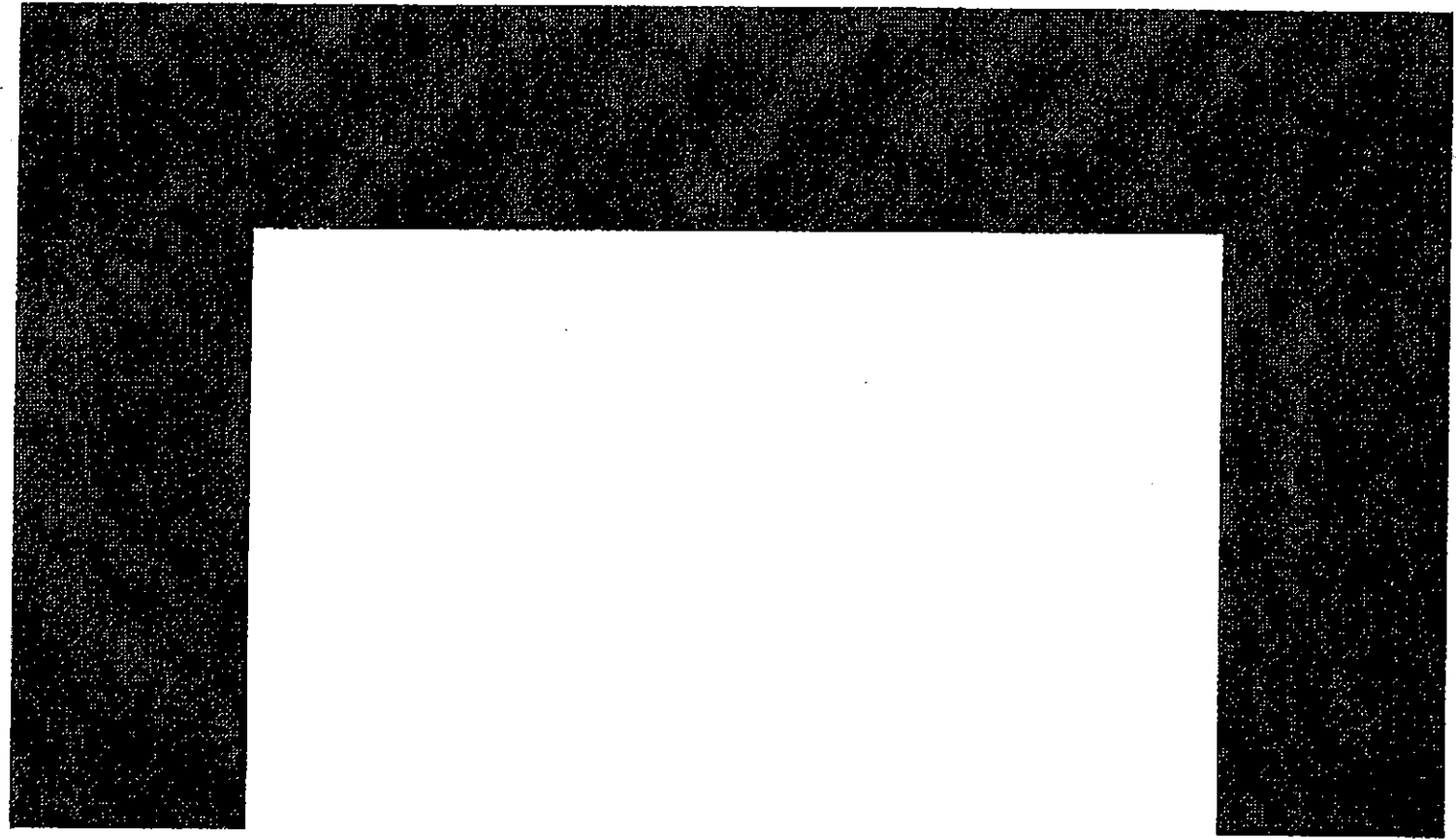
July 24, 2007

TYLER TREECE, Declarant
 An Officer Of Maricopa County Superior Court

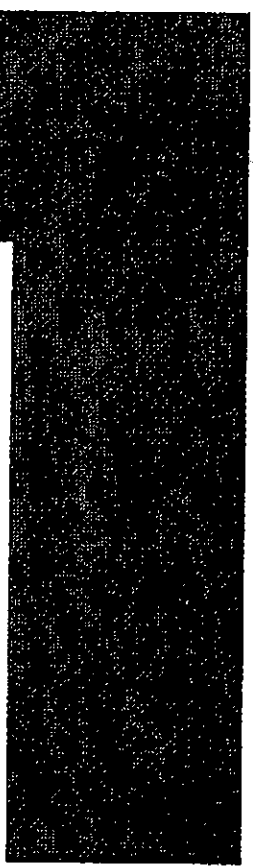
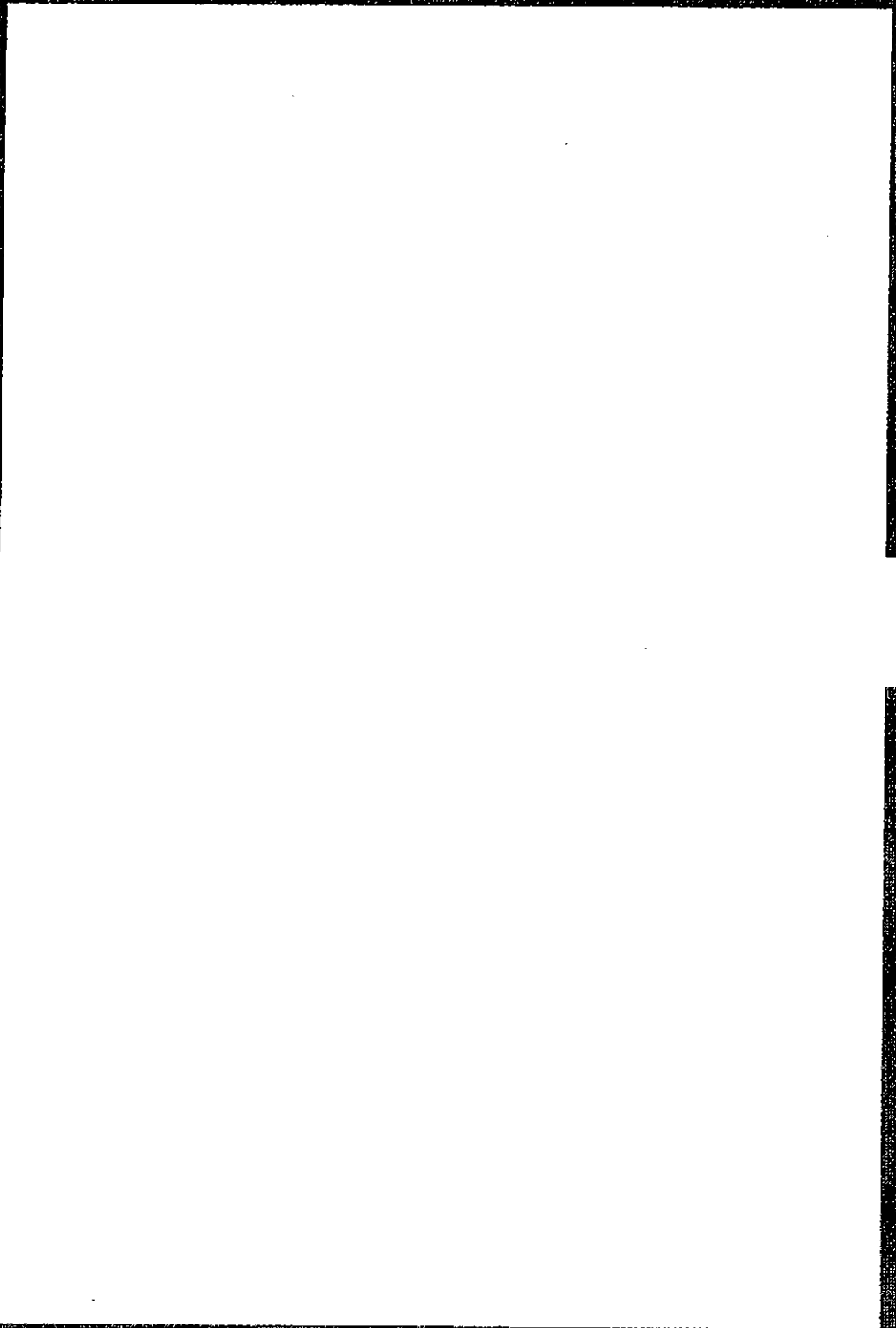
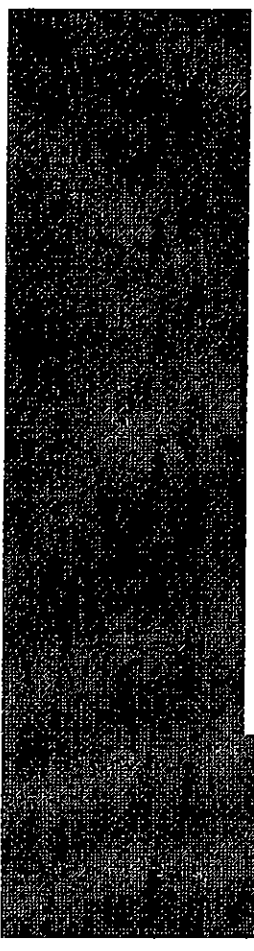
AAA Landlord Services, Inc.

www.aaalandlord.com

AAA Landlord Services
 P.O. Box 30804 Mesa, AZ 85275
 480.660.5980, 480.660.7423 Fax



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SUM

ORIGINAL
District Court
CLARK COUNTY, NEVADA

FILED

AUG 28 12 45 PM '07

Cliff
 CLERK OF THE COURT

A 5 3 9 4 5 5

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

Plaintiffs,

vs.

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

Defendants.

SUMMONS

CASE NO.

Dept. NO.

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT. A Civil Complaint has been filed by the plaintiff against you for the relief set forth in the Complaint.

JAMES RISH
3029 CONSTITUTION STREET, APARTMENT A
HILL AFB, UTAH 84056

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you exclusive of the day of service, you must do the following:

- a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.
- b. Serve a copy of your response upon the attorney whose name and address is shown below

2. Unless you respond, your default will be entered upon application of the plaintiff and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

Issued at the direction of:

AARON & PATERNOSTER, LTD.

CHARLES J. SHORT, CLERK OF COURT

By:

Matthew E. Aaron
 Matthew E. Aaron, Esq.
 Nevada Bar No. 4900
 AARON & PATERNOSTER
 2300 West Sahara, Suite 650
 Attorneys for Plaintiffs

By:

Patricia Boggett
 Deputy Clerk
 County Courthouse
 200 South Third Street
 Las Vegas, NV 89155

APR 13 2007
 PATRICIA BOGGESS
 RECEIVED

AUG 28 2007
 CLERK OF THE COURT

STATE OF UTAH)

)ss:

AFFIDAVIT OF SERVICE

COUNTY OF SALT LAKE)

Joseph Reardon, being duly sworn, says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made. That affiant received one copy of the Summons, Complaint for Personal Injuries on the 15th day of June, 2007 and served the same on the 21st day of August, 2007 at 12:10 p.m. by:

(Affiant must complete the appropriate paragraph)

1. Delivering and leaving a copy with the defendant: James Rish at (state address) 369 South 700 East, Clearfield UT 84015.
2. Serving the defendant _____ by personally delivering and leaving a copy with _____, a person of suitable age and discretion residing at the defendant's usual place of abode located at: (state address) _____.


(Use paragraph 3 for service upon agent, completing A or B)

3. Serving the defendant _____ by personally delivering and leaving a copy at (state address) _____.
 - a. With _____, as _____, an agent lawfully designated by statute to accept service of process;
 - b. With _____, pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the resident agent as shown on the current certificate of designation filed with the Secretary of State.
4. Personally depositing a copy in a mail box of the United States Post Office, enclosed in a sealed envelope postage prepaid (Check appropriate method):

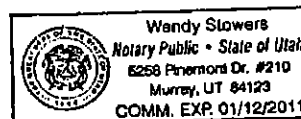
_____ Ordinary mail
 _____ Certified mail, return receipt requested
 _____ Registered mail, return receipt requested

addressed to the defendant _____ at the defendant's last known address
 which is (state address) _____

SUBSCRIBED AND SWORN to before me this
 21st day of August, 2007.


 Signature of person making service


 Notary Public in and for the
 County of Salt Lake
 State of Utah My commission expires: January 12, 2011



PLAINTIFF(s): William Jay Simao, et al.

CASE NO. A539455

DEFENDANT(s): Jenny Rish, et al.

AFFIDAVIT OF DUE DILIGENCE

I, Joseph Reardon, being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, authorized to serve civil process in the State of Utah, and not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Summons, Complaint for Personal Injuries on the 15th day of June, 2007. The following is a list of the attempts made to serve Linda Rish.

(Reason)

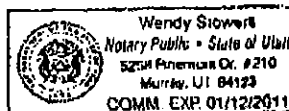
June 29, 2007 10:46 Called (801) 586-5978, no answer.
 July 5, 2007 10:00 Called (801) 586-5978, no answer.
 July 19, 2007 10:00 Called (801) 777-8631 and spoke with gate attendant who transferred the call to the legal department. Left message.
 July 19, 2007 14:00 Legal department returned call and stated they can not authorize service unless process is given to them for review through an officer of law or the gate attendant.
 July 20, 2007 16:00 Called (801) 586-5978 and spoke with a female who stated co-defendant, James Rish, is out for one week. Subject of service is not military. Left message.
 July 27, 2007 15:00 Called (801) 586-5978 and spoke with a male who stated co-defendant, James Rish, is out until next week. Subject of service is not military. Left message.
 August 3, 2007 09:20 Called (801) 586-5978, no answer.
 August 6, 2007 11:46 Called (801) 586-5978, no answer.

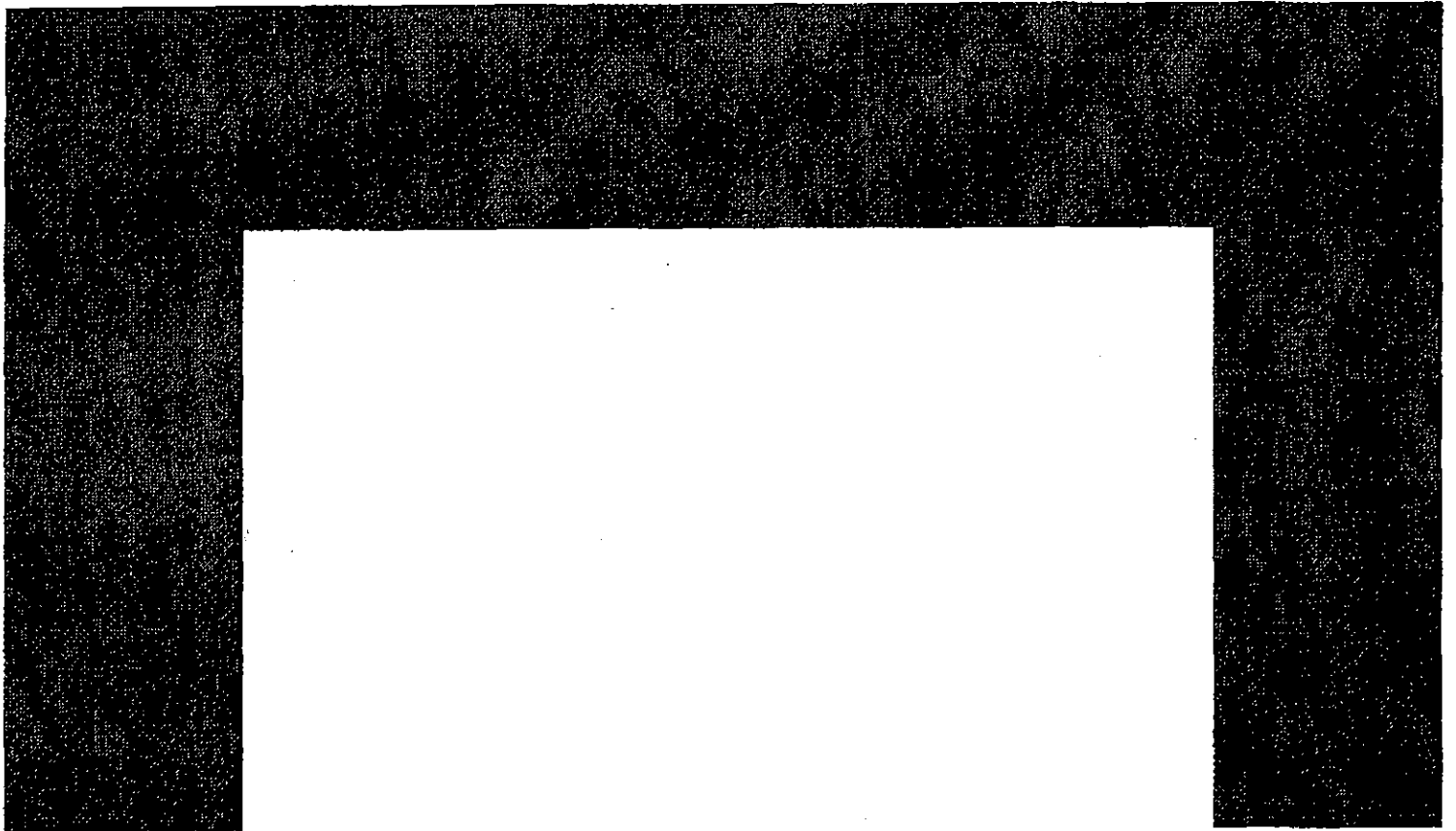
I declare under penalty of perjury that the foregoing is true and correct.

SUBSCRIBED and SWORN before me this
 6th day of August, 2007.

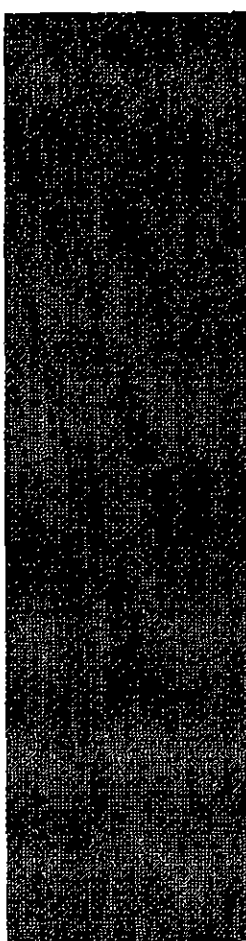
NOTARY PUBLIC

Affiant

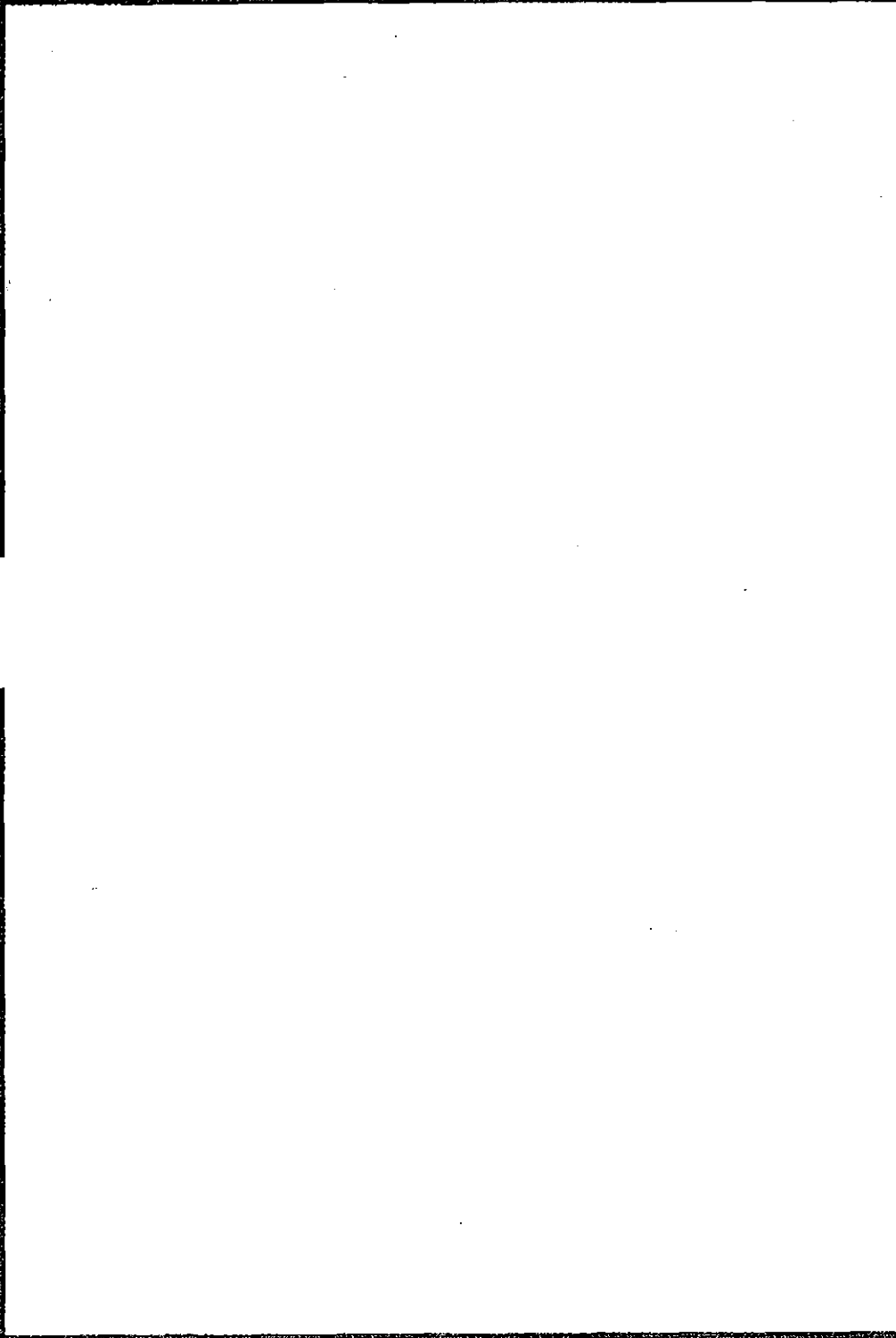




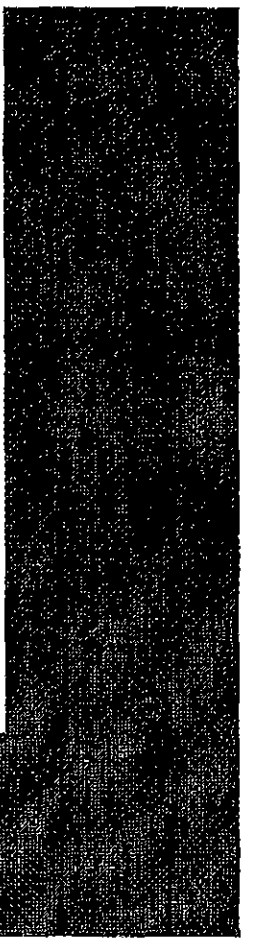
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SUM

ORIGINAL

District Court

CLARK COUNTY, NEVADA

FILED

Aug 28 12 45 PM '07

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

Plaintiffs,

vs.

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

Defendants.

SUMMONS

CASE NO.

A 5 3 9 4 5 5

Dept. NO.

Charles J. Short
 CLERK OF THE COURT

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT. A Civil Complaint has been filed by the plaintiff against you for the relief set forth in the Complaint.

LINDA RISH
3029 CONSTITUTION STREET, APARTMENT A
HILL AFB, UTAH 84056

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you exclusive of the day of service, you must do the following:

- File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.
- Serve a copy of your response upon the attorney whose name and address is shown below

2. Unless you respond, your default will be entered upon application of the plaintiff and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

Issued at the direction of:

AARON & PATERNOSTER, LTD.

CHARLES J. SHORT, CLERK OF COURT

By:

Matthew E. Aaron
 Matthew E. Aaron, Esq.
 Nevada Bar No. 4900
 AARON & PATERNOSTER
 2300 West Sahara, Suite 650
 Las Vegas, NV 89155

By:

Patricia Bogges
 Deputy Clerk
 County Courthouse
 200 South Third Street
 Las Vegas, NV 89155

PATRICIA BOGGESS

APR 13 2007

RECEIVED

AUG 28 2007

CLERK OF THE COURT

STATE OF UTAH)

COUNTY OF SALT LAKE)

)ss:

AFFIDAVIT OF SERVICE

Joseph Reardon, being duly sworn, says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made. That affiant received one copy of the Summons, Complaint for Personal Injuries on the 15th day of June, 2007 and served the same on the 21st day of August, 2007 at 12:10 p.m. by:

(Affiant must complete the appropriate paragraph)

1. Delivering and leaving a copy with the defendant: _____ at (state address) _____.
2. Serving the defendant **Linda Rish** by personally delivering and leaving a copy with **James Rish, co-resident**, a person of suitable age and discretion residing at the defendant's usual place of abode located at: (state address) **369 South 700 East, Clearfield UT 84015**.


(Use paragraph 3 for service upon agent, completing A or B)

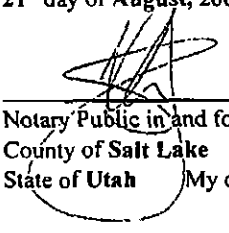
3. Serving the defendant _____ by personally delivering and leaving a copy at (state address) _____.
 - a. With _____, as _____, an agent lawfully designated by statute to accept service of process;
 - b. With _____, pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the resident agent as shown on the current certificate of designation filed with the Secretary of State.
4. Personally depositing a copy in a mail box of the United States Post Office, enclosed in a sealed envelope postage prepaid (Check appropriate method):

☐ Ordinary mail
☐ Certified mail, return receipt requested
☐ Registered mail, return receipt requested

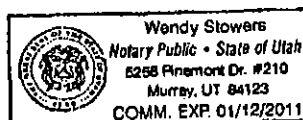
addressed to the defendant _____ at the defendant's last known address
 which is (state address) _____

SUBSCRIBED AND SWORN to before me this
 21st day of August, 2007.


 Signature of person making service


 Notary Public in and for the
 County of Salt Lake
 State of Utah

My commission expires: January 12, 2011



PLAINTIFF(s): William Jay Simao, et al.

CASE NO. A539455

DEFENDANT(s): Jenny Rish, et al.

AFFIDAVIT OF DUE DILIGENCE

I, Joseph Reardon, being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, authorized to serve civil process in the State of Utah, and not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Summons, Complaint for Personal Injuries on the 15th day of June, 2007. The following is a list of the attempts made to serve Linda Rish.

(Reason)

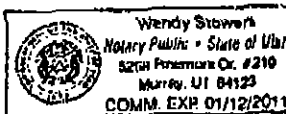
June 29, 2007 10:46 Called (801) 586-5978, no answer.
 July 5, 2007 10:00 Called (801) 586-5978, no answer.
 July 19, 2007 10:00 Called (801) 777-8631 and spoke with gate attendant who transferred the call to the legal department. Left message.
 July 19, 2007 14:00 Legal department returned call and stated they can not authorize service unless process is given to them for review through an officer of law or the gate attendant.
 July 20, 2007 16:00 Called (801) 586-5978 and spoke with a female who stated co-defendant, James Rish, is out for one week. Subject of service is not military. Left message.
 July 27, 2007 15:00 Called (801) 586-5978 and spoke with a male who stated co-defendant, James Rish, is out until next week. Subject of service is not military. Left message.
 August 3, 2007 09:20 Called (801) 586-5978, no answer.
 August 6, 2007 11:46 Called (801) 586-5978, no answer.

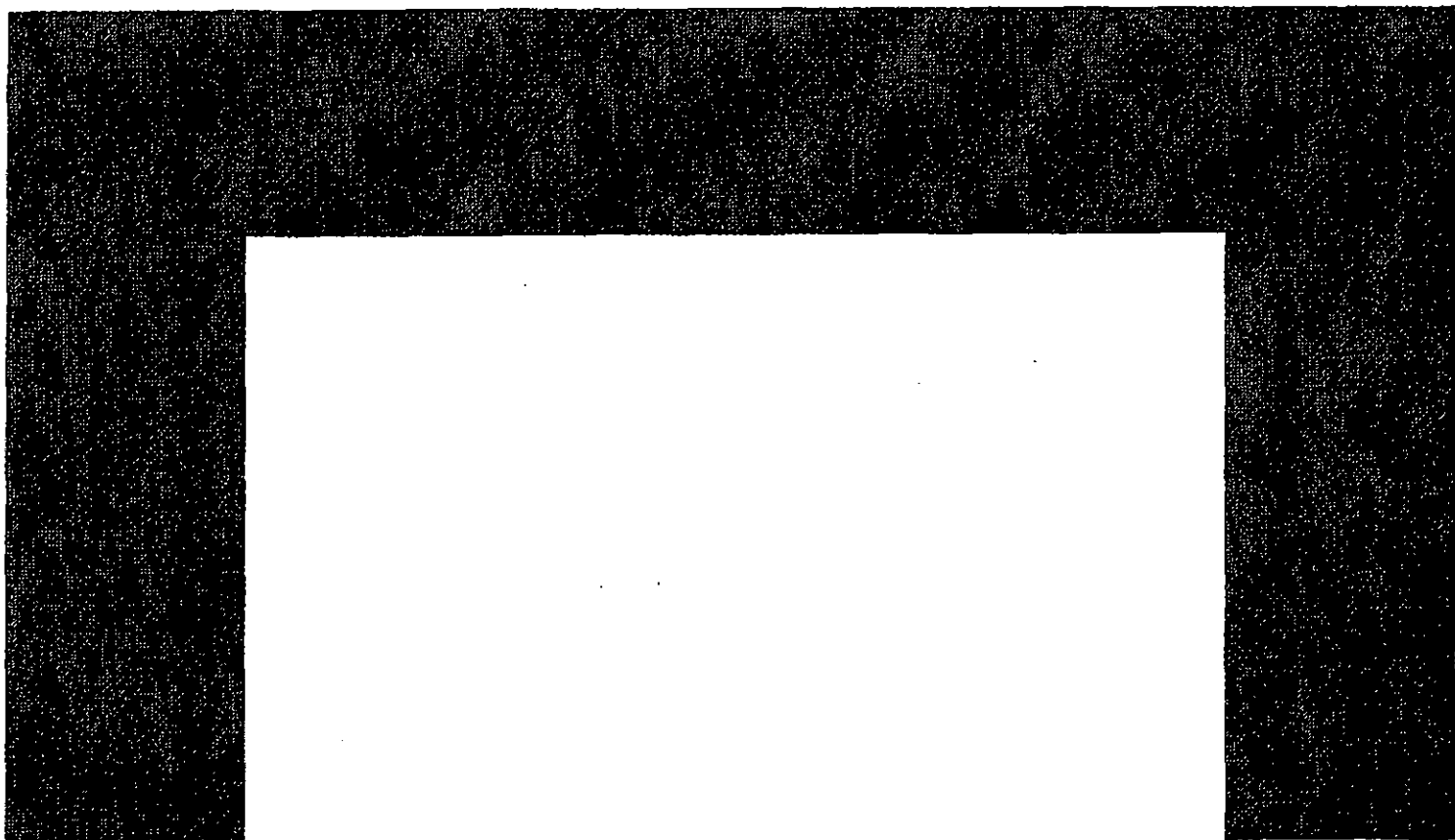
I declare under penalty of perjury that the foregoing is true and correct.

SUBSCRIBED and SWORN before me this
 6th day of August, 2007.

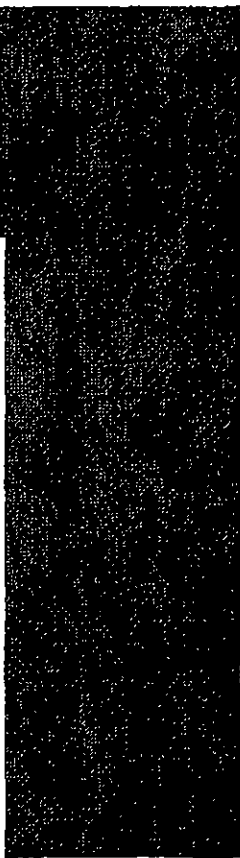
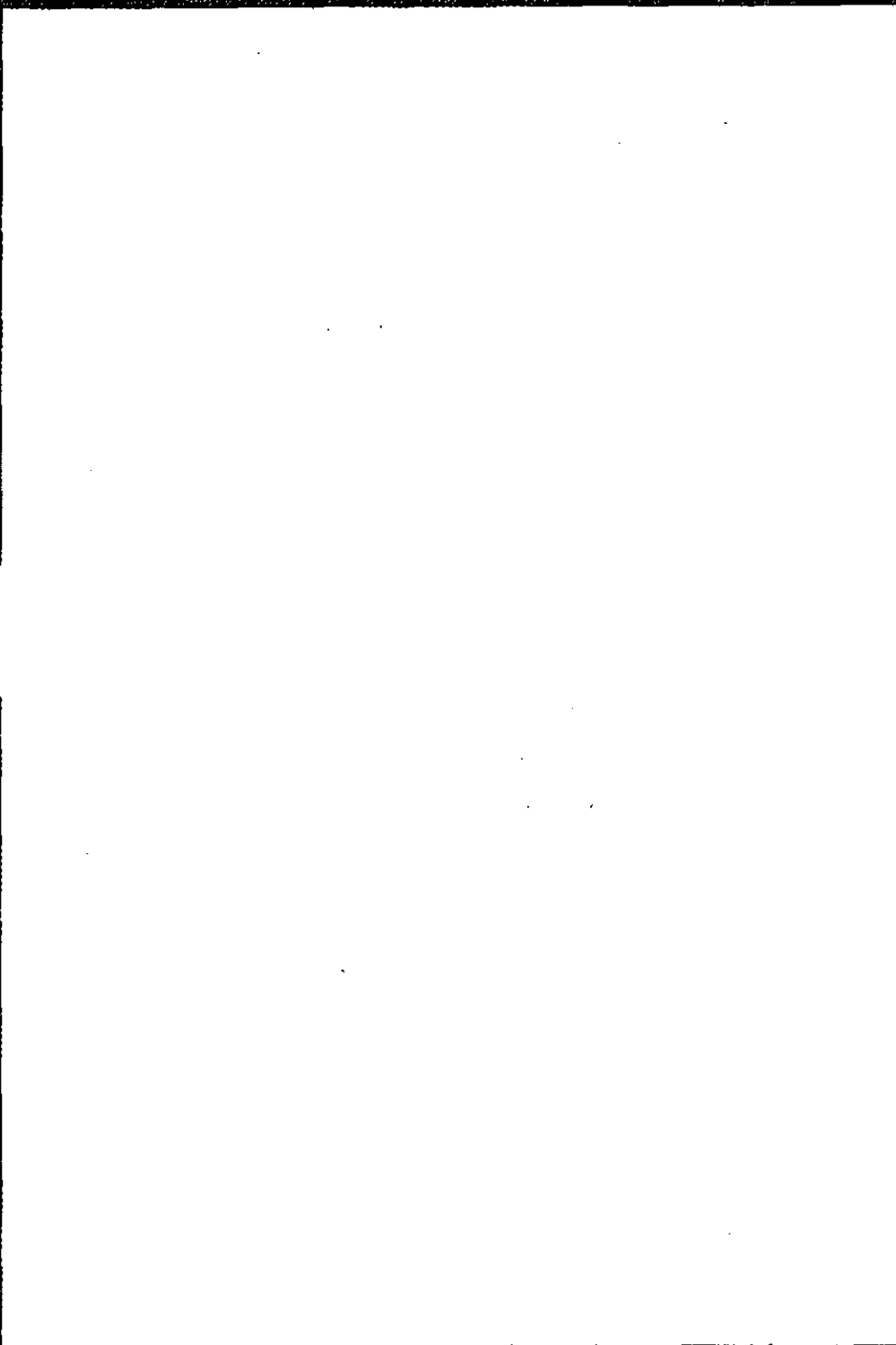
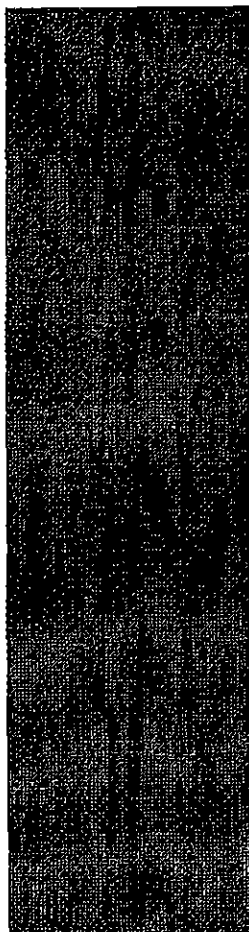
NOTARY PUBLIC

Affiant





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5



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CLERK OF THE COURT

ASSC
 BRYAN W. LEWIS, ESQ.
 Nevada Bar Number 3651
 LEWIS & ASSOCIATES, LLC
 500 South Rancho Drive, Suite 7
 Las Vegas, Nevada 89106
 Tel: (702) 870-5571
 Fax: (702) 870-8978
 Attorney for Defendant,
 Jenny, James and Linda Rish

DISTRICT COURT

CLARK COUNTY, NEVADA

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

CASE NO.: A539455
 DEPT. NO.: X

Plaintiffs

vs.

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

Defendants.

NOTICE OF ASSOCIATION OF COUNSEL

TO : ALL INTERESTED PARTIES

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that Defendants, JENNY RISH,
 JAMES RISH and LINDA RISH, do hereby associate KENNETH A. CARDONE, ESQ. as his counsel
 of record in the above-entitled action.

BRYAN W. LEWIS, ESQ.
 Nevada Bar Number 3651
 LEWIS & ASSOCIATES, LLC
 500 South Rancho Drive, Suite 7
 Las Vegas, Nevada 89106
 Tel: (702) 870-5571
 Fax: (702) 870-8978

KENNETH A. CARDONE, ESQ
 Nevada Bar Number 3377
 KENNETH A. CARDONE, CHTD.
 8689 W. Sahara Ave., Suite 100
 Las Vegas, Nevada 89117
 Tel: (702) 870-5366
 Fax: (701) 507-0092

LEWIS AND ASSOCIATES, LLC

Attorneys at Law

500 SOUTH RANCHO DRIVE, SUITE 7
 LAS VEGAS, NEVADA 89106
 (702) 870-5571 FAX (702) 870-8978

RECEIVED

SEP 27 2007

CLERK OF THE COURT

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 27th day of Sept, 2007, I mailed a true and correct copy of the foregoing **NOTICE OF ASSOCIATION OF COUNSEL**, via U.S. Mail, Postage paid, to:

Matthew E. Aaron, Esq.
 AARON & PATERNOSTER, LTD.
 2300 W. Sahara Avenue, Suite 650
 Las Vegas, NV 89102
 Attorneys for Plaintiffs

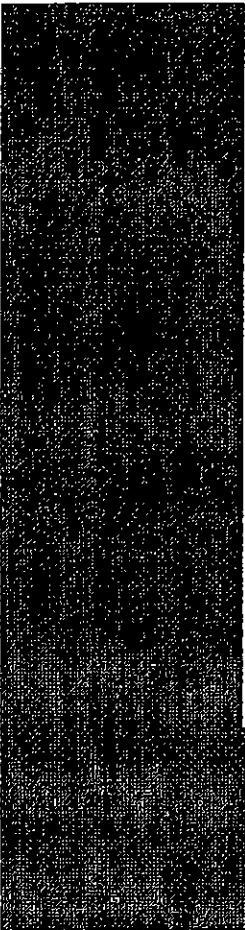

 An Employee of Lewis & Associates, LLC

LEWIS AND ASSOCIATES, LLC

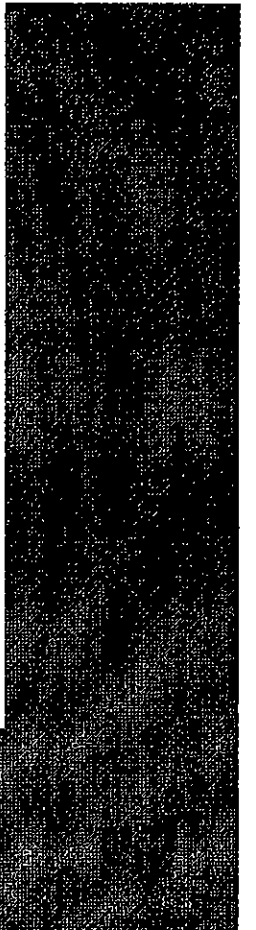
Attorneys at Law
 500 SOUTH RANCHO DRIVE, SUITE 7
 LAS VEGAS, NEVADA 89106
 (702) 870-5571 FAX (702) 870-8978



6



6



1 ANS
 2 STEPHEN H. ROGERS, ESQ.
 3 Nevada Bar No. 5755
 4 ROGERS, MASTRANGELO, CARVALHO & MITCHELL
 5 300 South Fourth Street, Suite 710
 6 Las Vegas, Nevada 89101
 7 Phone (702) 383-3400
 8 Fax (702) 384-1460
 9 Attorneys for Defendant Jenny Rish

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2008 MAR 21 P 4:36

Chris [Signature]
 CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

8 WILLIAM JAY SIMAO, individually and
 9 CHERYL ANN SIMAO, individually, and as
 10 husband and wife,

Plaintiff,

v.

12 JENNY RISH; JAMES RISH; LINDA RISH;
 13 DOES I - V; and ROE CORPORATIONS I - V,
 14 inclusive,

Defendants.

CASE NO. A539455
 DEPT. NO X

DEFENDANT JENNY RISH'S ANSWER TO PLAINTIFFS' COMPLAINT

18 COME NOW Defendant, JENNY RISH, by and through her attorneys, ROGERS,
 19 MASTRANGELO, CARVALHO & MITCHELL, and for her answer to Plaintiff's Complaint on
 20 file herein, admits, denies and alleges as follows:

BACKGROUND FACTS

22 1. Answering Paragraphs 1, 4 and 5, Defendant states that she is without knowledge
 23 or information sufficient to form a belief as to the truth of the allegations contained therein.

24 2. Answering Paragraphs 2, 3, 6, 7, 8 and 9, Defendant admits the allegations
 25 contained therein.

FIRST CLAIM FOR RELIEF

26 3. Answering Paragraph 10, Defendant repeats and realleges her answers to the
 27 allegations contained in Paragraphs 1 through 9 of the Complaint on file herein.
 28

- 1 4. Answering Paragraph 11, Defendant admits the allegations contained therein.
2 5. Answering Paragraphs 12, 13, 14, 15, 16, 17, 18 and 19, Defendant denies the
3 allegations contained therein.

4 **SECOND CLAIM FOR RELIEF**

- 5 6. Answering Paragraph 20, Defendant repeats and realleges her answers to the
6 allegations contained in Paragraphs 1 through 19 of the Complaint on file herein.
7 7. Answering Paragraphs 21, 22, 23 and 24, Defendant denies the allegations
8 contained therein.

9 **THIRD CLAIM FOR RELIEF**

- 10 8. Answering Paragraph 25, Defendant repeats and realleges her answers to the
11 allegations contained in Paragraphs 1 through 24 of the Complaint on file herein.
12 9. Answering Paragraph 26, Defendant admits the allegations contained therein
13 10. Answering Paragraphs 27 and 28, Defendant denies the allegations contained
14 therein.

15 **FOURTH CLAIM FOR RELIEF**

- 16 11. Answering Paragraph 29, Defendant repeats and realleges her answers to the
17 allegations contained in Paragraphs 1 through 28 of the Complaint on file herein.
18 12. Answering Paragraphs 30 and 31, Defendant denies the allegations contained
19 therein.

20 **AFFIRMATIVE DEFENSES**

21 **FIRST AFFIRMATIVE DEFENSE**

22 Plaintiff's Complaint on file herein fails to state a claim upon which relief can be granted.

23 **SECOND AFFIRMATIVE DEFENSE**

24 Plaintiff's damages, if any, were caused in whole or in part, by the Plaintiff's own
25 negligence, which was greater than the negligence, if any, of this Defendant.

26 **THIRD AFFIRMATIVE DEFENSE**

27 Plaintiff's damages, if any, were caused by the acts or omissions of a third party over
28 whom this Defendant had no control.

FOURTH AFFIRMATIVE DEFENSE

 That Plaintiff has failed to mitigate his damages.


FIFTH AFFIRMATIVE DEFENSE

1 Pursuant to N.R.C.P. 11, as amended, all possible affirmative defenses may not have been
2 alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing
3 of Defendant' Answer, and therefore, the answering Defendant reserves the right to amend her
4 Answer to allege additional affirmative defenses, if subsequent investigation so warrants.

5 WHEREFORE, the Defendant prays that Plaintiff takes nothing by reason of his Complaint
6 on file herein; that these Defendant be dismissed with costs incurred and reasonable attorneys fees;
7 and, for such other and further relief as the Court may deem just and proper in the premises.

8 DATED this 20th day of March, 2008.


9 ROGERS, MASTRANGELO, CARVALHO &
10 MITCHELL

11 
12 STEPHEN H. ROGERS, ESQ.
13 Nevada Bar No. 5755
14 300 South Fourth Street, Suite 710
15 Las Vegas, Nevada 89101
16 Attorneys for Defendant Jenny Rish

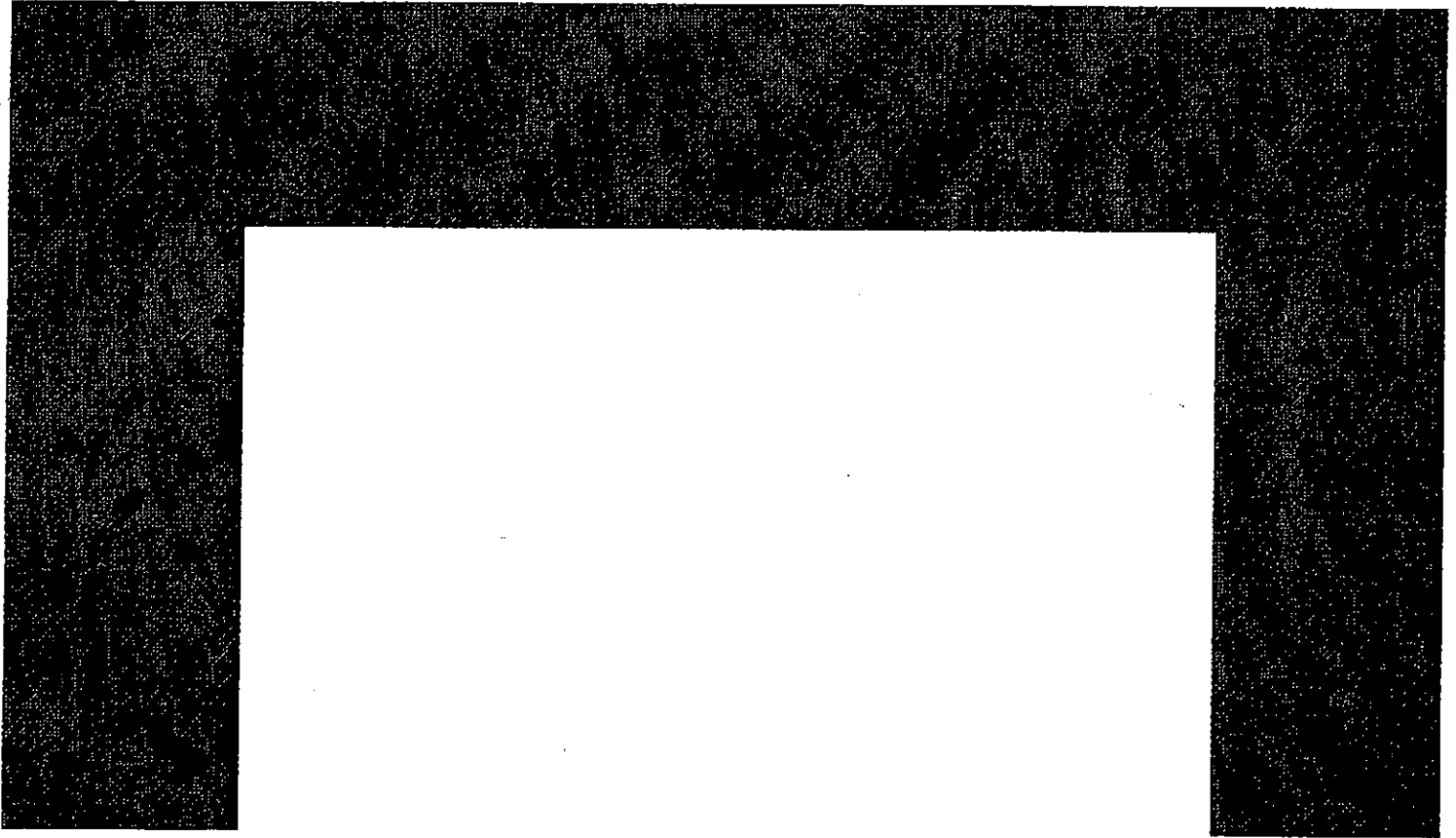
17 **CERTIFICATE OF SERVICE**

18 Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of
19 ROGERS, MASTRANGELO, CARVALHO & MITCHELL, and on the 21 day of March, 2008,
20 a true and correct copy of the foregoing **DEFENDANT JENNY RISH'S ANSWER TO**
21 **PLAINTIFFS' COMPLAINT** was served via Facsimile and First Class, U.S. Mail, postage prepaid,
22 addressed as follows, upon the following counsel of record:

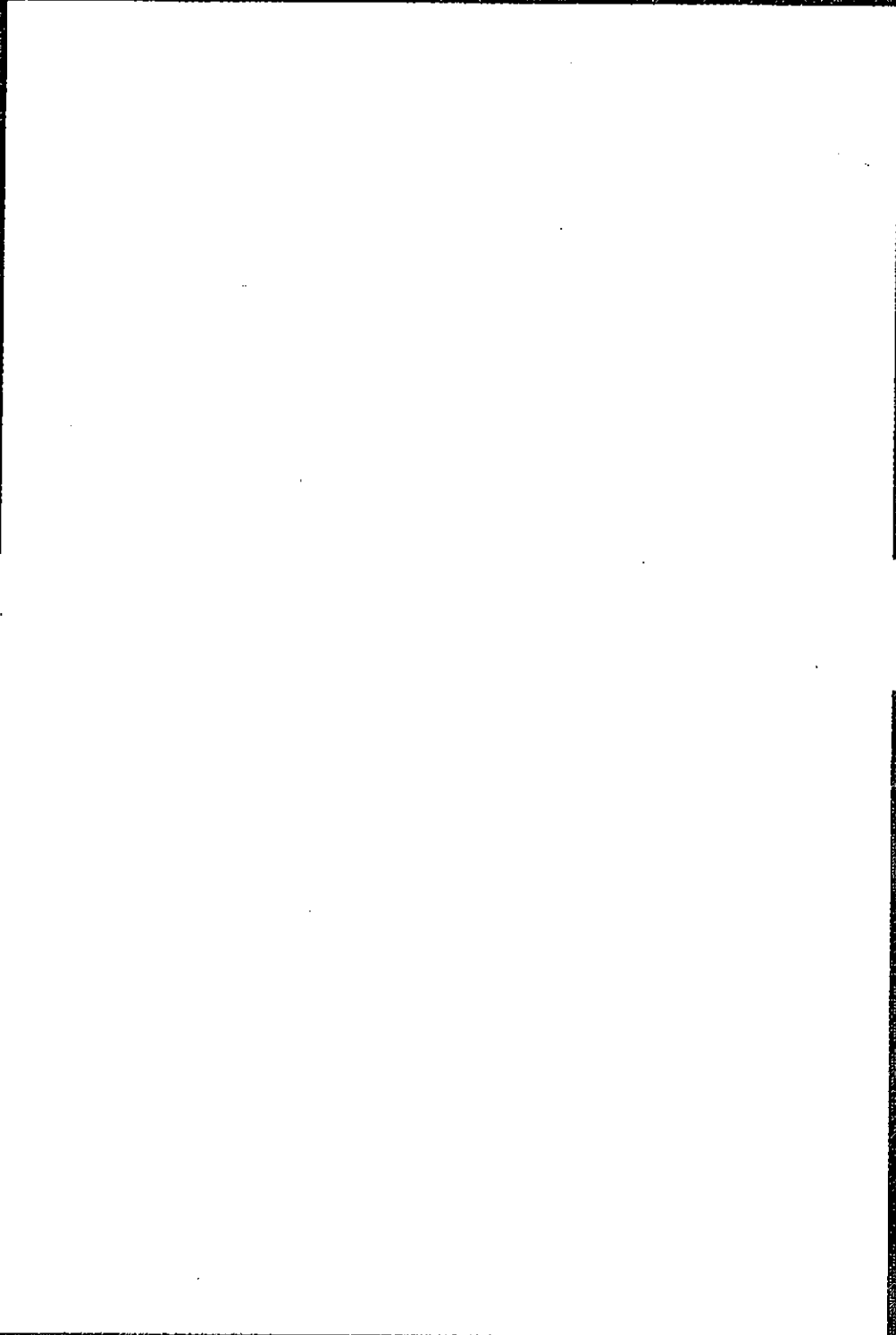
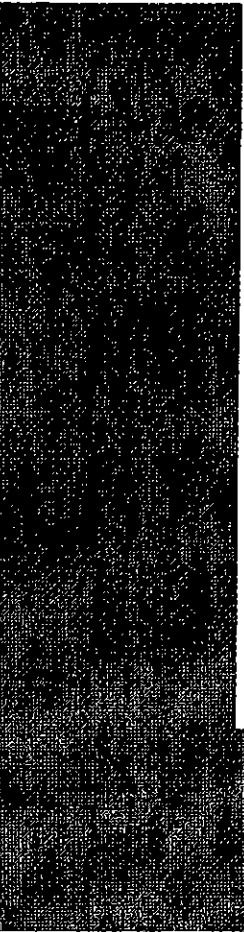
23 Matthew E. Aaron, Esq.
24 AARON & PATERNOSTER, LTD
25 2300 West Sahara Avenue, Suite 650
26 Las Vegas, Nevada 89102
27 Attorney for Plaintiffs

28 
An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell

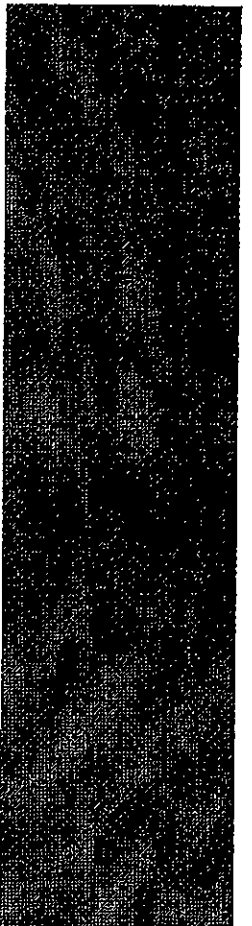
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CLERK OF THE COURT

DMJT
 STEPHEN H. ROGERS, ESQ.
 Nevada Bar No. 5755
 ROGERS, MASTRANGELO, CARVALHO & MITCHELL
 300 South Fourth Street, Suite 710
 Las Vegas, Nevada 89101
 Phone (702) 383-3400
 Fax (702) 384-1460
 Attorneys for Defendant Jenny Rish

DISTRICT COURT
 CLARK COUNTY, NEVADA

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

Plaintiff,

v.

CASE NO. A539455
 DEPT. NO X

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

Defendants.

DEMAND FOR JURY TRIAL

Defendant, JENNY RISH, by and through her attorneys, the law firm of ROGERS,
 MASTRANGELO, CARVALHO & MITCHELL, hereby demands a trial by jury of all issues in
 the above-entitled action.

DATED this 20th day of March, 2008.

ROGERS, MASTRANGELO, CARVALHO &
 MITCHELL

STEPHEN H. ROGERS, ESQ.
 Nevada Bar No. 5755
 300 South Fourth Street, Suite 710
 Las Vegas, Nevada 89101
 Attorneys for Defendant Jenny Rish

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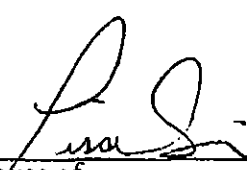
MAR 21 2008

CLERK OF THE COURT

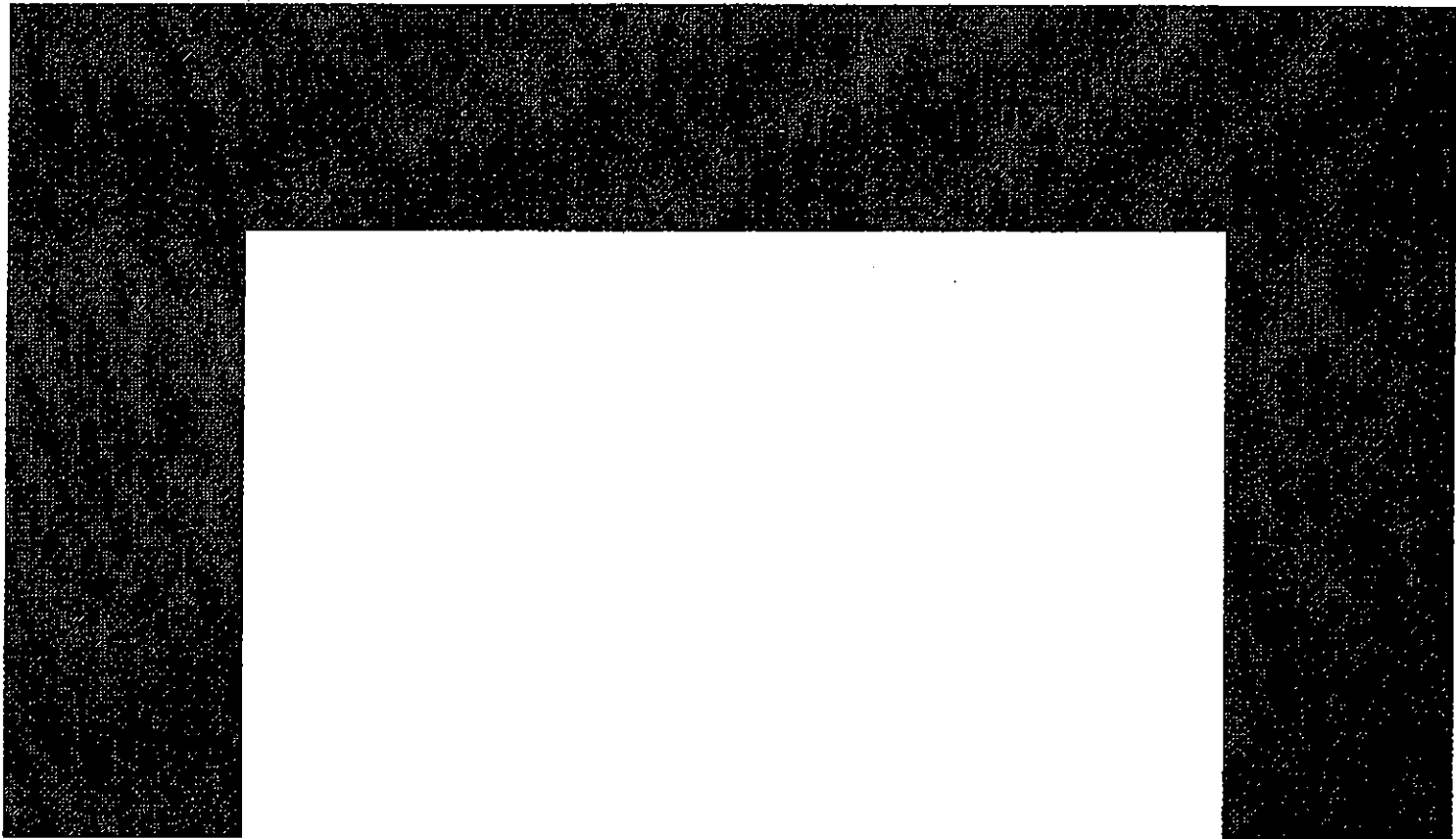
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of Rogers, Mastrangelo, Carvalho & Mitchell, and on the 21 day of March, 2008, a true and correct copy of the foregoing **DEMAND FOR JURY TRIAL** was served via First Class, U.S. Mail, postage prepaid, addressed as follows, upon the following counsel of record:

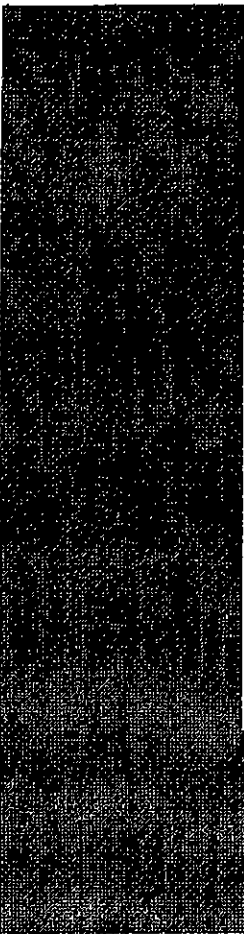
Matthew E. Aaron, Esq.
AARON & PATERNOSTER, LTD
2300 West Sahara Avenue, Suite 650
Las Vegas, Nevada 89102
Attorney for Plaintiffs


An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell

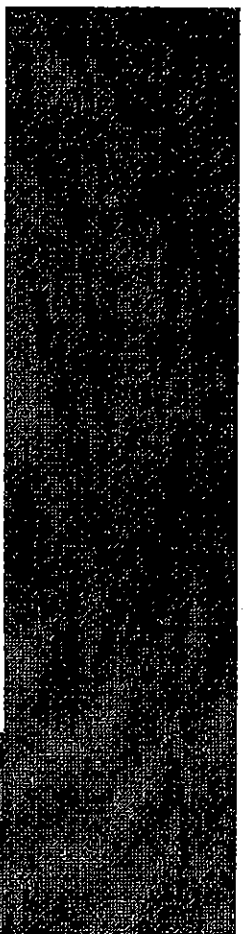
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DISTRICT COURT
CLARK COUNTY, NEVADA

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Chris SRS
CLERK OF THE COURT

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

Plaintiffs,

CASE NO. A539455
DEPT NO. X

v.

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

Defendants.

SCHEDULING ORDER

(Discovery/Dispositive Motions/Motions to Amend or Add Parties)

NATURE OF ACTION: **Personal injury - vehicle accident**DATE OF FILING JOINT CASE CONFERENCE REPORT(S): **6/2/08**TIME REQUIRED FOR TRIAL: **4-5 days** JURY DEMAND FILED: **Yes**

Counsel for Plaintiffs:

Glenn A. Paternoster, Esq., Aaron & Paternoster

Counsel for Defendant JENNY RISH:

Stephen H. Rogers, Esq., Rogers, Mastrangelo, Carvalho & Mitchell

Counsel representing all parties have been heard and
after consideration by the Discovery Commissioner,

IT IS HEREBY ORDERED:

1. all parties shall complete discovery on or before

7/15/09.

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CLERK OF THE COURT

DISCOVERY
COMMISSIONER
EIGHTH JUDICIAL
DISTRICT COURT

1 2. all parties shall file motions to amend pleadings or
2 add parties on or before 4/16/09.

3 3. all parties shall make initial expert disclosures
4 pursuant to N.R.C.P. 16.1(a)(2) on or before 4/16/09.

5 4. all parties shall make rebuttal expert disclosures
6 pursuant to N.R.C.P. 16.1(a)(2) on or before 5/18/09.

7 5. all parties shall file dispositive motions on or
8 before 8/14/09.

9
10 Certain dates from your case conference report(s) may
11 have been changed to bring them into compliance with N.R.C.P.
12 16.1.

13 Within 60 days from the date of this Scheduling Order,
14 the Court shall notify counsel for the parties as to the date
15 of trial, as well as any further pretrial requirements in
16 addition to those set forth above.

17
18 Unless otherwise directed by the court, all pretrial
19 disclosures pursuant to N.R.C.P. 16.1(a)(3) must be made at
20 least 30 days before trial.

21 Motions for extensions of discovery shall be made to the
22 Discovery Commissioner in strict accordance with E.D.C.R.
23 2.35. Discovery is completed on the day responses are due or
24 the day a deposition begins.

25 . . .


26 . . .

27 . . .

28 . . .

1 Unless otherwise ordered, all discovery disputes (except
2 disputes presented at a pre-trial conference or at trial) must
3 first be heard by the Discovery Commissioner.

4 Dated this 10 day of June, 2008.

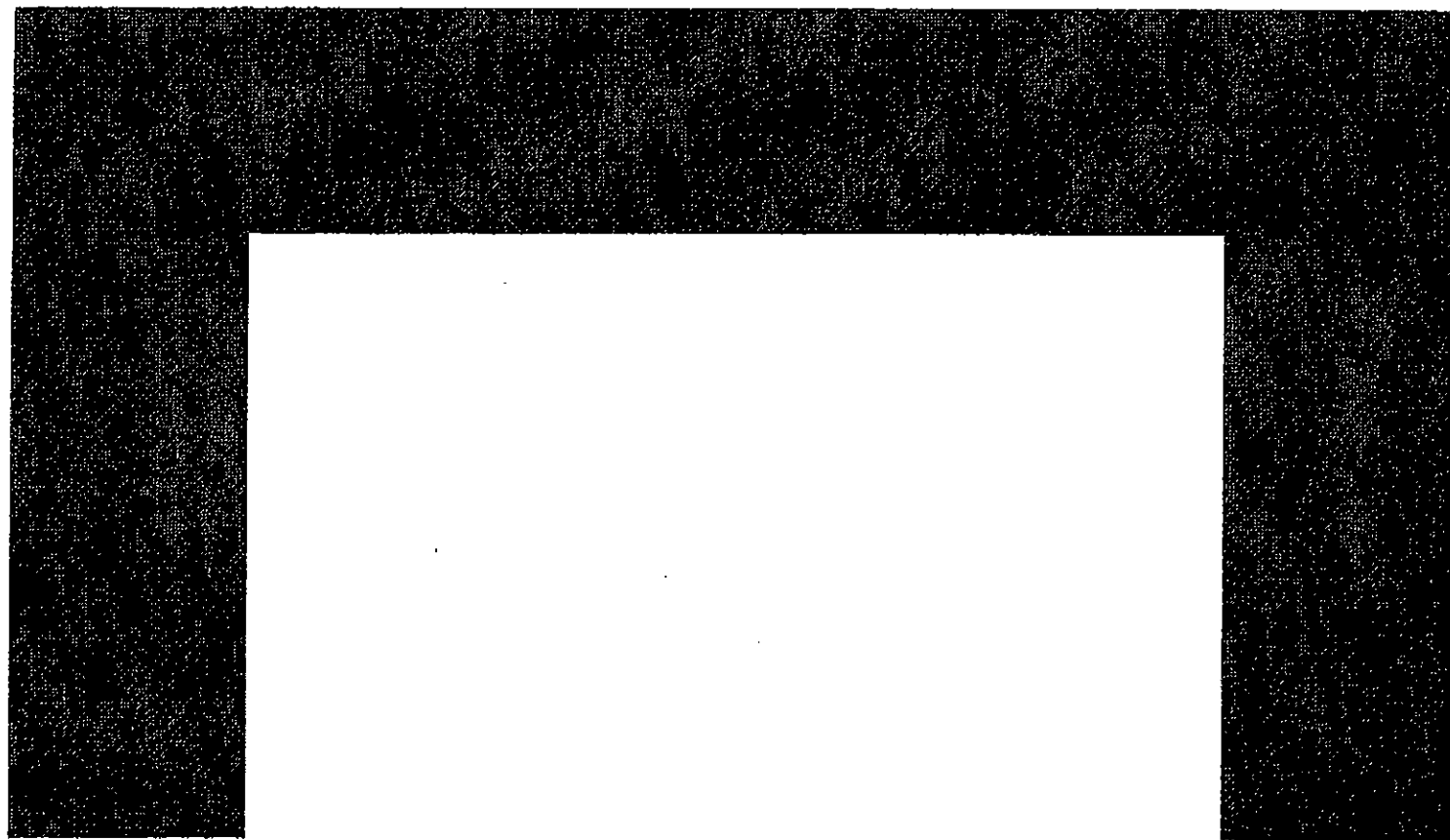
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7 _____
8 DISCOVERY COMMISSIONER

9 **CERTIFICATE OF SERVICE**

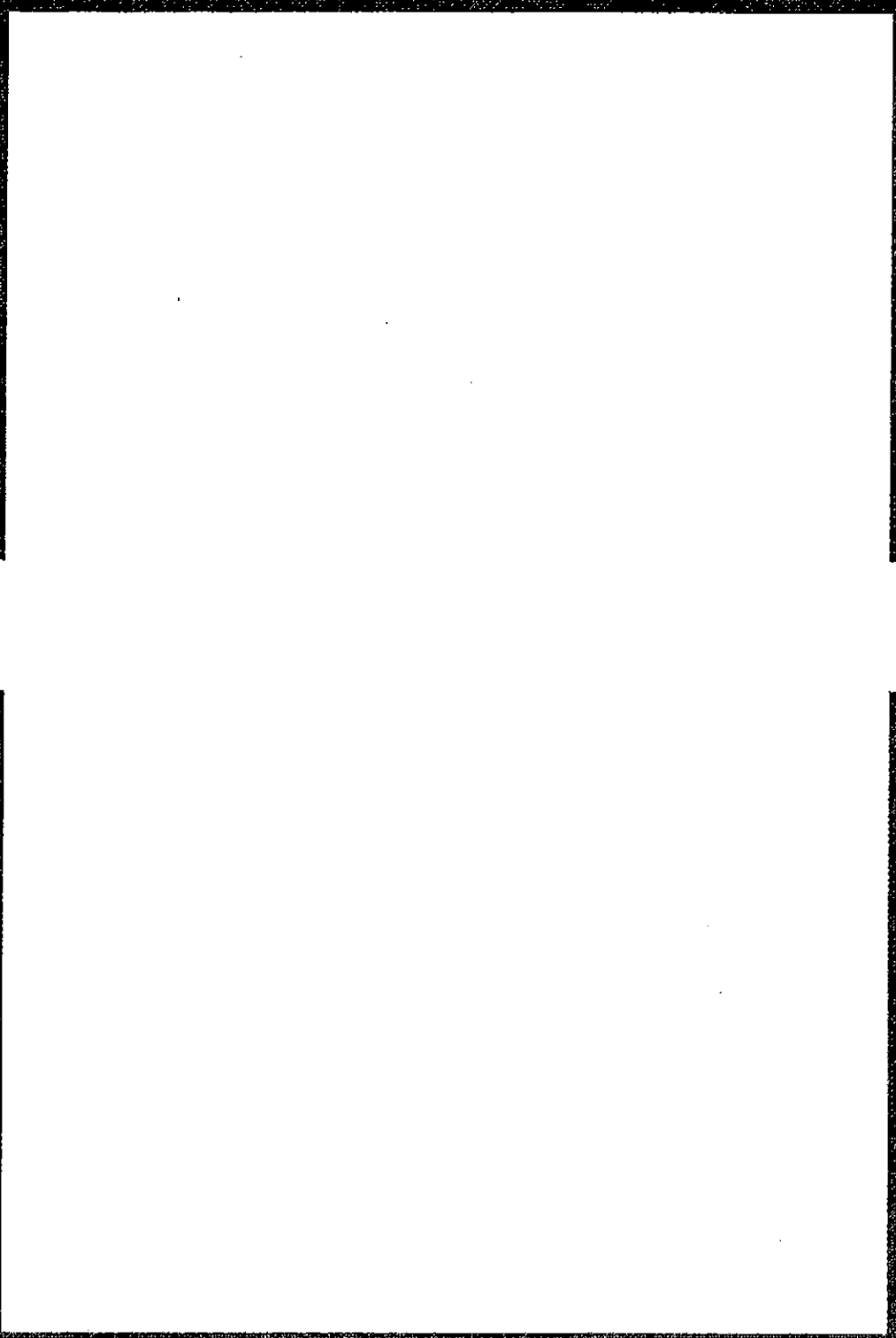
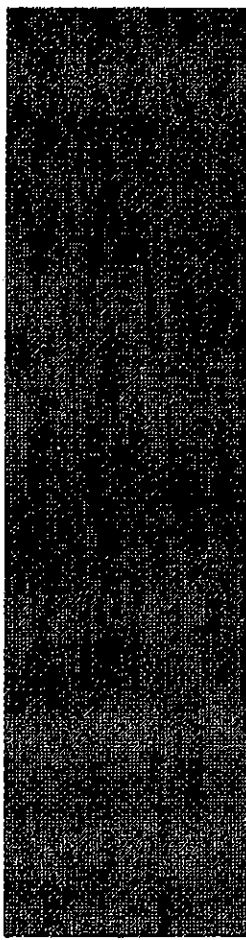
10 I hereby certify that on the date filed, I placed a copy
11 of the foregoing DISCOVERY SCHEDULING ORDER in the folder(s)
12 in the Clerk's office or mailed as follows:

13 Glenn A. Paternoster, Esq.
14 Stephen H. Rogers, Esq.

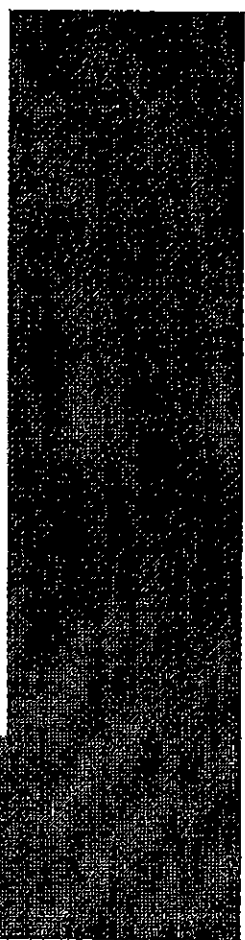
15 
16 _____
17 COMMISSIONER DESIGNEE
18
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DISTRICT COURT
CLARK COUNTY, NEVADA

CR
CLERK OF THE COURT

WILLIAM JAY SIMAO, et. al.,

CASE NO. A-539455

Plaintiff,

DEPT. X

vs.

JENNY RISH,
et. al.,

Defendants.

ORDER SETTING CIVIL JURY TRIAL

IT IS HEREBY ORDERED THAT:

A. The above-entitled case is set for a Jury Trial on a five week stack to begin on **Monday, October 5, 2009 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 18, 2009 at 9:00 A.M.** in CHAMBERS. Be prepared to discuss in detail how much time you will require for opening and closing arguments as well as for your case-in-chief.

C. A Calendar Call will be held on **September 29, 2009 at 3:00 P.M.** in chambers.

Parties must bring to Calendar Call the following:

- (1) All exhibits marked by counsel for identification purposes;
- (2) Typed exhibit lists with all stipulated exhibits marked;
- (3) A complete set of Jury instructions in two (2) groups: (1) one set with authoritative

JESSIE WALSH
DISTRICT JUDGE
DEPARTMENT TEN
LAS VEGAS, NEVADA 89155

1 citations, and (2) one set without citations. Be prepared to argue any contested jury instructions ten
2 days before your firm trial date.

3 (4) Proposed voir dire questions;

4 (5) Original depositions;

5 (6) List of equipment needed for trial; and

6 (7) Courtesy copies of legal briefs on trial issues.

7
8 **You will leave calendar call with a firm trial date.** At calendar call the Judicial Secretary
9 will give you your firm trial date and set a hearing ten days before trial for the parties to argue any
10 contested jury instructions.

11
12 D. The Pre-Trial Memorandum must be filed no later than 5:00 P.M. on **September 24,**
13 **2009** with a courtesy copy delivered to Department X. All parties, (Attorneys and parties in Proper
14 Person) **MUST** comply with ALL REQUIREMENTS of E.D.C.R. 2.67).

15 E. All discovery deadlines, deadlines for filing dispositive motions and motions to amend
16 the pleadings or add parties are controlled by the previously issued Scheduling Order.

17 F. All other pre-trial motions, including motions in limine, must be in writing and set for
18 hearing no later than **September 18, 2009.**

19 G. Such pre-trial motions **MUST** be filed by 5:00 P.M. on **August 28, 2009;** Oppositions
20 are to be filed by 5:00 P.M. on **September 8, 2009;** Replies thereto are to be filed by 5:00 P.M. on
21 **September 14, 2009.** Orders shortening time will not be signed except in extreme emergencies.

22
23 Failure of the designated attorney or any party appearing in proper person to appear for any
24 court appearances or to comply with this Order shall result in any of the following: (1) dismissal of
25 the action; (2) default judgment; (3) monetary sanctions; (4) vacation of the trial date; and/or other
26 appropriate remedy or sanction.
27

1 Counsel are required to advise the Court immediately when the case settles or is otherwise
2 resolved prior to trial. A stipulation which terminates a case by dismissal shall also indicate whether
3 a Scheduling Order has been filed and, if a trial date has been set, the date of that trial. A copy
4 should be given to Chambers.
5

6 DATED this 13 day of August, 2008.

7
8 
9 JESSIE WALSH, DISTRICT COURT JUDGE

10 CERTIFICATE OF MAILING

11 I hereby certify that on the day the within document was filed I placed a copy of the
12 foregoing Order in the attorneys folder in the clerks office:

13 Glenn A. Paternoster, Esq., AARON & PATERNOSTER Plaintiff

14 Stephen H. Rogers, Esq., ROGERS, MASTRANGELO CARVALHO Defendant
15

16
17 
18 Judicial Executive Assistant

1 TO: JUDGE JESSIE WALSH
2 FROM: BONNIE A. BULLA, DISCOVERY COMMISSIONER
3 SUBJECT: William Jay Simao, et al. v. Jenny Rish, et al.,
4 Case No. A539455
5 DATE: June 10, 2008

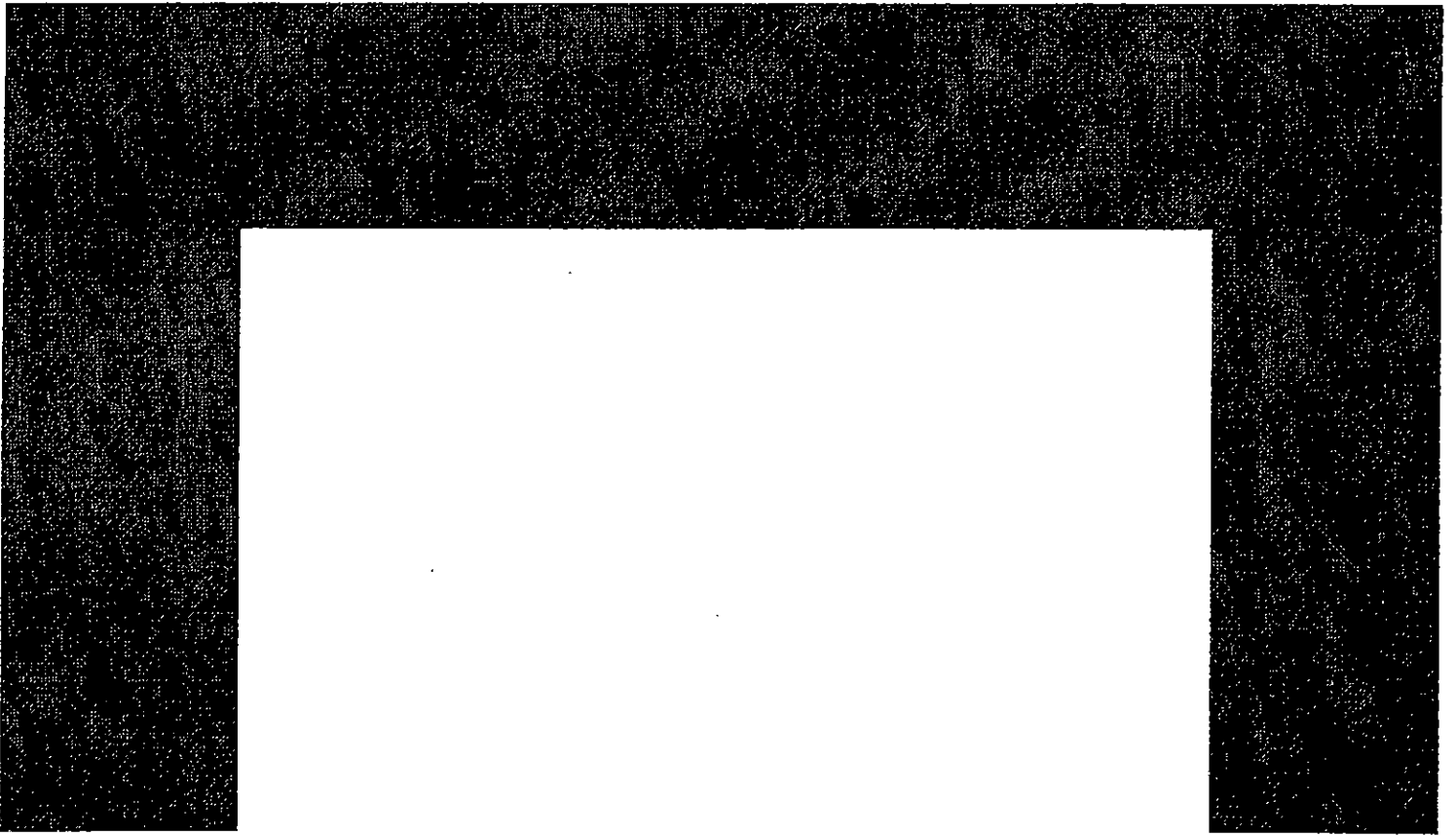
6 SCHEDULING MEMO

- 7 1. A Joint Case Conference Report has been filed and
8 approved.
9 2. A Scheduling Order has issued pursuant to N.R.C.P.
10 16(b).
11 3. Counsel for Plaintiffs:
12 Glenn A. Paternoster, Esq., Aaron & Paternoster
13 Counsel for Defendant JENNY RISH:
14 Stephen H. Rogers, Esq., Rogers, Mastrangelo,
15 Carvalho & Mitchell
16 4. Nature of action: P.I. - vehicle accident.
17 5. A jury demand has been filed.
18 6. Estimated time for trial: 4-5 days.
19 7. A discovery cut-off date has been set.
20 8. The case is ready to be set for trial on your
earliest available date beginning 9/28/09.
21 9. Please notify counsel of their trial date no later
22 than 60 days from the date of this memo.

23 **NOTE:** Final dates for filing motions to amend, motions to add parties and dispositive
24 motions have been ordered pursuant to N.R.C.P. 16(b)(1)-(3) and 16.1(c), as set forth in the
25 Scheduling Order. If your trial setting form includes any of these dates, please redact such
26 information or be sure the dates match those set forth in the Scheduling order.

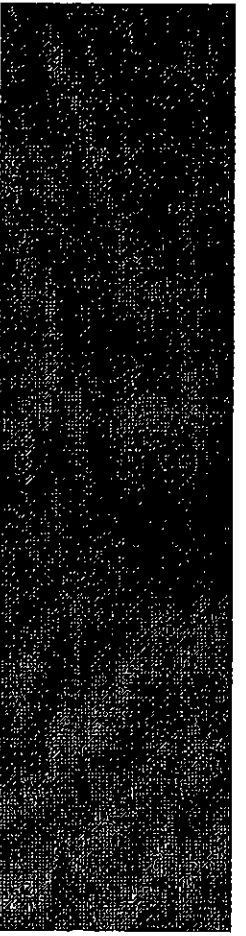
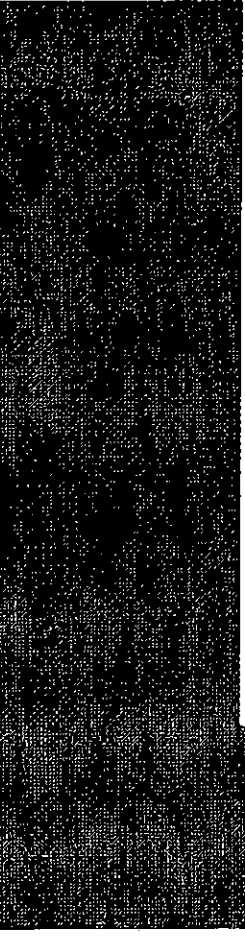
27 Thank you.

28 
DISCOVERY COMMISSIONER



10

10

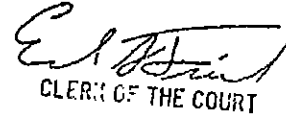


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 CLERK OF THE COURT

1 **SAO**
 2 **GLENN A. PATERNOSTER, ESQ.**
 3 **Nevada Bar No. 5452**
 4 **JOHN E. PALERMO, ESQ.**
 5 **Nevada Bar No. 9887**
 6 **AARON & PATERNOSTER, LTD.**
 7 **2300 West Sahara Avenue, Suite 650**
 8 **Las Vegas, Nevada 89102**
 9 **(702) 384-4111, telephone**
 10 **(702) 387-9739, facsimile**
 11 **Attorney for Plaintiffs**

DISTRICT COURT**CLARK COUNTY, NEVADA**

11 **WILLIAM JAY SIMAO, individually and**) **CASE NO.: A539455**
 12 **CHERYL ANN SIMAO, individually, and as**) **DEPT. NO.: X**
 13 **husband and wife,**)

14 **Plaintiffs,**

15 **vs.**

16 **JENNY RISH; JAMES RISH; LINDA RISH;**
 17 **DOES I through V; and ROE CORPORATIONS I**
 18 **through V, inclusive.**

19 **Defendants.**

20 **STIPULATION AND ORDER TO EXTEND DISCOVERY**
 21 **(FIRST REQUEST)**

22 **IT IS HEREBY STIPULATED AND AGREED, by and through the parties herein, through**
 23 **their undersigned counsel, that the discovery deadlines in the above-entitled matter be extended,**
 24 **pursuant to EDCR 2.35.**

25 **Plaintiffs filed their Complaint on April 13, 2007. Defendant Jenny Rish filed her Answer to**
 26 **Plaintiffs' Complaint on March 21, 2008.**

27 **....**

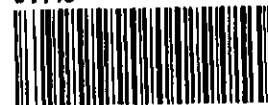
28 **....**

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MAY 06 2009

CLERK OF THE COURT

07A539455
91143



1 **A. DISCOVERY COMPLETED TO DATE BY THE PARTIES:**

- 2 1. The parties held the Early Case Conference on May 21, 2008.
- 3 2. The Joint Case Conference Report was filed on June 2, 2008.
- 4 3. Defendant propounded her First Set of Requests for Production of Documents and
- 5 Interrogatories to Plaintiff Cheryl Ann Simao on May 29, 2008.
- 6 4. Plaintiff Cheryl Ann Simao provided her discovery responses on September 4, 2008.
- 7 5. Defendant propounded her First Set of Requests for Production of Documents and
- 8 Interrogatories to Plaintiff William Jay Simao on May 29, 2008.
- 9 6. Plaintiff William Jay Simao provided his discovery responses on September 4, 2008.
- 10 7. A Scheduling Order was issued on June 11, 2008.
- 11 8. Plaintiffs propounded their First Set of Interrogatories, First Set of Requests for
- 12 Admission and First Set of Requests for Production of Documents to Defendant Jenny Rish on
- 13 September 4, 2008.
- 14 9. Defendant Jenny Rish provided her discovery responses on October 17, 2008.
- 15 10. Deposition of Britt Hill, PA-C was taken on October 20, 2008.
- 16 11. Deposition of Cheryl Ann Simao was taken on October 22, 2008.
- 17 12. Deposition of William Jay Simao was taken on October 23, 2008.
- 18 13. Deposition of Dr. Adam Arita was taken on November 5, 2008.
- 19 14. Deposition of Dr. Patrick McNulty was taken on December 1, 2008.
- 20 15. Defendant Jenny Rish provided Supplemental Responses to Plaintiffs' First Set of
- 21 Requests for Production of Documents on December 23, 2008.
- 22 16. Independent Medical Examination of William Jay Simao was performed on February
- 23 10, 2009.
- 24 17. Deposition of Jenny Rish was taken on April 7, 2009.
- 25
- 26
- 27
- 28

B. DISCOVERY REMAINING TO BE COMPLETED BY THE PARTIES:

1. Deposition of Dr. Jorg Rosler is scheduled for April 8, 2009.
2. Deposition of Dr. Jaswinder Grover is scheduled for April 16, 2009.
3. Last day to disclose initial expert disclosures is April 16, 2009.
4. Last day to disclose rebuttal expert disclosures is May 18, 2009.
5. Discovery cut-off is July 15, 2009.

C. REASONS REMAINING DISCOVERY WAS NOT COMPLETED WITHIN THE TIME SET BY THE PRIOR SCHEDULING ORDER:

Plaintiff William Jay Simao recently had surgery on March 25, 2009. Plaintiffs' counsel does not believe that there is ample time to gather surgery related medical records for review by experts. Plaintiff's counsel requests a continuance of the initial expert disclosure date.

D. PROPOSED SCHEDULE FOR COMPLETING REMAINING DISCOVERY AND AMENDMENTS TO OTHER PRETRIAL DATES:

1. Close of Discovery: October 13, 2009
2. Final date to file motions to amend pleadings or add parties (without further court order): July 15, 2009 (Not later than 90 days before close of discovery)
3. Final dates for expert disclosures:

Initial expert:	July 15, 2009 (Not later than 90 days before close of discovery)
Rebuttal expert:	August 14, 2009 (Not later than 30 days after initial disclosure of experts)
4. Final date to file dispositive motions: November 12, 2009
(Not later than 30 days after close of discovery)

E. CURRENT TRIAL DATE:

This case is currently set on a five (5) week jury stack for October 5, 2009.

....
....
....

1 **F. OTHER ITEMS:**

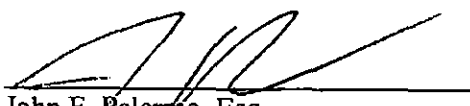
2 The parties do not request a conference with the Court before entry of an Amended Scheduling
3 Order.


4 DATED this ____ day of April, 2009.

DATED this 14th day of April, 2009.

6 AARON & PATERNOSTER, LTD.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

7 
8 John E. Palermo, Esq.
9 Nevada Bar No. 9887
10 Attorney for Plaintiff


11 Stephen H. Rogers, Esq.
12 300 S. Fourth Street, Suite 710
13 Las Vegas, NV 89101
14 Attorney for Defendant,
15 JENNY RISH

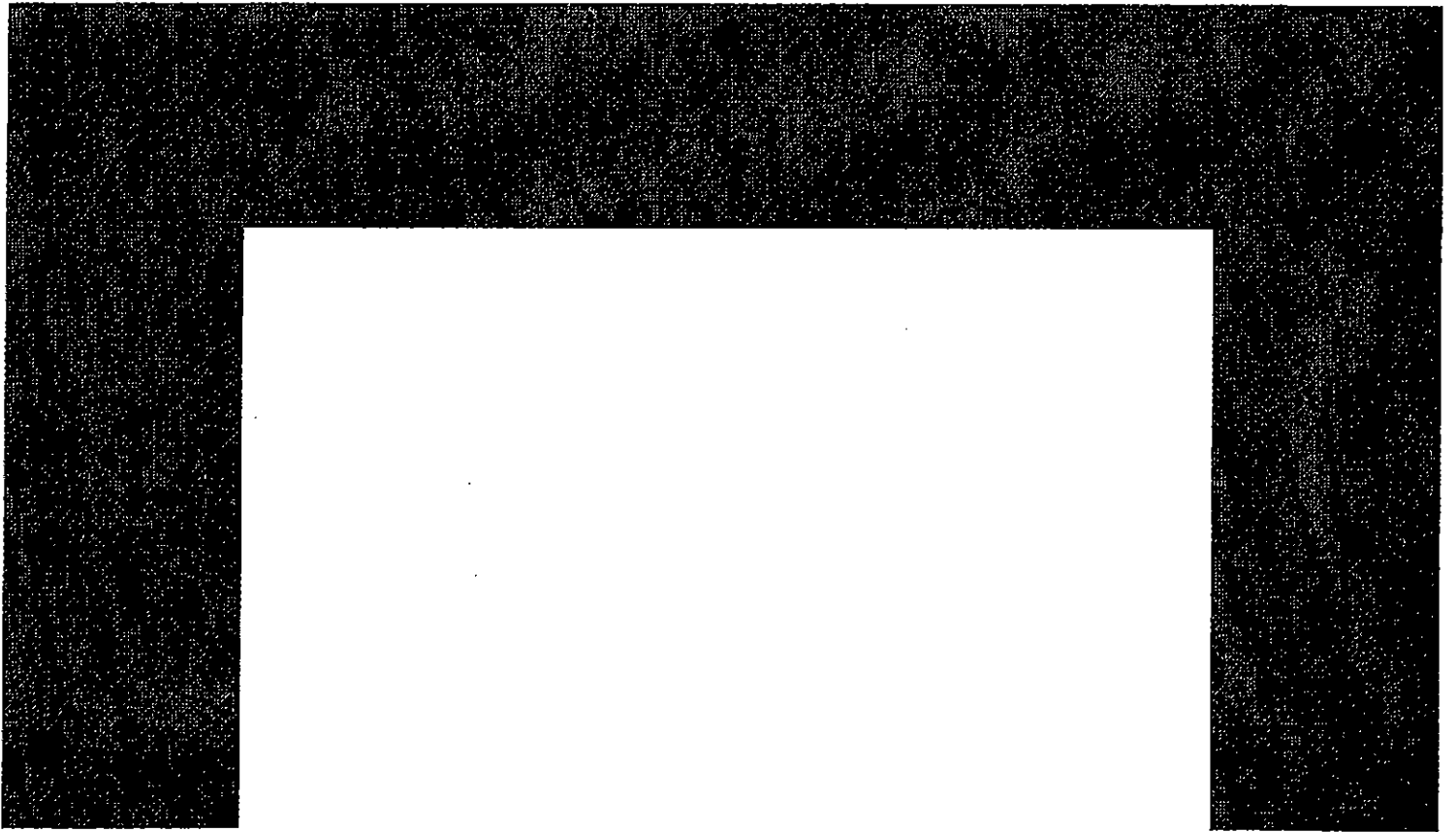
16 **ORDER**

17 *An amended scheduling order will be issued; the trial*
18 IT IS SO ORDERED.

19 DATED this 4 day of ^{May} April, 2009.

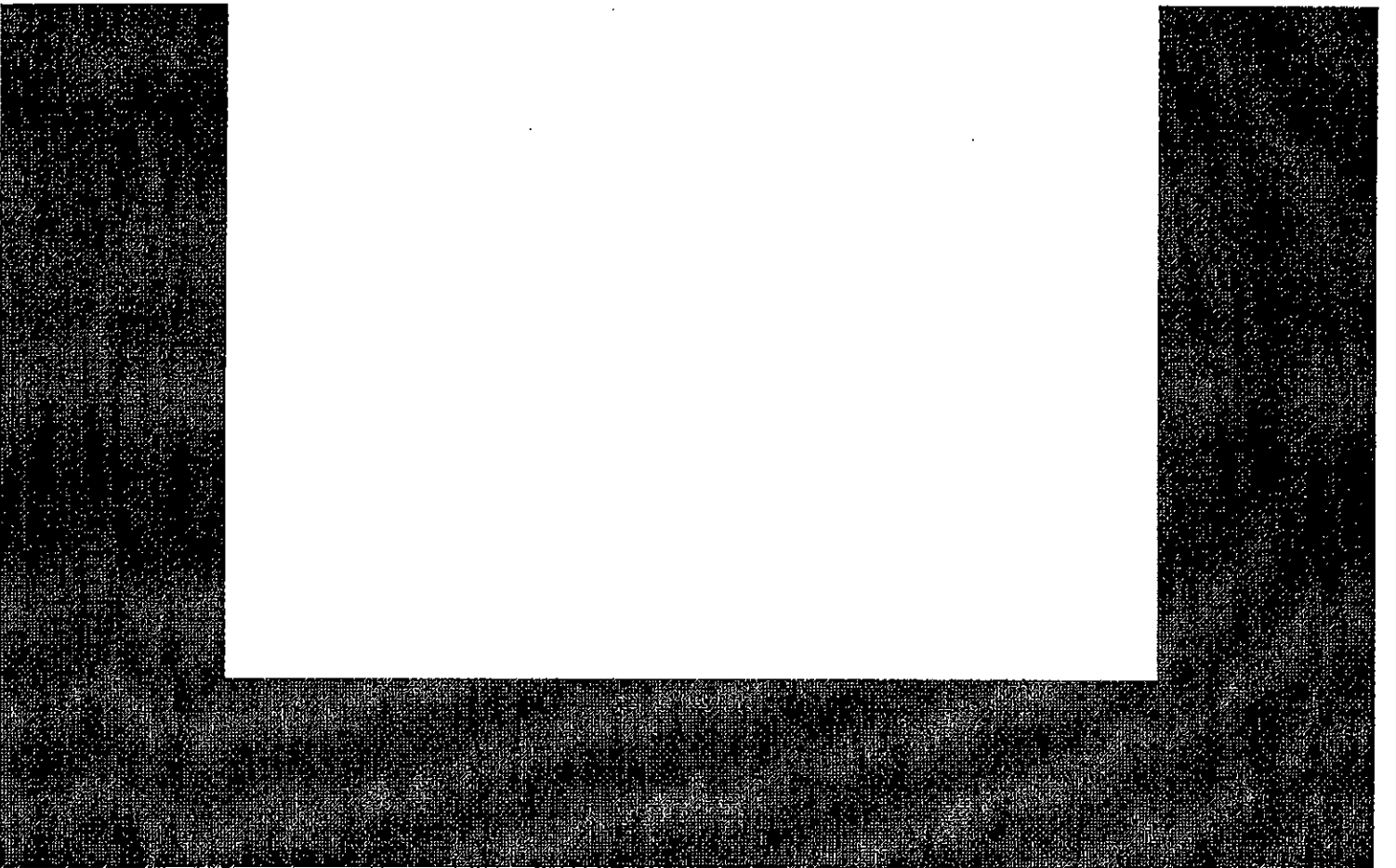
date of 10-5-09 will be
vacated at result
in accordance with the amended
Scheduling order. 10

20 
21 DISCOVERY COMMISSIONER



11

11



ORIGINALElectronically Filed
05/08/2009 02:52:33 PM
CLERK OF THE COURT**NOTC**

GLENN A. PATERNOSTER, ESQ.
Nevada Bar No. 5452
JOHN E. PALERMO, ESQ.
Nevada Bar No. 9887
AARON & PATERNOSTER, LTD.
2300 West Sahara Avenue, Suite 650
Las Vegas, Nevada 89102
(702) 384-4111, telephone
(702) 387-9739, facsimile
Attorneys for Plaintiffs

DISTRICT COURT**CLARK COUNTY, NEVADA**

WILLIAM JAY SIMAO, individually and) CASE NO.: A539455
CHERYL ANN SIMAO, individually, and as) DEPT. NO.: X
husband and wife,

Plaintiffs,

vs.

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


Defendants.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE, that on the 6th day of May, 2009, the Court entered its Order to
Extend Discovery, in the above-captioned matter. A copy of that Order is attached hereto.

DATED this 8th day of May, 2009.

AARON & PATERNOSTER, LTD.



GLENN A. PATERNOSTER, ESQ.
Nevada Bar No. 5452
Attorney for Plaintiffs

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b) and the amendment to the EDCR 7.26, I hereby certify that service of the foregoing **NOTICE OF ENTRY OF ORDER** was made this date by depositing a true and correct copy of same for mailing, in a sealed envelope, postage fully prepaid, first class mail at Las Vegas, Nevada, addressed to the following:

Stephen H. Rogers, Esq.
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
300 S. Fourth Street, Suite 710
Las Vegas, NV 89101
Facsimile: (702) 384-1460
Attorney for Defendant,
JENNY RISH

at his last known mailing address.

DATED this 8 day of May, 2009.


An employee of AARON & PATERNOSTER, LTD.

1 **SAO**
 2 GLENN A. PATERNOSTER, ESQ.
 Nevada Bar No. 5452
 3 JOHN E. PALERMO, ESQ.
 Nevada Bar No. 9887
 4 AARON & PATERNOSTER, LTD.
 2300 West Sahara Avenue, Suite 650
 5 Las Vegas, Nevada 89102
 6 (702) 384-4111, telephone
 (702) 387-9739, facsimile
 7 Attorney for Plaintiffs

FILED

2009 MAY -6 A 11: 59

E. J. Smith
 CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

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

CASE NO.: A539455
 DEPT. NO.: X

13 Plaintiffs,

14 vs.

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

17 Defendants.
 18

STIPULATION AND ORDER TO EXTEND DISCOVERY
(FIRST REQUEST)

21 IT IS HEREBY STIPULATED AND AGREED, by and through the parties herein, through
 22 their undersigned counsel, that the discovery deadlines in the above-entitled matter be extended,
 23 pursuant to EDCR 2.35.

24
 25 Plaintiffs filed their Complaint on April 13, 2007. Defendant Jenny Rish filed her Answer to
 26 Plaintiffs' Complaint on March 21, 2008.

27

28

A. DISCOVERY COMPLETED TO DATE BY THE PARTIES:

1. The parties held the Early Case Conference on May 21, 2008.
2. The Joint Case Conference Report was filed on June 2, 2008.
3. Defendant propounded her First Set of Requests for Production of Documents and Interrogatories to Plaintiff Cheryl Ann Simao on May 29, 2008.
4. Plaintiff Cheryl Ann Simao provided her discovery responses on September 4, 2008.
5. Defendant propounded her First Set of Requests for Production of Documents and Interrogatories to Plaintiff William Jay Simao on May 29, 2008.
6. Plaintiff William Jay Simao provided his discovery responses on September 4, 2008.
7. A Scheduling Order was issued on June 11, 2008.
8. Plaintiffs propounded their First Set of Interrogatories, First Set of Requests for Admission and First Set of Requests for Production of Documents to Defendant Jenny Rish on September 4, 2008.
9. Defendant Jenny Rish provided her discovery responses on October 17, 2008.
10. Deposition of Britt Hill, PA-C was taken on October 20, 2008.
11. Deposition of Cheryl Ann Simao was taken on October 22, 2008.
12. Deposition of William Jay Simao was taken on October 23, 2008.
13. Deposition of Dr. Adam Arita was taken on November 5, 2008.
14. Deposition of Dr. Patrick McNulty was taken on December 1, 2008.
15. Defendant Jenny Rish provided Supplemental Responses to Plaintiffs' First Set of Requests for Production of Documents on December 23, 2008.
16. Independent Medical Examination of William Jay Simao was performed on February 10, 2009.
17. Deposition of Jenny Rish was taken on April 7, 2009.

1 **B. DISCOVERY REMAINING TO BE COMPLETED BY THE PARTIES:**

- 2 1. Deposition of Dr. Jorg Rosler is scheduled for April 8, 2009.
- 3 2. Deposition of Dr. Jaswinder Grover is scheduled for April 16, 2009.
- 4 3. Last day to disclose initial expert disclosures is April 16, 2009.
- 5 4. Last day to disclose rebuttal expert disclosures is May 18, 2009.
- 6 5. Discovery cut-off is July 15, 2009.

7

8 **C. REASONS REMAINING DISCOVERY WAS NOT COMPLETED WITHIN THE TIME**

9 **SET BY THE PRIOR SCHEDULING ORDER:**

10 Plaintiff William Jay Simao recently had surgery on March 25, 2009. Plaintiffs' counsel does

11 not believe that there is ample time to gather surgery related medical records for review by experts.

12 Plaintiff's counsel requests a continuance of the initial expert disclosure date.

13 **D. PROPOSED SCHEDULE FOR COMPLETING REMAINING DISCOVERY AND**

14 **AMENDMENTS TO OTHER PRETRIAL DATES:**

- 15 1. Close of Discovery: October 13, 2009
- 16 2. Final date to file motions to amend pleadings or add parties (without further court
- 17 order): July 15, 2009 (Not later than 90 days before close of discovery)
- 18 3. Final dates for expert disclosures:
- 19 Initial expert: July 15, 2009 (Not later than 90 days before close of discovery)
- 20 Rebuttal expert: August 14, 2009 (Not later than 30 days after initial disclosure of experts)
- 21 4. Final date to file dispositive motions: November 12, 2009
- 22 (Not later than 30 days after close of discovery)
- 23

24 **E. CURRENT TRIAL DATE:**

25 This case is currently set on a five (5) week jury stack for October 5, 2009.

26

27

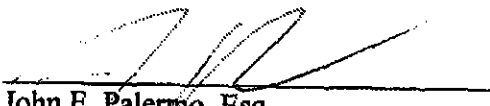
28

1 **F. OTHER ITEMS:**

2 The parties do not request a conference with the Court before entry of an Amended Scheduling
3 Order.


4
5 DATED this ____ day of April, 2009.

6 AARON & PATERNOSTER, LTD.

7
8 
9 John E. Palermo, Esq.
Nevada Bar No. 9887
Attorney for Plaintiff

DATED this APR day of April, 2009.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

10 
11 Stephen H. Rogers, Esq.
300 S. Fourth Street, Suite 710
Las Vegas, NV 89101
Attorney for Defendant,
JENNY RISH

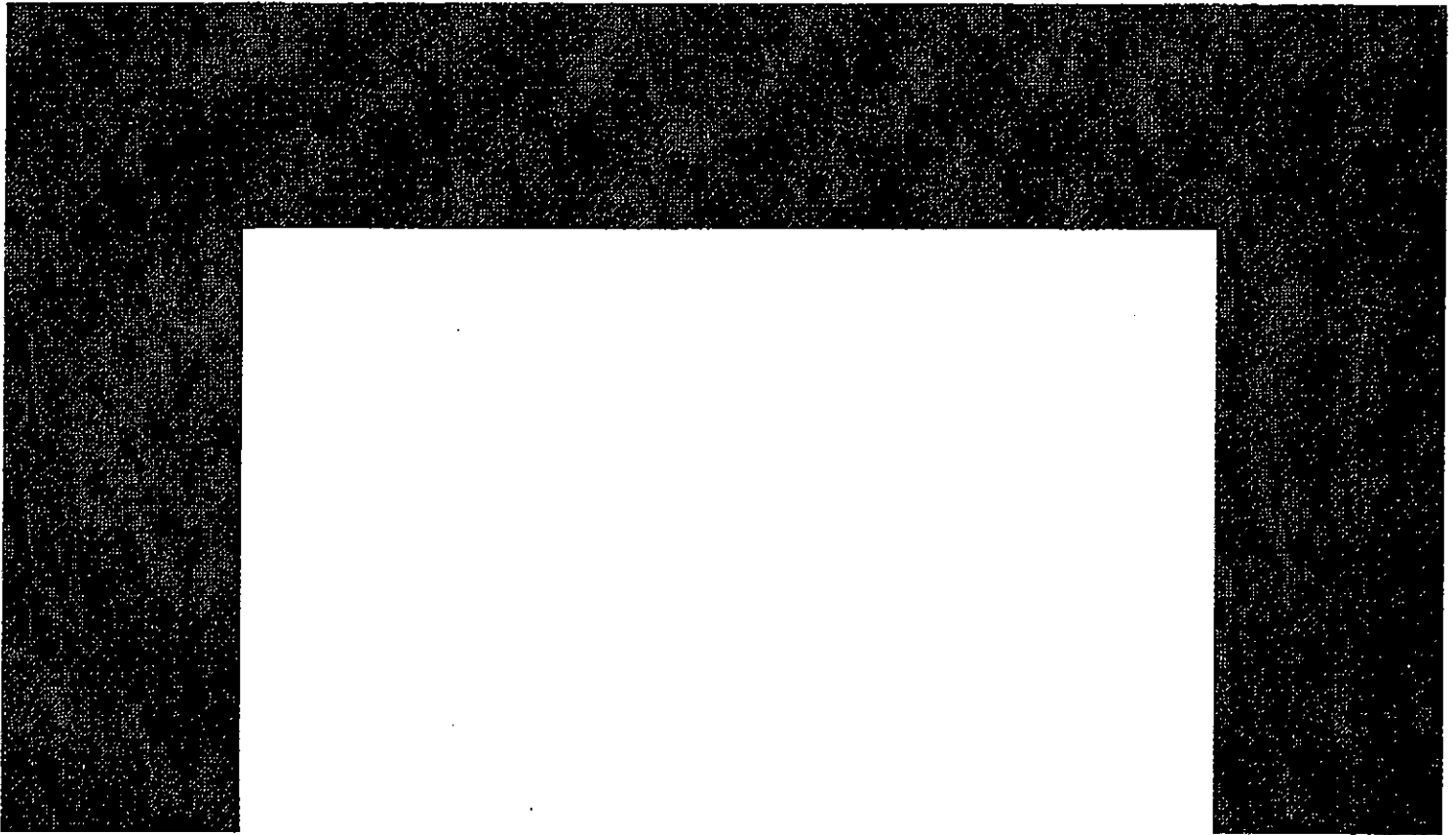
12
13 **ORDER**

14 *An amended scheduling order will be issued; the trial*
IT IS SO ORDERED. *date of 10-5-09 will be*

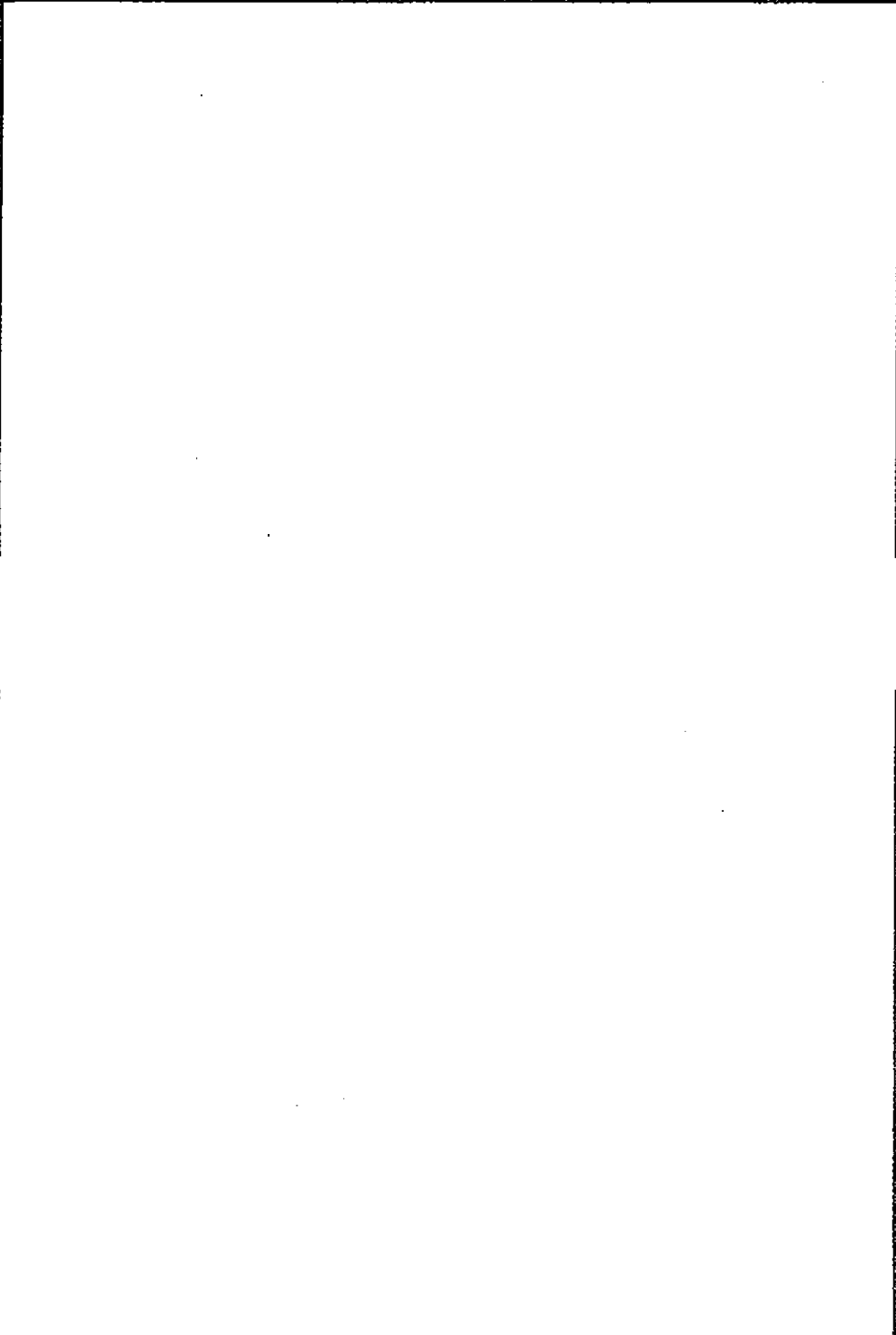
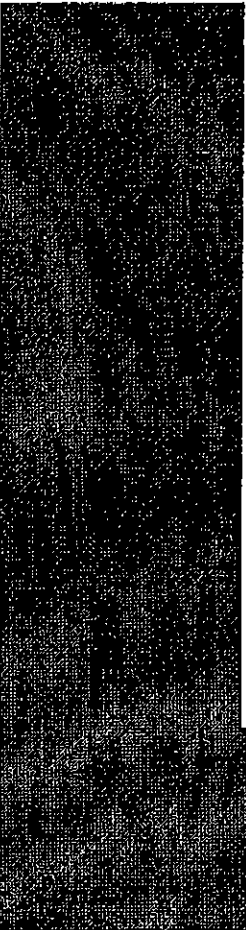
15 DATED this 4 day of April, 2009. *May 10*

16 *vacated as result*
17 *in accordance with the amended*
18 *Scheduling order. 10*

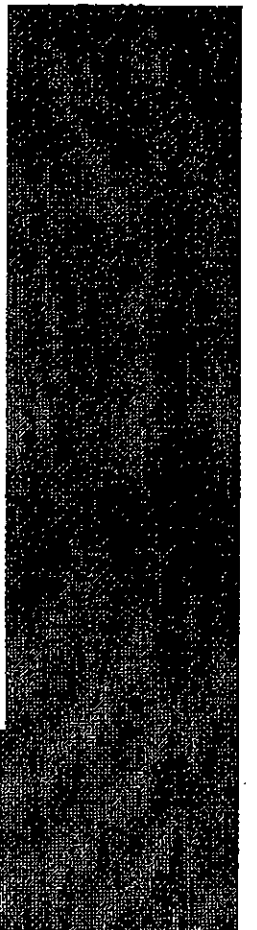
19 
20 DISCOVERY COMMISSIONER



12



12



ORIGINAL

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FILED

DISTRICT COURT
CLARK COUNTY, NEVADA

Jun 13 10 07 AM '09

E. J. [Signature]
CLERK OF THE COURT

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

Plaintiffs,

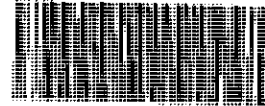
CASE NO. A539455
DEPT NO. X

v.

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

Defendants.

07A539455
159025



AMENDED SCHEDULING ORDER

(Discovery/Dispositive Motions/Motions to Amend or Add Parties)

NATURE OF ACTION: Personal injury - vehicle accident

TIME REQUIRED FOR TRIAL: 4-5 days

Counsel for Plaintiffs:

John E. Palermo, Esq., Aaron & Paternoster

Counsel for Defendant JENNY RISH:

Stephen H. Rogers, Esq., Rogers, Mastrangelo, Carvalho &
Mitchell

Counsel representing all parties have been heard and
after consideration by the Discovery Commissioner,

IT IS HEREBY ORDERED:

1. all parties shall complete discovery on or before

10/13/09.

RECEIVED

JUN 10 2009

CLERK OF THE COURT

DISCOVERY
COMMISSIONER
EIGHTH JUDICIAL
DISTRICT COURT

000052

1 2. all parties shall file motions to amend pleadings or
2 add parties on or before 7/15/09.

3 3. all parties shall make initial expert disclosures
4 pursuant to N.R.C.P. 16.1(a)(2) on or before 7/15/09.

5 4. all parties shall make rebuttal expert disclosures
6 pursuant to N.R.C.P. 16.1(a)(2) on or before 8/14/09.

7 5. all parties shall file dispositive motions on or
8 before 11/12/09.

9 Certain dates from your case conference report(s) may
10 have been changed to bring them into compliance with N.R.C.P.
11 16.1.
12

13 Within 60 days from the date of this Scheduling Order,
14 the Court shall notify counsel for the parties as to the date
15 of trial, as well as any further pretrial requirements in
16 addition to those set forth above.
17


18 Unless otherwise directed by the court, all pretrial
19 disclosures pursuant to N.R.C.P. 16.1(a)(3) must be made at
20 least 30 days before trial.
21

22 Motions for extensions of discovery shall be made to the
23 Discovery Commissioner in strict accordance with E.D.C.R.
24 2.35. Discovery is completed on the day responses are due or
25 the day a deposition begins.
26

27 . . .
28 . . .
29 . . .

1 Unless otherwise ordered, all discovery disputes (except
2 disputes presented at a pre-trial conference or at trial) must
3 first be heard by the Discovery Commissioner.
4

5 Dated this 9 day of June, 2009.

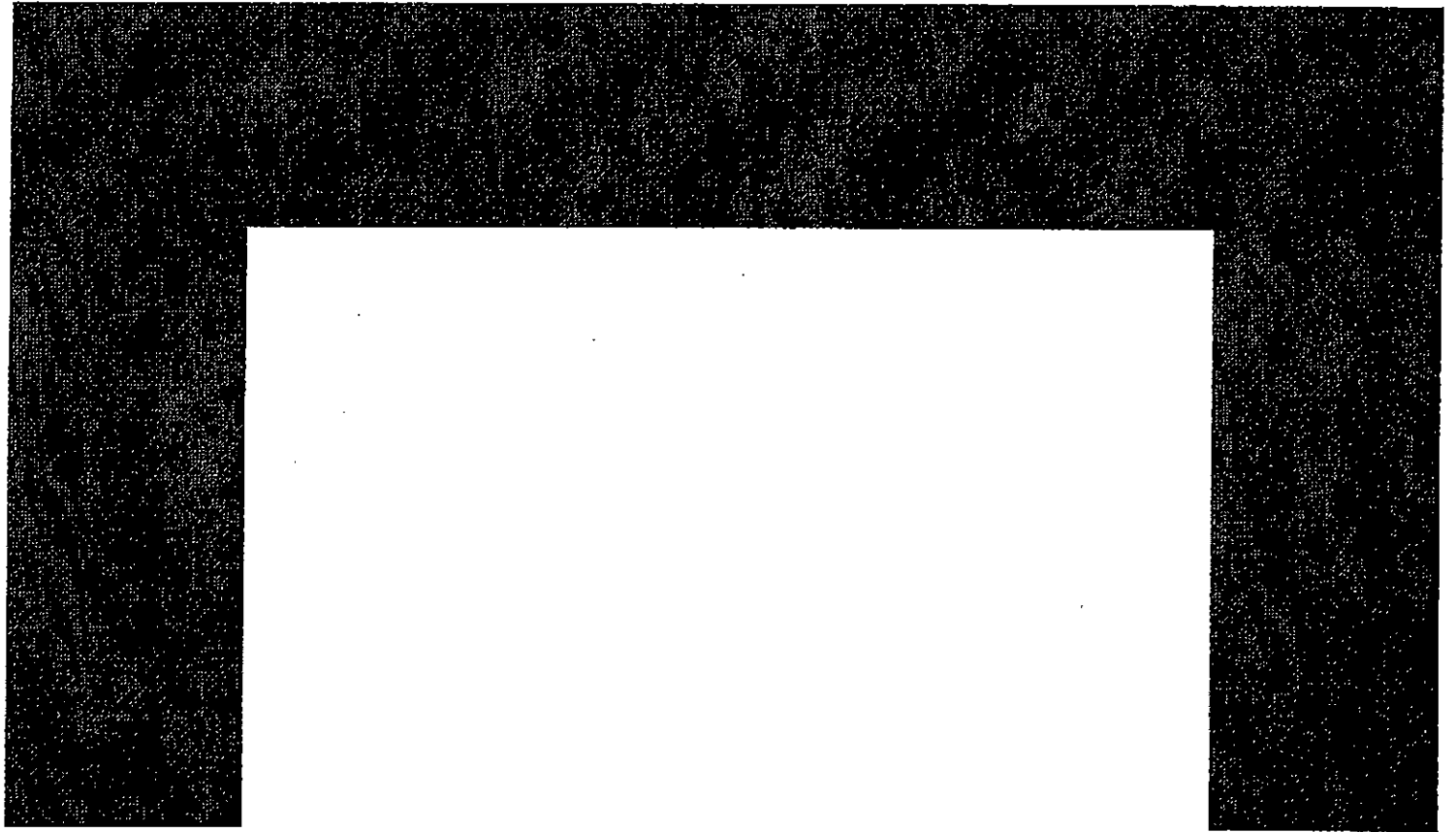
6
7 
8 DISCOVERY COMMISSIONER

9 CERTIFICATE OF SERVICE

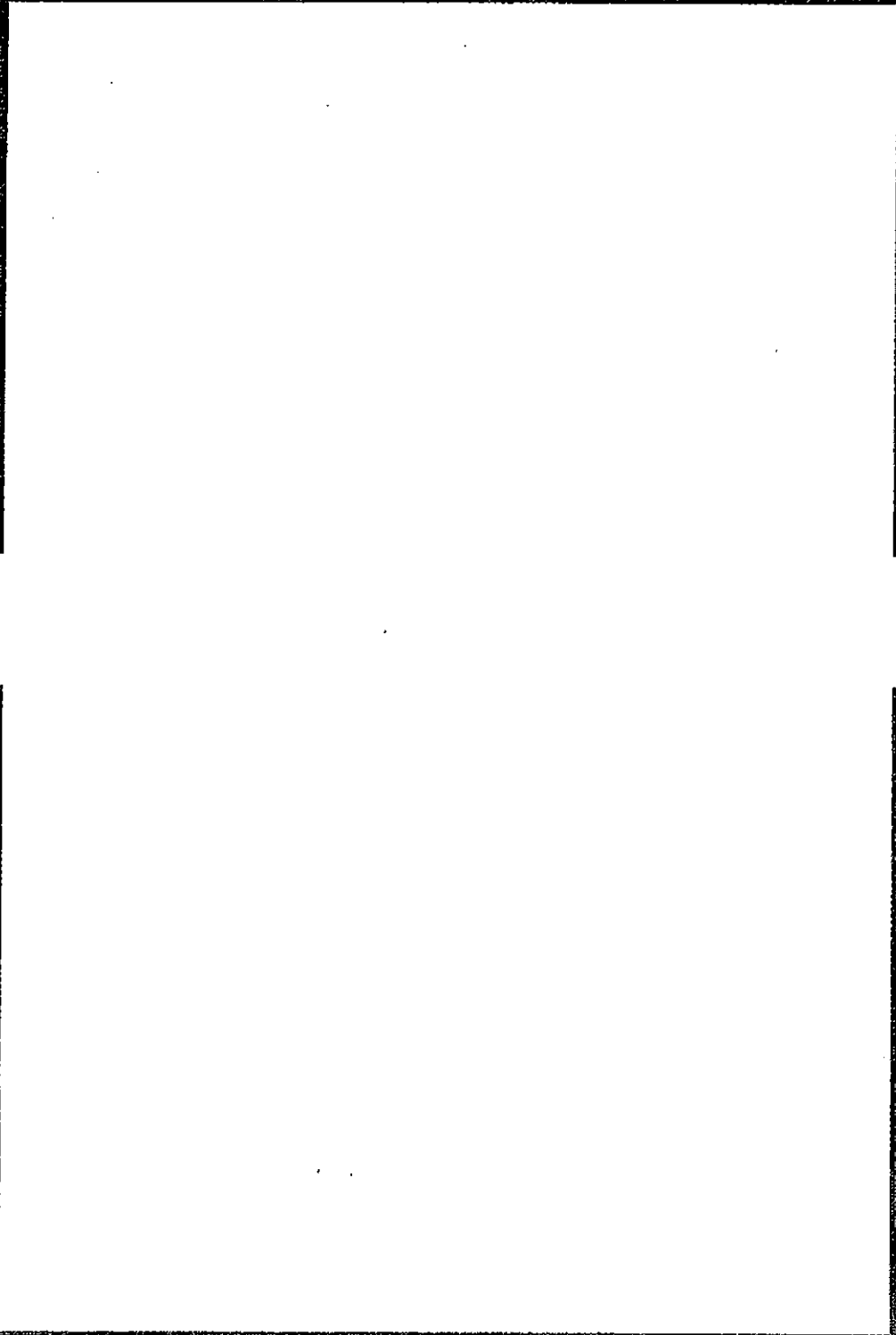
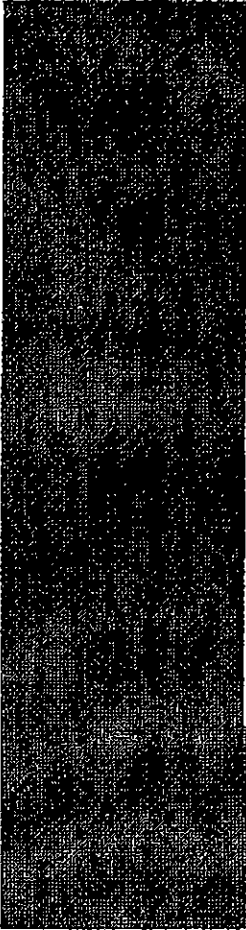
10 I hereby certify that on the date filed, I placed a copy
11 of the foregoing AMENDED DISCOVERY SCHEDULING ORDER in the
12 folder(s) in the Clerk's office or mailed as follows:

13 John E. Palermo, Esq.
14 Stephen H. Rogers, Esq.

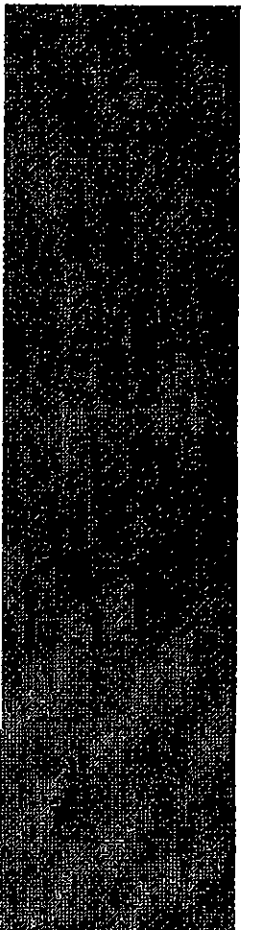
15 
16 COMMISSIONER DESIGNEE
17
18
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13



13

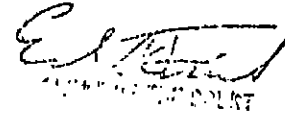


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FILED 7

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2009 AUG 28 A 10:57



DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, et. al,

CASE NO. A-539455

DEPT. X

Plaintiff,

vs.

JENNY RISH,

Defendants.

07A539455
357799ORDER SETTING CIVIL JURY TRIAL

IT IS HEREBY ORDERED THAT:

A. The above-entitled case is set for a Jury Trial on a three week stack to begin on **Monday, January 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 **December 11, 2009 at 9:00 A.M.** in chambers. Be prepared to discuss in detail how much time you will require for opening and closing arguments as well as for your case-in-chief.

C. A Calendar Call will be held on **December 23, 2009 at 3:00 P.M.** in chambers.

Parties must bring to Calendar Call the following:



CLERK OF THE COURT

AUG 28 2009

RECEIVED

JESSIE WALSH
DISTRICT JUDGEDEPARTMENT TEN
LAS VEGAS, NEVADA 89155

000056

1 (1) All exhibits marked by counsel for identification purposes;
2 (2) Typed exhibit lists with all stipulated exhibits marked;
3 (3) A complete set of Jury instructions in two (2) groups: (1) one set with authoritative
4 citations, and (2) one set without citations. Be prepared to argue any contested jury instructions ten
5 days before your firm trial date.
6

7 (4) Proposed voir dire questions;

8 (5) Original depositions;

9 (6) List of equipment needed for trial; and
10

11 (7) Courtesy copies of legal briefs on trial issues.

12 **You will leave calendar call with a firm trial date.** At calendar call the Judicial Secretary
13 will give you your firm trial date and set a hearing ten days before trial for the parties to argue any
14 contested jury instructions.

15 D. The Pre-Trial Memorandum must be filed no later than 5:00 P.M. on **December 24, 2009**
16 with a courtesy copy delivered to Department X. All parties, (Attorneys and parties in Proper
17 Person) **MUST** comply with ALL REQUIREMENTS of E.D.C.R. 2.67).

18 E. All discovery deadlines, deadlines for filing dispositive motions and motions to amend
19 the pleadings or add parties are controlled by the previously issued Scheduling Order.
20

21 F. All other pre-trial motions, including motions in limine, must be in writing and set for
22 hearing no later than **December 18, 2009**.
23

24 G. Such pre-trial motions **MUST** be filed by 5:00 P.M. **November 25, 2009**. Oppositions
25 are to be filed by 5:00 P.M. on **December 9, 2009**; Replies thereto are to be filed by 5:00 P.M. on
26 **December 14, 2009**. Orders shortening time will not be signed except in extreme emergencies.

27 Failure of the designated attorney or any party appearing in proper person to appear for any
28

1 court appearances or to comply with this Order shall result in any of the following: (1) dismissal of
 2 the action; (2) default judgment; (3) monetary sanctions; (4) vacation of the trial date; and/or other
 3 appropriate remedy or sanction.
 4

5 Counsel are required to advise the Court immediately when the case settles or is otherwise
 6 resolved prior to trial. A stipulation which terminates a case by dismissal shall also indicate whether
 7 a Scheduling Order has been filed and, if a trial date has been set, the date of that trial. A copy
 8 should be given to Chambers.
 9

10 Dated this 24 day of August, 2009.

11
 12 
 13 JESSIE WALSH, DISTRICT COURT JUDGE

14 **CERTIFICATE OF MAILING**

15 I hereby certify that on the day the within document was filed I placed a copy of the
 16 foregoing Order in the attorneys folder in the clerks office of the attorneys listed below:

17 John E. Palermo, Esq., AARON & PATERNOSTER Plaintiffs

18 Stephen H. Rogers, Esq., ROGERS, MASTRANGELO Defendants
 19

20
 21 
 22 Judicial Executive Assistant
 23
 24
 25
 26
 27
 28

JESSIE WALSH
 DISTRICT JUDGE

DEPARTMENT TEN
 LAS VEGAS, NEVADA 89155

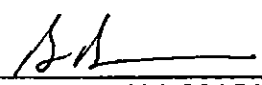
1 TO: JUDGE JESSIE WALSH
2 FROM: BONNIE A. BULLA, DISCOVERY COMMISSIONER
3 SUBJECT: William Jay Simao, et al. v. Jenny Rish, et al.,
4 Case No. A539455
5 DATE: June 9, 2009

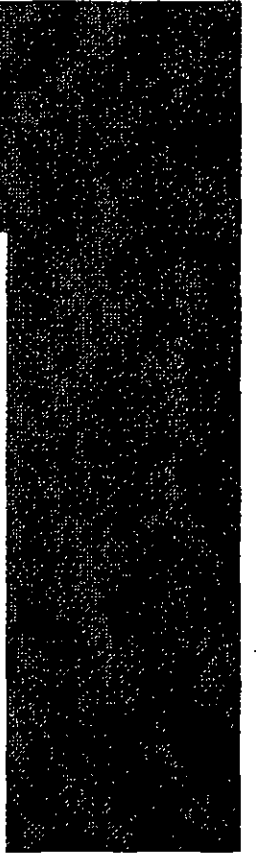
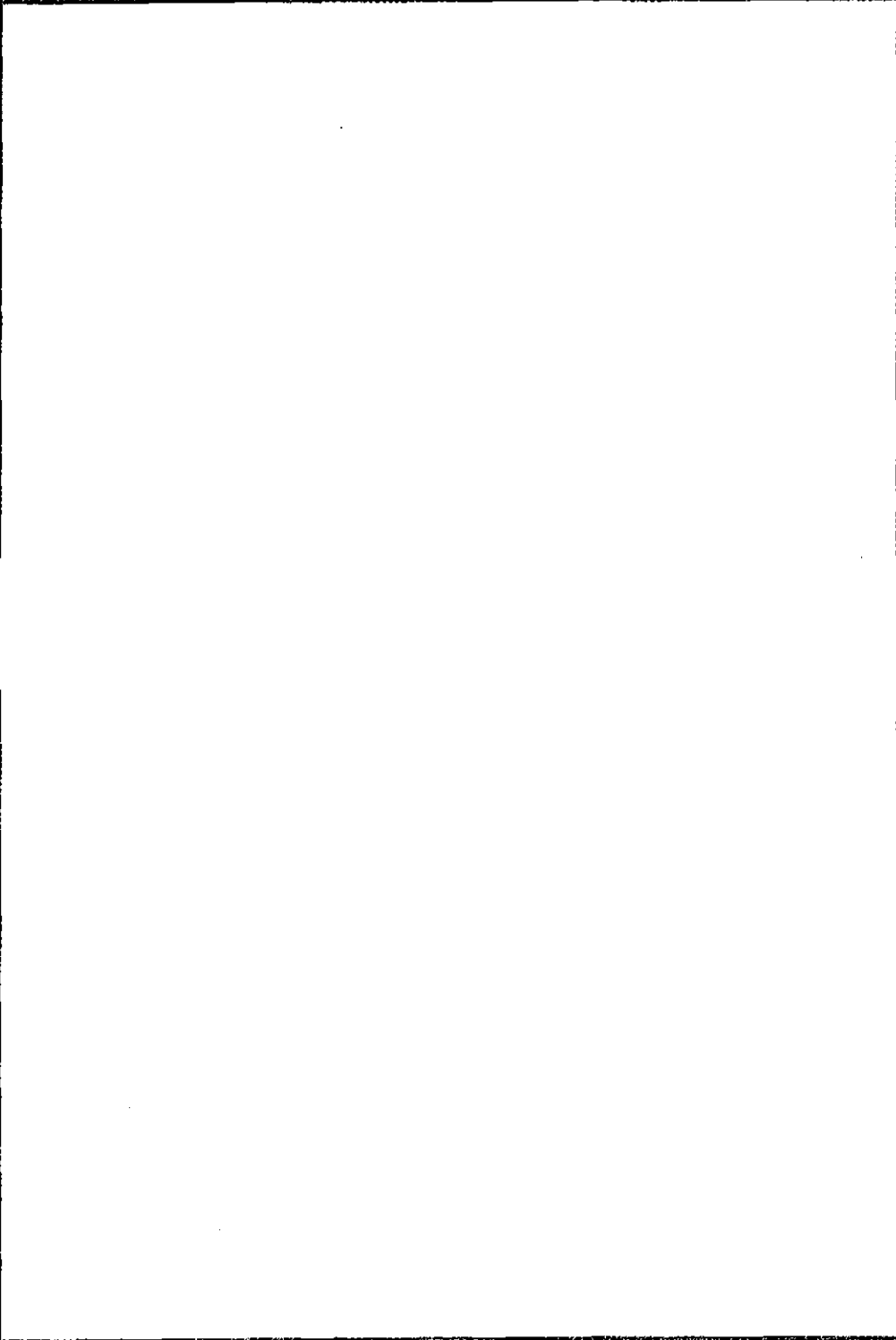
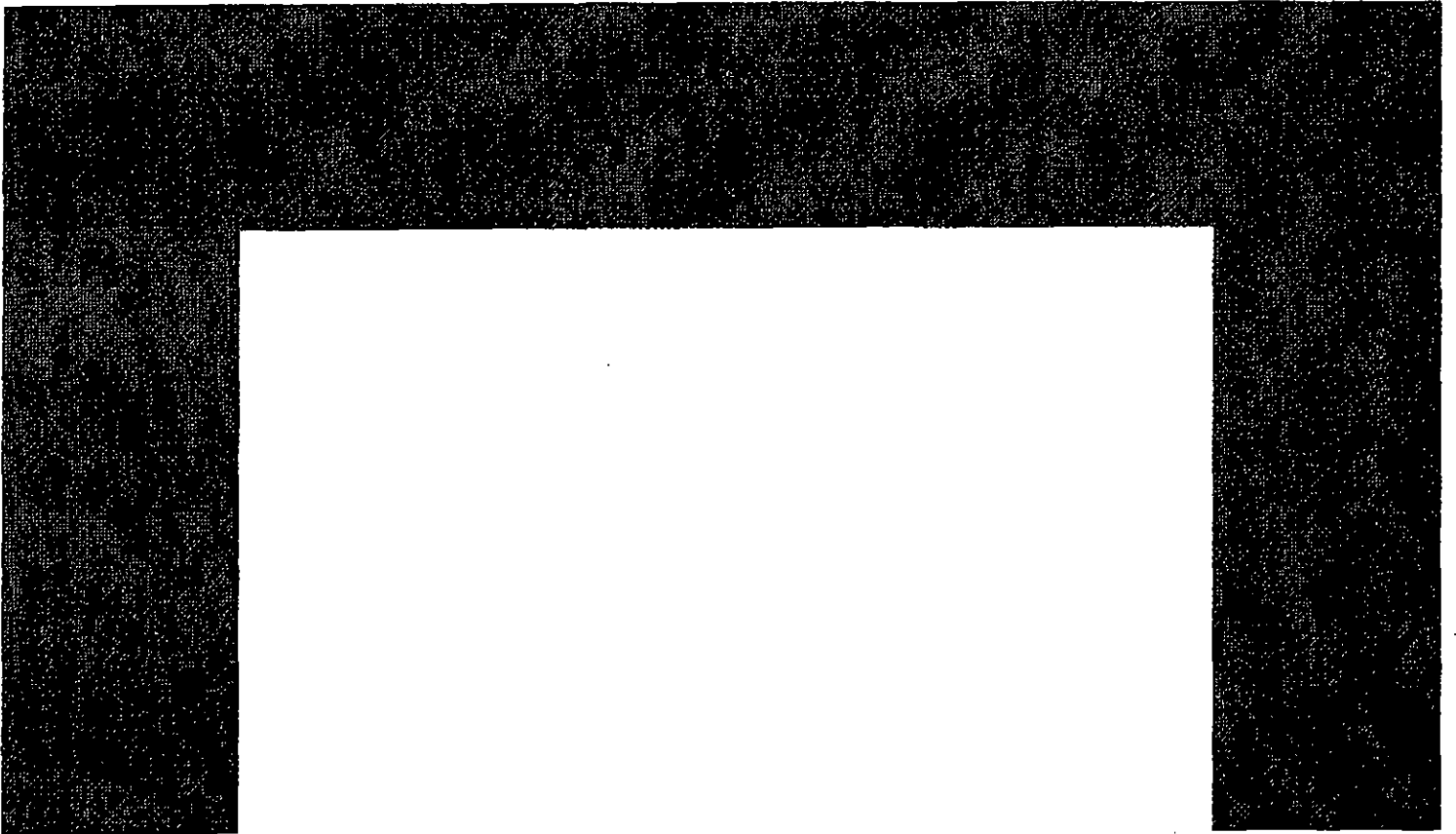
6
7 SCHEDULING MEMO

- 8 1. A Joint Case Conference Report has been filed and
9 approved.
10 2. A Scheduling Order has issued pursuant to N.R.C.P.
11 16(b).
12 3. Counsel for Plaintiffs:
13 John E. Palermo, Esq., Aaron & Paternoster
14 Counsel for Defendant JENNY RISH:
15 Stephen H. Rogers, Esq., Rogers, Mastrangelo,
16 Carvalho & Mitchell
17 4. Nature of action: P.I. - vehicle accident.
18 5. Estimated time for trial: 4-5 days.
19 6. A discovery cut-off date has been set.
20 7. The case is ready to be set for trial on your
21 earliest available date beginning 12/28/09.
22 8. Please notify counsel of their trial date no later
23 than 60 days from the date of this memo.

24 NOTE: Final dates for filing motions to amend, motions to add parties and dispositive
25 motions have been ordered pursuant to N.R.C.P. 16(b)(1)-(3) and 16.1(c), as set forth in the
26 Scheduling Order. If your trial setting form includes any of these dates, please redact such
27 information or be sure the dates match those set forth in the Scheduling order.

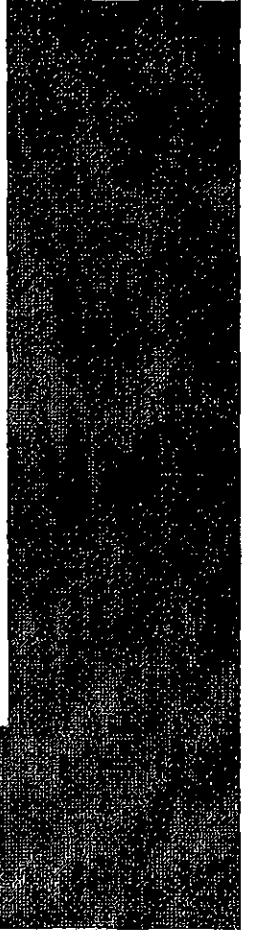
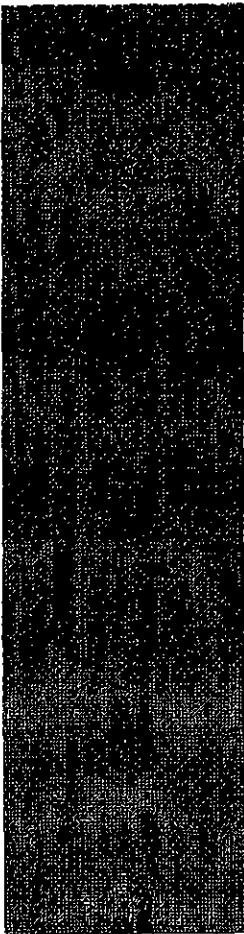
28 Thank you.


DISCOVERY COMMISSIONER



14

14



DEPARTMENT X
NOTICE OF HEARING
DATE 2/27/10 TIME 9:00
APPROVED BY *[Signature]*

DEPARTMENT X
NOTICE OF HEARING
DATE 1/28/10 TIME 9:00
APPROVED BY *[Signature]*
Cal call

1 **STIP**
2 **STEPHEN H. ROGERS, ESQ.**
3 **Nevada Bar No. 5755**
4 **ROGERS, MASTRANGELO, CARVALHO & MITCHELL**
5 **300 South Fourth Street, Suite 710**
6 **Las Vegas, Nevada 89101**
7 **Phone (702) 383-3400**
8 **Fax (702) 384-1460**
9 **Attorneys for Defendant Jenny Rish**

Electronically Filed
03/31/2010 08:50:22 AM

[Signature]
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

10 **WILLIAM JAY SIMAO, individually and**
11 **CHERYL ANN SIMAO, individually, and as**
12 **husband and wife,**

CASE NO. A539455

DEPT. NO X

Plaintiff,

13 v.

14 **JENNY RISH; JAMES RISH; LINDA RISH;**
15 **DOES I - V; and ROE CORPORATIONS I - V,**
16 **inclusive,**

Defendants.

STIPULATION AND ORDER TO CONTINUE TRIAL DATE

17 **IT IS HEREBY STIPULATED** by and between the parties, through their respective counsel,
18 **that the trial date for the above-captioned matter which is currently set for May 10, 2010, be continued**

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 and placed for a firm trial setting beginning 2/2/11, at 9:00 a.m., with a calendar call
 2 on 4/28/11, at 9:00 a.m. and the Pre-Trial Memorandums due on 4/28/11
 3 in Chambers

4 DATED this ____ day of March, 2010.

DATED this ____ day of March, 2010.

5 ROGERS, MASTRANGELO, CARVALHO
 6 & MITCHELL

AARON & PATERNOSTER, LTD.

7 STEPHEN H. ROGERS, ESQ.
 8 Nevada Bar No. 5755
 9 300 South Fourth Street, Suite 710
 10 Las Vegas, Nevada 89101
 11 Attorneys for Defendant

MATTHEW E. AARON, ESQ.
 Nevada Bar No. 4900
 JOHN PALERMO, ESQ.
 Nevada Bar No. 9887
 Las Vegas, Nevada 89101
 Attorney for Plaintiffs

ORDER

14 IT IS SO ORDERED.

15 DATED this 29 day of Mar, 2010.

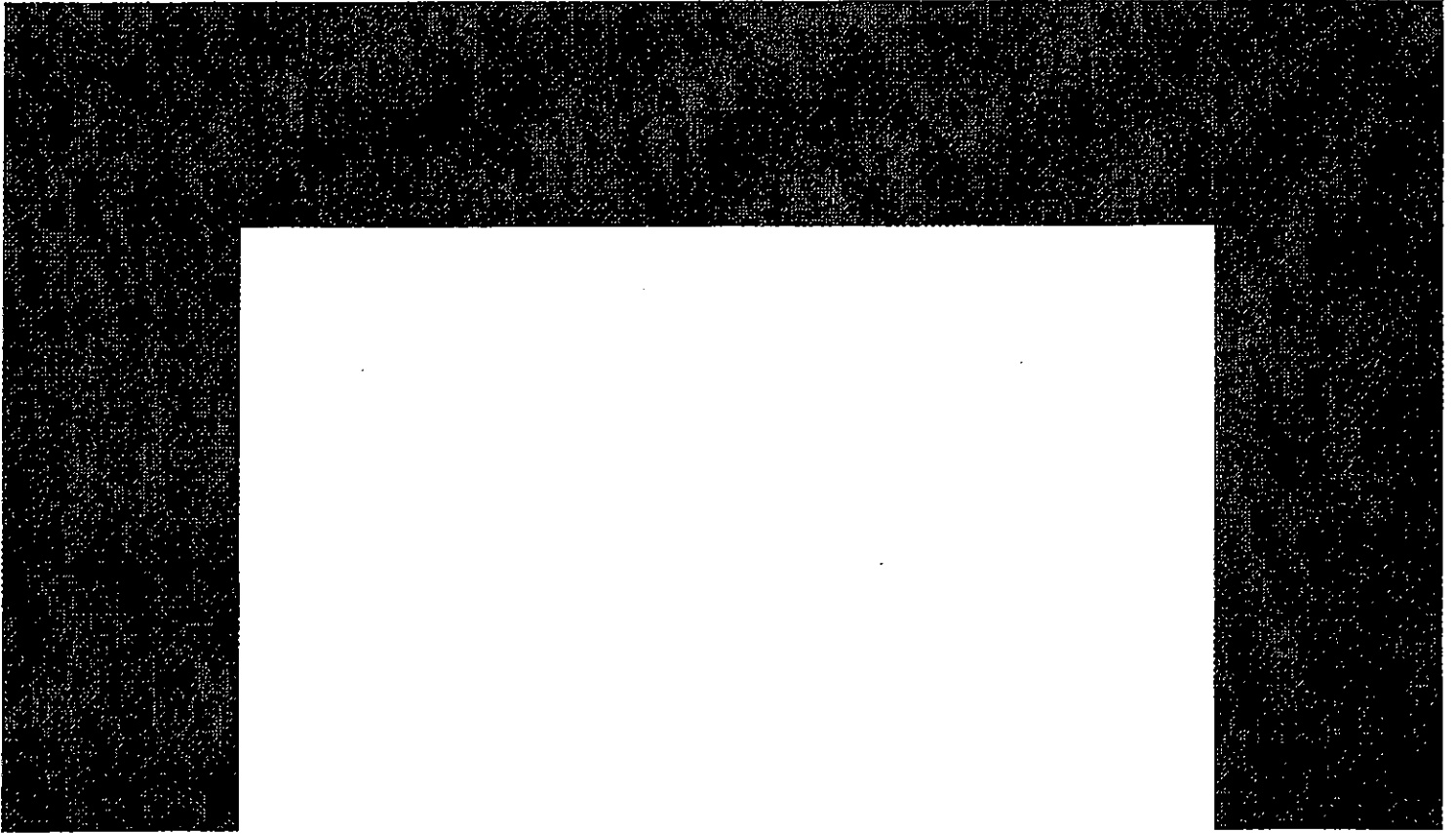
Jessie Walsh
 DISTRICT JUDGE

19 Submitted by:

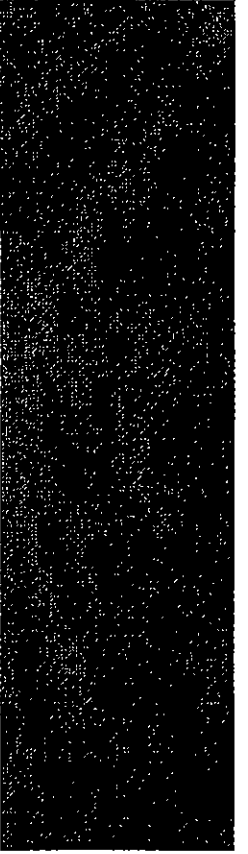
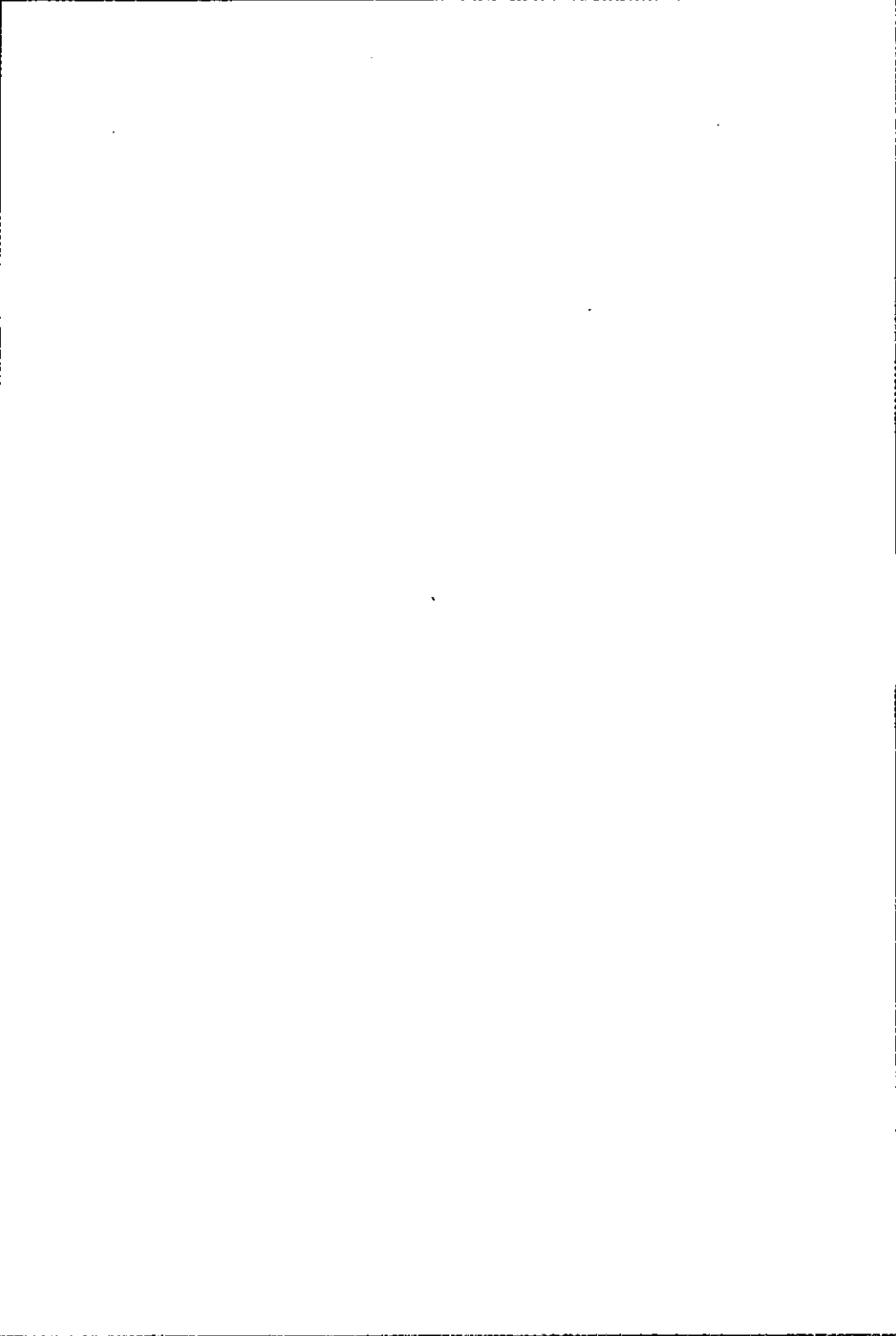
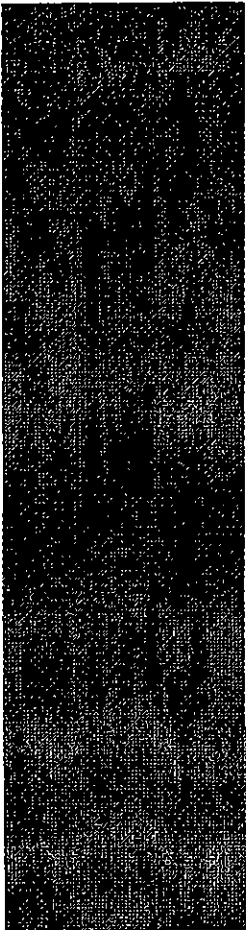
20 ROGERS, MASTRANGELO, CARVALHO &
 21 MITCHELL

22 STEPHEN H. ROGERS, ESQ.
 23 Nevada Bar No. 5755
 24 300 South Fourth Street, Suite 710
 25 Las Vegas, Nevada 89101
 26 Attorneys for Defendant

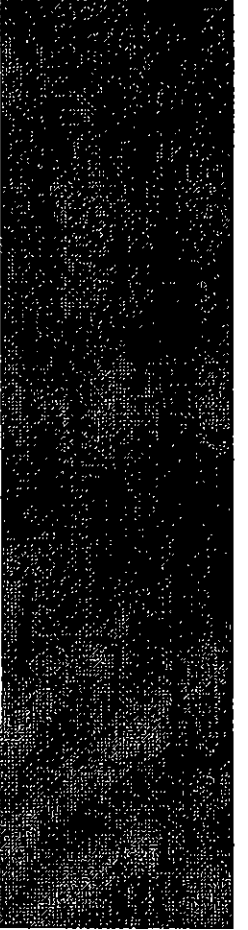
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15



15



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1 **NEOJ**
2 **STEPHEN H. ROGERS, ESQ.**
3 Nevada Bar No. 5755
4 **ROGERS, MASTRANGELO, CARVALHO & MITCHELL**
5 300 South Fourth Street, Suite 710
6 Las Vegas, Nevada 89101
7 Phone (702) 383-3400
8 Fax (702) 384-1460
9 *Attorneys for Defendant Jenny Rish*


CLERK OF THE COURT

6
7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**
9

10 **WILLIAM JAY SIMAO, individually and**
11 **CHERYL ANN SIMAO, individually, and as**
12 husband and wife,

Plaintiff,

13 v.

14 **JENNY RISH; JAMES RISH; LINDA RISH;**
15 **DOES I - V; and ROE CORPORATIONS I - V,**
16 inclusive,

Defendants.

CASE NO. A539455

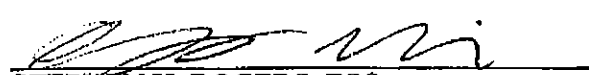
DEPT. NO X

17
18 **NOTICE OF ENTRY OF ORDER**

19 PLEASE TAKE NOTICE that an Order in the above-entitled action was entered and filed
20 on the 31st day of March, 2010, a copy of which is attached hereto.

21 DATED this 2nd day of ^{April} ~~March~~, 2010.

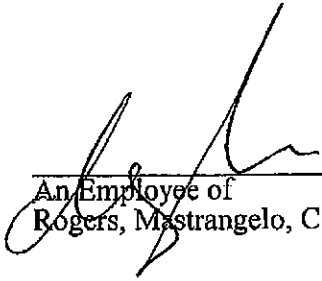
22 **ROGERS, MASTRANGELO, CARVALHO &**
23 **MITCHELL**

24 
25 **STEPHEN H. ROGERS, ESQ.**
26 Nevada Bar No. 5755
27 300 South Fourth Street, Suite 710
28 Las Vegas, Nevada 89101
Attorneys for Defendant Jenny Rish

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of
ROGERS, MASTRANGELO, CARVALHO & MITCHELL, and on the 2ND day of APRIL, 2010,
a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** (re: **Continue Trial**)
was served via First Class, U.S. Mail, postage prepaid, addressed as follows, upon the following
counsel of record:

Matthew E. Aaron, Esq.
John Palermo, Esq.
AARON & PATERNOSTER, LTD
2300 West Sahara Avenue, Suite 650
Las Vegas, Nevada 89102
Telephone: (702) 384-4111
Facsimile: (702) 387-9739
Attorney for Plaintiffs


An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell

M:\Rogers\Uish adv. Simao\Pleadings\NEO - OrderContTrial.wpd

1 **STIP**2 **STEPHEN H. ROGERS, ESQ.**

3 Nevada Bar No. 5755

4 **ROGERS, MASTRANGELO, CARVALHO & MITCHELL**

5 300 South Fourth Street, Suite 710

6 Las Vegas, Nevada 89101

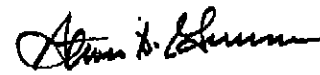
7 Phone (702) 383-3400

8 Fax (702) 384-1460

9 Attorneys for Defendant Jenny Rish

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CLERK OF THE COURT

DISTRICT COURT**CLARK COUNTY, NEVADA**10 **WILLIAM JAY SIMAO, individually and**
11 **CHERYL ANN SIMAO, individually, and as**
12 **husband and wife,**

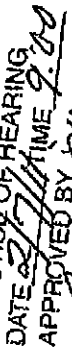
CASE NO. A539455

DEPT. NO X

13 **Plaintiff,**14 **JENNY RISH; JAMES RISH; LINDA RISH;**
15 **DOES I - V; and ROE CORPORATIONS I - V,**
16 **inclusive,**17 **Defendants.****STIPULATION AND ORDER TO CONTINUE TRIAL DATE**18 **IT IS HEREBY STIPULATED** by and between the parties, through their respective counsel,
19 **that the trial date for the above-captioned matter which is currently set for May 10, 2010, be continued**
20
21
22
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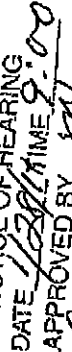
DEPARTMENT X

NOTICE OF HEARING

DATE 03/27/10 TIME 9:00
APPROVED BY 

DEPARTMENT X

NOTICE OF HEARING

DATE 03/27/10 TIME 9:00
APPROVED BY 

Cal call

1 and placed for a firm trial setting beginning 2/2/11, at 9:00 a.m., with a calendar call
 2 on 1/28/11, at 9:00 a.m. and the Pre-Trial Memorandums due on 1/28/11
 3 in Chambers

4 DATED this day of March, 2010.

DATED this day of March, 2010.

5 ROGERS, MASTRANGELO, CARVALHO
 6 & MITCHELL

AARON & PATERNOSTER, LTD.

7 STEPHEN H. ROGERS, ESQ.
 8 Nevada Bar No. 5755
 9 300 South Fourth Street, Suite 710
 10 Las Vegas, Nevada 89101
 11 Attorneys for Defendant

MATTHEW E. AARON, ESQ.
 Nevada Bar No. 4900
JOHN PALERMO, ESQ.
 Nevada Bar No. 9887
 Las Vegas, Nevada 89101
 Attorney for Plaintiffs

12 ORDER

13 IT IS SO ORDERED.

14 DATED this 29 day of Mar, 2010.

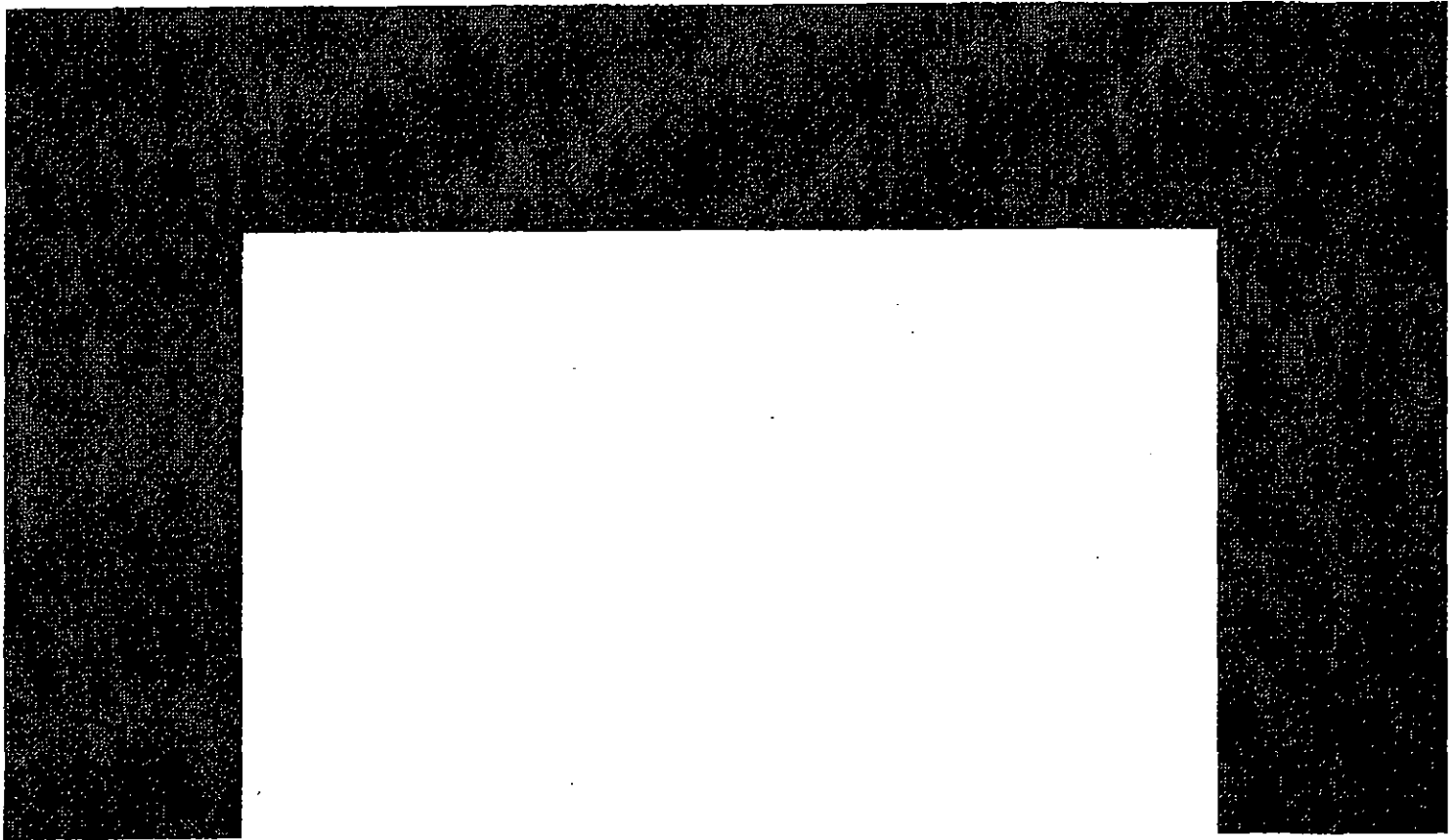
15 Jessie Walsh
 16 DISTRICT JUDGE

17 Submitted by:

18 ROGERS, MASTRANGELO, CARVALHO &
 19 MITCHELL

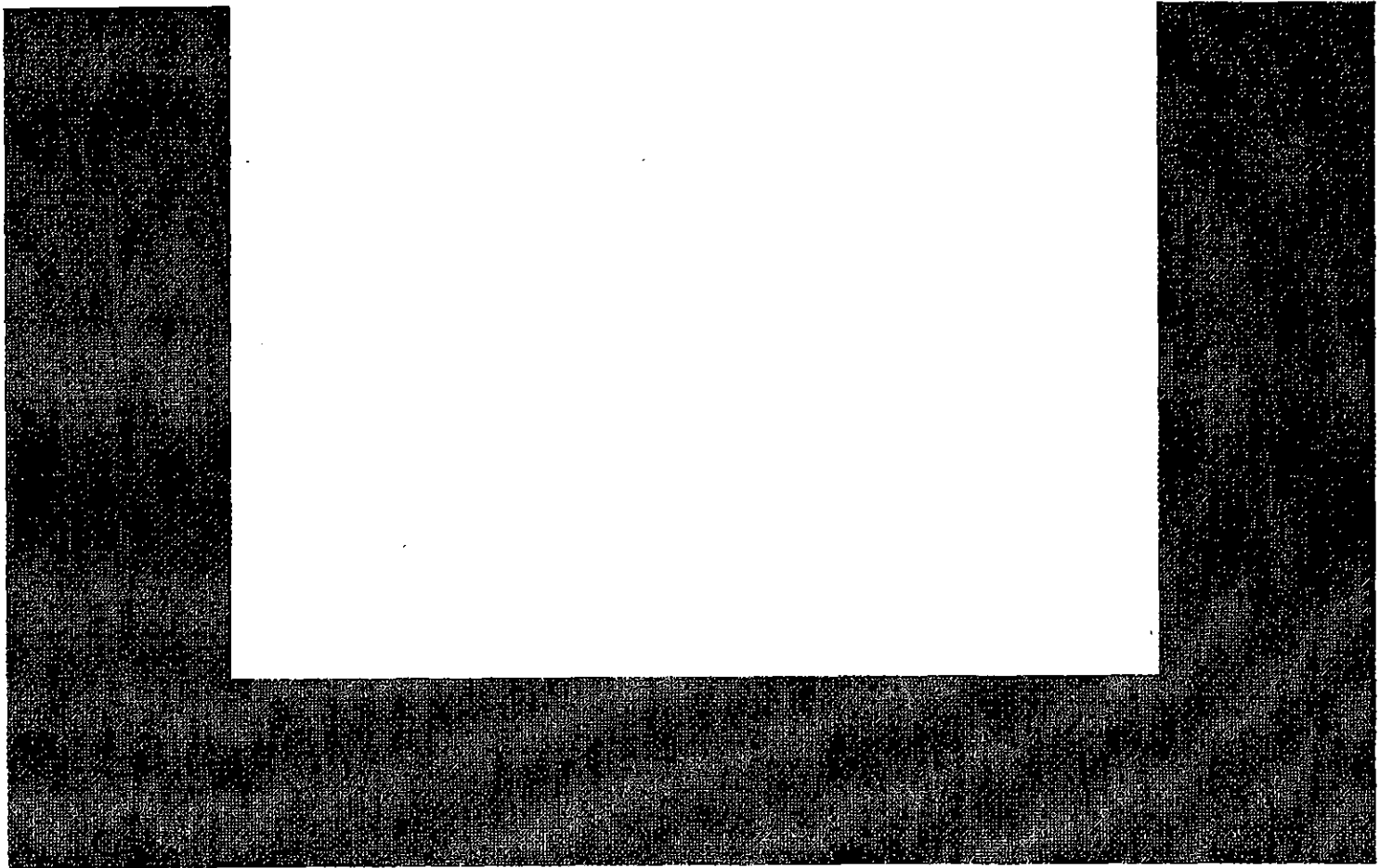
20 STEPHEN H. ROGERS, ESQ.
 21 Nevada Bar No. 5755
 22 300 South Fourth Street, Suite 710
 23 Las Vegas, Nevada 89101
 24 Attorneys for Defendant

25 M:\Rogers\RJ\adu. Simo\Pfond\lga\SlipCont\Tribl.wpd

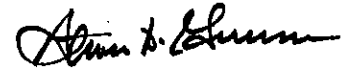


16

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CLERK OF THE COURT

1 ASSN

2 **ROBERT T. EGLET, ESQ.**

Nevada Bar No. 3402

3 **ROBERT M. ADAMS, ESQ.**

Nevada Bar No. 6551

4 **MAINOR EGLET COTTLE**

400 South Fourth Street, Suite 600

Las Vegas, Nevada 89101

6 Telephone: (702) 450-5400

Facsimile: (702) 450-5451

7 reglet@mainorlawyers.com

8 radams@mainorlawyers.com

9 **MATTHEW E. AARON, ESQ.**

Nevada Bar No. 4900

10 **JOHN E. PALERMO, ESQ.**

Nevada Bar No. 9887

11 **AARON & PATERNOSTER, LTD.**

2300 West Sahara Avenue, Ste.650

Las Vegas, Nevada 89102

13 Telephone: (702) 384-4111

Facsimile: (702) 384-8222

14 *Attorney for Plaintiff*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 * * * *

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

21 Plaintiffs,

22 v.

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

26 Defendants.

CASE NO.: A539455

DEPT. NO.: X

**NOTICE OF ASSOCIATION
OF COUNSEL**

690000
MAINOR EGLET COTTLE
ATTORNEYS


000069

1 **NOTICE OF ASSOCIATION OF COUNSEL**

2 NOTICE IS HEREBY GIVEN that MATTHEW E. AARON, ESQ. and JOHN E.
3 PALERMO, ESQ. of the law firm of AARON & PATERNOSTER, attorneys of record for the
4 above-named Plaintiffs, does hereby consent to associate with ROBERT T. EGLET, ESQ., and
5 ROBERT M. ADAMS, ESQ., of the law firm of MAINOR EGLET COTTLE as attorneys for
6 Plaintiffs, in the above-entitled matter.
7

8 DATED this 31st day of March, 2010.

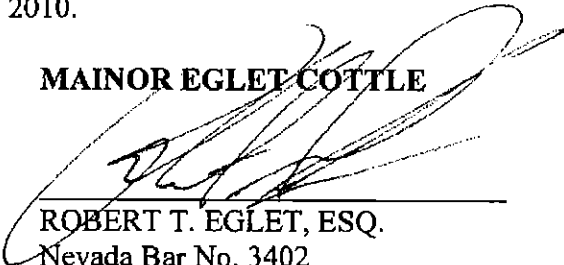
9 **AARON & PATERNOSTER**

10
11 
12 MATTHEW E. AARON, ESQ.
13 Nevada Bar No. 4900
14 JOHN E. PALERMO, ESQ.
15 Nevada Bar No. 9887
16 2300 West Sahara Avenue, Ste.650
17 Las Vegas, Nevada 89102

18 ROBERT T. EGLET, ESQ. and ROBERT M. ADAMS, ESQ., of the law firm of
19 MAINOR EGLET COTTLE, hereby agree to associate with MATTHEW E. AARON, ESQ. and
20 JOHN E. PALERMO, ESQ. as attorneys for the Plaintiffs, in the above-entitled matter.
21 ROBERT T. EGLET, ESQ. and ROBERT M. ADAMS, ESQ., hereby request that they be added
22 to counsel's service list and be copied on all correspondence, pleadings, discovery, etc.

23 DATED this 31st day of March, 2010.


24 **MAINOR EGLET COTTLE**

25
26 
27 ROBERT T. EGLET, ESQ.
28 Nevada Bar No. 3402
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Suite 600
Las Vegas, NV 89101

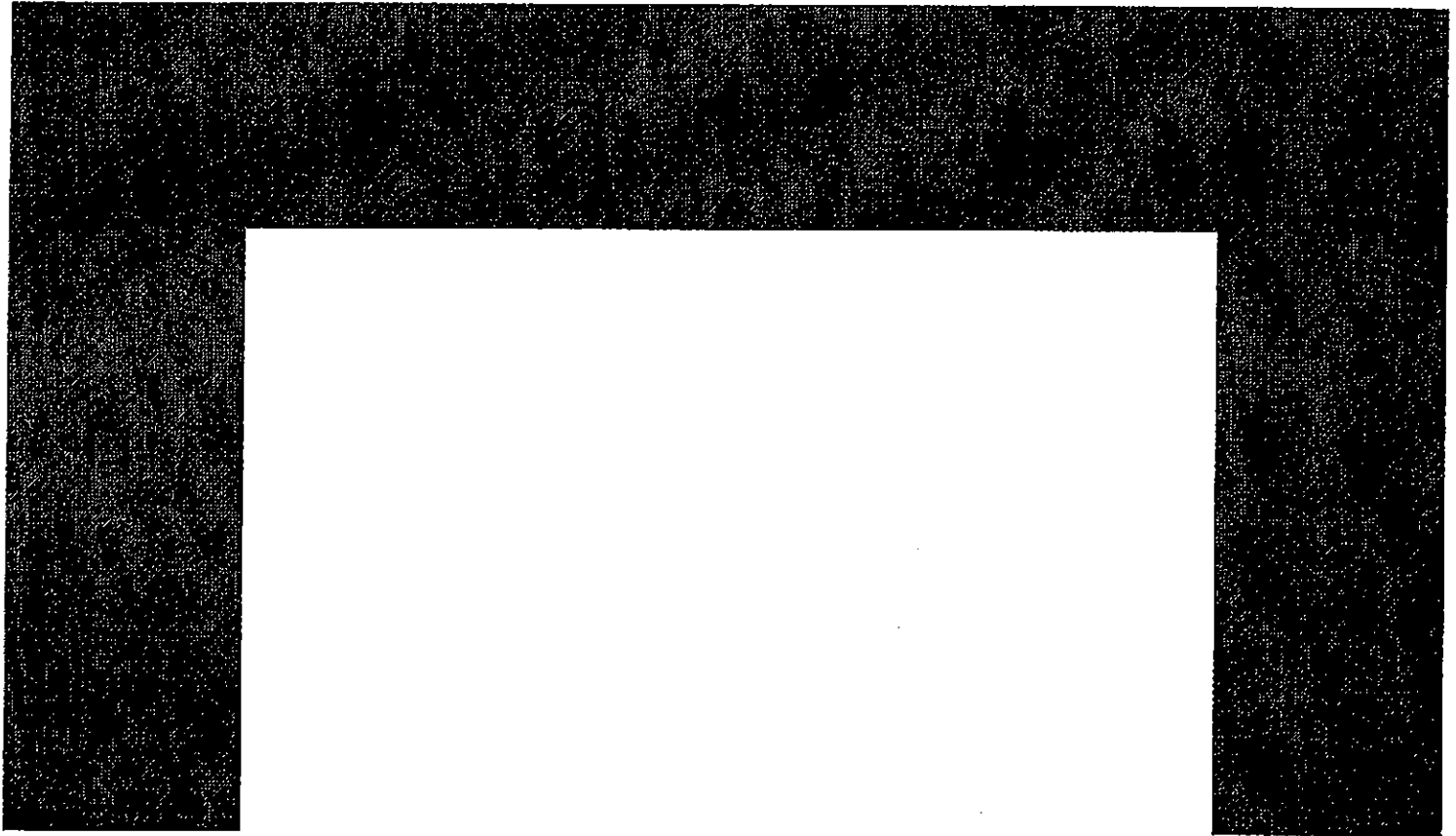
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MAINOR EGLET COTTLE

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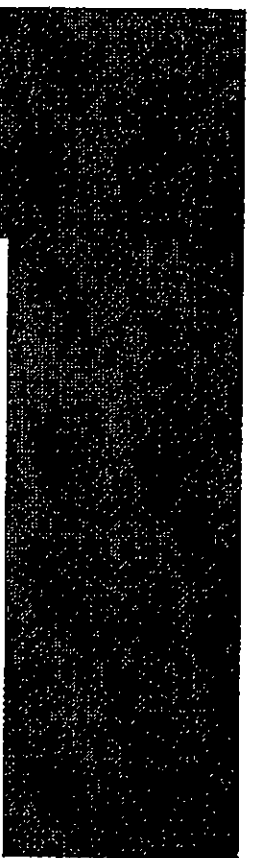
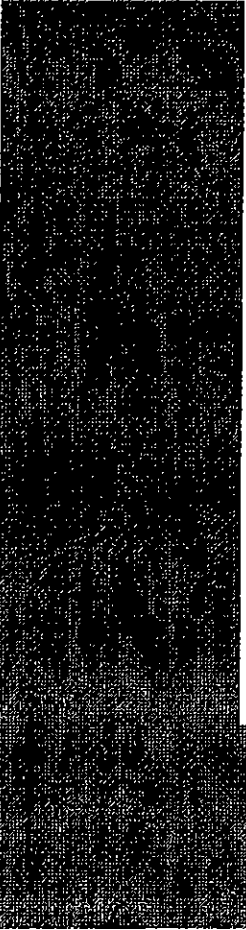
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Stephen H. Rogers, Esq.

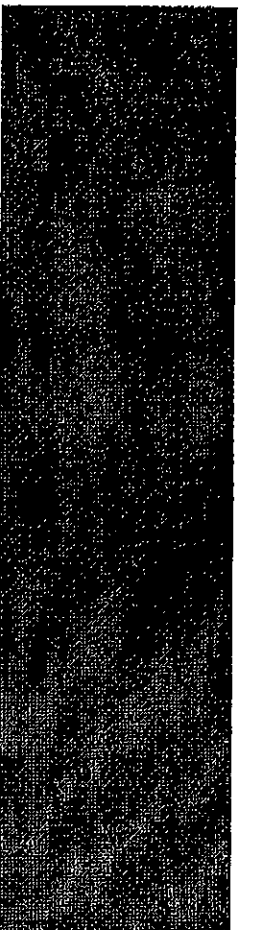
Stephen H. Rogers, Esq.
ROGERS, MASTRANGELO, CARVALHO & MITCHELL, LTD.
 300 S. Fourth Street, #710
 Las Vegas, NV 89101
 Attorneys for Defendants



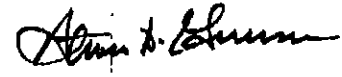
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CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

WILLIAM SIMAO, CHERYL
SIMAO, et. al.,

**CASE NO. A-539455
DEPT. X**

Plaintiff,

vs.

JENNY RISH, JAMES RISH,
et.al.,

Defendant.

ORDER SETTING CIVIL JURY TRIAL

IT IS HEREBY ORDERED THAT:

A. The above-entitled case is set for a Jury Trial to begin on **Monday, January 24, 2011**
at 1:00 P.M.

B. A Pre-Trial Conference with the designated attorney and/or parties in proper person
will be held on **Tuesday, January 4, 2011 at 9 A.M.** in CHAMBERS. Be prepared to discuss
in detail how much time you will require for opening and closing arguments as well as for your
case-in-chief.

C. A Calendar Call will be held on **Tuesday, January 18, 2011 at 9:00 A.M.** in
chambers. Parties must bring to Calendar Call the following:

CLERK OF THE COURT

DEC 15 2010

RECEIVED

JESSIE WALSH
DISTRICT JUDGE

DEPARTMENT TEN
LAS VEGAS, NEVADA 89155

1
2 (1) All exhibits marked by counsel for identification purposes;
3 (2) Typed exhibit lists with all stipulated exhibits marked;
4 (3) A complete set of Jury instructions in two (2) groups: (1) one set with authoritative
5 citations, and (2) one set without citations. Be prepared to argue any contested jury instructions
6 ten days before your firm trial date.

7 (4) Proposed voir dire questions;

8 (5) Original depositions;

9 (6) List of equipment needed for trial; and

10 (7) Courtesy copies of legal briefs on trial issues.

11
12 **This is a firm trial date. THE TRIAL DATE IS BEING MOVED UP SLIGHTLY**
13 **BECAUSE JUDGE WALSH HAS INHERITED A 50% CRIMINAL CASE LOAD AND**
14 **FEBRUARY (WHICH IS WHEN YOU WERE SET) IS A CRIMINAL TRIAL STACK. THIS**
15 **PUTS YOU IN JANUARY, WHICH IS A CIVIL TRIAL STACK.**

16
17 D. The Pre-Trial Memorandum must be filed no later than 5:00 P.M. on **January 16,**
18 **2011** with a courtesy copy delivered to Department X. All parties, (Attorneys and parties in
19 Proper Person) MUST comply with ALL REQUIREMENTS of E.D.C.R. 2.67).

20
21 E. All discovery deadlines, deadlines for filing dispositive motions and motions to amend
22 the pleadings or add parties are controlled by the previously issued Scheduling Order.

23 F. All other pre-trial motions, including motions in limine, must be in writing and set for
24 hearing no later than **January 20, 2011.**

25 G. Such pre-trial motions MUST be filed by 5:00 P.M. on **January 6, 2011.**
26 Oppositions thereto are to be filed by 5:00 P.M. on **January 13, 2011**; Replies thereto are to be
27 filed by 5:00 P.M. on **January 18, 2011.** PLEASE SUBMIT THE MOTION(S) ON AN ORDER
28

1 SHORTENING TIME.

2 Failure of the designated attorney or any party appearing in proper person to appear for
3 any court appearances or to comply with this Order shall result in any of the following: (1)
4 dismissal of the action; (2) default judgment; (3) monetary sanctions; (4) vacation of the trial date;
5 and/or other appropriate remedy or sanction.
6

7 Counsel are required to advise the Court immediately when the case settles or is otherwise
8 resolved prior to trial. A stipulation which terminates a case by dismissal shall also indicate
9 whether a Scheduling Order has been filed and, if a trial date has been set, the date of that trial.
10 A copy should be given to Chambers.
11

12 DATED this 13 day of December, 2010.

13
14 
15 JESSIE WALSH, DISTRICT COURT JUDGE
16

17 CERTIFICATE OF MAILING

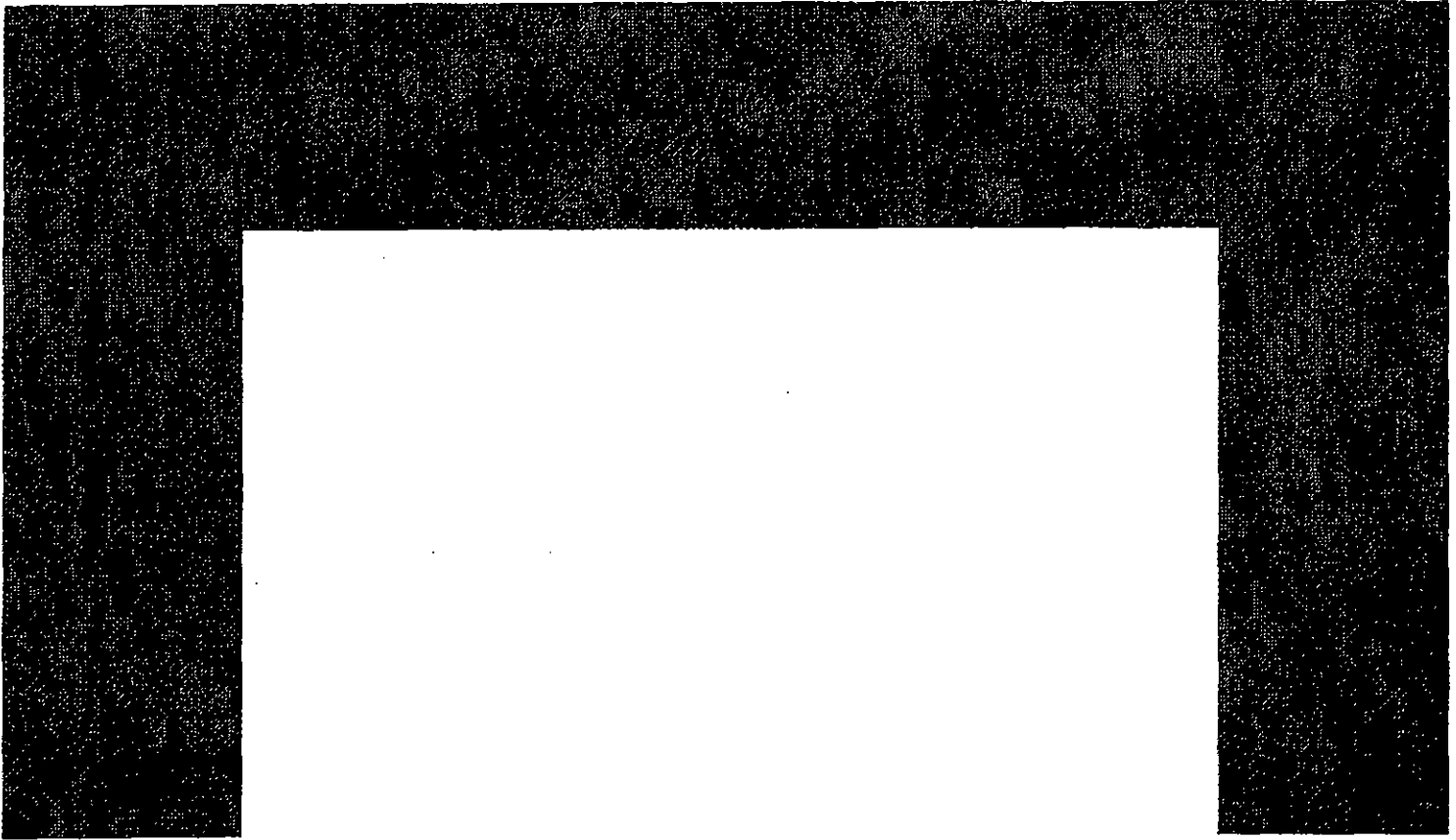
18 I hereby certify that on the day the within document was filed I placed a copy of the
19 foregoing Order in the attorney folder in the clerks office of the following attorneys:

20 Matthew L. Aaron, Esq., via facsimile to 384-8222	Plaintiff
21 Robert Eglet, Esq., via facsimile to 450-5451	Plaintiff
22 Bryan Lewis, Esq., via facsimile to 870-8978	Defendant
23 Stephen W. Rogers, via facsimile to 384-1460	Defendant

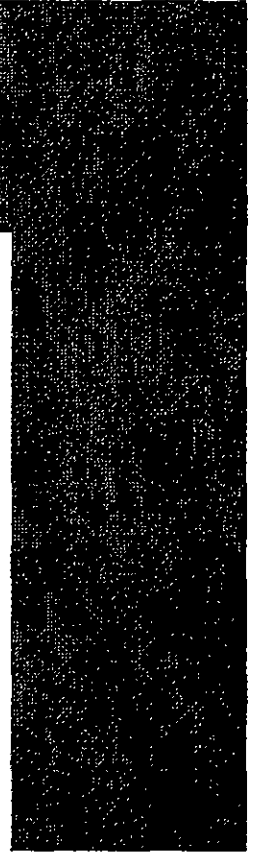
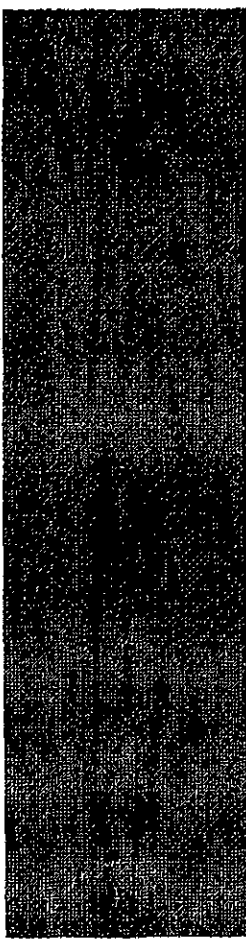
24
25
26 
27 Judicial Executive Assistant
28

JESSIE WALSH
DISTRICT JUDGE

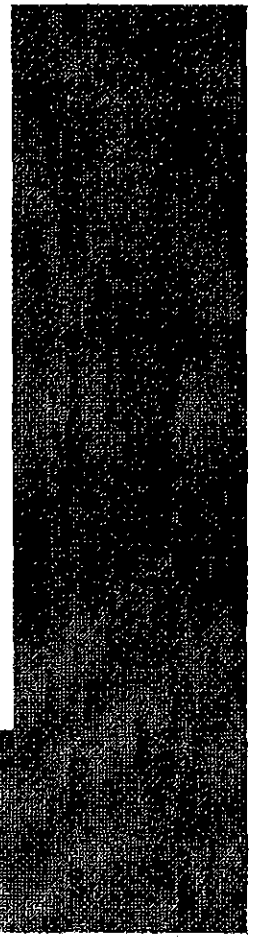
DEPARTMENT TEN
LAS VEGAS, NEVADA 89155



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ORIGINAL

Alvin D. Linn

CLERK OF THE COURT

1 STIP
STEPHEN H. ROGERS, ESQ.
2 Nevada Bar No. 5755
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
3 300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
4 Phone (702) 383-3400
Fax (702) 384-1460
5 Attorneys for Defendant Jenny Rish

6
7
8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

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

CASE NO. A539455

DEPT. NO X

12 Plaintiff,

13 v.

14 JENNY RISH; JAMES RISH; LINDA RISH;
DOES I - V; and ROE CORPORATIONS I - V,
15 inclusive,

16 Defendants.

17
18
19 STIPULATION AND ORDER TO CONTINUE TRIAL DATE

20 IT IS HEREBY STIPULATED by and between the parties, through their respective counsel,
21 that the trial date for the above-captioned matter which is currently set for January 24, 2011, be
22 continued and placed for a trial setting beginning 3/14/11 at 1:00pm with a

23 ///

24 ///

25 ///

26 ///

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28 ///

3 / 1 / 11

calendar call on 3/17/11, at 9:00 a.m. *In chambers* and the Pre-Trial Memorandums due on

3/3/11.

DATED this 10th day of December, 2010.

ROGERS, MASTRANGELO, CARVALHO
& MITCHELL

STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendant

DATED this 16 day of December, 2010.

MAINOR EGLET

David T. Wall
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Attorney for Plaintiffs

ORDER

IT IS SO ORDERED.

DATED this 20 day of Dec, 2010.

Jessie Walsh
DISTRICT JUDGE

Submitted by:

ROGERS, MASTRANGELO, CARVALHO &
MITCHELL

STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendant

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