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A Division of Corporate Financial Group
Economics / Finance / Litigation Support

March 29, 2011

Stan V. Smith, Ph.D.
President

Mr. Robert M. Adams
Mainor Eglet
City Center Place, 6th Floor
400 South 4th Street
Las Vegas, NV 89101

Re: Simao - ADDENDUM

Dear Mr. Adams:

This is an addendum to my calculation of the value of certain losses subsequent to the injury of William Simao. These losses are: (1) the loss of housekeeping and household management services; (2) the reduction in value of life ("RVL"), also known as loss of enjoyment of life; (3) the loss of the society or relationship sustained by Mr. Simao's wife; and (4) the cost of future life care.

William Simao is a Caucasian, married male, who was born on May 8, 1963, and injured on April 15, 2005 at the age of 41.9 years. Mr. Simao will be 47.9 years old at the estimated trial or settlement date of April 1, 2011, with a remaining life expectancy estimated at 30.9 years. This data is from the National Center for Health Statistics, United States Life Tables, 2006, Vol. 58, No. 21, National Vital Statistics Reports, 2010.

In order to perform this evaluation, I have reviewed the following materials: (1) the Nevada Highway Patrol Traffic Accident Report; (2) Cheryl Ann Simao's Responses to Defendant's First Set of Requests for Production of Documents; (3) Cheryl Ann Simao's Answers to Defendant's Interrogatories; (4) William Simao's Answers to Defendant's Interrogatories; (5) William Simao's Responses to Defendant's First Set of Requests for Production of Documents; (6) Jenny Rish's Responses to Plaintiffs' First Set of Interrogatories; (7) Jenny Rish's Responses to Plaintiffs' First Set of Requests for Admissions; (8) Jenny Rish's Responses to Plaintiffs' First Set of Requests for Production of Documents; (9) Jenny Rish's Supplemental Responses to Plaintiffs' First Set of Requests for Production of Documents; (10) medical records; (11) the deposition of William Simao on October 23, 2008; (12) the deposition of Cheryl Ann Simao on October 22, 2008; (13) interviews with William Simao on April 15, 2009, April 16, 2009, and December 13, 2010; (14) an interview with Cheryl Simao on April 15, 2009; (15) the case information form; (16) William and Cheryl Simao's personal income tax returns from 2003 through 2005 and 2007 through 2009; (17) Ameri-Clean Carpet-N-Upholstery-N-More income tax returns from 2007 through 2009; and (18) Dr. Patrick McNulty's trial testimony dated March 23, 2011.

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My methodology for estimating the losses, which is explained below, is generally based on past wage growth, interest rates, and consumer prices, as well as studies regarding the value of life. The effective net discount rate using statistically average wage growth rates and statistically average discount rates is 0.40 percent.

My estimate of the real wage growth rate is 1.05 percent per year. This growth rate is based on Business Sector, Hourly Compensation growth data from the Major Sector Productivity and Costs Index found at the U.S. Bureau of Labor Statistics website at www.bls.gov/data/home.htm, Series ID: PRS84006103, for the real increase in wages primarily for the last 20 years.

My estimate of the real discount rate is 1.45 percent per year. This discount rate is based on the rate of return on 91-day U.S. Treasury Bills published in the Economic Report of the President for the real return on T-Bills primarily for the last 20 years. This rate is also consistent with historical rates published by Ibbotson Associates, Chicago, in its continuously updated series Stocks, Bonds, Bills and Inflation published by Morningstar, Inc. This series, which acknowledges me as the Originator while a Principal and Managing Director at Ibbotson Associates, is generally regarded by academics in the field of finance as the most widely accepted source of statistics on the rates of return on investment securities. It is relied upon almost exclusively by academic and business economists, insurance companies, banks, institutional investors, CPA's, actuaries, benefit analysts, and economists in courts of law.

Estimates of real growth and discount rates are net of inflation based on the Consumer Price Index (CPI-U), published in monthly issues of the U.S. Bureau of Labor Statistics, CPI Detailed Report (Washington, D.C.: U.S. Government Printing Office) and available at the U.S. Bureau of Labor Statistics website at www.bls.gov/data/home.htm, Series ID: CUUR0000SA0. The rate of inflation for the past 20 years has been 2.73 percent.

I. LOSS OF HOUSEHOLD/FAMILY HOUSEKEEPING AND HOUSEHOLD MANAGEMENT SERVICES

Tables 4A through 6A show the pecuniary loss of tangible housekeeping chores and household management services. The number of hours of housekeeping and household management services, assuming Mrs. Simao is employed, ranges from 1.0 to 2.0 hours per day and varies over time as family members age. Mr. Simao has difficulty in performing housekeeping and household management services. I illustrate the loss at 45 percent. This data is based on a study by William H. Gauger and Katherine E. Walker, The Dollar Value of Household Work, Bulletin 60, New York State College of Human Ecology, Cornell University, Ithaca, NY, 1980.

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The hourly value of the housekeeping and household management services is based on the mean hourly earnings of carpenters; maintenance and repair workers; painters; child care workers; waiters and waitresses; private household cooks; laundry and drycleaning workers; maids and housekeeping cleaners; bookkeeping, accounting and auditing clerks; and taxi drivers and chauffeurs, which is \$13.65 per hour in year 2009 dollars. This wage data is based on information from the U.S. Bureau of Labor Statistics, Occupational Employment Statistics, May 2009 National Occupational Employment and Wage Statistics found at www.bls.gov/oes. I value such services at their replacement cost which includes a conservative estimate of 50 percent hourly overhead reasonably charged by agencies who supply such services on a part-time basis, and who are responsible for advertising, vetting, hiring, training, insuring and bonding the part-time employee, and who are also responsible for payroll-related costs such as the employer's share of social security contributions, etc. The hourly value of these services grows at the same rate as wages and is discounted at the same rates as wages.

Based on these assumptions, and William Simao's life expectancy of 78.8 years, my opinion of the loss of the value of housekeeping and household management services is \$167,196 ▶ Table 6A.

II. REDUCTION IN VALUE OF LIFE

Economists have long agreed that life is valued at more than the lost earnings capacity. My estimate of the value of life is based on many economic studies on what we, as a contemporary society, actually pay to preserve the ability to lead a normal life. The studies examine incremental pay for risky occupations as well as a multitude of data regarding expenditure for life savings by individuals, industry, and state and federal agencies.

My estimate of the value of life is consistent with estimates published in other studies that examine and review the broad spectrum of economic literature on the value of life. Among these is "The Plausible Range for the Value of Life," Journal of Forensic Economics, Vol. 3, No. 3, Fall 1990, pp. 17-39, by T. R. Miller. This study reviews 67 different estimates of the value of life published by economists in peer-reviewed academic journals. The Miller results, in most instances, show the value of life to range from approximately \$1.6 million to \$2.9 million dollars in year 1988 after-tax dollars, with a mean of approximately \$2.2 million dollars. In "The Value of Life: Estimates with Risks by Occupation and Industry," Economic Inquiry, Vol. 42, No. 1, May 2003, pp. 29-48, Professor W. K. Viscusi estimates the value of life to be approximately \$4.7 million dollars in year 2000 dollars. An early seminal paper on the value of life was written by Richard Thaler and Sherwin

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Rosen, "The Value of Saving a Life: Evidence from the Labor Market." in N.E. Terlickyj (ed.), Household Production and Consumption, New York: Columbia University Press, 1975, pp. 265-300. The Meta-Analyses Appendix to this report reviews additional literature suggesting a value of life of approximately \$5.4 million in year 2008 dollars.

Because it is generally accepted by economists, the methodology used to estimate the value of life has been found to meet Daubert standards, as well as Frye standards and the Rules of Evidence in various states, by Federal Circuit and Appellate courts, as well as state trial, supreme and appellate courts nationwide. Testimony based on this peer-reviewed methodology has been admitted in over half the states in over 175 trials nationwide. Proof of general acceptance and other standards is found in a discussion of the extensive references to the scientific economic peer-reviewed literature on the value of life listed in the Value of Life Appendix to this report.

The underlying, academic, peer-reviewed studies fall into two general groups: (1) consumer behavior and purchases of safety devices; (2) wage risk premiums to workers; in addition, there is a third group of studies consisting of cost-benefit analyses of regulations. For example, one consumer safety study analyzes the costs of smoke detectors and the lifesaving reduction associated with them. One wage premium study examines the differential rates of pay for dangerous occupations with a risk of death on the job. Just as workers receive shift premiums for undesirable work hours, workers also receive a higher rate of pay to accept a increased risk of death on the job. A study of government regulation examines the lifesaving resulting from the installation of smoke stack scrubbers at high-sulphur, coal-burning power plants. As a hypothetical example of the methodology, assume that a safety device such as a carbon monoxide detector costs \$46 and results in lowering a person's risk of premature death by one chance in 100,000. The cost per life saved is obtained by dividing \$46 by the one in 100,000 probability, yielding \$4,600,000.

Tables 7A through 12A are based on several factors:

- (1) An assumed impairment rating by the trier-of-fact of 15 percent to 30 percent reduction in the ability to lead a normal life. The diminished capacity to lead a normal life reflects the impact on career, social and leisure activities, the activities of daily living, and the internal emotional state, as discussed in Berla, Edward P., Michael L. Brookshire and Stan V. Smith, "Hedonic Damages and Personal Injury: A Conceptual Approach," Journal of Forensic Economics, Vol 3, No. 1, Winter 1990, pp. 1-8;
- (2) The central tendency of the range of the economic studies cited above which I estimate to be

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- approximately \$4.2 million in year 2010 dollars; and
 (3) A life expectancy of 78.8 years.

Tables 7A through 9A are based on the lower estimated impairment rating; Tables 10A through 12A are based on the upper estimated impairment rating. Based on these values and life expectancy, my opinion of the reduction in the value of life is estimated at \$603,454 ▶ Table 9A to \$1,205,076 ▶ Table 12A, averaging \$1,206,884.

III. LOSS OF SOCIETY OR RELATIONSHIP

Tables 13A through 15A show the loss of society or relationship sustained by Mr. Simao's wife. The value of the loss of society or relationship by family members with the injured can be based on a measure of the value of preserving the ability to live a normal life. This is discussed in the article, "The Relevance of Willingness-To-Pay Estimates of the Value of a Statistical Life, in Determining Wrongful Death Awards," Journal of Forensic Economics, Vol. 3, No. 3, Fall 1990, pp. 75-89, by L. G. Chestnut and D. M. Violette.

Based on a benchmark loss of 15 percent for William Simao's wife, my opinion of the loss of relationship as a result of the injury of William Simao is \$681,286 ▶ Table 15A for Cheryl Simao.

IV. COST OF FUTURE LIFE CARE

Table 16A shows the cost of future life care. The present value of life care is based on the trial testimony of Dr. Patrick McNulty dated March 23, 2011. In his testimony, Dr. McNulty indicated that William Simao would require the following: (1) a trial stimulator costing \$84,000, once; (2) a permanent placement stimulator costing \$212,000, once; (3) stimulator replacement costing \$141,000, every three to seven years; (4) leads revision costing \$103,000, every two to three years; (5) two follow up visits within three months of his stimulator placement surgery, costing \$1,000 per visit; and (6) two follow up visits annually, costing \$1,000 per visit.

I assume real growth rates of 2.20 percent for medical services, 0.75 percent for medical commodities, 1.05 percent for non-medical services, and zero percent for non-medical commodities. These growth rates are based on medical care growth data from 1989 through 2009 found at the U.S. Bureau of Labor Statistics website at www.bls.gov/data/home.htm, Series ID: CUUR0000SAM1 and CUUR0000SAM2.

Based on this information, my opinion of the average cost of future life care is \$2,608,897 ▶ Table 16A, and can vary up or down by as much as 34.64 percent or \$903,718.

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A trier-of-fact may weigh other factors to determine if these estimated losses for William Simao should be adjusted because of special qualities or circumstances that economists do not as yet have a methodology for analysis. These estimates are provided as an aid, tool and guide for the trier-of-fact.

All opinions expressed in this report are clearly labeled as such. They are rendered in accordance with generally accepted standards within the field of economics and are expressed to a reasonable degree of economic certainty. Estimates, assumptions, illustrations and the use of benchmarks, which are not opinions, but which can be viewed as hypothetical in nature, are also clearly disclosed and identified herein.

In my opinion, it is reasonable for experts in the field of economics and finance to rely on the materials and information I reviewed in this case for the formulation of my substantive opinions herein.

If additional information is provided to me, which could alter my opinions, I may incorporate any such information into an update, revision, addendum, or supplement of the opinions expressed in this report.

If you have any questions, please do not hesitate to call me.

Sincerely,



Stan V. Smith, Ph.D.
President

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APPENDIX: VALUE OF LIFE

The economic methodology for the valuation of life has been found to meet the Daubert and Frye standards by many courts, along with the Rules of Evidence in many states nationwide. My testimony has been accepted in approximately 200 state and federal cases nationwide in approximately two-thirds of the states and two-thirds of the federal jurisdictions. Testimony has been accepted by Federal circuit and Appellate courts as well as in state trial, supreme, and appellate Courts. The Daubert standard sets forth four criteria:

1. Testing of the theory and science
2. Peer Review
3. Known or potential rate of error
4. Generally accepted.

Testing of the theory and science has been accomplished over the past four decades, since the 1960s. Dozens of economists of high renown have published over a hundred articles in high quality, peer-reviewed economic journals measuring the value of life. The value of life theories are perhaps among the most well-tested in the field of economics, as evidenced by the enormous body of economic scientific literature that has been published in the field and is discussed below.

Peer Review of the concepts and methodology have been extraordinarily extensive. One excellent review of this extensive, peer-reviewed literature can be found in "The Value of Risks to Life and Health," W. K. Viscusi, Journal of Economic Literature, Vol. 31, December 1993, pp. 1912-1946. A second is "The Value of a Statistical Life: A Critical Review of Market Estimates throughout the World." W. K. Viscusi and J. E. Aldy, Journal of Risk and Uncertainty, Vol. 27, No. 1, November 2002, pp. 5-76. Additional theoretical and empirical work by Viscusi, a leading researcher in the field, can be found in: "The Value of Life", W. K. Viscusi, John M. Olin Center for Law, Economics, and Business, Harvard Law School, Discussion Paper No. 517, June 2005. An additional peer-reviewed article discusses the application to forensic economics: "The Plausible Range for the Value of Life," T. R. Miller, Journal of Forensic Economics, Vol. 3, No. 3, Fall 1990, pp. 17-39, which discusses the many dozens of articles published in other peer-reviewed economic journals on this topic. This concept is discussed in detail in "Willingness to Pay Comes of Age: Will the System Survive?" T. R. Miller, Northwestern University Law Review, Summer 1989, pp. 876-907, and "Hedonic Damages in Personal Injury and Wrongful Death

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Litigation," by S. V. Smith in Litigation Economics, pp. 39-59. Kenneth Arrow, a Nobel Laureate in economics, discusses this method for valuing life in "Invaluable Goods," Journal of Economic Literature, Vol. 35, No. 2, 1997, pp. 759. See the Meta-Analyses Appendix for an additional review of the literature.

The known or potential rate of error is well researched. All of these articles discuss the known or potential rate of error, well within the acceptable standard in the field of economics, generally using a 95% confidence rate for the statistical testing and acceptance of results. There are few areas in the field of economics where the known or potential rate of error has been as well-accepted and subject to more extensive investigation.

General Acceptance of the concepts and methodology on the value of life in the field of economics is extensive. This methodology is and has been generally accepted in the field of economics for many years. Indeed, according to the prestigious and highly-regarded research institute, The Rand Corporation, by 1988, the peer-reviewed scientific methods for estimating the value of life were well-accepted: "Most economists would agree that the willingness-to-pay methodology is the most conceptually appropriate criterion for establishing the value of life," Computing Economic loss in Cases of Wrongful Death, King and Smith, Rand Institute for Civil Justice, R-3549-ICJ, 1988.

While first discussed in cutting edge, peer-reviewed economic journals, additional proof of general acceptance is now indicated by the fact that this methodology is now taught in standard economics courses at the undergraduate and graduate level throughout hundreds of colleges and universities nationwide as well as the fact that it is taught and discussed in widely-accepted textbooks in the field of law and economics: Economics, Sixth Edition, David C. Colander, McGraw-Hill Irwin, Boston, 2006, pp. 463-465; this introductory economics textbook is the third most widely used textbook in college courses nationwide. Hamermesh and Rees's The Economics of Work and Pay, Harper-Collins, 1993, Chapter 13, a standard advanced textbook in labor economics, also discusses the methodology for valuing life. Other textbooks discuss this topic as well. Richard Posner, a Justice and former Chief Justice of the U.S. Court of Appeals for the highly regarded 7th Circuit and Senior Lecturer at the University of Chicago Law School, one of most prolific legal writers in America, details the Value of Life approach in his widely used textbooks: Economic Analysis of Law, 1986, Little Brown & Co., pp. 182-185 and Tort Law, 1982, Little Brown & Co., pp. 120-126.

As further evidence of general acceptance in the field, some surveys published in the field of forensic economics show that hundreds of economics nationwide are now familiar with this

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methodology and are available to prepare (and critique) forensic economic value of life estimates. Indeed, some economists who indicate they will prepare such analysis for plaintiffs also are willing to critique such analysis for defendants, as I have often done. That an economist is willing to critique a report does not indicate that he or she is opposed to the concept or the methodology, but merely available to assure that the plaintiff economist has employed proper techniques. The fact that there are economists who indicate they do not prepare estimates of value of life is again no indication that they oppose the methodology: many claim they are not familiar with the literature and untrained in this area. While some CPAs and others without a degree in economics have opposed these methods, such professionals do not have the requisite academic training and are unqualified to make such judgements. However, as in any field of economics, this area is not without any dissent. General acceptance does not mean universal acceptance.

Additional evidence of general acceptance in the field is found in the teaching of the concepts regarding the value of life. Forensic Economics is now taught as a special field in a number of institutions nationwide. I taught what is believed to be the first course ever presented in the field of Forensic Economics at DePaul University in Spring, 1990. My own book, Economic/Hedonic Damages, Anderson, 1990, and supplemental updates thereto, co-authored with Dr. Michael Brookshire, a Professor of Economics in West Virginia, has been used as a textbook in at least 5 colleges and universities nationwide in such courses in economics, and has a thorough discussion of the methodology. Toppino et. al., in "Forensic Economics in the Classroom," published in The Earnings Analyst, Journal of the American Rehabilitation Economics Association, Vol. 4, 2001, pp. 53-86, indicate that hedonic damages is one of 15 major topic areas taught in such courses.

Lastly, general acceptance is found by examining publications in the primary journal in the field of Forensic Economics, which is the peer-reviewed Journal of Forensic Economics, where there have been published many articles on the value of life. Some are cited above. Others include: "The Econometric Basis for Estimates of the Value of Life," W. K. Viscusi, Vol 3, No. 3, Fall 1990, pp. 61-70; "Hedonic Damages in the Courtroom Setting." S. V. Smith, Vol. 3, No. 3, Fall 1990, pp. 41-49; "Issues Affecting the Calculated Value of Life," E. P. Berla, M. L. Brookshire and S. V. Smith, Vol 3, No. 1, 1990, pp. 1-8; "Hedonic Damages and Personal Injury: A Conceptual Approach," G. R. Albrecht, Vol. 5., No. 2, Spring/Summer 1992, pp. 97-104; "The Application of the Hedonic Damages Concept to Wrongful and Personal Injury Litigation." G. R. Albrecht, Vol. 7, No. 2, Spring/Summer 1994, pp. 143-150; and also "A Review of the Monte Carlo Evidence Concerning Hedonic Value of Life Estimates," R. F. Gilbert, Vol. 8, No. 2, Spring/Summer 1995, pp. 125-130.

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It is important to note that this methodology is endorsed and employed by the U. S. Government as the standard and recommended approach for use by all U. S. Agencies in valuing life for policy purposes, as mandated in current and past Presidential Executive Orders in effect since 1972, and as discussed in "Report to Congress on the Costs and Benefits of Federal Regulations," Office of Management and Budget, 1998, and "Economic Analysis of Federal Regulations Under Executive Order 12866," Executive Office of the President, Office of Management and Budget, pp. 1-37, and "Report to the President on Executive Order No. 12866," Regulatory Planning and Review, May 1, 1994, Office of Information and Regulatory Affairs, Office of Management and Budget. Prior presidents signed similar orders as discussed in "Federal Agency Valuations of Human life," Administrative Conference of the United States, Report for Recommendation 88-7, December 1988, pp. 368-408. 926

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APPENDIX: META-ANALYSES AND VALUE OF LIFE RESULTS SINCE 2000

Below I list the principal systematic reviews (meta-analyses), since the year 2000, of the value of life literature, and the values of a statistical life that they recommend. In statistics, a meta-analysis combines the results of several studies that address a set of related research hypotheses. Meta-analysis increase the statistical power of studies by analyzing a group of studies and provide a more powerful and accurate data analysis than would result from analyzing each study alone. Based on those reviews, the Summary Table suggests a best estimate. The following table summarizes the studies and their findings.

These statistically based studies place the value between \$4.4 and \$7.5 million, with \$5.9 million representing a conservative yet credible estimate of the average (and range midpoint) of the values of a statistical life published in the studies in year 2005 dollars. Net of human capital, a credible net value of life based on all these literature reviews to be \$4.8 million in year 2005 dollars, or \$5.4 million in year 2008 dollars.

The actual value that I use, \$4.1 million is approximately 24 percent lower than a conservative average estimate based on the credible meta-analyses. This value was originally based on a review conducted in the late 1980s, averaging the results published by that time. I have increased that late 1980s value only by inflation over time, despite the fact a review of literature over the years since that time has put obvious upward pressure on the figure that I use.

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Summary Table: Mean and range of value of statistical life estimates (in 2005 dollars) from the best meta-analyses and systematic reviews and characteristics of those reviews.

Study	Formal Meta-Analysis?	Number of Values	Best Estimate (2005 Dollars)	Range	Context
Miller 2000	Yes	68 estimates	\$5.1M	\$4.5-\$6.2M	US estimate from all
Mrozek & Taylor 2002	Yes	203 estimates, from 33 studies	\$4.4M	+ or - 35%	Labor market
Viscusi & Aldy 2003	Yes	49 estimates (reviewed more than 60 studies, but some lacked desired variables)	\$6.5M	\$5.1-\$9.6M	Labor market, US estimate from all
Kochi et al. 2006	Yes	234 estimates from 40 studies	\$6.0M	+ or - 44%	Labor market, survey
Bellavance 2006	Yes	37 estimates from 34 studies (rejected 15 others that lacked desired data or were flawed)	\$7.0M	+ or - 19%	Labor market

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Miller (2000) started from the Miller 1989 JFE estimates and used statistical methods to adjust for differences between studies. It also added newer studies, primarily ones outside the United States. The authors specified the most appropriate study approach a priori, which allowed calculation of a best estimate from the statistical regression.

Mrozek and Taylor (2002) searched intensively for studies of the value of life implied by wages paid for risky jobs. They coded all values from each study rather than a most appropriate estimate. A statistical analysis identified what factors accounted for the differences in values between studies. The authors specified the most appropriate study approach a priori, which allowed calculation of a best estimate from the statistical regression.

Viscusi and Aldy (2003) focused on values from labor market studies that they considered of high quality and that provided data on risk levels and other important explanatory variables. They used statistical methods to account for variations between studies and derive a best estimate.

Kochi et al. (2006) searched intensively for studies of the value of life implied by wages and coded all values from each study rather than a most appropriate estimate. They did not filter study quality carefully. The best estimate was derived by statistical methods based on the distribution of the values within and across studies.

Bellavance et al. (2006) focused on values from labor market studies that they considered of high quality and that provided data on risk levels and other important explanatory variables. They used statistical methods to account for variations between studies and derive a best estimate. 926

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SUMMARY OF LOSSES FOR WILLIAM SIMAO

TABLE	DESCRIPTION	ESTIMATE
*****	*****	*****
	<u>HOUSEHOLD/FAMILY REPLACEMENT SERVICES</u>	
6A	LOSS OF HOUSEHOLD/FAMILY HOUSEKEEPING AND HOME MANAGEMENT SERVICES	\$ 167,196

	<u>LOSS OF ENJOYMENT OF LIFE</u>	
9A	REDUCTION IN VALUE OF LIFE	
	Lower impairment rating	\$ 603,454
12A	Upper impairment rating	\$1,206,884

	<u>LOSS OF SOCIETY AND RELATIONSHIP</u>	
15A	LOSS OF RELATIONSHIP Cheryl Simao	\$ 681,286

	<u>PRESENT VALUE OF FUTURE LIFE CARE</u>	
16A	COST OF FUTURE LIFE CARE See Page 4 of Life Care Plan	\$2,608,897

The information on this Summary of Losses is intended to summarize losses under certain given assumptions. Please refer to the report and the tables for all the opinions.

Table 4A

LOSS OF PAST HOUSEHOLD SERVICES
2005 - 2011

YEAR	AGE	HOUSEHOLD SERVICES	CUMULATE
****	***	*****	*****
2005	42	\$3,190	\$3,190
2006	43	4,675	7,865
2007	44	4,849	12,714
2008	45	4,997	17,711
2009	46	6,724	24,435
2010	47	6,996	31,431
2011	48	1,795	\$33,226
SIMAO		\$33,226	

Table 5A

PRESENT VALUE OF FUTURE HOUSEHOLD SERVICES
2011 - 2042

YEAR	AGE	HOUSEHOLD SERVICES	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
****	***	*****	*****	*****	*****
2011	48	\$5,484	0.98919	\$5,425	\$5,425
2012	49	3,678	0.97506	3,586	9,011
2013	50	3,717	0.96112	3,572	12,583
2014	51	3,756	0.94738	3,558	16,141
2015	52	3,795	0.93384	3,544	19,685
2016	53	3,835	0.92049	3,530	23,215
2017	54	3,875	0.90734	3,516	26,731
2018	55	3,916	0.89437	3,502	30,233
2019	56	3,957	0.88159	3,488	33,721
2020	57	3,999	0.86899	3,475	37,196
2021	58	4,041	0.85657	3,461	40,657
2022	59	4,083	0.84432	3,447	44,104
2023	60	4,126	0.83226	3,434	47,538
2024	61	4,169	0.82036	3,420	50,958
2025	62	4,213	0.80863	3,407	54,365
2026	63	4,257	0.79708	3,393	57,758
2027	64	4,302	0.78568	3,380	61,138
2028	65	4,347	0.77446	3,367	64,505
2029	66	4,393	0.76339	3,354	67,859
2030	67	4,439	0.75248	3,340	71,199
2031	68	4,486	0.74172	3,327	74,526
2032	69	4,533	0.73112	3,314	77,840
2033	70	4,581	0.72067	3,301	81,141
2034	71	9,256	0.71037	6,575	87,716
2035	72	9,353	0.70022	6,549	94,265
2036	73	9,451	0.69021	6,523	100,788
2037	74	9,550	0.68034	6,497	107,285
2038	75	9,650	0.67062	6,471	113,756
2039	76	9,751	0.66103	6,446	120,202
2040	77	9,853	0.65159	6,420	126,622
2041	78	9,956	0.64227	6,394	133,016
2042	79	1,488	0.64090	954	\$133,970

WILLIAM SIMAO

\$133,970

Table 6A

PRESENT VALUE OF NET HOUSEHOLD SERVICES LOSS
2005 - 2042

YEAR	AGE	HOUSEHOLD SERVICES	CUMULATE
****	***	*****	*****
2005	42	\$3,190	\$3,190
2006	43	4,675	7,865
2007	44	4,849	12,714
2008	45	4,997	17,711
2009	46	6,724	24,435
2010	47	6,996	31,431
2011	48	7,220	38,651
2012	49	3,586	42,237
2013	50	3,572	45,809
2014	51	3,558	49,367
2015	52	3,544	52,911
2016	53	3,530	56,441
2017	54	3,516	59,957
2018	55	3,502	63,459
2019	56	3,488	66,947
2020	57	3,475	70,422
2021	58	3,461	73,883
2022	59	3,447	77,330
2023	60	3,434	80,764
2024	61	3,420	84,184
2025	62	3,407	87,591
2026	63	3,393	90,984
2027	64	3,380	94,364
2028	65	3,367	97,731
2029	66	3,354	101,085
2030	67	3,340	104,425
2031	68	3,327	107,752
2032	69	3,314	111,066
2033	70	3,301	114,367
2034	71	6,575	120,942
2035	72	6,549	127,491
2036	73	6,523	134,014
2037	74	6,497	140,511
2038	75	6,471	146,982
2039	76	6,446	153,428
2040	77	6,420	159,848
2041	78	6,394	166,242
2042	79	954	\$167,196
SIMAO		\$167,196	

Table 7A

LOSS OF PAST RVL OF WILLIAM (LOWER)
2005 - 2011

YEAR	AGE	RVL	CUMULATE
****	***	*****	*****
2005	42	\$12,206	\$12,206
2006	43	17,570	29,776
2007	44	18,287	48,063
2008	45	18,304	66,367
2009	46	18,802	85,169
2010	47	19,366	104,535
2011	48	4,918	\$109,453
SIMAO		\$109,453	

Table 8A

PRESENT VALUE OF FUTURE RVL OF WILLIAM (LOWER)
2011 - 2042

YEAR	AGE	RVL	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
****	***	*****	*****	*****	*****
2011	48	\$15,029	0.98919	\$14,866	\$14,866
2012	49	19,947	0.97506	19,450	34,316
2013	50	19,947	0.96112	19,171	53,487
2014	51	19,947	0.94738	18,897	72,384
2015	52	19,947	0.93384	18,627	91,011
2016	53	19,947	0.92049	18,361	109,372
2017	54	19,947	0.90734	18,099	127,471
2018	55	19,947	0.89437	17,840	145,311
2019	56	19,947	0.88159	17,585	162,896
2020	57	19,947	0.86899	17,334	180,230
2021	58	19,947	0.85657	17,086	197,316
2022	59	19,947	0.84432	16,842	214,158
2023	60	19,947	0.83226	16,601	230,759
2024	61	19,947	0.82036	16,364	247,123
2025	62	19,947	0.80863	16,130	263,253
2026	63	19,947	0.79708	15,899	279,152
2027	64	19,947	0.78568	15,672	294,824
2028	65	19,947	0.77446	15,448	310,272
2029	66	19,947	0.76339	15,227	325,499
2030	67	19,947	0.75248	15,010	340,509
2031	68	19,947	0.74172	14,795	355,304
2032	69	19,947	0.73112	14,584	369,888
2033	70	19,947	0.72067	14,375	384,263
2034	71	19,947	0.71037	14,170	398,433
2035	72	19,947	0.70022	13,967	412,400
2036	73	19,947	0.69021	13,768	426,168
2037	74	19,947	0.68034	13,571	439,739
2038	75	19,947	0.67062	13,377	453,116
2039	76	19,947	0.66103	13,186	466,302
2040	77	19,947	0.65159	12,997	479,299
2041	78	19,947	0.64227	12,811	492,110
2042	79	2,951	0.64090	1,891	\$494,001

WILLIAM SIMAO

\$494,001

Table 9A

PRESENT VALUE OF NET RVL LOSS OF WILLIAM (LOWER)
2005 - 2042

YEAR	AGE	RVL	CUMULATE
****	***	*****	*****
2005	42	\$12,206	\$12,206
2006	43	17,570	29,776
2007	44	18,287	48,063
2008	45	18,304	66,367
2009	46	18,802	85,169
2010	47	19,366	104,535
2011	48	19,784	124,319
2012	49	19,450	143,769
2013	50	19,171	162,940
2014	51	18,897	181,837
2015	52	18,627	200,464
2016	53	18,361	218,825
2017	54	18,099	236,924
2018	55	17,840	254,764
2019	56	17,585	272,349
2020	57	17,334	289,683
2021	58	17,086	306,769
2022	59	16,842	323,611
2023	60	16,601	340,212
2024	61	16,364	356,576
2025	62	16,130	372,706
2026	63	15,899	388,605
2027	64	15,672	404,277
2028	65	15,448	419,725
2029	66	15,227	434,952
2030	67	15,010	449,962
2031	68	14,795	464,757
2032	69	14,584	479,341
2033	70	14,375	493,716
2034	71	14,170	507,886
2035	72	13,967	521,853
2036	73	13,768	535,621
2037	74	13,571	549,192
2038	75	13,377	562,569
2039	76	13,186	575,755
2040	77	12,997	588,752
2041	78	12,811	601,563
2042	79	1,891	\$603,454
SIMAO		\$603,454	

Table 10A

LOSS OF PAST RVL OF WILLIAM (UPPER)
2005 - 2011

YEAR	AGE	RVL	CUMULATE
****	***	*****	*****
2005	42	\$24,412	\$24,412
2006	43	35,141	59,553
2007	44	36,574	96,127
2008	45	36,607	132,734
2009	46	37,603	170,337
2010	47	38,731	209,068
2011	48	9,837	\$218,905
SIMAO		\$218,905	

Table 11A

PRESENT VALUE OF FUTURE RVL OF WILLIAM (UPPER)
2011 - 2042

YEAR	AGE	RVL	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
****	***	*****	*****	*****	*****
2011	48	\$30,056	0.98919	\$29,731	\$29,731
2012	49	39,893	0.97506	38,898	68,629
2013	50	39,893	0.96112	38,342	106,971
2014	51	39,893	0.94738	37,794	144,765
2015	52	39,893	0.93384	37,254	182,019
2016	53	39,893	0.92049	36,721	218,740
2017	54	39,893	0.90734	36,197	254,937
2018	55	39,893	0.89437	35,679	290,616
2019	56	39,893	0.88159	35,169	325,785
2020	57	39,893	0.86899	34,667	360,452
2021	58	39,893	0.85657	34,171	394,623
2022	59	39,893	0.84432	33,682	428,305
2023	60	39,893	0.83226	33,201	461,506
2024	61	39,893	0.82036	32,727	494,233
2025	62	39,893	0.80863	32,259	526,492
2026	63	39,893	0.79708	31,798	558,290
2027	64	39,893	0.78568	31,343	589,633
2028	65	39,893	0.77446	30,896	620,529
2029	66	39,893	0.76339	30,454	650,983
2030	67	39,893	0.75248	30,019	681,002
2031	68	39,893	0.74172	29,589	710,591
2032	69	39,893	0.73112	29,167	739,758
2033	70	39,893	0.72067	28,750	768,508
2034	71	39,893	0.71037	28,339	796,847
2035	72	39,893	0.70022	27,934	824,781
2036	73	39,893	0.69021	27,535	852,316
2037	74	39,893	0.68034	27,141	879,457
2038	75	39,893	0.67062	26,753	906,210
2039	76	39,893	0.66103	26,370	932,580
2040	77	39,893	0.65159	25,994	958,574
2041	78	39,893	0.64227	25,622	984,196
2042	79	5,902	0.64090	3,783	\$987,979

WILLIAM SIMAO

\$987,979

Table 12A

PRESENT VALUE OF NET RVL LOSS OF WILLIAM (UPPER)
2005 - 2042

YEAR	AGE	RVL	CUMULATE
****	***	*****	*****
2005	42	\$24,412	\$24,412
2006	43	35,141	59,553
2007	44	36,574	96,127
2008	45	36,607	132,734
2009	46	37,603	170,337
2010	47	38,731	209,068
2011	48	39,568	248,636
2012	49	38,898	287,534
2013	50	38,342	325,876
2014	51	37,794	363,670
2015	52	37,254	400,924
2016	53	36,721	437,645
2017	54	36,197	473,842
2018	55	35,679	509,521
2019	56	35,169	544,690
2020	57	34,667	579,357
2021	58	34,171	613,528
2022	59	33,682	647,210
2023	60	33,201	680,411
2024	61	32,727	713,138
2025	62	32,259	745,397
2026	63	31,798	777,195
2027	64	31,343	808,538
2028	65	30,896	839,434
2029	66	30,454	869,888
2030	67	30,019	899,907
2031	68	29,589	929,496
2032	69	29,167	958,663
2033	70	28,750	987,413
2034	71	28,339	1,015,752
2035	72	27,934	1,043,686
2036	73	27,535	1,071,221
2037	74	27,141	1,098,362
2038	75	26,753	1,125,115
2039	76	26,370	1,151,485
2040	77	25,994	1,177,479
2041	78	25,622	1,203,101
2042	79	3,783	\$1,206,884
SIMAO		\$1,206,884	

Table 13A

LOSS OF PAST RELATIONSHIP TO CHERYL
2005 - 2011

YEAR	AGE	RELATIONSHIP	CUMULATE
****	***	*****	*****
2005	39	\$12,206	\$12,206
2006	40	17,570	29,776
2007	41	18,287	48,063
2008	42	18,304	66,367
2009	43	18,802	85,169
2010	44	19,366	104,535
2011	45	4,918	\$109,453
CHERYL SIMAO		\$109,453	

Table 14A

PRESENT VALUE OF FUTURE RELATIONSHIP TO CHERYL
2011 - 2048

YEAR	AGE	RELATIONSHIP	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
****	***	*****	*****	*****	*****
2011	45	\$15,029	0.98919	\$14,866	\$14,866
2012	46	19,947	0.97506	19,450	34,316
2013	47	19,947	0.96112	19,171	53,487
2014	48	19,947	0.94738	18,897	72,384
2015	49	19,947	0.93384	18,627	91,011
2016	50	19,947	0.92049	18,361	109,372
2017	51	19,947	0.90734	18,099	127,471
2018	52	19,947	0.89437	17,840	145,311
2019	53	19,947	0.88159	17,585	162,896
2020	54	19,947	0.86899	17,334	180,230
2021	55	19,947	0.85657	17,086	197,316
2022	56	19,947	0.84432	16,842	214,158
2023	57	19,947	0.83226	16,601	230,759
2024	58	19,947	0.82036	16,364	247,123
2025	59	19,947	0.80863	16,130	263,253
2026	60	19,947	0.79708	15,899	279,152
2027	61	19,947	0.78568	15,672	294,824
2028	62	19,947	0.77446	15,448	310,272
2029	63	19,947	0.76339	15,227	325,499
2030	64	19,947	0.75248	15,010	340,509
2031	65	19,947	0.74172	14,795	355,304
2032	66	19,947	0.73112	14,584	369,888
2033	67	19,947	0.72067	14,375	384,263
2034	68	19,947	0.71037	14,170	398,433
2035	69	19,947	0.70022	13,967	412,400
2036	70	19,947	0.69021	13,768	426,168
2037	71	19,947	0.68034	13,571	439,739
2038	72	19,947	0.67062	13,377	453,116
2039	73	19,947	0.66103	13,186	466,302
2040	74	19,947	0.65159	12,997	479,299
2041	75	19,947	0.64227	12,811	492,110
2042	76	19,947	0.63309	12,628	504,738
2043	77	19,947	0.62404	12,448	517,186
2044	78	19,947	0.61513	12,270	529,456
2045	79	19,947	0.60633	12,094	541,550
2046	80	19,947	0.59767	11,922	553,472
2047	81	19,947	0.58912	11,751	565,223
2048	82	11,312	0.58432	6,610	\$571,833

CHERYL SIMAO

\$571,833

Table 15A

PRESENT VALUE OF NET RELATIONSHIP LOSS TO CHERYL
2005 - 2048

YEAR	AGE	RELATIONSHIP	CUMULATE
****	***	*****	*****
2005	39	\$12,206	\$12,206
2006	40	17,570	29,776
2007	41	18,287	48,063
2008	42	18,304	66,367
2009	43	18,802	85,169
2010	44	19,366	104,535
2011	45	19,784	124,319
2012	46	19,450	143,769
2013	47	19,171	162,940
2014	48	18,897	181,837
2015	49	18,627	200,464
2016	50	18,361	218,825
2017	51	18,099	236,924
2018	52	17,840	254,764
2019	53	17,585	272,349
2020	54	17,334	289,683
2021	55	17,086	306,769
2022	56	16,842	323,611
2023	57	16,601	340,212
2024	58	16,364	356,576
2025	59	16,130	372,706
2026	60	15,899	388,605
2027	61	15,672	404,277
2028	62	15,448	419,725
2029	63	15,227	434,952
2030	64	15,010	449,962
2031	65	14,795	464,757
2032	66	14,584	479,341
2033	67	14,375	493,716
2034	68	14,170	507,886
2035	69	13,967	521,853
2036	70	13,768	535,621
2037	71	13,571	549,192
2038	72	13,377	562,569
2039	73	13,186	575,755
2040	74	12,997	588,752
2041	75	12,811	601,563
2042	76	12,628	614,191
2043	77	12,448	626,639
2044	78	12,270	638,909
2045	79	12,094	651,003
2046	80	11,922	662,925
2047	81	11,751	674,676
2048	82	6,610	\$681,286

CHERYL SIMAO \$681,286

TABLE 16A

LIFE CARE PLAN CALCULATION				MEDICAL SERVICES				(MS = MED SERVICES)		(MCM = MED COMMODITIES)	
NAME:	William Simao	ADOT:	47.9								2.20%
DOI:	04/15/05	RLDOT:	30.9								0.75%
DOT:	04/01/11	LEDOI:	78.8								1.05%
# OF DAYS FROM DOT TO EOY =											
FIRST YEAR FRACTION											
END OF LE:				0923/42							
				# OF	# OF	# OF	# OF	INITIAL YEAR	LAST YEAR		
				UNITS USED	per	YEARS	PER YEAR	ANNUAL COST	OF COST	OF COST	
				COST PER UNIT							
				ITEM							
				Trial Stimulator	1	1	1.00	\$24,000	2011	2011	
				Permanent Placement Stimulator	1	1	1.00	\$212,000	2011	2011	
				Stimulator Replacement	1	5	0.20	\$28,200	2016	2042	
				Leads Revision	2	5	0.40	\$41,200	2013	2042	
				Follow Up Visits - First 3mos	2	1	2.00	\$2,000	2011	2011	
				Follow Up Visits Thereafter	2	1	2.00	\$2,000	2012	2042	

Smith Economics Group, Ltd.

Life Care Plan Costs

TABLE 16S

MED SVCS

MED SVCS

TABLE 165

MEO SVCS

TABLE 16A

ITEM	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037
Trial Stimulator													
Permanent Placement Stimulator													
Stimulator Replacement	\$30,927	\$31,156	\$31,386	\$31,618	\$31,852	\$32,087	\$32,326	\$32,564	\$32,804	\$33,047	\$33,291	\$33,537	\$33,785
Leads Revision	\$45,184	\$45,518	\$45,855	\$46,194	\$46,535	\$46,879	\$47,226	\$47,575	\$47,927	\$48,281	\$48,638	\$48,998	\$49,360
Follow Up Visits - First 3mos													
Follow Up Visits Thereafter	\$2,193	\$2,210	\$2,226	\$2,242	\$2,259	\$2,276	\$2,293	\$2,308	\$2,327	\$2,344	\$2,361	\$2,379	\$2,396
ANNUAL PRESENT VALUE	\$76,305	\$78,884	\$79,467	\$80,054	\$80,646	\$81,242	\$81,843	\$82,448	\$83,058	\$83,672	\$84,290	\$84,913	\$85,541
CUMULATIVE TOTAL	\$1,185,553	\$1,264,437	\$1,343,904	\$1,423,958	\$1,504,604	\$1,585,847	\$1,667,690	\$1,750,139	\$1,833,186	\$1,916,867	\$2,001,157	\$2,086,071	\$2,171,612

Smith Economics Group, Ltd.

Life Care Plan Costs

TABLE 16C

MED SVCS

TABLE 16A

ITEM	2038	2040	2042	2044	2046	TOTALS
Trial Stimulator						\$83,097
Permanent Placement Stimulator						\$209,721
Stimulator Replacement	\$34,035	\$34,287	\$34,540	\$34,796	\$35,053	\$881,417
Leads Revision	\$49,725	\$50,082	\$50,463	\$50,836	\$51,212	\$1,383,529
Follow Up Visits - First 3mos						\$1,979
Follow Up Visits Thereafter	\$2,414	\$2,432	\$2,450	\$2,468	\$2,486	\$89,155
ANNUAL PRESENT VALUE	\$85,173	\$86,811	\$87,462	\$88,099	\$88,750	
CUMULATIVE TOTAL	\$2,257,785	\$2,344,596	\$2,432,049	\$2,520,147	\$2,608,897	

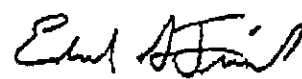
Smith Economics Group, Ltd.

Life Care Plan Costs

TABLE 16S

MED SVCS

EXHIBIT "8"

ORIGINALElectronically Filed
05/05/2009 10:47:50 AM
CLERK OF THE COURT**DOE**

GLENN A. PATERNOSTER, ESQ.

Nevada Bar No. 5452

JOHN E. PALERMO, ESQ.

Nevada Bar No. 9887

AARON & PATERNOSTER, LTD.

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Las Vegas, Nevada 89102

(702) 384-4111, telephone

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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,

vs.

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

Defendants.

CASE NO.: A539455

DEPT. NO.: X

PLAINTIFFS' DESIGNATION OF EXPERT WITNESSES AND REPORTS

Plaintiffs, WILLIAM JAY SIMAO and CHERYL ANN SIMAO, by and through their attorneys, AARON & PATERNOSTER, LTD., hereby submit their designation of expert witnesses and reports pursuant to NRCP 26(b)(5) as follows:

1. Stan Smith
SMITH ECONOMICS GROUP, LTD.
1165 N. Clark Street, Suite 600
Chicago, Illinois 60610
(312) 943-1551

....

....

ORIGINAL**DOE**

GLENN A. PATERNOSTER, ESQ.

Nevada Bar No. 5452

JOHN E. PALERMO, ESQ.

Nevada Bar No. 9887

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(702) 384-4111, telephone

(702) 387-9739, facsimile

Attorneys for Plaintiffs

DISTRICT COURT**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

Defendants.

CASE NO.: A539455

DEPT. NO.: X

PLAINTIFFS' DESIGNATION OF EXPERT WITNESSES AND REPORTS

Plaintiffs, WILLIAM JAY SIMAO and CHERYL ANN SIMAO, by and through their
 attorneys, AARON & PATERNOSTER, LTD., hereby submit their designation of expert witnesses and
 reports pursuant to NRCP 26(b)(5) as follows:

1. Stan Smith
 SMITH ECONOMICS GROUP, LTD.
 1165 N. Clark Street, Suite 600
 Chicago, Illinois 60610
 (312) 943-1551

Dr. Smith is an expert in the area of economics and finance. Dr. Smith's qualifications are set forth in the curriculum vitae attached hereto.¹ Dr. Smith's fee schedule and list of cases testified during either trial or deposition are attached hereto.² Dr. Smith is expected to provide expert testimony and opinions, including but not limited to the economic impact of Plaintiff William Simao's injuries and hedonic damages sustained by Plaintiff William Simao. Additionally, he will testify to the findings contained in his report.³

2. Kathleen Hartmann, RN
10761 Laurelwood Drive
Truckee, CA 96161

Ms. Hartmann is an expert in the area of life care planning, cost projections, medical record analysis, case management, and nursing. Ms. Hartmann's qualifications are set forth in the curriculum vitae attached hereto⁴. Ms. Hartmann's fee schedule and list of cases testified during either trial or deposition are attached hereto⁵. Ms. Hartmann is expected to provide expert testimony and opinions, including but not limited to the cost of life care needs of the Plaintiff William Simao. A copy of Ms. Hartmann's report and opinions is attached hereto⁶.

....

....

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¹ See Ex. "1"- Curriculum Vitae of Stan Smith.

² See Ex. "2"- Fee Schedule of Stan Smith.
See Ex. "3"- List of Cases of Stan Smith.

³ See Ex. "4"- Report of Stan Smith.

⁴ See Ex. "5"- Curriculum Vitae of Kathleen Hartmann.

⁵ See Ex. "6"- Fee Schedule of Kathleen Hartmann.
See Ex. "7"- List of Cases of Kathleen Hartmann.

⁶ See Ex. "8"- Report of Kathleen Hartmann.

1 3. Ira Spector, M.S., C.R.C.
2 3440 E. Russell Road, Suite 208
3 Las Vegas, NV 89120

4 Mr. Spector is an expert in the area of vocational rehabilitation. Mr. Spector's qualifications are
5 set forth in the curriculum vitae attached hereto⁷. Mr. Spector's fee schedule and list of cases testified
6 during either trial or deposition are attached hereto⁸. Mr. Spector is expected to provide expert testimony
7 and opinions, including but not limited to the extent of Plaintiff William Simao's vocational injuries, and
8 the impact of those injuries on the employability of the Plaintiff. Mr. Spector is also expected to testify
9 with regard to the Plaintiff William Simao's past employment history, his future employment prospects
10 and potential, and Plaintiff's earning capacity. A copy of Mr. Spector's report and opinions is attached
11 hereto⁹.
12

13 In addition to the retained expert witnesses designated by Plaintiffs, Plaintiffs may call one or
14 more of William Simao's treating physicians as non-retained experts to testify as to Mr. Simao's medical
15 care and treatment following the incident which is the subject of this litigation as well as to the necessity
16 and reasonableness of the treatment William Simao received and as to the reasonableness of the medical
17 bills, including the causation of William Simao's incident related injuries.
18

19 If any of the witnesses discussed or listed herein above are not available at the time of trial,
20 Plaintiffs advise all parties that they will seek the introduction of competent former testimony,
21 including depositions of such witnesses in lieu of live testimony.

22 Plaintiffs reserve the right to add to, amend or delete any of the above, and further reserve the
23 right to call any witnesses identified and elected under the provisions of NRCP 26(b)(4-5) by any other
24 party to this action whether or not such party remains a party at the time of trial.

25 _____
26 ⁷ See Ex. "9"- Curriculum Vitae of Ira Spector.

27 ⁸ See Ex. "10"- Fee Schedule of Ira Spector.
28 See Ex. "11"- List of Cases of Ira Spector.

⁹ See Ex. "12"- Report of Ira Spector.

1 Plaintiffs further reserve the right to add additional experts as such need arises during the
2 course of discovery and investigation in preparation of this case.

3 Plaintiffs further reserve the right to name rebuttal experts and supplement this expert
4 designation with a designation and report from such rebuttal experts.

5 DATED this 4th day of May, 2009.

6 AARON & PATERNOSTER, LTD.

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9 GLENN A. PATERNOSTER, ESQ.
10 Nevada Bar No. 5452
11 Attorney for Plaintiffs
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b) and the amendment to the EDCR 7.26, I hereby certify that service of the foregoing **PLAINTIFFS' DESIGNATION OF EXPERT WITNESSES AND REPORT** 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 5 day of May, 2009.


An employee of AARON & PATERNOSTER, LTD.

Exhibit 4

Smith Economics Group, Ltd.

A Division of Corporate Financial Group
Economics / Finance / Litigation Support

Stan V. Smith, Ph.D.
President

April 16, 2009

Mr. John Palermo
Aaron & Paternoster
2300 W. Sahara Ave, Ste. 650
Las Vegas, NV 89102

Re: Simao

Dear Mr. Palermo:

You have asked me to calculate the value of certain losses subsequent to the injury of William Simao. These losses are: (1) the loss of business earnings; (2) the loss of housekeeping and household management services; (3) the reduction in value of life ("RVL"), also known as loss of enjoyment of life; and (4) the loss of the society or relationship sustained by Mr. Simao's wife.

William Simao is a Caucasian, married male, who was born on May 8, 1963, and injured on April 15, 2005 at the age of 41.9 years. Mr. Simao will be 46.4 years old at the estimated trial or settlement date of October 1, 2009, with a remaining life expectancy estimated at 32.1 years. This data is from the National Center for Health Statistics, United States Life Tables, 2004, Vol. 56, No. 9, National Vital Statistics Reports, 2007.

In order to perform this evaluation, I have reviewed the following materials: (1) the Nevada Highway Patrol Traffic Accident Report; (2) Cheryl Ann Simao's Responses to Defendant's First Set of Requests for Production of Documents; (3) Cheryl Ann Simao's Answers to Defendant's Interrogatories; (4) William Simao's Answers to Defendant's Interrogatories; (5) William Simao's Responses to Defendant's First Set of Requests for Production of Documents; (6) Jenny Rish's Responses to Plaintiffs' First Set of Interrogatories; (7) Jenny Rish's Responses to Plaintiffs' First Set of Requests for Admissions; (8) Jenny Rish's Responses to Plaintiffs' First Set of Requests for Production of Documents; (9) Jenny Rish's Supplemental Responses to Plaintiffs' First Set of Requests for Production of Documents; (10) medical records; (11) the deposition of William Simao on October 23, 2008; (12) the deposition of Cheryl Ann Simao on October 22, 2008; (13) interviews with William Simao on April 15, 2009 and April 16, 2009; (14) an interview with Cheryl Simao on April 15, 2009; and (15) the case information form.

My methodology for estimating the losses, which is explained below, is generally based on past wage growth, interest rates,

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and consumer prices, as well as studies regarding the value of life. The effective net discount rate using statistically average wage growth rates and statistically average discount rates is 0.45 percent.

My estimate of the real wage growth rate is 1.15 percent per year. This growth rate is based on Business Sector, Hourly Compensation growth data from the Major Sector Productivity and Costs Index found at the U.S. Bureau of Labor Statistics website at www.bls.gov/data/home.htm, Series ID: PRS84006103, for the real increase in wages primarily for the last 20 years.

My estimate of the real discount rate is 1.60 percent per year. This discount rate is based on the rate of return on 91-day U.S. Treasury Bills published in the Economic Report of the President for the real return on T-Bills primarily for the last 20 years. This rate is also consistent with historical rates published by Ibbotson Associates, Chicago, in its continuously updated series Stocks, Bonds, Bills and Inflation published by Morningstar, Inc. This series, which acknowledges me as the Originator while a Principal and Managing Director at Ibbotson Associates, is generally regarded by academics in the field of finance as the most widely accepted source of statistics on the rates of return on investment securities. It is relied upon almost exclusively by academic and business economists, insurance companies, banks, institutional investors, CPA's, actuaries, benefit analysts, and economists in courts of law.

Estimates of real growth and discount rates are net of inflation based on the Consumer Price Index (CPI-U), published in monthly issues of the U.S. Bureau of Labor Statistics, CPI Detailed Report (Washington, D.C.: U.S. Government Printing Office) and available at the U.S. Bureau of Labor Statistics website at www.bls.gov/data/home.htm, Series ID: CUUR0000SA0. The rate of inflation for the past 20 years has been 2.82 percent.

I. LOSS OF BUSINESS EARNINGS

Tables 1 through 7 show the loss of business earnings. William Simao is the current owner of a cleaning company called Ameri Clean. Mr. Simao states that he first joined Ameri Clean in March 2005 and was earning \$1,000 per week. He recalls that his responsibilities included acquiring new accounts, preparing employees for jobs, working on job sites, and general company management. Mr. Simao states that in September 2007 he bought Ameri Clean and became the sole owner of the company. He states that roughly around this time, his weekly earnings were increased to approximately \$1,250, and he continues to earn this amount. Mr. Simao states that his responsibilities mostly remained the same when he became the owner.

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William Simao states that as a result of his injuries there are some things at his job that he can no longer do, such as cleaning carpets because he would have to hunch over. There are also things that he can still do, but for shorter periods of time, like bending over to mop or scrub. Mr. Simao states that he has turned down some jobs in the past and has had to continue to turn down jobs because he knew they would be too difficult for him to complete.

Tables 1 through 3 show the benchmark value of each \$10,000 in year 2009 dollars per year in business earnings grown at zero percent real growth. Based on these assumptions, my opinion of this benchmark loss is \$199,392, for example, through age 67 (Table 3 at the line for age 67).

By using this table, the trier of fact can determine the total wage and benefit losses once they have estimated the yearly earnings. For example, if the trier of fact determines that Mr. Simao's business would have earned an additional \$20,000 per year starting in September 2007, when Mr. Simao became the owner of Ameri Clean, through Mr. Simao's age 67, the loss would be \$199,392 times 2, or \$398,784.

II. LOSS OF HOUSEHOLD/FAMILY HOUSEKEEPING AND HOUSEHOLD MANAGEMENT SERVICES

Tables 4 through 6 show the pecuniary loss of tangible housekeeping chores and household management services. The number of hours of housekeeping and household management services, assuming Mrs. Simao is employed, ranges from 1.0 to 2.0 hours per day and varies over time as family members age. Mr. Simao has difficulty in performing housekeeping and household management services. I illustrate the loss at 45 percent. This data is based on a study by William H. Gauger and Katherine E. Walker, The Dollar Value of Household Work, Bulletin 60, New York State College of Human Ecology, Cornell University, Ithaca, NY, 1980.

The hourly value of the housekeeping and household management services is based on the mean hourly earnings of carpenters; maintenance and repair workers; painters; child care workers; waiters and waitresses; private household cooks; laundry and drycleaning workers; maids and housekeeping cleaners; bookkeeping, accounting and auditing clerks; and taxi drivers and chauffeurs, which is \$12.94 per hour in year 2007 dollars. This wage data is based on information from the U.S. Bureau of Labor Statistics, Occupational Employment Statistics, May 2007 National Occupational Employment and Wage Statistics found at www.bls.gov/oes. I value such services at their replacement cost which includes a conservative estimate of 50 percent hourly overhead reasonably charged by agencies who supply such services

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on a part-time basis, and who are responsible for advertising, vetting, hiring, training, insuring and bonding the part-time employee, and who are also responsible for payroll-related costs such as the employer's share of social security contributions, etc.

Based on these assumptions, and William Simao's life expectancy of 78.5 years, my opinion of the loss of the value of housekeeping and household management services is \$156,088 ▶ Table 6.

III. REDUCTION IN VALUE OF LIFE

Economists have long agreed that life is valued at more than the lost earnings capacity. My estimate of the value of life is based on many economic studies on what we, as a contemporary society, actually pay to preserve the ability to lead a normal life. The studies examine incremental pay for risky occupations as well as a multitude of data regarding expenditure for life savings by individuals, industry, and state and federal agencies.

My estimate of the value of life is consistent with estimates published in other studies that examine and review the broad spectrum of economic literature on the value of life. Among these is "The Plausible Range for the Value of Life," Journal of Forensic Economics, Vol. 3, No. 3, Fall 1990, pp. 17-39, by T. R. Miller. This study reviews 67 different estimates of the value of life published by economists in peer-reviewed academic journals. The Miller results, in most instances, show the value of life to range from approximately \$1.6 million to \$2.9 million dollars in year 1988 after-tax dollars, with a mean of approximately \$2.2 million dollars. In "The Value of Life: Estimates with Risks by Occupation and Industry," Economic Inquiry, Vol. 42, No. 1, May 2003, pp. 29-48, Professor W. K. Viscusi estimates the value of life to be approximately \$4.7 million dollars in year 2000 dollars. An early seminal paper on the value of life was written by Richard Thaler and Sherwin Rosen, "The Value of Saving a Life: Evidence from the Labor Market," in N.E. Terlickyj (ed.), Household Production and Consumption. New York: Columbia University Press, 1975, pp. 265-300. The Meta-Analysis Appendix to this report reviews additional literature suggesting a value of life of approximately \$5.4 million in year 2008 dollars.

Because it is generally accepted by economists, the methodology used to estimate the value of life has been found to meet Daubert standards, as well as Frye standards and the Rules of Evidence in various states, by Federal Circuit and Appellate courts, as well as state trial, supreme and appellate courts nationwide. Testimony based on this peer-reviewed methodology has been admitted in over half the states in over 175 trials nationwide.

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Proof of general acceptance and other standards is found in a discussion of the extensive references to the scientific economic peer-reviewed literature on the value of life listed in the Value of Life Appendix to this report.

The underlying, academic, peer-reviewed studies fall into two general groups: (1) consumer behavior and purchases of safety devices; (2) wage risk premiums to workers; in addition, there is a third group of studies consisting of cost-benefit analyses of regulations. For example, one consumer safety study analyzes the costs of smoke detectors and the lifesaving reduction associated with them. One wage premium study examines the differential rates of pay for dangerous occupations with a risk of death on the job. Just as workers receive shift premiums for undesirable work hours, workers also receive a higher rate of pay to accept a increased risk of death on the job. A study of government regulation examines the lifesaving resulting from the installation of smoke stack scrubbers at high-sulphur, coal-burning power plants. As a hypothetical example of the methodology, assume that a safety device costs \$460 and results in lowering a person's risk of premature death by one chance in 5,000. The cost per life saved is obtained by dividing \$460 by the one in 5,000 probability, yielding \$2,300,000.

Tables 7 through 12 are based on several factors:

- (1) An assumed impairment rating by the trier-of-fact of 15 percent to 30 percent reduction in the ability to lead a normal life. The diminished capacity to lead a normal life reflects the impact on career, social and leisure activities, the activities of daily living, and the internal emotional state, as discussed in Berla, Edward P., Michael L. Brookshire and Stan V. Smith, "Hedonic Damages and Personal Injury: A Conceptual Approach," Journal of Forensic Economics, Vol 3, No. 1, Winter 1990, pp. 1-8;
- (2) The central tendency of the range of the economic studies cited above which I estimate to be approximately \$4.1 million in year 2009 dollars; and
- (3) A life expectancy of 78.5 years.

Tables 7 through 9 are based on the lower estimated impairment rating; Tables 10 through 12 are based on the upper estimated impairment rating. Based on these values and life expectancy, my opinion of the reduction in the value of life is estimated at \$567,810 ▶ Table 9 to \$1,135,594 ▶ Table 12, averaging \$851,702.

IV. LOSS OF SOCIETY OR RELATIONSHIP

Tables 13 through 15 show the loss of society or relationship sustained by Mr. Simao's wife. The value of the loss of society or relationship by family members with the injured can be based

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on a measure of the value of preserving the ability to live a normal life. This is discussed in the article, "The Relevance of Willingness-To-Pay Estimates of the Value of a Statistical Life in Determining Wrongful Death Awards," Journal of Forensic Economics, Vol. 3, No. 3, Fall 1990, pp. 75-89, by L. G. Chestnut and D. M. Violette.

Based on a benchmark loss of 15 percent for William Simao's wife, my opinion of the loss of relationship as a result of the injury of William Simao is \$642,670 ▶ Table 15 for Cheryl Simao.

A trier-of-fact may weigh other factors to determine if these estimated losses for William Simao should be adjusted because of special qualities or circumstances that economists do not as yet have a methodology for analysis. These estimates are provided as an aid, tool and guide for the trier-of-fact.

All opinions expressed in this report are clearly labeled as such. They are rendered in accordance with generally accepted standards within the field of economics and are expressed to a reasonable degree of economic certainty. Estimates, assumptions, illustrations and the use of benchmarks, which are not opinions, but which can be viewed as hypothetical in nature, are also clearly disclosed and identified herein.

In my opinion, it is reasonable for experts in the field of economics and finance to rely on the materials and information I reviewed in this case for the formulation of my substantive opinions herein.

If additional information is provided to me, which could alter my opinions, I may incorporate any such information into an update, revision, addendum, or supplement of the opinions expressed in this report.

If you have any questions, please do not hesitate to call me.

Sincerely,



Stan V. Smith, Ph.D.
President

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APPENDIX: HOUSEHOLD REPLACEMENT SERVICES

Courts have long recognized that members's claims to the value of tangible family household replacement services as an element of damages in personal injury and wrongful death cases, as an aspect of the pecuniary loss in such cases. These services are those that are provided by the injured family member to other family members without charge or cost. Members who receive such services can include spouses, children, parents or siblings; such family members do not necessarily have to reside in the same household to receive such services.

Economists and courts have also long recognized that an appropriate method in valuing such tangible services is to value their replacement costs by examining costs paid in labor markets that provide generally comparable services for. Thus, economists can value the service by looking at market equivalents from which a pecuniary standard can be established. This approach is set forth in the 1913 U.S. Supreme Court Decision, Michigan Central Railroad Company v. Vreeland, 227 U.S. 59 (1913). So this method is a century old.

The Supreme Court's suggesting in valuing compensable services in the Vreeland decision is a standard that is not rigid, but actually rather general: "[The] pecuniary loss or damage must be one which can be measured by some standard.... Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings." Michigan Central v. Vreeland.

Examples of lost household services that used to be performed by victims (whether fatally or non-fatally injured) can include physical chores such as mowing the lawn, painting the house, cleaning the windows, doing the laundry, washing and repairing the car, preparing the meals and doing the dishes, among others. For many decades economists have met the Supreme Court's general standard by using labor market equivalents for cooks, laundry workers, gardeners, maids, etc. in valuing the physical chores regarding housekeeping services.

Additionally, economists have recognized that tangible services to family members include services well beyond the physical housekeeping chores. For example, William G. Jungbauer and Mark J. Odegard, in Maximizing Recovery in FELA Wrongful Death Actions, in Assessing Family Loss in Wrongful Death Litigation: The Special Roles of Lost Services and Personal Consumption, Lawyers & Judges Publishing Co., 1999, pp. 284, indicate that a complete analysis of all services performed by family members includes much, much more than the physical housekeeping chores. Frank D. Tinari, in a peer-reviewed, scientific, economic journal article "Household Services: Toward a More Comprehensive

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Measure," Journal of Forensic Economics, Vol. 11, No. 3, Fall 1998, pp. 253-265, expresses the same view.

Jungbauer and Odegard indicate that a victim may have provided services of many other professions such as that of a chauffeur, driving other family members to appointments, or that of a security guard, especially regarding the injury to a male spouse, etc. Every family member acts as a companion to other family members. And it is common for family members to act as counselors for one another, typically providing advice and counsel on important personal, family, medical, financial, career or other issues. The marketplace can and does value such items of loss. If the victim cannot provide these services, or does so at a reduced capacity or rate, there is a distinct and definite loss to the other family members. These losses have a definite and easily measurable pecuniary value. Vreeland requires only that a "reasonable expectation" of loss of services be proven and that such loss be valued by some standard, presumably a reasonably-based economic standard, to allow recovery.

The economic literature on recovery of loss of services discusses a market-oriented replacement-cost method to assess the pecuniary value of the loss of accompaniment services, as well as the value of advice, guidance and counsel services that family members provide to one another, within a broadly defined scope of family services. See, for example, Frank D. Tinari, "Household Services: Toward a More Comprehensive Measure," Journal of Forensic Economics, Vol. 11, No. 3, Fall 1998, pp. 253-265.

Finally, according to Chief Justice Robert Wilentz of the Supreme Court of New Jersey, in Green v. Bittner, 85 NJ 1, 1980, pp. 12, accompaniment services, to be compensable, must be that which would have provided services substantially equivalent to those provided by the companions often hired today by the aged or infirm, or substantially equivalent to services provided by nurses or practical nurses; and its value must be confined to what the marketplace would pay a stranger with similar qualifications for performing such services.

In valuing the household replacement services that are provided by family members to one another, beyond the physical housekeeping chores, both the U.S Supreme Court and the New Jersey Supreme Court discuss looking at labor markets for the equivalent value of such services. This methodology is identical to the traditional approach that economists have been using for over four decades in valuing the physical chores involved in housekeeping services. 8925

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APPENDIX: VALUE OF LIFE

The economic methodology for the valuation of life has been found to meet the Daubert and Frye standards by many courts, along with the Rules of Evidence in many states nationwide. My testimony has been accepted in approximately 175 state and federal jurisdictions nationwide in over half the states. Testimony has been accepted by Federal circuit and Appellate courts as well as in state trial, supreme, and appellate Courts. The Daubert standard sets forth four criteria:

1. Testing of the theory and science
2. Peer Review
3. Known or potential rate of error
4. Generally accepted.

Testing of the theory and science has been accomplished over the past four decades, since the 1960s. Dozens of economists of high renown have published over a hundred articles in high quality, peer-reviewed economic journals measuring the value of life. The value of life theories are perhaps among the most well-tested in the field of economics, as evidenced by the enormous body of economic scientific literature that has been published in the field and is discussed below.

Peer Review of the concepts and methodology have been extraordinarily extensive. One excellent review of this extensive, peer-reviewed literature can be found in "The Value of Risks to Life and Health," W. K. Viscusi, Journal of Economic Literature, Vol. 31, December 1993, pp. 1912-1946. A second is "The Value of a Statistical Life: A Critical Review of Market Estimates throughout the World." W. K. Viscusi and J. E. Aldy, Journal of Risk and Uncertainty, Vol. 27, No. 1, November 2002, pp. 5-76. Additional theoretical and empirical work by Viscusi, a leading researcher in the field, can be found in: "The Value of Life", W. K. Viscusi, John M. Olin Center for Law, Economics, and Business, Harvard Law School, Discussion Paper No. 517, June 2005. An additional peer-reviewed article discusses the application to forensic economics: "The Plausible Range for the Value of Life," T. R. Miller, Journal of Forensic Economics, Vol. 3, No. 3, Fall 1990, pp. 17-39, which discusses the many dozens of articles published in other peer-reviewed economic journals on this topic. This concept is discussed in detail in "Willingness to Pay Comes of Age: Will the System Survive?" T. R. Miller, Northwestern University Law Review, Summer 1989, pp. 876-907, and "Hedonic Damages in Personal Injury and Wrongful Death Litigation," by S. V. Smith in Litigation Economics, pp. 39-59.

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Kenneth Arrow, a Nobel Laureate in economics, discusses this method for valuing life in "Invaluable Goods," Journal of Economic Literature, Vol. 35, No. 2, 1997, pp. 759. See the Meta-Analyses Appendix for an additional review of the literature.

The known or potential rate of error is well researched. All of these articles discuss the known or potential rate of error, well within the acceptable standard in the field of economics, generally using a 95% confidence rate for the statistical testing and acceptance of results. There are few areas in the field of economics where the known or potential rate of error has been as well-accepted and subject to more extensive investigation.

General Acceptance of the concepts and methodology on the value of life in the field of economics is extensive. This methodology is and has been generally accepted in the field of economics for many years. Indeed, according to the prestigious and highly-regarded research institute, The Rand Corporation, by 1988, the peer-reviewed scientific methods for estimating the value of life were well-accepted: "Most economists would agree that the willingness-to-pay methodology is the most conceptually appropriate criterion for establishing the value of life," Computing Economic loss in Cases of Wrongful Death, King and Smith, Rand Institute for Civil Justice, R-3549-ICJ, 1988.

While first discussed in cutting edge, peer-reviewed economic journals, additional proof of general acceptance is now indicated by the fact that this methodology is now taught in standard economics courses at the undergraduate and graduate level throughout hundreds of colleges and universities nationwide as well as the fact that it is taught and discussed in widely-accepted textbooks in the field of law and economics: Economics, Sixth Edition, David C. Colander, McGraw-Hill Irwin, Boston, 2006, pp. 463-465; this introductory economics textbook is the third most widely used textbook in college courses nationwide. Hamermesh and Rees's The Economics of Work and Pay, Harper-Collins, 1993, Chapter 13, a standard advanced textbook in labor economics, also discusses the methodology for valuing life. Other textbooks discuss this topic as well. Richard Posner, a Justice and former Chief Justice of the U.S. Court of Appeals for the highly regarded 7th Circuit and Senior Lecturer at the University of Chicago Law School, one of most prolific legal writers in America, details the Value of Life approach in his widely used textbooks: Economic Analysis of Law, 1986, Little Brown & Co., pp. 182-185 and Tort Law, 1982, Little Brown & Co., pp. 120-126.

As further evidence of general acceptance in the field, many surveys published in the field of forensic economics show that hundreds of economics nationwide are now familiar with this methodology and are available to prepare (and critique) forensic

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economic value of life estimates. Indeed, many economists who indicate they will prepare such analysis for plaintiffs also are willing to critique such analysis for defendants, as I have often done. That an economist is willing to critique a report does not indicate that he or she is opposed to the concept or the methodology, but merely available to assure that the plaintiff economist has employed proper techniques. The fact that there are economists who indicate they do not prepare estimates of value of life is again no indication that they oppose the methodology; many claim they are not familiar with the literature and untrained in this area. While some CPAs and others without a degree in economics have opposed these methods, such professionals do not have the requisite academic training and are unqualified to make such judgments. However, as in any field of economics, this area is not without controversy and there are some qualified and trained economists who dispute certain aspects of the methodology. General acceptance does not mean universal acceptance.

Additional evidence of general acceptance in the field is found in the teaching of the concepts regarding the value of life. Forensic Economics is now taught as a special field in a number of institutions nationwide. I taught what is believed to be the first course ever presented in the field of Forensic Economics at DePaul University in Spring, 1990. My own book, Economic/Hedonic Damages, Anderson, 1990, and supplemental updates thereto, co-authored with Dr. Michael Brookshire, a Professor of Economics in West Virginia, has been used as a textbook in at least 5 colleges and universities nationwide in such courses in economics, and has a thorough discussion of the methodology. Toppino et. al., in "Forensic Economics in the Classroom," published in The Earnings Analyst, Journal of the American Rehabilitation Economics Association, Vol. 4, 2001, pp. 53-86, indicate that hedonic damages is one of 15 major topic areas taught in such courses.

Lastly, general acceptance is found by examining publications in the primary journal in the field of Forensic Economics, which is the peer-reviewed Journal of Forensic Economics, where there have been published many articles on the value of life. Some are cited above. Others include: "The Econometric Basis for Estimates of the Value of Life," W. K. Viscusi, Vol 3, No. 3, Fall 1990, pp. 61-70; "Hedonic Damages in the Courtroom Setting." S. V. Smith, Vol. 3, No. 3, Fall 1990, pp. 41-49; "Issues Affecting the Calculated Value of Life," E. P. Berla, M. L. Brookshire and S. V. Smith, Vol 3, No. 1, 1990, pp. 1-8; "Hedonic Damages and Personal Injury: A Conceptual Approach." G. R. Albrecht, Vol. 5., No. 2, Spring/Summer 1992, pp. 97-104; "The Application of the Hedonic Damages Concept to Wrongful and Personal Injury Litigation." G. R. Albrecht, Vol. 7, No. 2, Spring/Summer 1994, pp. 143-150; and also "A Review of the Monte Carlo Evidence Concerning Hedonic Value of Life Estimates," R. F. Gilbert, Vol. 8, No. 2, Spring/Summer 1995, pp. 125-130.

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It is important to note that this methodology is endorsed and employed by the U. S. Government as the standard and recommended approach for use by all U. S. Agencies in valuing life for policy purposes, as mandated in current and past Presidential Executive Orders in effect since 1972, and as discussed in "Report to Congress on the Costs and Benefits of Federal Regulations," Office of Management and Budget, 1998, and "Economic Analysis of Federal Regulations Under Executive Order 12866," Executive Office of the President, Office of Management and Budget, pp. 1-37, and "Report to the President on Executive Order No. 12866," Regulatory Planning and Review, May 1, 1994, Office of Information and Regulatory Affairs, Office of Management and Budget. Prior presidents signed similar orders as discussed in "Federal Agency Valuations of Human life," Administrative Conference of the United States, Report for Recommendation 88-7, December 1988, pp. 368-408. 926

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APPENDIX: META-ANALYSES AND VALUE OF LIFE RESULTS SINCE 2000

Below I list the principal systematic reviews (meta-analyses), since the year 2000, of the value of life literature, and the values of a statistical life that they recommend. In statistics, a meta-analysis combines the results of several studies that address a set of related research hypotheses. Meta-analysis increase the statistical power of studies by analyzing a group of studies and provide a more powerful and accurate data analysis than would result from analyzing each study alone. Based on those reviews, the Summary Table suggests a best estimate. The following table summarizes the studies and their findings.

These statistically based studies place the value between \$4.4 and \$7.5 million, with \$5.9 million representing a conservative yet credible estimate of the average (and range midpoint) of the values of a statistical life published in the studies in year 2005 dollars. Net of human capital, a credible net value of life based on all these literature reviews to be \$4.8 million in year 2005 dollars, or \$5.4 million in year 2008 dollars.

The actual value that I use, \$4.1 million is approximately 24 percent lower than a conservative average estimate based on the credible meta-analyses. This value was originally based on a review conducted in the late 1980s, averaging the results published by that time. I have increased that late 1980s value only by inflation over time, despite the fact a review of literature over the years since that time has put obvious upward pressure on the figure that I use.

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Summary Table: Mean and range of value of statistical life estimates (in 2005 dollars) from the best meta-analyses and systematic reviews and characteristics of those reviews.

Study	Formal Meta-Analysis?	Number of Values	Best Estimate (2005 Dollars)	Range	Context
Miller 2000	Yes	68 estimates	\$5.1M	\$4.5-\$6.2M	US estimate from all
Mrozek & Taylor 2002	Yes	203 estimates, from 33 studies	\$4.4M	+ or - 35%	Labor market
Viscusi & Aldy 2003	Yes	49 estimates (reviewed more than 60 studies, but some lacked desired variables)	\$6.5M	\$5.1-\$9.6M	Labor market, US estimate from all
Kochi et al. 2006	Yes	234 estimates from 40 studies	\$6.0M	+ or - 44%	Labor market, survey
Bellavance 2006	Yes	37 estimates from 34 studies (rejected 15 others that lacked desired data or were flawed)	\$7.0M	+ or - 19%	Labor market

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Miller (2000) started from the Miller 1989 JFE estimates and used statistical methods to adjust for differences between studies. It also added newer studies, primarily ones outside the United States. The authors specified the most appropriate study approach a priori, which allowed calculation of a best estimate from the statistical regression.

Mrozek and Taylor (2002) searched intensively for studies of the value of life implied by wages paid for risky jobs. They coded all values from each study rather than a most appropriate estimate. A statistical analysis identified what factors accounted for the differences in values between studies. The authors specified the most appropriate study approach a priori, which allowed calculation of a best estimate from the statistical regression.

Viscusi and Aldy (2003) focused on values from labor market studies that they considered of high quality and that provided data on risk levels and other important explanatory variables. They used statistical methods to account for variations between studies and derive a best estimate.

Kochi et al. (2006) searched intensively for studies of the value of life implied by wages and coded all values from each study rather than a most appropriate estimate. They did not filter study quality carefully. The best estimate was derived by statistical methods based on the distribution of the values within and across studies.

Bellavance et al. (2006) focused on values from labor market studies that they considered of high quality and that provided data on risk levels and other important explanatory variables. They used statistical methods to account for variations between studies and derive a best estimate. 926

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SUMMARY OF LOSSES FOR WILLIAM SIMAO

TABLE *****	DESCRIPTION *****	ESTIMATE *****
	<u>EARNINGS</u>	
3	LOSS OF BUSINESS EARNINGS \$10,000 Benchmark to age 67	\$ 199,392
	----- <u>HOUSEHOLD/FAMILY REPLACEMENT SERVICES</u>	
6	LOSS OF HOUSEHOLD/FAMILY HOUSEKEEPING AND HOME MANAGEMENT SERVICES	\$ 156,088
	----- <u>LOSS OF ENJOYMENT OF LIFE</u>	
9	REDUCTION IN VALUE OF LIFE Lower impairment rating	\$ 567,810
12	Upper impairment rating	\$1,135,594
	----- <u>LOSS OF SOCIETY AND RELATIONSHIP</u>	
15	LOSS OF RELATIONSHIP Cheryl Simao	\$ 642,670

The information on this Summary of Losses is intended to summarize losses under certain given assumptions. Please refer to the report and the tables for all the opinions.

Table 1

LOSS OF PAST BENCHMARK BUSINESS EARNINGS
2007 - 2009

YEAR	AGE	EARNINGS	CUMULATE
****	***	*****	*****
2007	44	\$3,233	\$3,233
2008	45	9,709	12,942
2009	46	7,479	\$20,421
SIMAO		\$20,421	

Table 2

PRESENT VALUE OF FUTURE BENCHMARK BUSINESS EARNINGS
2009 - 2041

YEAR	AGE	EARNINGS	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
****	***	*****	*****	*****	*****
2009	46	\$2,521	0.99598	\$2,510	\$2,510
2010	47	10,000	0.98030	9,803	12,313
2011	48	10,000	0.96486	9,549	21,962
2012	49	10,000	0.94967	9,497	31,459
2013	50	10,000	0.93471	9,347	40,806
2014	51	10,000	0.91999	9,200	50,006
2015	52	10,000	0.90550	9,055	59,061
2016	53	10,000	0.89124	8,912	67,973
2017	54	10,000	0.87721	8,772	76,745
2018	55	10,000	0.86339	8,634	85,379
2019	56	10,000	0.84980	8,498	93,877
2020	57	10,000	0.83641	8,364	102,241
2021	58	10,000	0.82324	8,232	110,473
2022	59	10,000	0.81028	8,103	118,576
2023	60	10,000	0.79752	7,975	126,551
2024	61	10,000	0.78496	7,850	134,401
2025	62	10,000	0.77260	7,726	142,127
2026	63	10,000	0.76043	7,604	149,731
2027	64	10,000	0.74845	7,485	157,216
2028	65	10,000	0.73667	7,367	164,583
2029	66	10,000	0.72507	7,251	171,834
2030	67	10,000	0.71365	7,137	178,971
2031	68	10,000	0.70241	7,024	185,995
2032	69	10,000	0.69135	6,914	192,909
2033	70	10,000	0.68046	6,805	199,714
2034	71	10,000	0.66974	6,697	206,411
2035	72	10,000	0.65920	6,592	213,003
2036	73	10,000	0.64882	6,488	219,491
2037	74	10,000	0.63860	6,386	225,877
2038	75	10,000	0.62854	6,285	232,162
2039	76	10,000	0.61864	6,186	238,348
2040	77	10,000	0.60890	6,089	244,437
2041	78	8,466	0.60076	5,086	\$249,523

WILLIAM SIMAO

\$249,523

Table 3

PRESENT VALUE OF NET BENCHMARK BUSINESS EARNINGS LOSS
2007 - 2041

YEAR	AGE	EARNINGS	CUMULATE
****	***	*****	*****
2007	44	\$3,233	\$3,233
2008	45	9,709	12,942
2009	46	9,989	22,931
2010	47	9,803	32,734
2011	48	9,649	42,383
2012	49	9,497	51,880
2013	50	9,347	61,227
2014	51	9,200	70,427
2015	52	9,055	79,482
2016	53	8,912	88,394
2017	54	8,772	97,166
2018	55	8,634	105,800
2019	56	8,498	114,298
2020	57	8,364	122,662
2021	58	8,232	130,894
2022	59	8,103	138,997
2023	60	7,975	146,972
2024	61	7,850	154,822
2025	62	7,726	162,548
2026	63	7,604	170,152
2027	64	7,485	177,637
2028	65	7,367	185,004
2029	66	7,251	192,255
2030	67	7,137	199,392
2031	68	7,024	206,416
2032	69	6,914	213,330
2033	70	6,805	220,135
2034	71	6,697	226,832
2035	72	6,592	233,424
2036	73	6,488	239,912
2037	74	6,386	246,298
2038	75	6,286	252,583
2039	76	6,186	258,769
2040	77	6,089	264,858
2041	78	5,086	\$269,944

SIMAO \$269,944

Table 4

LOSS OF PAST HOUSEHOLD SERVICES
2005 - 2009

YEAR	AGE	HOUSEHOLD SERVICES	CUMULATE
****	***	*****	*****
2005	42	\$3,155	\$3,155
2006	43	4,611	7,766
2007	44	4,780	12,546
2008	45	4,944	17,490
2009	46	5,135	\$22,625
SIMAO		\$22,625	

Table 5

PRESENT VALUE OF FUTURE HOUSEHOLD SERVICES
2009 - 2041

YEAR	AGE	HOUSEHOLD SERVICES	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
****	***	*****	*****	*****	*****
2009	46	\$1,730	0.99598	\$1,723	\$1,723
2010	47	5,944	0.98030	6,807	8,530
2011	48	7,024	0.96486	6,777	15,307
2012	49	3,552	0.94967	3,373	18,680
2013	50	3,593	0.93471	3,358	22,038
2014	51	3,634	0.91999	3,343	25,381
2015	52	3,676	0.90550	3,329	28,710
2016	53	3,718	0.89124	3,314	32,024
2017	54	3,761	0.87721	3,299	35,323
2018	55	3,804	0.86339	3,284	38,607
2019	56	3,848	0.84980	3,270	41,877
2020	57	3,892	0.83641	3,255	45,132
2021	58	3,937	0.82324	3,241	48,373
2022	59	3,982	0.81028	3,227	51,600
2023	60	4,028	0.79752	3,212	54,812
2024	61	4,074	0.78496	3,198	58,010
2025	62	4,121	0.77260	3,184	61,194
2026	63	4,168	0.76043	3,169	64,363
2027	64	4,216	0.74845	3,155	67,518
2028	65	4,264	0.73667	3,141	70,659
2029	66	4,313	0.72507	3,127	73,786
2030	67	4,363	0.71365	3,114	76,900
2031	68	4,413	0.70241	3,100	80,000
2032	69	4,464	0.69135	3,086	83,086
2033	70	4,515	0.68046	3,072	86,158
2034	71	9,137	0.66974	6,119	92,277
2035	72	9,242	0.65920	6,092	98,369
2036	73	9,348	0.64882	6,065	104,434
2037	74	9,456	0.63860	6,039	110,473
2038	75	9,565	0.62854	6,012	116,485
2039	76	9,675	0.61864	5,985	122,470
2040	77	9,786	0.60890	5,959	128,429
2041	78	8,380	0.60076	5,034	\$133,463

WILLIAM SIMAO

\$133,463

Table 6

PRESENT VALUE OF NET HOUSEHOLD SERVICES LOSS
2005 - 2041

YEAR	AGE	HOUSEHOLD SERVICES	CUMULATE
****	***	*****	*****
2005	42	\$3,155	\$3,155
2006	43	4,611	7,766
2007	44	4,780	12,546
2008	45	4,944	17,490
2009	46	6,858	24,348
2010	47	6,807	31,155
2011	48	6,777	37,932
2012	49	3,373	41,305
2013	50	3,358	44,663
2014	51	3,343	48,006
2015	52	3,329	51,335
2016	53	3,314	54,649
2017	54	3,299	57,948
2018	55	3,284	61,232
2019	56	3,270	64,502
2020	57	3,255	67,757
2021	58	3,241	70,998
2022	59	3,227	74,225
2023	60	3,212	77,437
2024	61	3,198	80,635
2025	62	3,184	83,819
2026	63	3,169	86,988
2027	64	3,155	90,143
2028	65	3,141	93,284
2029	66	3,127	96,411
2030	67	3,114	99,525
2031	68	3,100	102,625
2032	69	3,086	105,711
2033	70	3,072	108,783
2034	71	6,119	114,902
2035	72	6,092	120,994
2036	73	6,065	127,059
2037	74	6,039	133,098
2038	75	6,012	139,110
2039	76	5,985	145,095
2040	77	5,959	151,054
2041	78	5,034	\$156,088
SIMAO		\$156,088	

Table 7

LOSS OF PAST RVL OF WILLIAM (LOWER)
2005 - 2009

YEAR	AGE	RVL	CUMULATE
****	***	*****	*****
2005	42	\$12,581	\$12,581
2006	43	18,110	30,691
2007	44	18,849	49,540
2008	45	18,866	68,406
2009	46	14,534	\$82,940
SIMAO		\$82,940	

Table 8

PRESENT VALUE OF FUTURE RVL OF WILLIAM (LOWER)
2009 - 2041

YEAR	AGE	RVL	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
****	***	*****	*****	*****	*****
2009	46	\$4,898	0.99598	\$4,878	\$4,878
2010	47	19,432	0.98030	19,049	23,927
2011	48	19,432	0.96486	18,749	42,676
2012	49	19,432	0.94967	18,454	61,130
2013	50	19,432	0.93471	18,163	79,293
2014	51	19,432	0.91999	17,877	97,170
2015	52	19,432	0.90550	17,596	114,766
2016	53	19,432	0.89124	17,319	132,085
2017	54	19,432	0.87721	17,046	149,131
2018	55	19,432	0.86339	16,777	165,908
2019	56	19,432	0.84980	16,513	182,421
2020	57	19,432	0.83641	16,253	198,674
2021	58	19,432	0.82324	15,997	214,671
2022	59	19,432	0.81028	15,745	230,416
2023	60	19,432	0.79752	15,497	245,913
2024	61	19,432	0.78496	15,253	261,166
2025	62	19,432	0.77260	15,013	276,179
2026	63	19,432	0.76043	14,777	290,956
2027	64	19,432	0.74845	14,544	305,500
2028	65	19,432	0.73667	14,315	319,815
2029	66	19,432	0.72507	14,090	333,905
2030	67	19,432	0.71365	13,868	347,773
2031	68	19,432	0.70241	13,649	361,422
2032	69	19,432	0.69135	13,434	374,856
2033	70	19,432	0.68046	13,223	388,079
2034	71	19,432	0.66974	13,014	401,093
2035	72	19,432	0.65920	12,810	413,903
2036	73	19,432	0.64882	12,608	426,511
2037	74	19,432	0.63860	12,409	438,920
2038	75	19,432	0.62854	12,214	451,134
2039	76	19,432	0.61864	12,021	463,155
2040	77	19,432	0.60890	11,832	474,987
2041	78	16,451	0.60076	9,883	\$484,870

WILLIAM SIMAO

\$484,870

Table 9

PRESENT VALUE OF NET RVL LOSS OF WILLIAM (LOWER)
2005 - 2041

YEAR	AGE	RVL	CUMULATE
****	***	*****	*****
2005	42	\$12,581	\$12,581
2006	43	18,110	30,691
2007	44	18,849	49,540
2008	45	18,866	68,406
2009	46	19,412	87,818
2010	47	19,049	106,867
2011	48	18,749	125,616
2012	49	18,454	144,070
2013	50	18,163	162,233
2014	51	17,877	180,110
2015	52	17,596	197,706
2016	53	17,319	215,025
2017	54	17,046	232,071
2018	55	16,777	248,848
2019	56	16,513	265,361
2020	57	16,253	281,614
2021	58	15,997	297,611
2022	59	15,745	313,356
2023	60	15,497	328,853
2024	61	15,253	344,106
2025	62	15,013	359,119
2026	63	14,777	373,896
2027	64	14,544	388,440
2028	65	14,315	402,755
2029	66	14,090	416,845
2030	67	13,868	430,713
2031	68	13,649	444,362
2032	69	13,434	457,796
2033	70	13,223	471,019
2034	71	13,014	484,033
2035	72	12,810	496,843
2036	73	12,608	509,451
2037	74	12,409	521,860
2038	75	12,214	534,074
2039	76	12,021	546,095
2040	77	11,832	557,927
2041	78	9,883	\$567,810
SIMAO		\$567,810	

Table 10

LOSS OF PAST RVL OF WILLIAM (UPPER)
2005 - 2009

YEAR	AGE	RVL	CUMULATE
****	***	*****	*****
2005	42	\$25,161	\$25,161
2006	43	36,219	61,380
2007	44	37,697	99,077
2008	45	37,731	136,808
2009	46	29,067	\$165,875
SIMAO		\$165,875	

Table 11

PRESENT VALUE OF FUTURE RVL OF WILLIAM (UPPER)
2009 - 2041

YEAR	AGE	RVL	DISCOUNT FACTOR	PRESENT VALUE	CUMULATE
****	***	*****	*****	*****	*****
2009	46	\$9,796	0.99598	\$9,756	\$9,756
2010	47	38,863	0.98030	38,097	47,853
2011	48	38,863	0.96486	37,497	85,350
2012	49	38,863	0.94967	36,907	122,257
2013	50	38,863	0.93471	36,326	158,583
2014	51	38,863	0.91999	35,754	194,337
2015	52	38,863	0.90550	35,190	229,527
2016	53	38,863	0.89124	34,636	264,163
2017	54	38,863	0.87721	34,091	298,254
2018	55	38,863	0.86339	33,554	331,808
2019	56	38,863	0.84980	33,026	364,834
2020	57	38,863	0.83641	32,505	397,339
2021	58	38,863	0.82324	31,994	429,333
2022	59	38,863	0.81028	31,490	460,823
2023	60	38,863	0.79752	30,994	491,817
2024	61	38,863	0.78496	30,506	522,323
2025	62	38,863	0.77260	30,026	552,349
2026	63	38,863	0.76043	29,553	581,902
2027	64	38,863	0.74845	29,087	610,989
2028	65	38,863	0.73667	28,629	639,618
2029	66	38,863	0.72507	28,178	667,796
2030	67	38,863	0.71365	27,735	695,531
2031	68	38,863	0.70241	27,298	722,829
2032	69	38,863	0.69135	26,868	749,697
2033	70	38,863	0.68046	26,445	776,142
2034	71	38,863	0.66974	26,028	802,170
2035	72	38,863	0.65920	25,618	827,788
2036	73	38,863	0.64882	25,215	853,003
2037	74	38,863	0.63860	24,818	877,821
2038	75	38,863	0.62854	24,427	902,248
2039	76	38,863	0.61864	24,042	926,290
2040	77	38,863	0.60890	23,664	949,954
2041	78	32,900	0.60076	19,765	\$969,719

WILLIAM SIMAO

\$969,719

Table 12

PRESENT VALUE OF NET RVL LOSS OF WILLIAM (UPPER)
2005 - 2041

YEAR	AGE	RVL	CUMULATE
****	***	*****	*****
2005	42	\$25,161	\$25,161
2006	43	36,219	61,380
2007	44	37,697	99,077
2008	45	37,731	136,808
2009	46	38,823	175,631
2010	47	38,097	213,728
2011	48	37,497	251,225
2012	49	36,907	288,132
2013	50	36,326	324,458
2014	51	35,754	360,212
2015	52	35,190	395,402
2016	53	34,636	430,038
2017	54	34,091	464,129
2018	55	33,554	497,683
2019	56	33,026	530,709
2020	57	32,505	563,214
2021	58	31,994	595,208
2022	59	31,490	626,698
2023	60	30,994	657,692
2024	61	30,506	688,198
2025	62	30,026	718,224
2026	63	29,553	747,777
2027	64	29,087	776,864
2028	65	28,629	805,493
2029	66	28,178	833,671
2030	67	27,735	861,406
2031	68	27,298	888,704
2032	69	26,868	915,572
2033	70	26,445	942,017
2034	71	26,028	968,045
2035	72	25,618	993,663
2036	73	25,215	1,018,878
2037	74	24,818	1,043,696
2038	75	24,427	1,068,123
2039	76	24,042	1,092,165
2040	77	23,664	1,115,829
2041	78	19,765	\$1,135,594
SIMAO		\$1,135,594	

Table 13

LOSS OF PAST RELATIONSHIP TO CHERYL
2005 - 2009

YEAR	AGE	RELATIONSHIP	CUMULATE
****	***	*****	*****
2005	39	\$12,581	\$12,581
2006	40	18,110	30,691
2007	41	18,849	49,540
2008	42	18,866	68,406
2009	43	14,534	\$82,940
CHERYL SIMAO		\$82,940	

Table 14

PRESENT VALUE OF FUTURE RELATIONSHIP TO CHERYL
2009 - 2048

YEAR ****	AGE ***	RELATIONSHIP *****	DISCOUNT FACTOR *****	PRESENT VALUE *****	CUMULATE *****
2009	43	\$4,898	0.99598	\$4,878	\$4,878
2010	44	19,432	0.98030	19,049	23,927
2011	45	19,432	0.96486	18,749	42,676
2012	46	19,432	0.94967	18,454	61,130
2013	47	19,432	0.93471	18,163	79,293
2014	48	19,432	0.91999	17,877	97,170
2015	49	19,432	0.90550	17,596	114,766
2016	50	19,432	0.89124	17,319	132,085
2017	51	19,432	0.87721	17,046	149,131
2018	52	19,432	0.86339	16,777	165,908
2019	53	19,432	0.84980	16,513	182,421
2020	54	19,432	0.83641	16,253	198,674
2021	55	19,432	0.82324	15,997	214,671
2022	56	19,432	0.81028	15,745	230,416
2023	57	19,432	0.79752	15,497	245,913
2024	58	19,432	0.78496	15,253	261,166
2025	59	19,432	0.77260	15,013	276,179
2026	60	19,432	0.76043	14,777	290,956
2027	61	19,432	0.74845	14,544	305,500
2028	62	19,432	0.73667	14,315	319,815
2029	63	19,432	0.72507	14,090	333,905
2030	64	19,432	0.71365	13,868	347,773
2031	65	19,432	0.70241	13,649	361,422
2032	66	19,432	0.69135	13,434	374,856
2033	67	19,432	0.68046	13,223	388,079
2034	68	19,432	0.66974	13,014	401,093
2035	69	19,432	0.65920	12,810	413,903
2036	70	19,432	0.64882	12,608	426,511
2037	71	19,432	0.63860	12,409	438,920
2038	72	19,432	0.62854	12,214	451,134
2039	73	19,432	0.61864	12,021	463,155
2040	74	19,432	0.60890	11,832	474,987
2041	75	19,432	0.59931	11,646	486,633
2042	76	19,432	0.58987	11,462	498,095
2043	77	19,432	0.58059	11,282	509,377
2044	78	19,432	0.57144	11,104	520,481
2045	79	19,432	0.56244	10,929	531,410
2046	80	19,432	0.55359	10,757	542,167
2047	81	19,432	0.54487	10,588	552,755
2048	82	12,937	0.53913	6,975	\$559,730

CHERYL SIMAO

\$559,730

Table 15

PRESENT VALUE OF NET RELATIONSHIP LOSS TO CHERYL
2005 - 2048

YEAR	AGE	RELATIONSHIP	CUMULATE
****	***	*****	*****
2005	39	\$12,581	\$12,581
2006	40	18,110	30,691
2007	41	18,849	49,540
2008	42	18,866	68,406
2009	43	19,412	87,818
2010	44	19,049	106,867
2011	45	18,749	125,616
2012	46	18,454	144,070
2013	47	18,163	162,233
2014	48	17,877	180,110
2015	49	17,596	197,706
2016	50	17,319	215,025
2017	51	17,046	232,071
2018	52	16,777	248,848
2019	53	16,513	265,361
2020	54	16,253	281,614
2021	55	15,997	297,611
2022	56	15,745	313,356
2023	57	15,497	328,853
2024	58	15,253	344,106
2025	59	15,013	359,119
2026	60	14,777	373,896
2027	61	14,544	388,440
2028	62	14,315	402,755
2029	63	14,090	416,845
2030	64	13,868	430,713
2031	65	13,649	444,362
2032	66	13,434	457,796
2033	67	13,223	471,019
2034	68	13,014	484,033
2035	69	12,810	496,843
2036	70	12,608	509,451
2037	71	12,409	521,860
2038	72	12,214	534,074
2039	73	12,021	546,095
2040	74	11,832	557,927
2041	75	11,646	569,573
2042	76	11,462	581,035
2043	77	11,282	592,317
2044	78	11,104	603,421
2045	79	10,929	614,350
2046	80	10,757	625,107
2047	81	10,588	635,695
2048	82	6,975	\$642,670

CHERYL SIMAO \$642,670

EXHIBIT "9"

7/19/07

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

10 WILLIAM JAY SIMAO, individually and)
 11 CHERYL ANN SIMAO, individually, and as)
 12 husband and wife,)
 13)
 14 Plaintiff,)

14 v.)
 15)
 16 JENNY RISH; JAMES RISH; LINDA RISH;
 17 DOES I - V; and ROE CORPORATIONS I - V,
 18 inclusive,)
 19)
 20 Defendants.)

CASE NO. A539455
 DEPT. NO X

20 **DEFENDANT JENNY RISH'S OFFER OF JUDGMENT TO PLAINTIFF'S**

21 TO: WILLIAM JAY SIMAO and CHERYL ANN SIMAO, Plaintiffs; and

22 TO: AARON & PATERNOSTER, LTD, their attorneys:

23 Pursuant to Rule 68 of the Nevada Rules of Civil Procedure and NRS 17.115, Defendant,
 24 JENNY RISH, hereby offers to allow judgment to be taken against her in this action, in the total
 25 amount of \$5,000.00, including all fees, costs, and pre-judgment interest. This Offer of Judgment is
 26 made for the purposes specified in Rule 68 and NRS 17.115, and is not to be construed either as an
 27
 28

admission that the Defendant is liable in this action or that the Plaintiffs have suffered any damage.

DATED this 9th day of July, 2008.

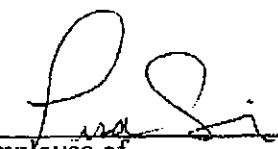
ROGERS, MASTRANGELO, CARVALHO &
MITCHELL


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

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 9th day of July, 2008,
a true and correct copy of the foregoing **DEFENDANT JENNY RISH'S OFFER OF JUDGMENT
TO PLAINTIFFS** 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

M:\Rogers\Buck only - Simon\Pleadings\001538.rpt

JUL 11 2008

EXHIBIT "10"

OFFER

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.

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

Defendants.

CASE NO. A539455

DEPT. NO XX

OFFER OF JUDGMENT TO PLAINTIFF WILLIAM SIMAO

TO: WILLIAM SIMAO, Plaintiff and,

TO: JOHN PALERMO, ESQ., Plaintiff's attorney.

PLEASE TAKE NOTICE that pursuant to the provisions of NRCP 68 and NRS 17.115, Defendant, JENNY RISH, hereby offer to allow judgment to be taken against her in the sum of FORTY-TWO THOUSAND FIVE HUNDRED and NO/100 DOLLARS (\$42,500.00) inclusive of costs, interest and fees. This offer is for a total sum of FORTY-TWO THOUSAND FIVE HUNDRED and NO/100 DOLLARS (\$42,500.00) and does not contemplate nor allow for the addition of costs, interest nor fees. This Offer of Judgment is made for the purposes specified in NRCP Rule 68 and NRS 17.115 and is not to be construed as an admission of any kind whatsoever. If accepted, pursuant to NRCP 68, Defendant shall exercise its option to pay the amount of the offer, and obtain

1 a dismissal, and no judgment shall be entered by Plaintiff against Defendant. Any attempt to enter
2 judgment and seek interest or monies in excess of the amount of the offer shall render the offer null
3 and void.

4
5 DATED this 12th day of October, 2009.

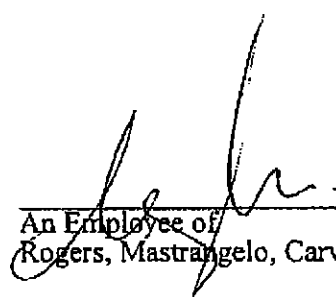
6 ROGERS, MASTRANGELO, CARVALHO &
7 MITCHELL

8 
9 _____
10 STEPHEN H. ROGERS, ESQ.
11 Nevada Bar No. 5755
12 300 South Fourth Street, Suite 710
13 Las Vegas, Nevada 89101
14 *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 6TH day of October,
2009, a true and correct copy of the foregoing **OFFER OF JUDGMENT TO PLAINTIFF**
WILLIAM SIMAO 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

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EXHIBIT "11"

OFFER

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.

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

Defendants.

CASE NO. A539455

DEPT. NO XX

OFFER OF JUDGMENT TO PLAINTIFF CHERYL ANN SIMAO

TO: CHERYL ANN SIMAO, Plaintiff and,

TO: JOHN PALERMO, ESQ., Plaintiff's attorney.

PLEASE TAKE NOTICE that pursuant to the provisions of NRCP 68 and NRS 17.115, Defendant, JENNY RISH, hereby offer to allow judgment to be taken against her in the sum of FIVE THOUSAND and NO/100 DOLLARS (\$5,000.00) inclusive of costs, interest and fees. This offer is for a total sum of FIVE THOUSAND and NO/100 DOLLARS (\$5,000.00) and does not contemplate nor allow for the addition of costs, interest nor fees. This Offer of Judgment is made for the purposes specified in NRCP Rule 68 and NRS 17.115 and is not to be construed as an admission of any kind whatsoever. If accepted, pursuant to NRCP 68, Defendant shall exercise its option to pay the amount of the offer, and obtain a dismissal, and no judgment shall be entered by Plaintiff against Defendant.

1 Any attempt to enter judgment and seek interest or monies in excess of the amount of the offer shall
2 render the offer null and void.

3
4 DATED this 17 day of October, 2009.

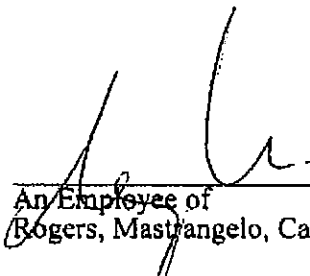
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6 ROGERS, MASTRANGELO, CARVALHO &
MITCHELL

7
8 
9 STEPHEN H. ROGERS, ESQ.
10 Nevada Bar No. 5755
11 300 South Fourth Street, Suite 710
12 Las Vegas, Nevada 89101
13 Attorneys for Defendant Jenny Rish
14
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28

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 6th day of October,
2009, a true and correct copy of the foregoing **OFFER OF JUDGMENT TO PLAINTIFF**
CHERYL ANN SIMAO 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\Kish adv Simao\Pleadings\DOJ - Cheryl Simao.wpd

EXHIBIT "12"

AFFIDAVIT OF ROBERT T. EGLET, ESQ.

STATE OF NEVADA)
)
COUNTY OF CLARK) ss:

ROBERT T. EGLET, being duly sworn, deposes and states as follows:

1. That I am an attorney licensed to practice law in Nevada and I was one (1) trial counsel for the Plaintiffs, WILLIAM and CHERYL SIMAO , in connection with the above-captioned matter;

2. On April 2, 2010, Mainor Eglet and I associated with Mathew Aaron, Esq. to assist in the litigation of this matter;

3. On February 5, 2009, prior to my Association of Counsel with Mathew Aaron, Esq., Plaintiffs served an Offer of Judgment on Defendant in the amount of \$799,999.00. That Offer was unreasonably rejected by operation of law;

4. Thereafter, in preparation for trial, Plaintiffs took multiple depositions, filed several motions, attended several hearings, prepared several witnesses and participated in a 15 day trial as Lead Trial Counsel;

5. That I spent, at the very least, 267.5 hours working on this case, both in preparation for, and attendance at, the trial of this matter. That all of these hours are subsequent to the date that Plaintiffs' Offer of Judgment was served on defense counsel;

6. That I am a Martindale-Hubbel "AV" rated attorney with an excellent state and nationwide reputation as a Plaintiff's trial attorney.

7. In this case, my arrangement with Plaintiffs was on a contingency fee basis, providing for fees in the amount of 40% of any recovery in this case, whether by settlement and/or verdict.

MAINOR EGLET

004281

1 8. Although the majority of my work is on a contingency fee basis, I do work on
2 hourly matters and, on those matters, I charge the sum of \$750 per hour as and for services
3 rendered. For this reason, I feel that \$750 per hour is a reasonable amount to assess for the time
4 spent in preparation of this case. Moreover, I have been awarded this hourly rate by other Courts
5 within the Eighth Judicial District for other similar matter. That Mainor Eglet bills the time of
6 my Partner, David T. Wall, Esq., at the hourly rate of \$750, per hour, which is a reasonable
7 amount for his time spent in this case and based upon his years of experience as a trial attorney
8 and former judge in the Clark County.

9
10 9. The complexity and expense associated with this type of case requires me to turn
11 down at least 15 cases for every case that I accept;

12
13 10. The complexity of Plaintiff's injuries created an enormous challenge in preparing
14 Plaintiff's experts for trial, the majority of whom were board certified, fellowship trained and/or
15 board certified in subspecialties. That is because the severity of Plaintiff's injuries, he required
16 significant medical treatment, including complicated interventional pain management injections,
17 diagnostic imaging and other diagnostic studies to definitively diagnose. Moreover, Plaintiff
18 underwent surgical procedures, including an anterior cervical disectomy at C3-4 and C4-5. The
19 medical evidence in this matter had to be presented to the jury in a comprehensive fashion, since
20 the members of the jury were without complex medical training or background. As a
21 consequence, I should be fairly compensated for the loss to my law practice for that effort.

22
23 11. Based upon my hourly fee of \$750 and the total of 267.5 hours that I personally
24 devoted to this matter, \$200,625.00 represents the fair market value for my services.

25
26 12. My firm associated into this case on April 2, 2010, for the specific purpose of
27 preparing the matter for trial.

28 ///

MAINOR EGLET

004282

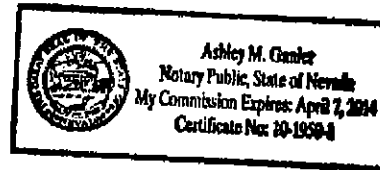
13. Given the complex nature of the case, the significant contingent risk, the quality of Mr. Wall and my legal services, and the extraordinarily successful results, I respectfully submit that if attorney fees are not to be awarded on a contingency fee basis, then all attorney services in this case, including mine and Mr. Wall's, be multiplied by a minimum factor of 2.5.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.

ROBERT T. EGLET, ESQ.,
AFFIANT

SUBSCRIBED and SWORN to before
me this 25 day of May, 2011.

NOTARY PUBLIC in and said for the
above-referenced County and State.



MAINOR EGLET

004283

EXHIBIT "13"

AFFIDAVIT OF DAVID T. WALL, ESQ.

STATE OF NEVADA)
) SS:
 COUNTY OF CLARK)

DAVID T. WALL, being duly sworn, deposes and states as follows:

1. I am an attorney duly licensed to practice law in Nevada and I was (1) one of the trial counsel for the Plaintiffs, in connection with this case. I have personal knowledge of the following facts and if called upon could competently testify to such facts.

3. After Plaintiffs' Offer of Judgment was served on defense counsel (February 5, 2009), I spent, at the very least, 307.5 hours working on this case, both in preparation for, and attendance at, the trial of this matter.

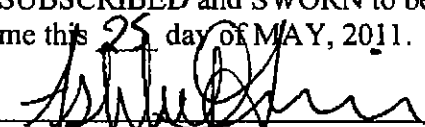
4. Although the majority of my work is on a contingency fee basis, I do work on hourly matters and, on those matters, I charge the sum of \$750 per hour as and for services rendered.

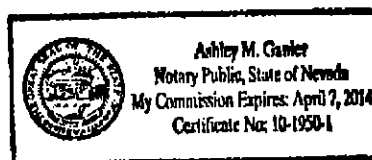
5. Based upon my reasonable hourly fee of \$750 and the total of 307.5 hours that I have personally devoted to this matter, \$230,625.00 represents the fair market value for my services.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.


 DAVID T. WALL, ESQ.

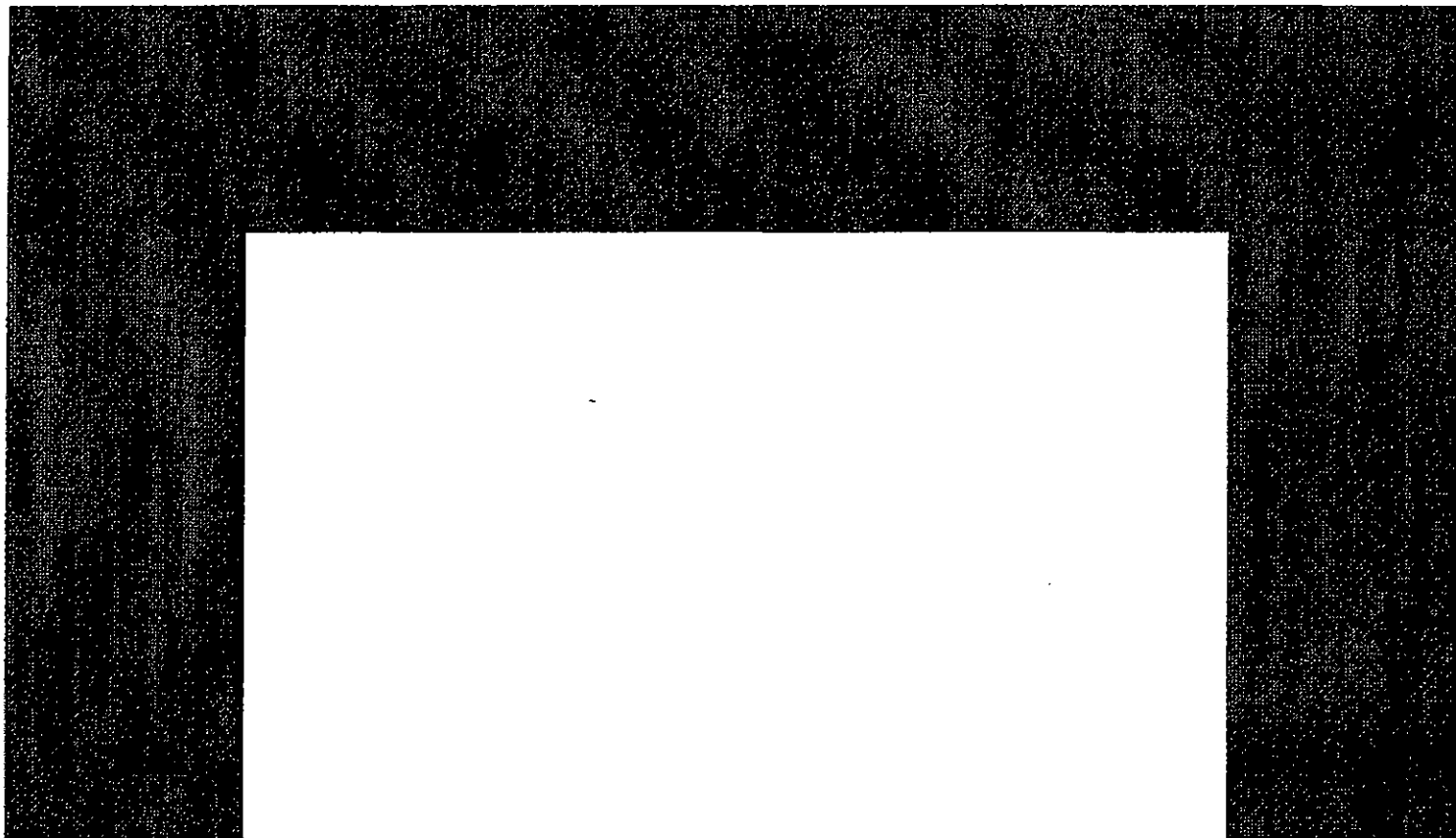
SUBSCRIBED and SWORN to before me this 25 day of MAY, 2011.


 NOTARY PUBLIC in and said for the above-referenced County and State.



MAINOR EGLET

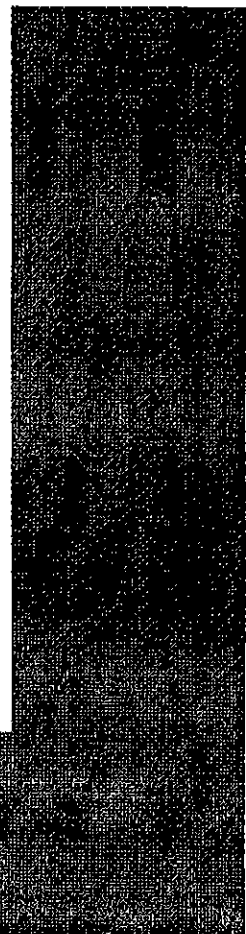
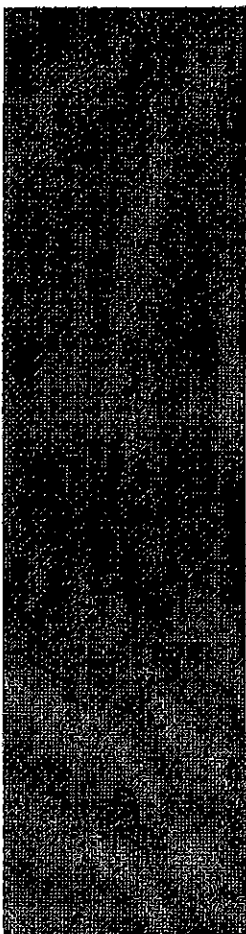
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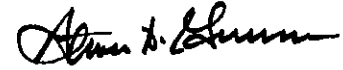
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CLERK OF THE COURT

RPLY

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.

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

Defendants.

CASE NO. A539455

DEPT. NO X

DEFENDANT'S REPLY TO OPPOSITION TO MOTION TO RETAX COSTS

COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H. ROGERS, ESQ., and hereby submits this Reply in support of her Motion to Retax Plaintiffs' costs.

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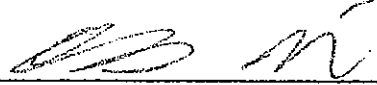
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1 This Motion is based upon the following Memorandum of Points and Authorities, the
2 pleadings and papers on file herein, and any argument the Court is willing to entertain at the time of
3 the hearing.

4 DATED this 26th day of May, 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 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. Argument**

15 **1. Plaintiffs' costs are excessive and should be reduced**

16 Plaintiffs object to Defendant's motion to retax the costs, stating that no justification exists
17 for a retaxing of the costs. As Defendant stated in the initial motion, Plaintiffs sought, and already
18 received, an award of costs in the amount of \$99,555.49. Defendant was unable to file a motion to
19 object to the costs prior to the judgment being entered, as the costs were already included therein.
20 However, as to the specific statute justifying costs, Defendant cited to NRS 18.005, which does
21 proscribe those costs which are allowed.

22 Plaintiffs seek \$59,028.16 in expert witness fees, despite the limitations of NRS 18.005,
23 which limits recovery for costs for expert witnesses to \$1500 per expert, for no more than 5 experts.
24 Plaintiffs characterize this statute as a "decades old statute", as if the length of time a law has been
25 in effect allows one to ignore its language. Had the legislature wanted to update the statute to include
26 more than \$1500 in expert witness fees, it could have done so.

27 Plaintiffs' fees for these experts was excessive and should be disallowed. In addition, while
28 the catchall provision allows reasonable expenses, there is no authority for Plaintiffs to obtain

1 mediation fees or excessive copying charges. Plaintiffs are the party who must establish its right ti
2 fees under the statute, not the defense. And Plaintiffs has not met their burden. Defendant therefore
3 objects to the award of these costs.

4 **II. Conclusion**

5 For the foregoing reasons, the Defendant asks that the Motion to Retax Costs be granted.

6 DATED this 21st day of May, 2011.

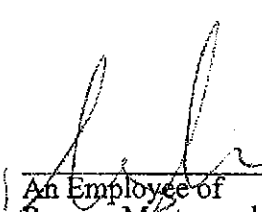
7 ROGERS, MASTRANGELO, CARVALHO &
8 MITCHELL

9
10 
11 STEPHEN H. ROGERS, ESQ.
12 Nevada Bar No. 5755
13 300 South Fourth Street, Suite 710
14 Las Vegas, Nevada 89101
15 Attorneys for Defendant Jenny Rish
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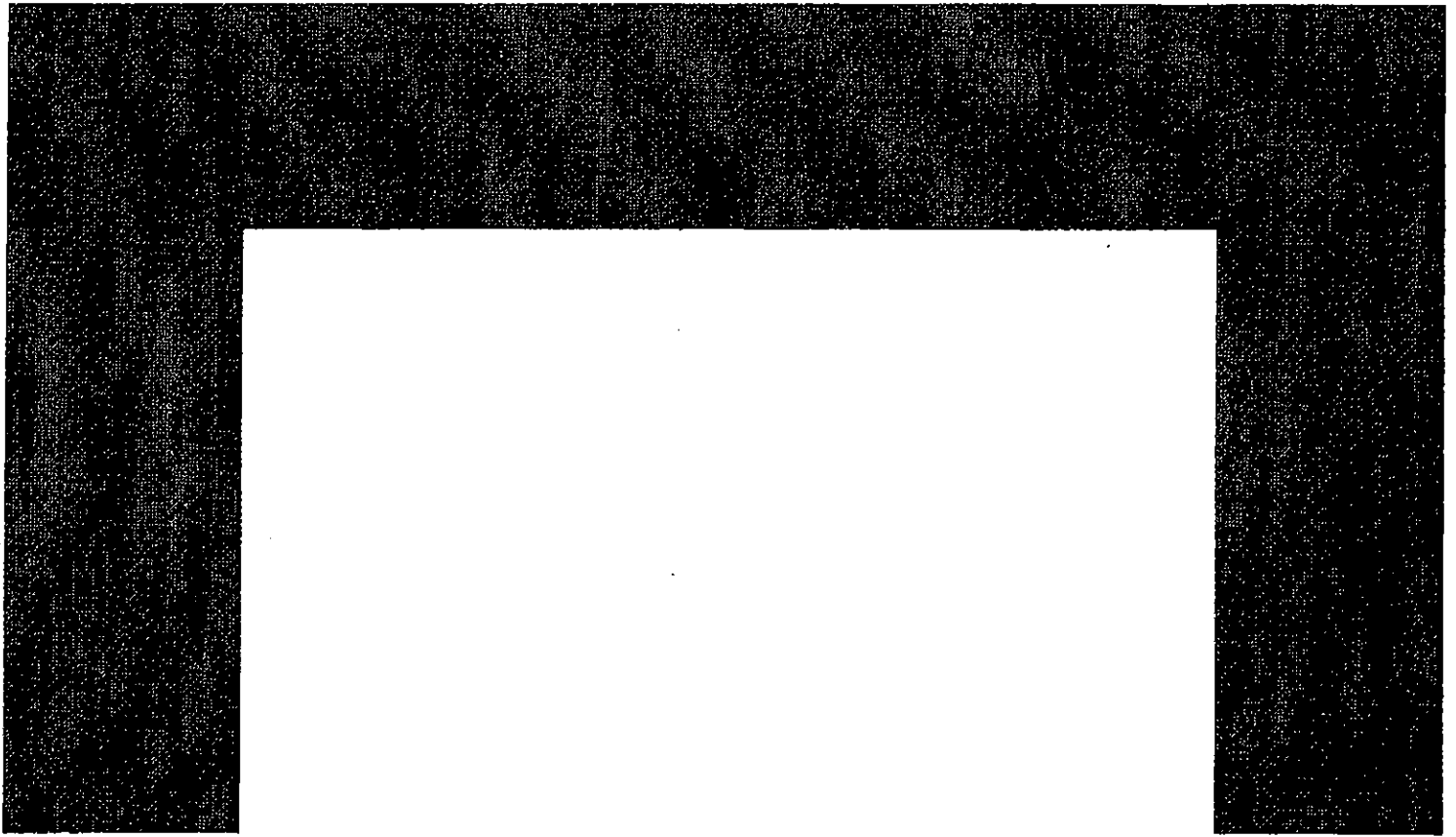
CERTIFICATE OF SERVICE

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 26th day of May, 2011,
a true and correct copy of the foregoing **DEFENDANT'S REPLY TO OPPOSITION TO**
MOTION TO RETAX COSTS was served via First Class, U.S. Mail, postage prepaid, addressed
as follows, upon the following counsel of record:

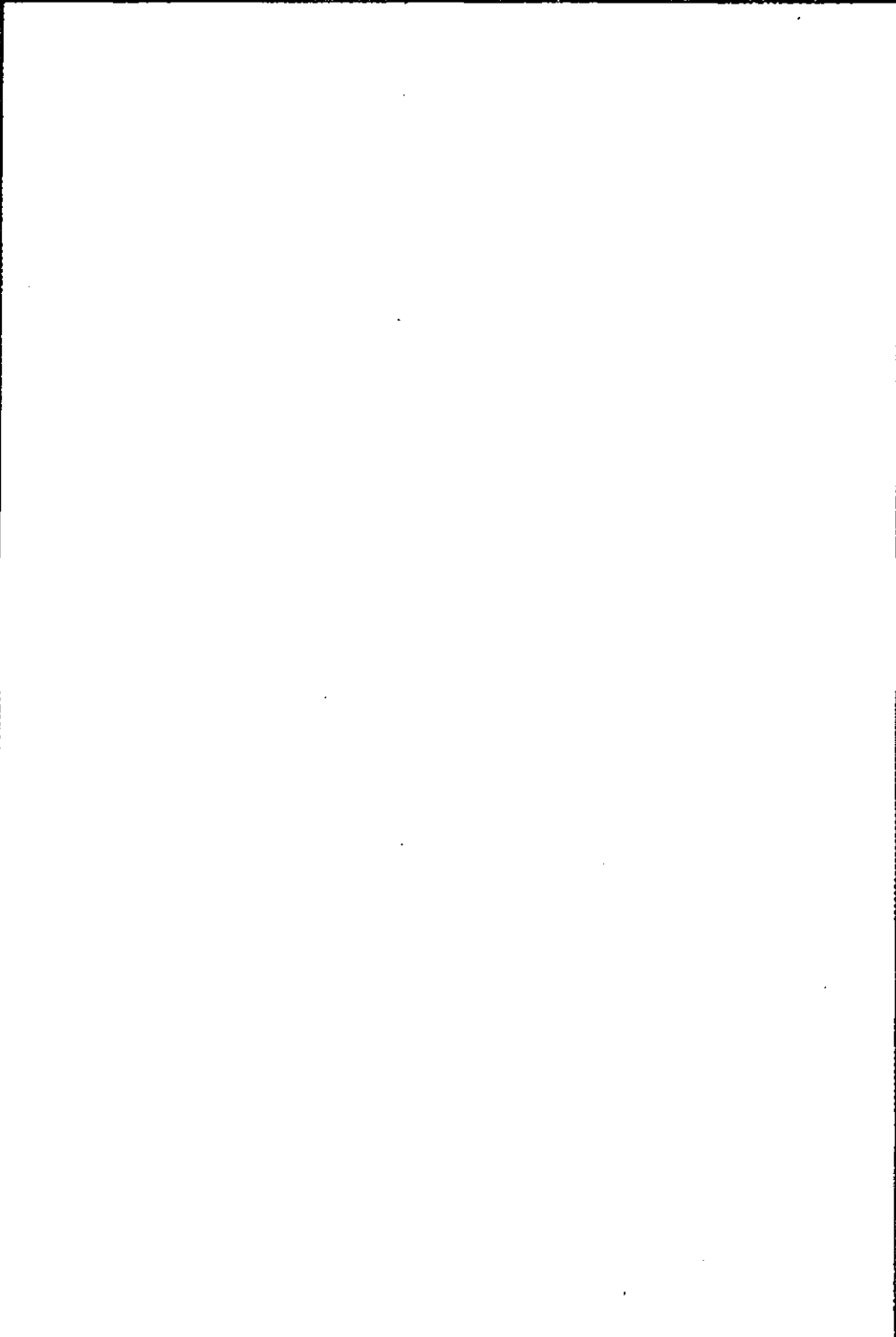
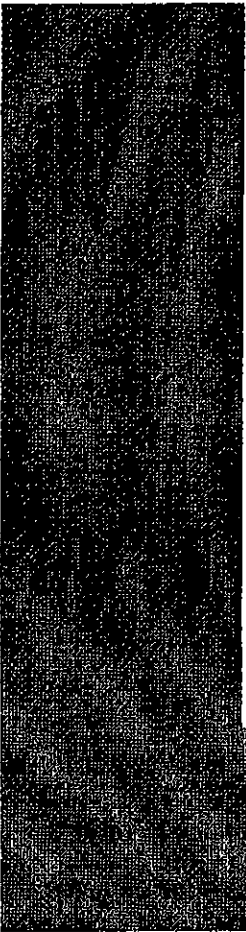
David T. Wall, Esq.
MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Telephone: (702) 450-5400
Facsimile: (702) 450-5451
Attorneys for Plaintiffs


An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell

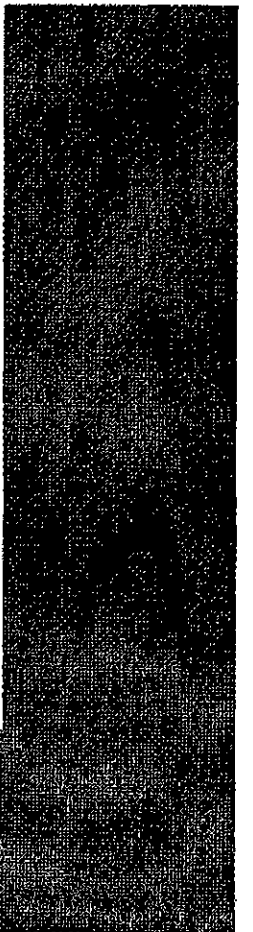
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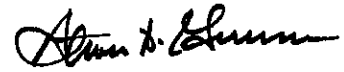
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CLERK OF THE COURT

DEPARTMENT 1
NOTICE OF HEARING
DATE 6/7/11 9:00 am
APPROVED BY JWE

1 **MQUA**
2 **ROBERT T. EGLET, ESQ.**
3 Nevada Bar No. 3402
4 **DAVID T. WALL, ESQ.**
5 Nevada Bar No. 2805
6 **BRICE J. CRAFTON, ESQ.**
7 Nevada Bar No. 10558
8 **MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
dwall@mainorlawyers.com

9 **MATTHEW E. AARON, ESQ.**
10 Nevada Bar No. 4900
11 **AARON & PATERNOSTER, LTD.**
12 2300 West Sahara Avenue, Ste.650
13 Las Vegas, Nevada 89102
14 Ph.: (702) 384-4111
15 Fx.: (702) 384-8222
16 *Attorneys for Plaintiffs*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

17 **WILLIAM JAY SIMAO, individually and**
18 **CHERYL ANN SIMAO, individually, and**
19 **as husband and wife,**

20 **Plaintiffs,**

21 **v.**

22 **JENNY RISH; JAMES RISH; LINDA**
23 **RISH; DOES I through V; and ROE**
24 **CORPORATIONS I through V, inclusive,**

25 **Defendants.**

CASE NO.: A539455
DEPT. NO.: X

Date of Hearing: 6/7/11

Time of Hearing: 9:00 am

27 **PLAINTIFFS' MOTION TO QUASH DEFENDANT'S SUBPOENA DUCES TECUM TO**
28 **JANS-JORG ROSLER, M.D. AT NEVADA SPINE INSTITUTE**
ON ORDER SHORTENING TIME

AFFIDAVIT OF IN SUPPORT OF REQUEST FOR ORDER SHORTENING TIME

STATE OF NEVADA)
) ss:
 COUNTY OF CLARK)

BRICE J. CRAFTON, ESQ. being first duly sworn, deposes and says:

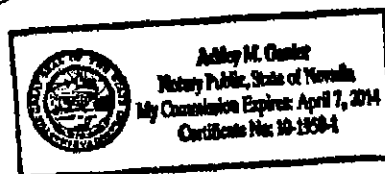
1. Affiant is an associate with the law firm of MAINOR EGLET, LLP, attorneys of record for Plaintiffs.
2. That Defendant served a Subpoena Duces Tecum to Jorg Rosler, M.D. at Nevada Spine Institute on May 16, 2011, demanding fluoroscopy images taken at the time of Plaintiff William Simao's discogram to be produced no later than May 26, 2011;
3. That trial for the instant case completed on March 31, 2011 after the Court dismissed Defendant's Answer as a sanction for repeatedly violating pretrial orders;
4. That the time to conduct discovery has passed;
5. That Plaintiffs already provided the fluoroscopy images to Defendant;
6. That because the Subpoena date is May 26, 2011 and is wholly improper and untimely, this matter cannot be heard in normal course and it is respectfully requested that it be heard on an Order Shortening Time, pursuant to Court order; and
7. This Motion is made for a proper purpose and is not made to delay or harass.

Further, Affiant sayeth naught.

BRICE J. CRAFTON, ESQ.

SUBSCRIBED and SWORN to before
 me this 24 day of May, 2011.

NOTARY PUBLIC

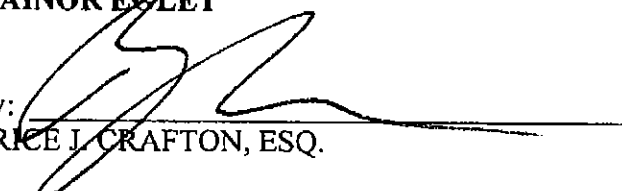


COME NOW Plaintiffs, WILLIAM and CHERYL SIMAO, by and through their attorneys, ROBERT T. EGLET, ESQ., DAVID T. WALL, ESQ. and BRICE J. CRAFTON, ESQ. of the law firm of MAINOR EGLET, and hereby file this Motion to Quash Defendant's Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at Nevada Spine Institute on Order Shortening Time.

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 24 day of May, 2011.

MAINOR EGLET

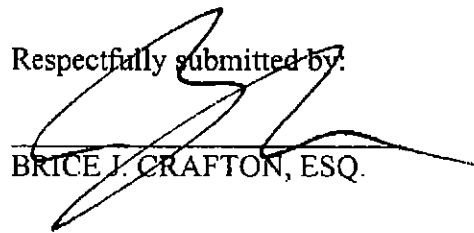
By: 
BRICE J. CRAFTON, ESQ.

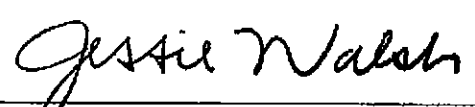
ORDER SHORTENING TIME

It appearing to the satisfaction of the Court, and good cause appearing therefore. IT IS HEREBY ORDERED that **PLAINTIFF'S MOTION TO QUASH DEFENDANTS' SUBPOENA DUCES TECUM TO JANS-JORG ROSLER, M.D. AT NEVADA SPINE INSTITUTE ON ORDER SHORTENING TIME** shall come on for hearing before this Honorable Court on the 7 day of June, 2011 at 9:00Am., in Department X, or as soon thereafter as counsel may be heard.

Dated this 25 day of May, 2011.

Respectfully submitted by:


BRICE J. CRAFTON, ESQ.


DISTRICT COURT JUDGE y

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

On May 16, 2011, Defendant served a Subpoena Duces Tecum to Jorg Rosler, M.D. at Nevada Spine Institute, demanding fluoroscopy images taken at the time of Plaintiff William Simao's discogram to be produced no later than May 26, 2011. *See* Subpoena Duces Tecum to Dr. Rosler, attached hereto as **Exhibit "1."**

Approximately six (6) weeks prior to the service of the Subpoena, on March 31, 2011, trial for the instant case completed after the Court dismissed Defendant's Answer as a sanction for repeatedly violating pretrial orders. As the Court may recall, during trial, Defense requested that the subject fluoroscopy images be provided to them, and in fact, these images were provided to the defense on April 15, 2011. *See* Receipt of Copy, filed April 18, 2011, attached hereto as **Exhibit "2."** Because this matter initially arose during trial, the court retains jurisdiction, thus this Motion is brought before Your Honor.

II.

LEGAL ARGUMENT

Among other requirements, every subpoena must state the title of the action, the name of the court in which it is pending, and its civil case number. Nev. R. Civ. P. 45(a)(1). A valid ground for objection to disclosing information is that the information sought is not reasonably calculated to lead to the discovery of admissible evidence. Nev. R. Civ. P. 26(b)(1).

It is questionable whether Defendant's Subpoena Duces Tecum is even effective, considering the instant case has already been resolved. Including voir dire of potential jurors, trial took place for nearly two weeks before Defendant's Answer was stricken for repeated violations of pretrial orders. Further, on April 15, 2011, Plaintiffs provided to Defendant a copy

1 of the very images requested in the Subpoena at issue. See Exhibit "2." Mr. Simao is still
2 treating with Dr. Rosler, thus the original images must remain at his facility.

3 The instant case is *post-trial* and clearly, the discovery period has closed. Defendant's
4 Subpoena to Dr. Rosler is untimely, unreasonable, irrelevant, and not reasonably calculated to
5 lead to admissible evidence because *trial is over*. Therefore, Plaintiffs request this Court to
6 quash Defendant's Subpoena Duces Tecum to Dr. Rosler.
7

8 **III.**

9 **CONCLUSION**

10 Based on the foregoing reasons, Plaintiffs respectfully request this Court to grant
11 Plaintiffs' Motion to Quash Defendant's Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at
12 Nevada Spine Institute.
13

14 DATED this 24 day of May, 2011.

15 **MAINOR EGLET, LLP**

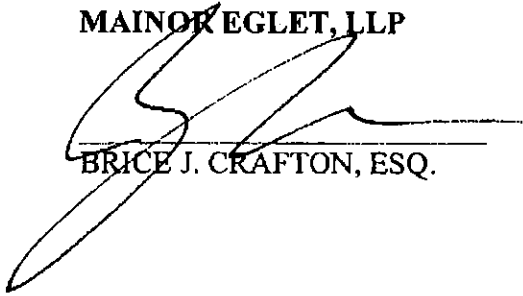
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18 **BRICE J. CRAFTON, ESQ.**
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EXHIBIT "1"

1 **SUBP**
 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

10
 11
 12 **DISTRICT COURT**
 13
 14 **CLARK COUNTY, NEVADA**

10	WILLIAM JAY SIMAO, individually and	)	CASE NO.	A539455
11	CHERYL ANN SIMAO, individually, and as	)	DEPT. NO	X
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.	)		

19 **SUBPOENA - CIVIL**

20 ☐ REGULAR ☒ DUCES TECUM

21 **THE STATE OF NEVADA SENDS GREETINGS TO:**

22 Jans-Jorg Rosler, M.D.
 23 Nevada Spine Institute
 24 7140 Smoke Ranch Road
 25 Las Vegas, Nevada 89128
 26 Telephone: 702-320-8111

27 **YOU ARE HEREBY COMMANDED** that all singular, business and excuses set aside,
 28 you appear and attend on **May 26, 2011, at 11:00 a.m.** The address where you are required to
 appear is Rogers, Mastrangelo, Carvalho & Mitchell, 300 South Fourth Street, 710 Bank of
 America Plaza, Las Vegas, Nevada 89101. Your attendance is required to give testimony and/or to

1 produce and permit inspection and copying of designated books, documents or tangible things in
2 your possession, custody or control. You are required to bring with you at the time of your
3 appearance any items set forth below. If you fail to attend, you may be deemed guilty of contempt
4 of Court and liable to pay all losses and damages caused by your failure to appear.

5
6 **ITEMS TO BE PRODUCED**

- 7 1. The flourescopy images taken at the time of the discogram, which you
8 published to the jury during the Trial of the above named case pertaining to
9 WILLIAM JAY SIMAO DOB 05-08-1963.

10 **IN LIEU OF APPEARANCE**, you are permitted to provide a copy of the above- referenced
11 documentation together with a signed and notarized Affidavit or Certificate of Custodian of Records,
12 on or before Thursday, the 26th day of May, 2011 at the hour of 10:00 a.m., to Rogers,
13 Mastrangelo, Carvalho & Mitchell, 300 South Fourth Street, 710 Bank of America Plaza, Las Vegas,
Nevada 89101.

14 Please see Exhibit "A" attached hereto for information regarding the rights of the person
15 subject to this Subpoena.

16 DATED this 13th day of May, 2011.

17 ROGERS, MASTRANGELO, CARVALHO &
18 MITCHELL

19
20 
21 Stephen H. Rogers, Esq.
22 Nevada Bar No. 5755
23 300 South Fourth Street, Suite 710
24 Las Vegas, Nevada 89101
25 Telephone: (702) 383-3400
26 Facsimile: 702-384-1460
27 Attorneys for Defendant Jenny Rish

28 **EXHIBIT "A"**

EXHIBIT "A"
NEVADA RULES OF CIVIL PROCEDURE

Rule 45

(c) Protection of Persons Subject to Subpoena.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

AFFIDAVIT OF SERVICE

1 State of Nevada)
2)ss:
3 County of Clark)

4 _____, being duly sworn says: That at all time herein affiant
5 was over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is
6 made. That affiant received the Subpoena on the _____ day of _____, 2011, and
7 served the same on the _____ day of _____, 2011 by delivering a copy to the
8 witness at:

9 I declare under penalty of perjury under the law of the State of Nevada that the foregoing is
10 true and correct.

11 EXECUTED this _____ day of _____, 2011.

12
13 _____
14 Signature of person making service
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1
2 **CERTIFICATE OF SERVICE**

3 Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of Rogers,
4 Mastrangelo, Carvalho & Mitchell, and on the 16th day of May, 2011, a true and correct copy of the
5 foregoing **SUBPOENA DUCES TECUM** was served via First Class, U.S. Mail, postage prepaid,
6 addressed as follows, upon the following counsel of record:

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

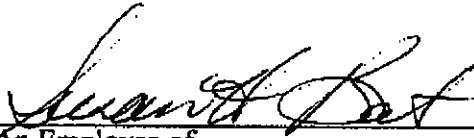
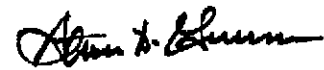
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An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell

EXHIBIT "2"

Electronically Filed
04/18/2011 10:38:51 AM



CLERK OF THE COURT

1 **ROC**
2 **ROBERT T. EGLET, ESQ.**
3 Nevada Bar No. 3402
4 **DAVID T. WALL, ESQ.**
5 Nevada Bar No. 2805
6 **ROBERT M. ADAMS, ESQ.**
7 Nevada Bar No. 6551
8 **MAINOR EGLET**
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11 Ph: (702) 450-5400
12 Fx: (702) 450-5451
13 dwall@mainorlawyers.com

14 **MATTHEW E. AARON, ESQ.**
15 Nevada Bar No. 4900
16 **AARON & PATERNOSTER, LTD.**
17 2300 West Sahara Avenue, Ste.650
18 Las Vegas, Nevada 89102
19 Ph.: (702) 384-4111
20 Fx.: (702) 384-8222
21 *Attorneys for Plaintiffs*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

22 **WILLIAM JAY SIMAO, individually and**
23 **CHERYL ANN SIMAO, individually, and**
24 **as husband and wife,**

25 Plaintiffs,

26 v.

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

Defendants.

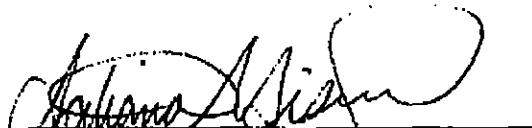
CASE NO.: A539455
DEPT. NO.: X

RECEIPT OF COPY

MAINOR EGLET

004304

1 RECEIPT OF A COPY OF the fluoroscopy image, which was addressed by Dr.
2 Rosler during the trial of this matter and ordered by the Court to be produced as an exhibit,
3
4 is hereby acknowledged:

5
6 

Date: 4/15/11 Time: 4:25

7 Stephen H. Rogers, Esq.

8 **ROGERS, MASTRANGELO, CARVALHO & MITCHELL, LTD.**

9 300 S. Fourth Street, #710

10 Las Vegas, NV 89101

11 Attorneys for Defendants

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MAINOR EGLET

In the Supreme Court of Nevada

Case Nos. 58504, 59208 and 59423

Electronically Filed
Aug 15 2012 08:32 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

JENNY RISH,

Appellant,

vs.

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

Respondents.

APPEAL

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

**APPELLANT'S APPENDIX
VOLUME 18
PAGES 4103-4305**

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& MITCHELL
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SRogers@RMCMLaw.com

Attorneys for Appellant

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04	Summons (Linda Rish)	08/28/07	1	16-19
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06	Defendant Jenny Rish's Answer to Plaintiff's Complaint	03/21/08	1	23-26
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08	Scheduling Order	06/11/08	1	30-33
09	Order Setting Civil Jury Trial	08/18/08	1	34-38
10	Stipulation and Order to Extend Discovery	05/06/09	1	39-43
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14	Stipulation and Order to Continue Trial Date	03/31/10	1	60-62
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25	Plaintiffs' Opposition to Defendant Jenny Rish's Motion in Limine Enforcing the Abolition of the Treating Physician Rule	02/04/11	1	212-217
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13 (Pages 46 to 49)

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

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

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

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

12 A That's correct.

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

17 A Yes.

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

20 A Yes.

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

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

25 Go ahead, Doctor.

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

5 BY MR. WALL:

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

8 A I believe so.

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

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

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

18 A I believe it was essentially the same.

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

23 A Yes.

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

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1 A No.

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

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

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

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

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

25 A I recall seeing them.

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

4 A No.

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

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

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

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

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

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

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

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

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14 (Pages 50 to 53)

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

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

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1 Q Do you have any reason to believe that the
2 procedure was done incorrectly?
3 A It doesn't state that it was done incorrectly.
4 Q Do you have any reason to believe that it was
5 done incorrectly?
6 A No.
7 Q Do you have any reason to believe that this
8 would constitute a false positive?
9 A Well, I guess - I guess in reviewing Dr. Mark
10 Winkler's report, I believe he had some issues on whether
11 or not the discogram was administered appropriately.
12 Q I'm asking you.
13 A Yeah, and I've already stated my opinion on
14 that.
15 Q And what did you understand Dr. Winkler's
16 criticism to be?
17 A I believe that he felt that the injection was
18 given in the annulus and not in the nucleus, which is the
19 wrong anatomic region to give the injection.
20 Q And what was his basis for that belief?
21 A I believe it was upon him examining the CT scan
22 and the records that he had available to him regarding
23 the injection.
24 Q You have the same records and CT scan; is that
25 right?

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

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15 (Pages 54 to 57)

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1 post-discogram CT demonstrates annular fissures, which 2 are commonly associated with arthritic changes. Do you 3 see that? 4 A I'm sorry, could you tell me what -- is it on 5 the last page. 6 Q Yeah, about the middle of the second paragraph. 7 A That's correct, I see it. 8 Q Where in this report do you state any 9 disagreement or discrepancy with the discogram? 10 A I'm not sure I understand the question. 11 Q You reviewed the films, you reviewed the reports 12 surrounding that discography procedure in August of 2008, 13 and where in any of your reports is there any criticism 14 of the procedure or the results? 15 A I don't see where I'm specifically criticizing 16 the discography. I am taking the entire picture into 17 account when I talk about the clarification of the pain 18 generator, and the fact that the discography really 19 contradicts the MRI which is relatively normal, and the 20 discography showed discogenic changes at multiple 21 cervical levels. And I did not believe that it clearly 22 identified the pain generator. 23 Q Are annular fissures such as those seen or 24 reported in August of 2008 ever the result of trauma, can 25 they be the result of trauma?	1 Q Are they always symptomatic? 2 A No. 3 Q Can trauma cause a previously asymptomatic 4 degenerative cervical change to become symptomatic? 5 MR. ROGERS: Same objection as before. 6 Go ahead, Doctor. 7 THE WITNESS: Yeah, I don't -- I'm not sure. 8 What is clear is that patients who have pre-existing 9 degenerative changes can get into an accident and have 10 pain. I believe that many people who cannot identify a 11 pain generator will attribute that to the pre-existing 12 degenerative changes. I'm not so sure that those 13 previously asymptomatic changes can become definitively 14 symptomatic. Although, I do agree that patients can 15 experience pain following a traumatic incident. 16 Q Pain as a result of those degenerative changes 17 or something else? 18 A I don't think that science has conclusively been 19 able to relate that to the degenerative changes. 20 Q The surgery of March of 2009 in your Addendum 21 Number 1, you describe it as, "an option" but "not 22 necessary." Do you recall that? 23 A Can you tell me what -- is it on the next to the 24 last page or the last page? 25 Q It's on the last page.
Page 55	Page 57
1 A It's certainly possible. 2 Q Even if they are pre-existing arthritic changes, 3 if they're previously asymptomatic can they become 4 symptomatic or aggravated by trauma? 5 MR. ROGERS: Objection, foundation. 6 Go ahead, Doctor. 7 THE WITNESS: Yeah, I guess I'd have to ask you 8 to define the question a little bit. Are you asking if 9 the fissures are they pre-existing, can they be further 10 torn by trauma, and that's what you mean by aggravating? 11 Or are you asking whether or not the patient is 12 experiencing pain from these fissures? 13 BY MR. WALL: 14 Q Fair enough. Let me break it down. 15 On the MRIs you testified that you saw 16 degenerative changes in Mr. Simao's spine; is that right? 17 A Yes. 18 Q Is it your belief that those predated the 19 accident of April of 2005? 20 A Yes. 21 Q Do you have any record or information suggesting 22 that they were -- strike that. 23 Can those -- are those age-related degenerative 24 changes uncommon in someone Mr. Simao's age? 25 A No, they're common.	1 A I see it, that's correct. 2 Q What did you mean by, not necessary? 3 A Well, I did not believe that this patient at 4 that time that the pain generator was identified nor that 5 this was a reliable surgery that would give reliable 6 results with relief of his pain. And that I would not 7 have recommended the surgery. And that's why I did not 8 feel that it was necessary. 9 Q Do you believe surgery was indicated by all the 10 diagnostic procedures that had been used? 11 A In my opinion, I don't believe the surgery was 12 indicated because of what I just stated. 13 Q Do you believe that it was -- that Dr. McNulty 14 acted below the standard of care in performing the 15 surgery? 16 A No, I do not believe he was below the standard 17 of care. 18 Q But he performed a surgery that was not 19 necessary, is that your testimony? 20 A In my opinion, I would not have recommended the 21 surgery nor would I have performed the surgery nor do I 22 teach my residents and fellows at the UCLA Spine Center 23 to perform this type of surgery for this indication. 24 Q Do you recall that Dr. Grover described 25 Mr. Simao as a reasonable candidate for a fusion as of

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1 September of 2008?

2 A I'd be happy to confirm that with the records or

3 I guess I could take your word for it.

4 Q On the 6th page of your October 1st, 2009

5 Addendum Number 1, at the top, it start on the bottom of

6 the 5th page, Grover found that Mr. Simac was a

7 reasonable candidate for interbody fusion,

8 reconstruction, decompression at C3-4 and C4-5?

9 A Yes, I see it.

10 Q Do you disagree with that conclusion?

11 A As I stated, I would not have recommended this

12 surgery nor would I have performed this surgery.

13 Q Why was it an option?

14 A Well, some people operate on discography.

15 Q Do you believe that the decision to perform a

16 surgery was solely based on discography?

17 A I think that was a very important factor in

18 leading to the reasoning behind this surgery.

19 Q And you feel that the discography resulted in a

20 false positive?

21 A No, I did not state that.

22 Q Do you believe that the result of the

23 discography was erroneous?

24 A I believe that the result of this discography is

25 the result. How you choose to use those results in

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1 treating your patient is a separate issue.

2 Q What do you understand the result of the surgery

3 to have been?

4 A Well, it appears he had the surgery around

5 March of 2009, and unfortunately when I review the

6 records subsequent to that, I see that he still has pain.

7 Q So do you form a conclusion or opinion as to the

8 result of the surgery, whether the surgery had any

9 success?

10 A Well, there's many ways to measure success, but

11 I think in this situation, the goal of the surgery was

12 probably trying to alleviate his neck pain. And

13 unfortunately it appears that he continues to have neck

14 pain and continues 'til the last records that I reviewed

15 to continue to experience neck pain.

16 Q You mention in Exhibit 7, which is Addendum

17 Number 2, on the 15th page of 21, which is a note from

18 March 23, 2010, from Nevada Orthopedic and Spine Center,

19 that Dr. McNulty, in his assessment, noted that Mr.

20 Simac's current pain may possibly be mediated pain below

21 the fusion; do you see that?

22 A Yes.

23 Q Is it common with, say, a two-level fusion to

24 encounter problems at the level either immediately above

25 or immediately below the area of the fusion?

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1 A You can get adjacent segment breakdown.

2 Q Do you agree or disagree with that assessment

3 number six on that 16th page?

4 A Well, I disagree with parts of it. Number one,

5 this patient, if he should develop adjacent segment

6 breakdown, you would typically see it on X-rays or an MRI

7 scan. Number two, it's very early after his surgery,

8 which was done probably just a year before, to develop

9 adjacent segment breakdown. The current literature shows

10 that it develops about three percent per year and it's

11 additive. And that's actually pretty low for this type

12 of patient. I wouldn't expect it to come on so soon. So

13 whereas adjacent segment breakdown can occur, it's been

14 well documented in literature, I'm not sure that in this

15 whole clinical scenario that I can attribute this pain to

16 adjacent segment breakdown.

17 Q But you would agree that his current pain is not

18 a result of the surgery, is that right or wrong?

19 A I'm not sure what you mean by that question.

20 Are you saying that is it his post-surgical pain result

21 from the pain from the procedure?

22 Q Let me rephrase. On the last page of your final

23 report you state that, if the patient is currently still

24 experiencing pain, I would not think that this surgery,

25 after successfully healing, would cause significant pain.

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1 What did you mean by that?

2 A Oh, I see it. What I mean by that is, is when

3 this surgery is done for the proper indications, for the

4 proper pain generator, this surgery is highly successful.

5 The literature quotes a very high success rate. This is

6 probably one of the most successful surgeries that we do

7 as spine surgeons today. And that's documented

8 throughout the medical literature. So what I was trying

9 to say is that I would not think that this surgery, after

10 successfully healing, would cause pain in and of itself.

11 It probably relates more to the fact that the surgery

12 probably wasn't necessary. Because he's still having

13 pain. And you would think that this highly successful

14 surgery, when done for the appropriate reasons, typically

15 alleviates patient's pain.

16 Q To what do you attribute his current pain?

17 A It's a little unclear in this situation, because

18 many of the injections have failed to give him complete

19 relief or even complete long lasting relief. Some of the

20 injections are a bit contradictory. And even Dr. McNulty

21 felt in some of his notes, I believe either prior or

22 immediately post-surgery, but I believe it was prior to

23 the surgery, that some of the injections just were not

24 consistent. And I believe prior to the surgery

25 Dr. McNulty really tried to order more tests because I

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17 (Pages 62 to 65)

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1 think he was maybe trying to really define the pain
2 generator because this is not a clear cut case.

3 Q So to what do you attribute his current pain?

4 A I'm not sure that the pain generator has been
5 isolated.

6 Q If the surgery was not necessary or
7 contraindicated, what steps would you have taken at that
8 point, March of 2009, if not surgery?

9 A Well, that's not the way I approach these types
10 of things. I would have recommended surgery had I
11 thought that we had isolated the pain generator, whether
12 I thought that this patient would have gotten better.
13 And so, at that time, I did not think he was a surgical
14 candidate and I would not have recommended the surgery.

15 Q What would you have recommended?

16 A Not to have the surgery.

17 Q Other than surgery, what would you have
18 recommended? If you criticize Dr. McNulty for
19 performing -- making the decision to perform the surgery,
20 what should he have done instead?

21 A Well, first of all, there's a couple things.
22 I'm not sure I'm criticizing Dr. McNulty. What I am
23 saying is that I would not have done the surgery, that's
24 not what I teach here at UCLA. Number two, not having
25 other options is still not an indication for surgery.

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1 And number three, my recommendation would have been not
2 to have surgery and continue with conservative care.

3 Q So just -- when you say conservative care, what
4 would you have recommended? What would you have taught
5 your residents to do?

6 A I would have told him to stop smoking; I would
7 have told him to get into a good rehab program; I would
8 have sent him to pain management to try and adjust his
9 meds and try and get him off any medications and get him
10 into an exercise program.

11 Q Do you believe that those things were done
12 before the surgery?

13 A I believe he had attempted at trying many of
14 those modalities.

15 Q And had they proved successful?

16 A By his reports, no. He's still reporting that
17 he's experiencing pain.

18 Q All three of your reports conclude that
19 Mr. Simao may have sustained a soft tissue whiplash-type
20 injury as a result of the motor vehicle accident in
21 April 2005; is that correct?

22 A I believe my reports refer to I felt like he may
23 have at most sustained a soft tissue injury.

24 Q Each of your reports has the sentence that I'll
25 quote as follows: He may have sustained a soft tissue

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1 whiplash injury to his cervical spine and exacerbated his
2 long history of headaches.

3 Well, let me back up. Make sure that -- let me
4 just go in order.

5 Your original report says on the second to last
6 page, He may have sustained a soft tissue whiplash injury
7 to his cervical spine and exacerbated his long history of
8 headaches.

9 Do you see that?

10 A Yes.

11 Q Yes?

12 A Yes, I see that.

13 Q On the last page of Exhibit 6, Addendum Number
14 1, you state, In summary, it is still my opinion that
15 Mr. Simao may have sustained a soft tissue whiplash-type
16 injury as a result of the motor vehicle accident.

17 Do you see that?

18 A Yes.

19 Q And on Exhibit 7, on the last page, in summary,
20 it is still my opinion that Mr. Simao may have sustained
21 a soft tissue whiplash-type injury as a result of the
22 motor vehicle accident in April 2005.

23 Do you see that?

24 A I do.

25 Q Do you believe, as reflected in all three

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1 reports, that Mr. Simao continued to experience pain in
2 his neck from the end of 2005 at least, forward to the
3 present; is that correct?

4 A Yes, based on the records.

5 Q I'm sorry?

6 A Based on the medical records, yes.

7 Q And your evaluation of him in 2009?

8 A Yes.

9 Q And that's beyond migraine headaches; is that
10 correct?

11 A Yes.

12 Q Now, in all three reports you relate the initial
13 treatment from the date of the motor vehicle accident
14 until May 26th, 2005 to the motor vehicle -- to the motor
15 vehicle accident; is that right?

16 A Yes.

17 Q And in all three reports you state that
18 treatment for symptoms of neck pain after May 26, 2005, I
19 apportion no more than 25 percent to the motor vehicle
20 accident. Is that what you wrote in all three of your
21 reports?

22 A I believe so.

23 Q How did you arrive at 25 percent when you
24 prepared those three reports?

25 A Well, at the time that I was preparing the

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18 (Pages 66 to 69)

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

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1 benefit of the doubt. And if he says that he's
2 experiencing pain, that's something I cannot be a hundred
3 percent reliable about. I'm going to give him the
4 benefit of the doubt. And that was my thinking at the
5 time I was preparing those three reports.
6 Q Would your conclusion had been different if you
7 understood that Mr. Sinno reported neck pain between May
8 and October of 2005?
9 A If he had reported pain during that period of
10 time, that would be more consistent with a true injury
11 from the motor vehicle accident.
12 Q And if he had suffered neck pain from May to
13 October of 2005, in addition to what's in the medical
14 records from 2005 forward, would that change your opinion
15 in this case?
16 A Would it -- are you asking would it change my
17 opinions put forth on my first three reports?
18 Q Yes.
19 A I think it would.
20 Q And how so? Would it change the percentage that
21 you have attributed to -- of his neck pain that you
22 attribute to the accident?
23 A At the time that I prepared my reports, then
24 yeah, I probably would have attributed more to that.
25 Q At the time you prepared your reports when you

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1 attributed 25 percent of his neck pain after May of 2005
2 to the accident, what would the other 75 percent be
3 attributed to?
4 A Well, as I stated before, I can't find any
5 evidence of any structural injury on this patient in all
6 the imaging studies. The only thing I attributed the
7 25 percent to was his -- based on his reliability and his
8 reports of his subjective complaints.
9 Q The question is what would the other 75 percent
10 be?
11 A Well, I'm not sure that it has anything to do
12 with the accident.
13 Q But would it be a facet injury? Would it be
14 degenerative changes? What would you attribute the other
15 75 percent of his neck pain to?
16 A I'm not sure that his pain generator has been
17 identified. I certainly don't think there's any evidence
18 of any structural injury such as a facet injury.
19 Q Well, would the other 75 percent just be
20 degenerative age-related changes in the cervical spine?
21 A I'm not -- I'm not really sure.
22 Q Are you aware of any evidence that -- any
23 complaints of neck pain prior to the date of the
24 accident?
25 A I don't believe I've seen any medical records

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1 prior to the accident.
2 Q Are you aware of any medical records after the
3 accident referencing any neck or left shoulder pain prior
4 to the accident?
5 A The only thing I have is that he did tell me he
6 had a motorcycle accident about one year prior to the
7 motor vehicle accident and that he had a history of
8 headaches for ten years.
9 Q So, did you see in any post-accident medical
10 records any reference to neck or left shoulder pain prior
11 to the accident?
12 A No.
13 Q Your conclusion -- well, your conclusion is that
14 he suffered a whiplash injury for which treatment was
15 appropriate after the accident for about five weeks; is
16 that about right?
17 A Yes.
18 Q And when he suffered the accident he reported
19 neck pain and left upper extremity pain; is that right?
20 A I believe the day of the accident he had a
21 neck -- neck pain, headache and left elbow pain.
22 Q All right. Let's just go with the neck pain
23 because that's the whiplash injury, right?
24 A I'm sorry, can we go off the record for one
25 second?

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

19 (Pages 70 to 73)

Page 70	Page 72
1 MR. WALL: Sure. 2 (Brief discussion held off the record.) 3 BY MR. WALL: 4 Q The whiplash injury, that's the soft tissue 5 injury in the area of his neck; is that right? 6 A Yes. 7 Q And you believe -- well, let me ask you today, 8 because we have your opinions on that 25 percent in terms 9 of what you wrote in your reports. What is your opinion 10 today as to the injuries suffered by Mr. Simao as a 11 result of the April 15th, 2005 motor vehicle accident? 12 A Well, I think at most he probably had a soft 13 tissue injury, as I stated before. I cannot identify any 14 structural imaging problem that I see would be related to 15 any trauma. I believe that he had neck pain for about -- 16 about a month, according to the medical records, and then 17 when he saw his medical care providers he stopped 18 complaining of any neck pain whatsoever. And then the 19 neck pain seemed to reappear in October of that year. 20 It's hard for me to relate the onset of that neck pain, 21 what, five or six months after the accident to be related 22 to the accident. Since that time I've seen that he's had 23 many injections that are actually quite confusing. I 24 don't think the pain generator's been identified. And 25 I've seen the surveillance video where he just seems like	1 the information I have, I'm not sure I can -- I can 2 related any of his current pain to the motor vehicle 3 accident. 4 Q So when you stated as recently as July of 2010, 5 that his treatment for his symptoms of neck pain after 6 this, being after May 26, 2005, I apportion no more than 7 25 percent to the motor vehicle accident; you have 8 changed that opinion and that is 0 percent today, is that 9 right? 10 A Yeah, I'm sorry, are you referring to my last 11 report? 12 Q Yeah, but your statement is the same in all 13 three. 14 A Yeah, I believe my statement was I would -- this 15 was from my last report, from July 4, 2010, I would at 16 most apportion at this time of reappearance of the 17 symptoms 25 percent of the reported subjective symptoms. 18 Q What page are you on? 19 A I'm sorry, I think it's the last page. 20 Q That sentence that says, His treatment for his 21 symptoms of neck pain after this I apportion no more than 22 25 percent to the motor vehicle accident. That? Right? 23 A Yeah, I'm sorry, I was at a different point. 24 Right. Apportion no more than 25 percent and this is 25 based on subjective reporting symptoms only.
Page 71	Page 73
1 he's pretty normal and doing pretty strenuous activities. 2 I do think that the soft tissue injuries when you look at 3 the literature are typically self-limiting and typically 4 resolve with time. And after a reasonable amount of 5 time, I would not expect the soft tissue injury to become 6 a chronic problem that would go on for years, and we're 7 now almost six years after this accident. 8 Q So in your three reports you attributed up to or 9 no more than 25 percent of his post May 26th, 2005 10 symptoms of neck pain to the motor vehicle accident. Is 11 that still your opinion today? 12 A No, as I think I stated earlier, I think the 13 apportionment probably would be much less given all the 14 facts that I now have. 15 Q How much less? 16 A It's hard for me to imagine that a soft tissue 17 injury would go on for six years. 18 Q And do you believe that that's all he had 19 currently is a soft tissue injury? 20 A I believe that's all that I can relate to the 21 accident. 22 Q So is it 0 percent now from 25 percent or what 23 is your opinion? 24 A Yeah, it's hard for me to relate any of his 25 current pain six years following the accident, given all	1 And what I mean by that is I gave him no more 2 than 25 percent based on the fact that he is truthful and 3 reliable in his reports of his symptomatology. And since 4 the time of this report, I've been able to review the 5 ongoing pain that has been progressive -- or maybe not 6 progressive, but existing up until the present time, also 7 the surveillance videos, and I guess I would have to 8 question his reliability. 9 Q So my question was now it's 0 percent as opposed 10 to 25 percent, is that your testimony? 11 A Yes. 12 Q So to your knowledge, he -- with respect to his 13 neck, he is asymptomatic prior to the motor vehicle 14 accident; is that right? 15 A I think we established I have not seen any 16 records or any reference to any pain in his neck prior to 17 the motor vehicle accident. 18 Q And on April 15, 2005, he's in a motor vehicle 19 accident and reports neck pain; is that right? 20 A Yes. 21 Q And your opinion is that that neck pain was a 22 soft tissue injury that resolved in five or six weeks; is 23 that correct? 24 A Yes. 25 Q And then he was symptom-free until October 2005,

Page 74

1 is that your impression?

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

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

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

11 BY MR. WALL:

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

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

18 Go ahead, Doctor.

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

Page 75

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

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

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

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

21 Q Did you understand my question, Doctor?

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

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

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

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

Page 76

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

3 A What's the date on that note?

4 Q December 7th, 2009.

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

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

10 A Yes.

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

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

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

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

18 (Brief discussion held off the record.)

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

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

EXAMINATION

Page 77

1 BY MR. ROGERS:

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

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

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

11 A That's correct.

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

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

15 Expedited transcript, can you do it by Friday?

16 THE COURT REPORTER: Absolutely.

17 MR. ROGERS: Make that two of them.

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

21 (THE DEPOSITION ENDED AT 4:47 P.M. DECLARATION
22 UNDER PENALTY OF PERJURY ON THE FOLLOWING PAGE HEREOF.)
23
24
25

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

21 (Pages 78 to 79)

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1 CERTIFICATE OF DEPONENT
2 PAGE LINE CHANGE REASON

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13
14 * * * * *
15 I, JEFFREY C. WANG, M.D., deponent herein,
16 do hereby certify and declare the within and foregoing
17 transcription to be my deposition in said action;
18 that I have read, corrected, and do hereby affix my
19 signature, under penalty of perjury, to said
20 deposition.
21
22
23
24
25

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

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1
2 CERTIFICATION
3 OF
4 CERTIFIED SHORTHAND REPORTER

5
6 I, the undersigned, a Certified Shorthand
7 Reporter of the State of California do hereby certify:
8 That the foregoing proceedings were taken
9 before me at the time and place herein set forth;
10 that any witnesses in the foregoing proceedings, prior
11 to testifying, were placed under oath; that a verbatim
12 record of the proceedings was made by me using machine
13 shorthand which was thereafter transcribed under my
14 direction; further, that the foregoing is an accurate
15 transcription thereof.

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

19 IN WITNESS WHEREOF, I have this date

20 subscribed my name _____

21 Dianne G. Slockbower, CSR No. 10676

22 Dated: _____
23
24
25

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EXHIBIT 13

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1
2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4 WILLIAM JAY SIMAO,
5 individually; and CHERYL ANN
6 SIMAO, individually and as
7 husband and wife,
8
9 Plaintiffs,
10
11 vs.
12
13 JENNY RISH; JAMES RISH; LINDA
14 RISH; DOES I through V; and
15 ROE CORPORATIONS I through V,
16 inclusive,
17
18 Defendants.
19
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22
23
24
25

CASE NO.: A539455
DEPT NO.: X

DEPOSITION OF ROSS SEIBEL, M.D.

Taken on Friday, August 20, 2010
At 3:14 p.m.

At 300 South Fourth Street, Suite 710
Las Vegas, Nevada

REPORTED BY: JEAN DAHLBERG, RPR, CCR NO. 759, CSR 11715

00002

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I N D E X

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LAS VEGAS, NEVADA; FRIDAY, AUGUST 20, 2010
3:14 P.M.

-000-

Whereupon --

(In an off-the-record discussion held prior to the commencement of the proceedings, counsel agreed to waive the court reporter's requirements under Rule 30(b)(4) of the Nevada Rules of Civil Procedure.)

9
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13
14

ROSS SEIBEL, M.D.,

having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. ROGERS:

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16
17
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Q. Would you state your name, please.

A. Ross Seibel, S-e-i-b-e-l.

Q. Okay. Before we went on the record I asked you if you'd given a statement under oath before; you said you had.

21
22
23
24
25

A. Yes.

Q. How many times have you given testimony in a deposition?

A. Six or seven times.

Q. And each time in the capacity of a treating

00005

medical provider?

1
2

A. Yes.

seibel, ross md 8 20 10.txt

3 Q. Do you have a curriculum vitae with you?
4 A. I don't.
5 Q. Is this something that you have at your office?
6 A. Yes.
7 Q. Is it something I can request and attach as an
8 exhibit?
9 A. Yes, you can. I can provide that.
10 Q. Very good. We'll attach your curriculum vitae
11 as Exhibit A.
12 (Exhibit A will be sent via e-mail to the
13 reporter, and it will be marked as Exhibit A for
14 identification.)
15 BY MR. ROGERS:
16 Q. Do you have a testimony history; you know, a
17 written account of these cases in which you've
18 testified?
19 A. No.
20 Q. Okay.
21 A. Let me rephrase that. Testifying as in coming
22 here to do depositions for it?
23 Q. Right.
24 A. Yes.
25 Q. Well, have you ever --
00006
1 A. Not a testimony as in trial or in a courtroom;
2 it's always depositions --
3 Q. Only in a lawyer's office?
4 A. Yes.
5 Q. You've never testified in court?
6 A. No.
7 Q. Let's get a couple of the admonitions out of the
8 way, then.
9 First of all, you understand that you're under
10 oath and obligated to tell the truth?
11 A. Yes.
12 Q. And the penalties could apply if you don't?
13 A. Yes.
14 Q. All right. One thing I want you to keep in mind
15 is that the court reporter can't take us both talking at
16 once. And while it's clear that you know where I'm
17 going with some of my questions before I'm done, wait
18 for me to finish so she can get us both clearly. Okay?
19 A. Yes.
20 Q. Now, while we're going to attach your C.V., let
21 me walk through, just for purposes of brevity, the
22 educational history that I'm aware of. It's that you
23 went to medical school at Wisconsin, did an internship
24 at St. Joseph's Hospital in Wisconsin, your residency at
25 Stanford in anesthesia, and your fellowship in pain
00007
1 management at Stanford?
2 A. Yes, that is correct.
3 Q. Impressive.
4 Are you Board certified?
5 A. Yes.
6 Q. In what?
7 A. Both anesthesiology and pain medicine.
8 Q. When did you pass your Boards?
9 A. Around 2004, 2005.
10 Q. Is that --
11 A. One came before the other, so anesthesia Boards,
12 I think, were 2004, and pain was, like, 2005.
13 Q. All right. Are you a member of any medical

seibel, ross md 8 20 10.txt

14 societies -- ISIS, things like that?

15 A. A few. I have been a member of ISIS. I don't

16 know if my membership's up to date. But ISIS; ASA,

17 American Society of Anesthesiologists.

18 Q. Will those societies be included in your

19 curriculum vitae?

20 A. Yes.

21 Q. All right. What did you do to prepare for

22 today's deposition?

23 A. I printed up some of the documents available on

24 our electronic medical records, just to refresh my

25 memory.

00008

1 Q. Okay. You haven't reviewed any deposition

2 transcripts?

3 A. No.

4 Q. And no medical records from providers outside of

5 Southwest Medical Associates?

6 A. No.

7 Q. You haven't reviewed any of the medical expert

8 reports in this case from Drs. Jeff Wong, David Fish or

9 Winkler?

10 A. No.

11 Q. Do you know any of those doctors?

12 A. No, not that I know of.

13 Q. Okay. Will you be testifying as an expert in

14 this case?

15 A. No.

16 Q. What percentage of your practice, if any,

17 involves patients who are making personal injury claims?

18 MR. CRAFTON: Object to form. Foundation.

19 BY MR. ROGERS:

20 Q. You can go ahead and answer.

21 A. In my practice, we typically don't see patients

22 in a personal injury claim, per se. We typically see

23 them as they're involved in a personal injury as their

24 primary insurance providers. So it's typically after

25 they've seen other providers regarding their personal

00009

1 injury.

2 Q. Do you do any personal injury lien work?

3 A. No.

4 Q. And Southwest was the plaintiff's primary -- or

5 pardon me, was the plaintiff's health insurer?

6 A. Yes, Southwest Medical is the physician group

7 for his primary health insurer.

8 Q. When was the last time you spoke with the

9 plaintiff?

10 A. Based on what I can recall, at least from his

11 medical records, I saw him in the clinic on March 5,

12 2010. I believe I saw him for a procedure in subsequent

13 months, but I can't tell you the exact date. I only

14 have --

15 Q. Well, before we went on the record plaintiff's

16 counsel showed us a more recent procedure that was a --

17 what was it?

18 A. He had a steroid injection, a transforaminal

19 steroid injection. I believe he had a date of sometime

20 in April. We looked at the note --

21 Q. Well, let's take a look --

22 A. -- that he had on the computer.

23 Q. -- just so that we're certain here.

24 A. Sure.

seibel, ross md 8 20 10.txt

25 MR. CRAFTON: Now you're making me scroll though

00010

1 this and find it again --

2 MR. ROGERS: While plaintiff's counsel --

3 MR. CRAFTON: I think I've got it.

4 THE WITNESS: A little bit more there. Now

5 you're looking at -- there you go.

6 June 10th, 2010.

7 BY MR. ROGERS:

8 Q. And what was the procedure?

9 A. Left -- or cervical transforaminal steroid
10 injection, left C3-4.

11 Q. And according to the records produced by
12 Southwest Medical Associates, the first time you saw the
13 plaintiff was June 7, 2006; is that right?

14 A. Do you have records there that you want me to
15 verify, or based on what I've brought in here?

16 Q. Well, let's do both.

17 A. I may not -- I may not have all of them.

18 Q. You may have something in addition to what I
19 have, though.

20 A. Yes.

21 Q. The initial procedure note that I see with your
22 signature is June 7th, 2006.

23 A. That is correct. I have a note prior to this
24 from May 10th, 2006, from a P.A. within our office
25 during the patient's initial evaluation.

00011

1 Q. Okay. But you didn't see him in May; your P.A.
2 did?

3 A. Correct.

4 Q. I have that, yeah.

5 Okay. You never saw him at any time before
6 June 7th, 2006? I mean, Southwest did; I'm asking of
7 you personally.

8 A. Right. Typically, if the P.A. was in the office
9 seeing him, I would see him then with the P.A. The P.A.
10 might have presented the case to me and we may have
11 discussed it with the patient. But as far as this note
12 goes, I'm not on it. The P.A. is on here, but I was
13 probably in the clinic that day with him.

14 Q. Okay. Would you have done the physical exam
15 that the P.A. reported?

16 A. Not necessarily. Probably not, on this note
17 here. If I did, it would have been documented that I
18 went and did the physical exam in addition to what he
19 had to say. But that's not what's on this note here, so
20 I would say that I didn't do it that day.

21 Q. Well, take a look at that note and tell me what
22 you can infer from reading it and that you would have
23 done in that May 2006 consultation, if anything.

24 A. Well, there was extensive documentation of the
25 patient presenting with neck pain. There's reference to

00012

1 him having a motor vehicle collision. There's reference
2 to his MRI that he had from March of 2006 that
3 demonstrated -- do you want me to repeat some of these
4 MRI findings?

5 Q. You're free to.

6 A. He had a C3-4; he had some mild narrowing of the
7 left neuroforamen, maybe some contact over the exiting
8 C4 nerve root. At C4-5 he had a broad-based disk
9 protrusion. So based on this, he was set up for some

Page 5

seibel, ross md 8 20 10.txt
10 trigger-point injections that we did in the clinic, and
11 also scheduled for a transforaminal steroid injection on
12 the left, C3-4.

13 Q. Okay. Now, after having reviewed that, can you
14 tell what you did at that visit, if anything?

15 A. There's no indication that I did anything at
16 this visit.

17 Q. Okay. What I'm trying to understand better is
18 your earlier comment that if the P.A. is examining the
19 patient, it's not uncommon that you're in the room,
20 maybe talking to this patient, in some way involved.
21 I'm wanting to understand what your involvement was, if
22 any, in this visit?

23 A. Not necessarily. P.A. Young, here on the
24 record, would have seen the patient and likely would
25 have presented to me if there were issues that he felt

00013

1 that I needed to do an exam on him, or do something
2 different than he had already done and presented in this
3 manner. I might go do that. There's no indication that
4 I did that here, though.

5 Q. Okay, I get it.

6 Then the patient comes to see you for the
7 procedure on June 7th, 2006. You have a section of this
8 report entitled "Active Problems." Are those your
9 diagnoses?

10 A. They can be. These are -- on electronic medical
11 records, they can actually be drawn in from the
12 patient's chart. So, for instance, he has -- on the
13 note of June 7th, 2006, he has four entries here. One
14 says migraine headache; one says episodic-tension-type
15 headache; one says cervicalgia; and the last says
16 cervical radiculopathy at C4. So, for instance, at our
17 clinic we may have assessed those last two on his
18 initial evaluation, which would then be put into his
19 active problem list.

20 Q. Okay. But my question, however, is this: Is
21 the phrase "active problems" synonymous with diagnoses?

22 A. Yes.

23 Q. All right. Are these diagnoses, particularly
24 the facet hypertrophy, confirmed by the MRI study that
25 was done at this time? And feel free to take a look at

00014

1 that MRI study that I handed to you before the
2 deposition. What's the date of that, Doctor?

3 A. I have two. The first one is 3/22/06.

4 Q. Okay. That would be the one that you would have
5 been referring to in this June 2006 report, then?

6 A. Yes.

7 Q. All right. So tell me, is this diagnosis of
8 facet hypertrophy confirmed by that MRI?

9 A. Yes, at -- on the report it says, "At C3-4,
10 facet hypertrophy greater on the left mildly narrowing
11 at the left neuroforamen. There may be contact at the
12 left exiting C4 nerve root."

13 Q. All right. Now, can the conditions seen in that
14 MRI be caused by something other than a single traumatic
15 event, such as a car accident?

16 MR. CRAFTON: I'll object to form and
17 foundation.

18 THE WITNESS: Yes, it can.

19 BY MR. ROGERS:

20 Q. Okay, what other potential causes are there?

seibel, ross md 8 20 10.txt

21 MR. CRAFTON: Same objections.

22 THE WITNESS: Degeneration. Age.

23 BY MR. ROGERS:

24 Q. Do you remember the plaintiff's age at the time
25 that MRI was taken?

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1 A. I don't remember his age.

2 Q. I think it was on the report.

3 A. It's on the report. And date it -- I could date
4 it and determine his age.

5 Q. His date of birth was May 1963, so --

6 A. He was --

7 Q. All right. Doing the math roughly --

8 A. 47 years old.

9 Q. Okay. Are the findings in the plaintiff's
10 initial cervical MRI from March 2006 consistent with age
11 appropriate degeneration?

12 MR. CRAFTON: Object to form.

13 THE WITNESS: In general, I would think so. But
14 these are, in some ways, nonspecific findings too.
15 Having facet hypertrophy can be seen at a wide age span
16 and may have various meanings.

17 BY MR. ROGERS:

18 Q. Okay. Dr. Arita was deposed in this case, and
19 he testified similarly to you. He said that the
20 plaintiff's condition could be normal, that what's seen
21 in this MRI could be a normal finding. Do you agree
22 with that?

23 A. It depends on how you define "normal." But I
24 think if you defined normal as a finding that I might
25 find in the general population, whether they're

00016

1 symptomatic or asymptomatic, it is possible that you
2 could find facet hypertrophy, say, in an asymptomatic
3 patient and consider that a, quote, "normal finding,"
4 end quote.

5 Q. Okay. But "normal," given a person's age, in
6 other words?

7 A. Correct.

8 Q. The Southwest Medical records reflect that the
9 plaintiff had a nicotine addiction, that he was a
10 smoker. Can smoking cause greater degeneration than you
11 find in patients who aren't smokers?

12 MR. CRAFTON: Object to form. Foundation.

13 THE WITNESS: I think that calls for more of an
14 expert witness on this, not as it pertained to this
15 patient. I don't have any reason to believe that this
16 particular finding on here is caused by him smoking.

17 BY MR. ROGERS:

18 Q. All right. And by "this particular finding,"
19 what you're referring to is facet hypertrophy?

20 A. Correct.

21 Q. Dr. Arita testified with regard to facet
22 hypertrophy that it, quote, "was either preexisting or
23 has no relation to this particular accident," closed
24 quote; meaning, the car accident. Do you agree with
25 that statement?

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1 MR. CRAFTON: I'll object to form. Foundation.
2 Misstates prior deposition testimony.

3 THE WITNESS: I think it's a bit of a broad
4 statement in trying to relate a cause and effect of an
5 event to the findings here. But if I was reading this

seibel, ross md 8 20 10.txt

6 report and asking out of context of an accident, "Is
7 this a normal, degenerative-type finding," I would
8 agree, yes, it is, and not necessarily caused by trauma.
9 BY MR. ROGERS:

10 Q. Do you see anything in the cervical MRI findings
11 or impression that will likely result only from a single
12 traumatic event, like a car accident?

13 MR. CRAFTON: Object to form and foundation.
14 Incomplete hypothetical.

15 THE WITNESS: There's nothing on this or, for
16 that matter, I think, any imaging of your MRI that could
17 only be caused by trauma to the region. But if I was
18 looking at this MRI, particularly noting statements such
19 as a C4-5 central-braced disk protrusion, that is
20 typically that might come from trauma, but could also be
21 found in the absence of it. So I don't think you could
22 draw a conclusion on this MRI of any of these type of
23 things coming from a trauma.

24 BY MR. ROGERS:

25 Q. Okay. In a patient who sustained a
00018

1 traumatically induced disk protrusion, such as the one
2 you just referred to, what is the typical pain
3 presentation?

4 MR. CRAFTON: Object to the form and foundation,
5 as to the word "typical."

6 THE WITNESS: Well, first of all, again, this
7 finding on here of a 2- to 3-millimeter disk protrusion,
8 is not necessarily something I consider associated with
9 a trauma. The only way I think you could technically
10 know that is if you had an MRI sometime in the near
11 vicinity of the trauma before, and then took an image of
12 his afterwards. So in the absence of that, I don't
13 think you can draw that direct conclusion.

14 But if you ask how would a patient typically
15 present after a trauma with a disk protrusion showing on
16 a subsequent MRI, typically will have neck pain, give or
17 take some radiation into his upper extremities.

18 BY MR. ROGERS:

19 Q. Okay. Now, as I look through the Southwest
20 Medical records, I didn't see any complaints of neck
21 pain or arm pain between April 15, 2005, and October, I
22 believe, 6, 2005; so for nearly five and a half months.
23 Would it be typical for a person who sustained a
24 traumatically induced disk protrusion to have no pain
25 for that length of time?

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1 MR. CRAFTON: Object to form. Foundation.
2 Calls for speculation. Also calls for an incomplete
3 hypothetical.

4 THE WITNESS: I'm sorry, could you repeat the
5 date? I believe you're referencing some time period
6 before we saw him, or before his injury?

7 BY MR. ROGERS:

8 Q. The time frame is April 15, 2005, to
9 October 6th, 2005. The context is this: The car
10 accident occurs on April 15 -- yeah, April 15, 2005.
11 Then as you go through the Southwest Medical records,
12 there's the initial presentation; he complains of neck
13 pain and left shoulder pain. And then for the next five
14 and a half months, nothing but headaches, migraines.
15 And then on October 6, 2005, he again complains of neck
16 pain. My question is: If you have a traumatically

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17 induced cervical disk protrusion, is that a typical pain
18 presentation?
19 MR. CRAFTON: Same objections.
20 THE WITNESS: Again, meaning a roughly
21 five-month delay between when he had the trauma and the
22 presentation of the neck pain? Is that what you're
23 referring to?
24 BY MR. ROGERS:
25 Q. That's what I'm getting to, yes.

00020

1 A. I don't know if I consider it typical; although,
2 in my practice, patients don't always have immediate
3 neck or back pain after an injury, but it's not unusual
4 for them to present weeks to even up to a month or two
5 later. I think five or six months after an accident is
6 starting to get into a gray zone about a cause and
7 effect type relationship.

8 Q. Okay. When you first saw the plaintiff, was he
9 on any medication at that time?

10 A. Are you referring to his initial eval in our
11 clinic on May 10th, 2006?

12 Q. Yes. And by "our clinic," what you're referring
13 to is the pain management clinic in Southwest; right?

14 A. Correct.

15 Q. Okay, go ahead.

16 MR. CRAFTON: I'm sorry, what was the question?
17 BY MR. ROGERS:

18 Q. What medication was he on at the time that he
19 presented to the pain management clinic in May of 2006?

20 A. Based on this, we have a few references to his
21 medication. Via the electronic medical record, there's
22 a listing of his current medications. There are several
23 in there that may be related to pain, such as an
24 anti-inflammatory or a muscle relaxant. But also in the
25 body of the notes there's reference to a previous

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1 medication trial that he's been on. Would you like me
2 to list some of those?

3 Q. What I want to know is the medications he was
4 taking at that time.

5 A. Based on this record, the medications at this
6 time were ibuprofen, Soma, Piroxicam, and Butalbital
7 product as needed.

8 Q. Clarify for me what those medications are for.
9 The reason I say that, is the only medication I see in
10 this report is Elavil.

11 A. Elavil is something that we prescribed to him
12 afterwards. But if you look to the body of this note,
13 he'll have current medications.

14 Q. Okay.

15 A. I can list a couple of these. For instance, the
16 ibuprofen and the Piroxicam would be considered for
17 pain, an anti-inflammatory medication.

18 Q. All right.

19 A. The Carisoprodol or Soma is a muscle relaxant.
20 And the Fioricet is Butalbital containing medication
21 typically used for headaches.

22 Q. Okay. I see in this initial exam that the
23 plaintiff's cervical range of motion was without
24 provocation of pain. Would you characterize that as
25 normal?

00022

1 A. Yes.

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2 Q. The motor function in his arms was normal as
3 well?
4 A. Yes.
5 Q. The only thing that I can see that is abnormal
6 on the physical exam is tenderness to palpation. Am I
7 reading this correctly?
8 A. That was correct.
9 Q. Can a person have tenderness to palpation
10 without having a problem with their facet joints or
11 cervical disks?
12 MR. CRAFTON: Object to the form.
13 THE WITNESS: Yes.
14 BY MR. ROGERS:
15 Q. That can be a simple whiplash-type problem?
16 MR. CRAFTON: Object to form.
17 THE WITNESS: It depends how you define
18 "whiplash." Without clarifying --
19 BY MR. ROGERS:
20 Q. As a soft tissue is --
21 A. It would be a soft tissue --
22 Q. -- is what I'm talking about?
23 A. -- a myofascial problem, yes.
24 Q. Well, trigger-point injections address
25 myofascial or soft-tissue problems; correct?
00023
1 A. Yes.
2 Q. And what was the plaintiff's response to the
3 trigger-point injections administered in April 2006?
4 MR. CRAFTON: He had trigger-point injections in
5 April '06?
6 BY MR. ROGERS:
7 Q. May, May 10.
8 A. On my record, I don't have a record from May 10.
9 I don't see a follow-up in my records until --
10 Q. At the conclusion of the May 10 report, it
11 reads, "He tolerated the procedure well. There were no
12 complications. Mr. Simao was monitored in the clinic
13 for 15 minutes after the injections, and he was
14 discharged in stable condition." Was there any further
15 response to his response to the trigger-point
16 injections?
17 A. No.
18 Q. And the next time he was seen at Southwest
19 Medical Associates was when?
20 A. Based on the records I have here, he was seen
21 June 7th, 2006, for a procedure. We ordered
22 transforaminal steroid injections, left C3-4.
23 Q. Okay. What was his response to the injection?
24 A. I don't have a note in front of me documenting
25 that.
00024
1 Q. I have a June 20 follow-up report.
2 A. Based on this note, the interval history from
3 June 20, 2006, states that he had a good overall
4 response to the steroid injection, decrease in the
5 severity and frequency of his headaches, continuous with
6 some pain of the left trapezial area. Says he did
7 respond well to trigger-point injections previously.
8 Q. Okay. Did the plaintiff respond better to the
9 trigger-point injections than the epidural?
10 MR. CRAFTON: Object to form and the foundation.
11 THE WITNESS: I don't know if you can tell from
12 this note in front of me.

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13 BY MR. ROGERS:

14 Q. Can you tell from your file?

15 A. I can't.

16 Q. The plaintiff was first deposed back -- or
17 pardon me, he was deposed a second time in October 2009.
18 At that time he testified that he would be treating with
19 a shoulder expert. Are the plaintiff's complaints from
20 May and April 2006 consistent with a shoulder injury?

21 A. Not based on the records I have here, no.

22 Q. Okay. You've looked at this as facet
23 hypertrophy, because it seems to follow a C4 dermatome;
24 right?

25 A. Two different things.

00025

1 Q. Well, the MRI --

2 A. Facet hypertrophy doesn't necessarily correlate
3 to a C4 dermatome. The narrowing of the foramen at the
4 C3-4 level could correlate to a C4 dermatome, yes.

5 Q. Okay. And that's because the pain he complained
6 of was across his neck and then over his left trapezius?

7 A. Correct.

8 Q. Was it down as far as his shoulder?

9 A. From what I could tell in my records, it looks
10 like it went just to the dome, or the edge of the
11 shoulder here, but not down his arm.

12 Q. Okay. You've also testified that his physical
13 exam was consistent with myofascial or soft-tissue pain;
14 right?

15 A. Correct.

16 Q. And we've learned now that he responded well to
17 trigger-point injections. Is that --

18 MR. CRAFTON: Object to form.

19 THE WITNESS: Correct.

20 BY MR. ROGERS:

21 Q. Could it be that the trapezius pain that he was
22 complaining of was not being caused by impingement at C4
23 but rather just soft tissue?

24 MR. CRAFTON: Form. Foundation. Calls for
25 speculation.

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1 THE WITNESS: Yes, it's possible.

2 BY MR. ROGERS:

3 Q. Did the plaintiff complain of any hand symptoms
4 when you saw him back in May and June of 2006?

5 A. It indicates here -- the records from May 10th,
6 2006, indicate a history of worsening neck and hand pain
7 over the past year.

8 Q. Were you aware that the plaintiff was diagnosed
9 with carpal tunnel syndrome?

10 A. I don't believe so at the time. Without jumping
11 ahead, I do recall on my re-eval, which was several
12 years later, a mention of a possible carpal tunnel
13 syndrome. But that -- there's no indication of that on
14 this initial eval in 2006, though.

15 Q. What did the plaintiff tell you about his
16 history at the time of that 2006 initial evaluation?

17 A. A little vague. What do you mean by "about his
18 history"?

19 Q. Sure. Let's start with his past medical
20 history.

21 A. Based on this, he has a history of migraine
22 headaches, which have been increasing. He said he has
23 insidiously worsening neck pain, chronic recurrent

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24 headaches, a year ago involving the motor vehicle
25 accident, which appeared to -- which he called as a
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1 whiplash-type injury after the accident. And then again
2 noticing increasing frequency of his migraines and
3 increasing pain over the left trapezial area.
4 Q. Did he tell you about any other car accidents
5 he'd been involved in?
6 A. Not that I can see here, no.
7 Q. Did he tell you about a prior motorcycle
8 accident?
9 A. Not that I can see here, no.
10 Q. Did he tell you anything about this car accident
11 that would give you an understanding of the kinds of
12 forces involved?
13 A. Not based --
14 MR. CRAFTON: Form.
15 BY MR. ROGERS:
16 Q. Go ahead.
17 A. Not based on the report here, no.
18 Q. Well, as you sit here, do you have any
19 understanding of what kind of a car accident this was?
20 A. No. I have no recall from 2006.
21 Q. Right. In your opinion, does the severity of
22 force correlate to the likelihood of cause of injury?
23 A. I think it's a fair statement. I would agree.
24 With that being said, I have to say that I've
25 seen people who have been in very severe accidents with

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1 a lot of force who don't have injuries that you would
2 expect to correlate with them.
3 Q. Back in 2006, what was the plaintiff's reported
4 pain level?
5 A. I'm assuming you mean on a zero- to ten-point
6 scale, or some type of scale?
7 Q. Yes.
8 A. I don't have it here. It may be on his intake
9 questionnaire, which I don't have a copy of in front of
10 me. It might -- it's about a ten-page form, if you want
11 me to look.
12 Q. Keep your thumb where it is, because that's
13 about where the May report is.
14 A. Going forward or backward?
15 I have a copy of his intake questionnaire. On
16 this he indicates the pain level of six out of ten on a
17 zero- to ten-point scale with exacerbations to ten-plus.
18 Q. Okay. Do you know whether the plaintiff was
19 working full time at the time of that evaluation?
20 A. I can't tell exactly. He did not indicate when
21 he last worked. But the information I do have here says
22 he worked for the past one and a half years and missed
23 ten days from work in the last six months.
24 Q. Is the physical exam consistent with those pain
25 complaints?

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1 A. Yes.
2 Q. Is a finding that there is no pain on cervical
3 range of motion consistent with a pain score of six to
4 ten-plus of ten?
5 A. It can be.
6 Q. Can it not be as well, then?
7 A. Yes.
8 Q. The car accident that the plaintiff reported to

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9 Southwest involved roughly rounding up 500- and, I
10 believe, 70 dollars of damage. There was no ambulance
11 and he drove from the scene. Is what I just told you
12 everything you know about this car accident?
13 MR. CRAFTON: Object to the form. Foundation.
14 THE WITNESS: Yes.
15 BY MR. ROGERS:
16 Q. All right. Do you have an opinion on the cause
17 of the condition with which you diagnosed the plaintiff?
18 A. No.
19 Q. And why is that?
20 A. Because I -- as I stated before, I'm working
21 under his primary insurance, evaluating the patient
22 independently of what may have occurred in the accident.
23 I don't draw a conclusion necessarily that one is a
24 cause of the other. I certainly take it into
25 consideration as a mechanism of injury when I'm trying
00030 to assess his presentation. But with pain, myofascial
1 pain, limit findings on MRI, as we spoke of before, it's
2 often hard to draw a conclusion as to a cause and effect
3 of this.
4 Q. And has the medical field tested the reliability
5 of a causation opinion based on the plaintiff's word in
6 a personal injury lawsuit?
7 MR. CRAFTON: Object to form.
8 THE WITNESS: Could you rephrase your question?
9 BY MR. ROGERS:
10 Q. Okay. I'll put it this way: Is there a known
11 potential error rate in basing a causation opinion on
12 the patient's word?
13 MR. CRAFTON: Same objection.
14 THE WITNESS: I don't know.
15 MR. CRAFTON: Foundation as well.
16 THE WITNESS: I don't know if I could tell you
17 an actual rate. I would agree that clinically, in some
18 sense, there's a high rate of error in causation between
19 patients having any type of accident and presenting with
20 pain symptoms.
21 BY MR. ROGERS:
22 Q. I've heard of publications documenting some
23 concern about the reliability of a patient's word in a
24 workers' compensation setting. Are you familiar with
25
00031 any of these kinds of publications?
1 A. Yes.
2 Q. All right. Are those same concerns -- let me
3 rephrase that.
4 Do those same concerns apply to personal injury
5 lawsuits?
6 MR. CRAFTON: Form. Foundation.
7 THE WITNESS: In my practice, sometimes I think
8 they do.
9 BY MR. ROGERS:
10 Q. Did your epidural injection positively identify
11 the plaintiff's pain generator?
12 MR. CRAFTON: Are we still talking June '06?
13 BY MR. ROGERS:
14 Q. Yes.
15 A. I don't think based on his follow-up there that
16 you can necessarily identify a single pain generator.
17 It's referencing that he had a good overall response to
18 the steroid injection, but he also states he had a --
19

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20 you know, a good response to some trigger-point
21 injections. So I don't think I particularly identified
22 a discrete pain generator at that time. I would say
23 that sometimes it is often difficult to identify a very
24 focal pain generator.

25 Q. Where we leave off in June of 2006, I understand
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1 that the plaintiff reported relief from the
2 trigger-point injections, but I'm not clear on what his
3 response to the epidural was. Did he have relief and,
4 if so, what was it on an immediate and a long-term
5 basis?

6 A. I can't tell what the long-term basis would have
7 been based on his follow-up in June of 2006. It merely
8 indicates that he had an overall good response to the
9 injection.

10 Q. Was that in reference to the trigger point or to
11 the epidural?

12 A. To the epidural.

13 Q. Okay.

14 A. This --

15 Q. I believe there's a -- look here. This may help
16 answer the question, in a July 27, 2006 report.

17 A. This note indicates, again, July 27, 2006, that
18 he continues to do well. His headache frequently has
19 significantly reduced, as his neck pain has. He wasn't
20 taking any medication. He seems to be very satisfied
21 with the outcome of the procedure and the treatment.
22 And I will see him back in three months or on an
23 as-needed basis. He continues to do well.

24 Q. Okay. Now, let me move on to the follow-up
25 visits there. But what does this July 2006 report tell

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1 you, at least as of July 27?

2 A. It means that for the -- you know, the next
3 month or two after the procedure that he had significant
4 improvement in his symptoms.

5 Q. Okay. Now I'm going to show you the next visit,
6 August 24, 2006. And what does it say there about his
7 response?

8 A. It says he returns to the clinic with complaint
9 of exacerbation of his left trapezial pain. It says we
10 discussed in the past the result of his transforaminal
11 steroid injections were not stellar. It says he did
12 have a reduction in the frequency of his tension-type
13 headaches, however the pain over the C4 distribution of
14 the left continues to worsen and having more frequent
15 exacerbations.

16 And it goes on to say we talked about trying a
17 left C4 selective nerve-root block to evaluate how he
18 did during the anesthetic period as such.

19 Q. Okay. Now, do you know what the exacerbation
20 was? In other words was there an aggravating event that
21 caused this change we see in August?

22 A. Not that I can see here. It doesn't indicate
23 there was any event that caused this exacerbation.

24 Q. What I mean by that is that some people use the
25 term "exacerbation" to reference an event; others use it

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1 differently. Do you know how that term was meant here?

2 A. Based on this, it looks like it was just an
3 escalation or an increase in the symptoms he had, not
4 based on there was an event that occurred and therefore

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5 "I have more pain." It looks like he's just had an
6 exacerbation or an increase in the symptoms that he
7 initially presented with.

8 Q. Now, if the problem in the plaintiff's neck was
9 facet hypertrophy, why start with an epidural?

10 A. The facet hypertrophy was causing some narrowing
11 of the foramen and possibly compressing on the C4 nerve
12 root. And if he has pain radiating down into his
13 trapezial region, that could come from a number of
14 reasons. Like we mentioned before, it could be a
15 myofascial pain in that region. It could be a radiant
16 pattern from a facet degenerative problem. But it could
17 also be a dermatomal pattern for a C4. So unfortunately
18 with that presentation, you have several different
19 options to pursue as far as trying to identify a
20 discrete generator for this pain.

21 Q. You said that your injection did not isolate the
22 pain generator. Dr. Arita followed up with pulsed
23 radiofrequency, and the injection responses were
24 basically the same, perhaps even shorter-lived. What
25 does that response suggest to you?

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1 MR. CRAFTON: Object to form and foundation.

2 BY MR. ROGERS:

3 Q. Go ahead and take the time to look at
4 Dr. Arita's the notes, if you'd like. They're right in
5 front of you.

6 A. Prior to having a pulsed radiofrequency
7 modulation, you'd typically have a selective nerve-root
8 block prior to that.

9 Q. He did a selective nerve-root block as well.

10 A. So using a -- referencing back to my procedure,
11 what we did was a transforaminal steroid injection.
12 Although, you can attempt to try to identify the relief
13 he had during the anesthetic phase, it's typically more
14 a therapeutic injection; whereas the selective
15 nerve-root block is much more selective and much more
16 short-term relief, and really looking for that
17 post-procedure-type relief. Depending on the local
18 anesthetic you use, anywhere from two to six hours.

19 If he subsequently proceeded with a pulse
20 radiofrequency modulation, that would presume that he
21 had a certain amount of relief during the diagnostic
22 selective nerve-root block.

23 Q. All right. Well, take a look at that note in
24 front of you, and you'll see the very injections you're
25 talking about.

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1 A. A follow-up from October 11, 2006, with
2 Dr. Arita, indicates he underwent a left C4 selective
3 nerve-root block and had 50- to 75-percent relief.
4 Pulse radiofrequency was discussed. And will schedule
5 for such.

6 Q. Okay. What does 50- to 75-percent relief
7 suggest?

8 A. I consider that a moderate relief. There's
9 certainly enough to point in a direction as being at
10 least a good portion of his pain generator. At this
11 point in time, it becomes sort of a practice variable
12 for myself. If I'm doing a diagnostic procedure, I
13 typically want to see in the range of 75 percent or
14 greater pain relief. In other people's practice having
15 50 percent sometimes can represent a reasonable measure

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16 of relief. It depends on the individual provider.
17 Q. You testified earlier that it can sometimes be
18 difficult to isolate a pain generator. And in this
19 case, the plaintiff had the responses you've described
20 to the epidural, the trigger point, and the select
21 nerve-root block, and generally the same responses to
22 the pulse radiofrequencies that followed. Is there
23 something about the cervical spine that makes it more
24 difficult to isolate the pain generator as compared to,
25 let's say, the lumbar spine?

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1 MR. CRAFTON: Object to form. Misstates prior
2 testimony.

3 THE WITNESS: One of the things that makes it
4 difficult in the cervical spine, particularly in this
5 presentation here, is the overlap between some of the
6 radiant patterns of pain that may come from disk
7 degeneration, myofascial pain, possibly even
8 facet-mediated pain, versus a radicular-type pattern
9 that would be mediated by a nerve root, particularly
10 when you're talking about an area of the trapezial
11 region. Because that pain pattern tends to overlap.
12 So, for instance, if somebody was felt to have a
13 discrete pain generator at an inferior nerve root, such
14 as a C6 or a C7, it might be a little more -- a little
15 easier to diagnose, as we might expect some symptoms
16 further down into the arm and into the hand. But when
17 you're in the trapezial region and the shoulder region,
18 a lot of the pain generators in the way they present
19 will overlap. So in that sense, that area can be
20 difficult to isolate one pain generator.

21 BY MR. ROGERS:

22 Q. Okay. Do you do discograms?

23 A. I do in some areas.

24 Q. What areas?

25 A. The lumbar spine.

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1 Q. You don't do them in the cervical?

2 A. No.

3 Q. Have you ever?

4 A. I did a few in training, but not in practice.

5 Q. Do you have an opinion on the reliability of
6 cervical discography in terms of isolating the level
7 that should be operated on?

8 MR. CRAFTON: Object to form and foundation.

9 THE WITNESS: Yeah, in general. I think at best
10 it's a marginal predictor. And from my practice, often
11 I think the risk of the procedure outweighs any
12 diagnostic information you're going to get from it.

13 BY MR. ROGERS:

14 Q. What risk are you talking about?

15 A. The risk of complications from the procedure
16 itself; meaning, hematoma particularly in your neck.

17 Q. Can discography actually injure the disk?

18 A. I think that's a bit of a debatable medical
19 question right now. I think in the sheer sense of
20 causing trauma to the disk with a needle, you could say
21 that it could damage the disk. But again, I think in
22 the medical literature there's always debate about the
23 trauma and the long-term effects about doing a
24 discography. But I don't think I could testify here to
25 you as to a cause and effect of that at all.

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1 Q. Is there any concern in the medical field about
2 a surgeon doing a diagnostic block and then basing a
3 surgical decision on this block?

4 MR. CRAFTON: I'll object to form. Foundation.
5 Go ahead.

6 THE WITNESS: I can't comment on any particular
7 literature. From my perspective, I have a concern over
8 somebody doing a diagnostic block as such and making a
9 surgical decision after that.

10 BY MR. ROGERS:

11 Q. What's your concern?

12 A. My concern is that, in general, a discography
13 can have a very high false-positive rate. And that if a
14 provider who is performing such has such false-positive
15 rates and then uses that information for a subsequent
16 and very interventional procedure, like a surgery, may
17 be making a poor decision based on that.

18 Q. Would that same concern you have about
19 discography apply equally to epidural blocks?

20 A. Well, typically an epidural block is not a
21 diagnostic procedure, so something wouldn't necessarily
22 come from that.

23 Q. So let's say a selective nerve-root block.

24 A. Yeah. I think what you might be thinking is if
25 I do a selective nerve-root block and subsequently do a

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1 pulse radiofrequency modulation on that. I think there
2 is some concern, but I think you have to weigh the risk
3 and the long-term outcomes that occur with the
4 subsequent procedure. For instance, if you do a
5 selective nerve-root block and you deem there's been a
6 specific amount of benefit, and you choose to do a pulse
7 radiofrequency modulation, I think the risk of
8 exacerbating or making these symptoms worse by such
9 procedure are relatively low.

10 Q. You know what? I think my question wasn't
11 clear. My question is: where a spine surgeon does his
12 own epidural or selective nerve-root block and then
13 bases a surgical decision on that block, is there any
14 concern in the medical field about that approach?

15 A. Oh. All right.

16 MR. CRAFTON: Object to form. Foundation.
17 Go ahead.

18 THE WITNESS: I'm sorry, I understand the
19 question now.

20 Again, same thing with discography. I can't
21 cite you specific detail in medical literature, but I
22 have my own personal opinion about that, and I do have
23 concern about making surgical decisions based on a
24 diagnostic block like that.

25 ///

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1 BY MR. ROGERS:

2 Q. In other words, in your professional experience,
3 there's a reason for this sort of separation between the
4 surgeon and the pain management provider?

5 A. In my practice and opinion, yes.

6 Q. When you have confusion about the pain generator
7 in a case like the plaintiff's where the pain is up in
8 the trapezial region and you get varying responses from
9 different injections, is it important to employ other
10 studies, other diagnostic studies like EMG, nerve
11 conduction studies, things like that to help isolate the

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12 pain generator?

13 A. It can be a reasonable option.

14 Q. Is it something that you would recommend doing
15 before performing an invasive procedure like a fusion?

16 A. Not routinely, no.

17 Q. Did Dr. McNulty ever recommend facet injections
18 to the plaintiff?

19 A. At any period in a time period, or would you
20 like me to reference a particular period?

21 Q. Well, each time he sent the plaintiff out, he
22 referred him to Southwest Pain Management, to your
23 office. Do you see any record of a recommendation for a
24 facet injection?

25 A. I don't see any requests to me, per se, for a
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1 facet injection, but there are several hundred pages of
2 documents here that I haven't gone through.

3 Q. All right. When he came back to see you after
4 the surgery, the plan, as I understand it, was medial
5 branch blocks? At least as of April 20, 2010.

6 A. I have a note from April 6th, 2010, indicating
7 that the patient had gone back to see Dr. McNulty and
8 re-referred to this office for evaluation of possible
9 medial branch blocks --

10 Q. Okay.

11 A. -- for the facet which would be -- not a facet
12 injection, per se, but a block of the nerve that goes to
13 the facet.

14 Q. Right. Well, let's go back, then, for a moment
15 to March, so that we get that first return visit. We
16 now haven't seen the plaintiff --

17 A. Sorry, which year?

18 Q. 2010.

19 A. Okay.

20 Q. So you now haven't seen the plaintiff, well, for
21 nearly four years. He comes back to see you and he's
22 had this two-level fusion. You write, "He seems to
23 present in a very similar fashion as he did
24 preoperatively several years back, still primarily axial
25 neck pain, radiation to the left trapezial region."

00043
1 what does the fact that the plaintiff had little to no
2 pain relief from that surgery suggest in terms of anyone
3 having isolated that pain generator?

4 MR. CRAFTON: Object to the form. Foundation.
5 Go ahead.

6 THE WITNESS: Yeah, I think that's a tough
7 conclusion to make. I see a lot of patients who have
8 surgeries after reasonable isolation of a pain generator
9 that don't have pain relief afterwards and, in fact, can
10 often have worsening of their pain after their surgery.
11 So I don't think I could draw any direct conclusion
12 between a -- necessarily a pain generator workup and a
13 response the patient had.

14 BY MR. ROGERS:

15 Q. Do you know whether there was a reasonable
16 isolation of the pain generator in this case?

17 A. I don't know. We hadn't seen him for years.

18 Q. Right. You weren't part of that workup?

19 A. No.

20 Q. But it is accurate to state that when the
21 plaintiff returned to you, he was in a very similar
22 fashion, as you put it, to the pain he had before?

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23 A. It appears that way, yes.
24 Q. Was there any difference in either the location
25 or the severity of the pain between June 2006 and

00044

1 March 2010?

2 A. He did not appear to have any significant
3 difference.

4 Q. You saw the MRI that was taken after the
5 surgery. Did the surgery relieve the stenosis that you
6 observed on the March 2006 MRI?

7 MR. CRAFTON: I guess I'll object. I didn't
8 understand the question.

9 THE WITNESS: It's a good thing I did.

10 MR. ROGERS: Okay. I'll just have her repeat
11 it, and then you can take a look at that Steinberg pile,
12 if you want.

13 Can you read that back, please.

14 (Question read by the reporter.)

15 MR. ROGERS: Did that make better sense?

16 MR. CRAFTON: Yeah, thank you.

17 BY MR. ROGERS:

18 Q. Okay.

19 A. I have two things to look at. Based on my note
20 of March 5th, 2010, it indicates that an updated CT scan
21 of the cervical spine was made from August 11th, 2009,
22 which showed an anterior cervical disk fusion from C3
23 through C5. There was a C3-4 stable left-sided joint
24 arthropathy resulting in moderate left neuroforaminal
25 stenosis potentially affecting the exiting L4 nerve

00045

1 root. And it says, parentheses, similar to previous
2 imaging of the studies of the left-sided C3-4 level,
3 period.

4 Q. That L was a typographical error?

5 A. I would note that that seems like a typo, yes.

6 Q. Go ahead.

7 A. That was my note from 2010. I think you are
8 referencing another MRI we have of the cervical spine
9 from 11/6/08 here, which is compared from 9/24/07, which
10 shows at C3-4 no significant discogenic disease,
11 possible mild left neuroforaminal narrowing, secondary
12 to facet hypertrophy, which was unchanged. And the
13 impression being a possible mild left C3-4
14 neuroforaminal narrowing.

15 Q. So is there anything in those films to
16 illuminate us on whether the stenosis that you diagnosed
17 the plaintiff with back in June of 2006 was relieved by
18 the surgery?

19 MR. CRAFTON: I'll object to form, foundation.

20 BY MR. ROGERS:

21 Q. Go ahead, Doctor.

22 A. Not based on these documents here.

23 Q. Now, I want you to take a look at this Newport
24 MRI. And you'll see in it findings and impressions of
25 annular tears or fissures. There's no comment on such a

00046

1 condition in any of the Steinberg studies. Do you know
2 why that difference?

3 MR. CRAFTON: Object to form. Foundation.

4 BY MR. ROGERS:

5 Q. And for the record, I'm going to attach some of
6 these exhibits while you're looking that over.

7 As Exhibit A we'll attach the Steinberg --

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8 THE REPORTER: Exhibit B.
9 MR. ROGERS: Exhibit B, we'll attach the
10 Steinberg records we've been referencing. Exhibit C
11 will be the Newport MRI records. Exhibit D will be the
12 Southwest Medical records that the doctor brought. And
13 the Exhibit E will be the Southwest records that
14 Southwest has produced to this office.
15 (Exhibits B, C, D, and E were marked for
16 identification.)

17 THE WITNESS: Could you repeat it? Was there a
18 question?

19 BY MR. ROGERS:

20 Q. Yes. The question is: Why does the Newport MRI
21 reportedly show things that aren't seen in the Steinberg
22 MRIs?

23 MR. CRAFTON: Same objection.

24 THE WITNESS: I don't know. I didn't read these
25 MRIs.

00047

1 BY MR. ROGERS:

2 Q. Is an annular tear something that would be seen
3 on the Steinberg MRIs as well as the Newport MRI?

4 MR. CRAFTON: Form and foundation.

5 THE WITNESS: Most likely. But it does indicate
6 here a subtle increased signal that's consistent with a
7 subtle annular tear, so subtle findings may not have
8 been reported out on the Steinberg.

9 BY MR. ROGERS:

10 Q. Are there some radiologists who interpret a
11 finding as a tear, where others would call it a
12 protrusion?

13 MR. CRAFTON: Form and foundation.

14 BY MR. ROGERS:

15 Q. In other words, I'm looking at the same levels
16 here and I'm seeing different words being used, and I'm
17 wondering why.

18 A. I don't think you would -- a radiologist, at
19 least in my experience from seeing reports from the
20 radiologists, that there's confusion and/or differences
21 the reading between a disk bulge or a protrusion and an
22 annular tear. Those are two different findings.

23 What I did imply is that on the Newport MRI it
24 does say that these were subtle findings. Maybe
25 these -- it wasn't as highly scrutinized on somebody's

00048

1 read.

2 Q. Well, can some radiologists overread a finding
3 on a film?

4 A. Yes.

5 Q. Okay. All right. Well, when the plaintiff --
6 we were focusing on that March 2010 report -- when he
7 came to see you again, did you do the trigger-point
8 injections?

9 A. Yes.

10 Q. When Dr. McNulty sent him to you, is that what
11 he recommended is trigger-point injections?

12 A. Not particularly on that visit. But again, I'm
13 going back to April 6 of 2010 where he had seen
14 Dr. McNulty and then being re-referred back for possible
15 medial-branch block.

16 Q. Okay.

17 A. Looking at my evaluation there, again felt he
18 presented in a very similar fashion; a combination of

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 19 possible C4 radicular pain and some myofascial pain. On
 20 March 5th, we opted to do trigger-point injections.
 21 Q. What happened with the medial-branch blocks that
 22 Dr. McNulty recommended?
 23 A. It appears he ultimately had these. I just
 24 didn't happen to do it on that visit. I felt like maybe
 25 a trigger point might have been more appropriate at that
 00049 time.

1
 2 But looking on forward to April 6, 2010 --
 3 Q. I know you did them on April 20th.
 4 A. I don't think I have that.
 5 THE WITNESS: But I think we saw those on your
 6 computer. That was the one.
 7 BY MR. ROGERS:
 8 Q. Let me give this to you. There you go.
 9 And for the record, the doctor is looking at the
 10 April 20, 2010, records, and I believe the April 22
 11 records are included in that stack I handed you as well.
 12 A. It looks like just the April 20th record. It's
 13 the package of the procedure note as well as the surgery
 14 center documentation.
 15 Q. Do you have those for April 22?
 16 MR. CRAFTON: It's right there.
 17 (Discussion held off the record.)

18 BY MR. ROGERS:
 19 Q. All right. So the question is: What was the
 20 plaintiff's response to the medial-branch blocks?
 21 A. Well, I have him undergoing the medial-branch
 22 blocks, left C3 through C6, April 20th, 2010.
 23 The next note's from April 22nd, 2010, on the
 24 follow-up. It indicates the patient appreciated a
 25 30-percent reduction in his left-sided axial neck pain,
 00050

1 continues to complain of left-sided neck pain and left
 2 upper trapezial pain.
 3 Q. Okay. What do you draw from that response to
 4 the injection?
 5 A. I consider that not a positive response. A 30
 6 percent is not a very positive response, particularly
 7 for a diagnostic procedure like that. So he's not
 8 having relief from that. I didn't feel that a
 9 facet-mediated pain generator was in play here.
 10 Q. Okay. But you felt what?
 11 A. I continued to feel that he had symptoms in a C4
 12 radicular pattern in addition to some myofascial pain in
 13 that region.
 14 Q. And that pain is from the facet hypertrophy that
 15 you diagnosed the plaintiff with at the outset?
 16 A. More precisely --
 17 Q. I should probably say compression?
 18 A. Correct.
 19 Q. Let me rephrase that to make a clear record.
 20 You maintain that the plaintiff's pain generator
 21 is a C4 compression caused by facet hypertrophy?
 22 A. Correct.
 23 Q. And I know that you weren't involved in much of
 24 the surgical workup -- well, maybe better stated, in any
 25 of it. Do you have an opinion regarding any of that
 00051

1 two-level fusion?
 2 MR. CRAFTON: Object to form. Foundation.
 3 THE WITNESS: No.

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4 BY MR. ROGERS:

5 Q. All right. After the plaintiff's negative
6 response to the medial-branch block, what did you next
7 do?

8 A. I then arranged for him to have a left C3-4
9 transforaminal steroid injection.

10 Q. Okay. That's the procedure that you did back in
11 June 2006?

12 A. Yes.

13 Q. All right. And was that the procedure that you
14 intended to do when the plaintiff first returned to you
15 after that March 2010 visit?

16 A. I'm not sure what you mean by "intended to do."

17 Q. Well, you did the trigger-point injection.

18 A. Correct.

19 Q. And was your plan, then, to do a C3-4 epidural?

20 A. No. My plan initially after the reevaluation
21 was to do the diagnostic medial-branch block that
22 Dr. McNulty had suggested and requested.

23 Q. Did you have a difference of opinion with
24 Dr. McNulty in terms of that recommendation for the
25 medial-branch block?

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1 A. Yes. I didn't think this was necessarily
2 mediated by a facet. And just looking back at his
3 follow-up imaging, it appeared that he still had some
4 compression of that nerve root and it was still in a C4
5 radicular pattern. And so I felt a left C3-4
6 transforaminal steroid injection would probably serve
7 him better, recognizing that he's had some limited
8 benefit to this in the past. But as a symptomatic
9 standpoint, I thought we could try to provide some pain
10 relief.

11 Q. I don't remember, because I just barely saw it
12 before the deposition began, whether you did the C3-4
13 epidural in June of 2010, or you simply planned to do
14 it?

15 A. I believe that's the one he has on his computer,
16 a digital record.

17 Q. Right.

18 A. And it looks like our note. It looks like
19 something we did do. And I vaguely recall seeing him
20 and doing this procedure, but I don't have the hard copy
21 in front of me, but that certainly looks like our note,
22 and it's signed electronically by me, 6/10/2010.

23 Q. Okay. So the C3-4 epidural was done on June 10,
24 2010?

25 A. Correct.

00053

1 Q. Do you have a follow-up to know how he responded
2 to it?

3 A. I don't know offhand. I'm sure he does, but I
4 couldn't tell you today whether -- when and where he has
5 follow-up.

6 Q. Okay.

7 A. Let's see. June 11th, this is just a procedure
8 follow-up made by our M.A., just seeing how the
9 patient's doing. It says, "Post-procedure call made.
10 Spoke with patient. He's feeling a little better prior
11 to procedure." But I wouldn't consider this a follow-up
12 with myself or one of the providers in the clinic. It's
13 a follow-up looking more at have you had any signs of a
14 complication from the procedure.

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15 Q. Okay, I see. And just for the record, the
16 June 10 and June 11 records that you testified about,
17 Doctor, we've read off plaintiff's counsel's computer;
18 right?
19 A. Correct.
20 Q. Let me shift gears here. Do you have a future
21 treatment plan for the plaintiff?
22 A. I don't right now in front of me.
23 Q. Okay. Well, will that be formulated upon
24 determining the plaintiff's response to that epidural
25 injection?
00054
1 A. It certainly would be part of it, yes.
2 Q. Okay. Is there a future treatment plan, even
3 though it's not yet formulated? In other words, is
4 there a plan to continue seeing the plaintiff or to
5 discharge him?
6 A. I don't have any particular plans to discharge
7 him for any reason. But again, I can't comment on
8 whether he has a follow-up right now or what date that
9 might be. But based on what I have here, I have no
10 reason to believe there would be.
11 Q. You mentioned at the outset that Dr. Arita was
12 your former partner. Is he no longer with Southwest
13 Medical Associates?
14 A. Correct, he is not.
15 Q. Is he still here in town?
16 A. I believe so.
17 Q. Have you discussed the plaintiff with Dr. Arita?
18 A. No.
19 Q. What's your professional opinion of Dr. Arita?
20 Is he a competent physician?
21 A. Yes.
22 Q. How long does facet hypertrophy typically take
23 to form?
24 A. I can't tell you that.
25 Q. You described it earlier as a degenerative
00055
1 process; right?
2 A. Yeah. I think what -- I can tell you that this
3 is not something that develops in a short term. This is
4 not a one- to two-day or several-month-type process. It
5 is a chronic condition that typically takes years to
6 develop.
7 Q. I asked you earlier about whether smoking
8 contributes to any of the findings that we saw on an
9 MRI. I want to refine that question now. Does smoking
10 contribute to degeneration in the spine?
11 A. It can.
12 MR. CRAFTON: I'll object to form.
13 THE WITNESS: It can.
14 BY MR. ROGERS:
15 Q. Do you know Dr. McNulty?
16 A. Yes.
17 Q. Do you work with him?
18 A. In the sense that he's one of the contracted
19 orthopedic providers, and so I see a lot of the patients
20 that are referred back and forth amongst ourselves, yes.
21 Q. What is your professional opinion of
22 Dr. McNulty?
23 A. I think he's a competent physician.
24 Q. As I understand your testimony, the surgery was
25 not effective in reducing the plaintiff's pain

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00056

1 complaints?

2 MR. CRAFTON: Object to form.

3 THE WITNESS: That would be per the patient's
4 report. The patient returned to me telling me he had
5 continued pain, which appeared to be in a very similar
6 fashion that he had before.

7 BY MR. ROGERS:

8 Q. What was it you said earlier about responses to
9 injections? You said something to the effect that
10 75 percent or greater is the threshold for a positive
11 response. Did I understand that?12 A. Yeah. I was referring to a diagnostic procedure
13 in trying to infer what a positive response is to that.
14 And in my practice, I tend to be a little more
15 conservative. I look for a positive response of around
16 75 percent or greater. But then in the community, I
17 think a 50 percent or greater mark is often construed as
18 a positive response.19 MR. ROGERS: I think I'm done. Let me just
20 finish going through here.21 MR. CRAFTON: I am going to have a few questions
22 for you.

23 MR. ROGERS: Well, go ahead.

24 MR. CRAFTON: Do you want me to go ahead while
25 you're looking through it?

00057

1 MR. ROGERS: Yeah.

2 EXAMINATION

3 BY MR. CRAFTON:

4 Q. Doctor, I introduced myself to you before the
5 deposition. My name is Brice Crafton. I'm representing
6 plaintiff, Mr. Simao.7 And first of all, Doctor, does pain -- I'm
8 sorry, strike that.9 Does degeneration always equate to pain in your
10 experience?

11 A. No.

12 Q. Okay. In other words, somebody can have a
13 degenerative condition in their spine and it is an
14 asymptomatic condition?

15 A. Yes.

16 Q. And can trauma cause an asymptomatic condition
17 to become symptomatic, meaning that it becomes painful
18 after trauma?19 MR. ROGERS: Objection, vague as to -- well, to
20 about four terms in the question.

21 But go ahead.

22 THE WITNESS: I think the conclusion of saying
23 that an asymptomatic degenerative process can be somehow
24 exacerbated by trauma is one question, which it
25 certainly can. But a bigger picture could be just does

00058

1 trauma result in people having pain that may or may not
2 be due to the underlying degeneration they had before.
3 I see all variations of such. They can have an
4 underlying degenerative process and have some type of
5 trauma and present with pain, and we are often left with
6 how much of this is due to the underlying degenerative
7 process and how much of this is due to trauma. It's a
8 tough question to answer.

9 BY MR. CRAFTON:

10 Q. And let me try to simplify it a little bit, or

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11 simplify the question a little bit.
 12 In your experience can trauma cause an
 13 asymptomatic degenerative condition to become painful --
 14 or I'm sorry, not painful -- symptomatic?
 15 MR. ROGERS: Same objection, and it's an
 16 incomplete hypothetical.
 17 Go ahead.
 18 THE WITNESS: Again, I think the conclusion was
 19 can it cause the degenerative process to become painful.
 20 It's hard to make that conclusion. I could say that,
 21 yes, a person who has an underlying asymptomatic
 22 degenerative process who has a trauma can have pain in a
 23 region that you might expect with that degenerative
 24 process. Yes, that was true.
 25 ///

00059

1 BY MR. CRAFTON:
 2 Q. And you diagnosed -- or your diagnosis of
 3 Mr. Simao was a C -- correct me if I'm wrong -- a C3-4
 4 compression resulting in a facet hypertrophy? Did I get
 5 that right?
 6 A. I think you have it backwards. You have,
 7 radiographically, a facet hypertrophy causing some
 8 compression upon his C4 nerve root, which exits the C3-4
 9 foramen.
 10 Q. And you stated earlier that that is a
 11 degenerative process?
 12 A. A facet hypertrophy is a degenerative process,
 13 yes.
 14 Q. Is it possible for one to have a facet
 15 hypertrophy that is asymptomatic?
 16 A. Yes.
 17 Q. And can trauma cause that to become symptomatic?
 18 MR. ROGERS: Same objection as earlier.
 19 THE WITNESS: It seems like the same question as
 20 before.
 21 Again, it can -- theoretically, can a trauma
 22 cause an asymptomatic degenerative condition, begin to
 23 cause pain now? Yes. Does it necessarily correlate to
 24 the degenerative process that's going on at that level?
 25 No.

00060

1 BY MR. CRAFTON:
 2 Q. I'm going to May 6th, 2000 -- I'm sorry, the
 3 May 10th, 2006, record, which I believe was the first
 4 time we talked about Mr. Simao receiving trigger-point
 5 injections; correct?
 6 A. May 10th, 2006?
 7 Q. Yes.
 8 A. Correct.
 9 Q. And since that discussion there was some
 10 questions and some -- I guess, some questions regarding
 11 a good response, or Mr. Simao having relief from those
 12 injections. Do you recall that discussion?
 13 A. Yes.
 14 Q. Can you point to me in the record, the May 10th,
 15 2006, record, where it states that Mr. Simao was
 16 relieved at all from the trigger-point injections?
 17 A. From the May 10th, 2006, record?
 18 Q. Yes.
 19 MR. ROGERS: Let's go off for a second.
 20 (Discussion held off the record.)
 21 THE WITNESS: For the May 10th, 2006, no.

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22 BY MR. CRAFTON:

23 Q. And I think off the record you said it was a
24 follow-up note?

25 A. That's correct.

00061

1 Q. And then I must have missed that. Can you point
2 me to that follow-up note that talks about the relief
3 from the trigger-point injections?

4 MR. ROGERS: I think it's in this stack right
5 here. There's 5/10, and then going with your left hand,
6 up.

7 THE WITNESS: Backwards?

8 MR. ROGERS: Yeah.

9 THE WITNESS: Off the record for a minute?

10 MR. ROGERS: Yeah.

11 (Discussion held off the record.)

12 THE WITNESS: This is the one. A note from
13 June 20, 2006, in the interval history section, this is
14 after he's had the trigger points, but also after he had
15 the left C3-4 transforaminal steroid injection. It
16 states: He had a good overall response to the steroid
17 injection, noticing a decrease in his headaches.
18 Continues to have some left pain -- or pain in the left
19 trapezial area. And it says he did respond well to the
20 trigger-point injections previously.

21 BY MR. CRAFTON:

22 Q. Could you state which one was more, I guess,
23 therapeutic for him?

24 A. No.

25 Q. Was either of those diagnostic in nature?

00062

1 A. No.

2 Q. Thank you for clarifying that.

3 You're not a spine surgeon; correct, Doctor?

4 A. No.

5 Q. And you would leave decisions regarding whether
6 a person should undergo spine surgery to the spine
7 surgeon; is that fair?

8 A. Yes.

9 Q. So whether or not Mr. Simao is a candidate for
10 surgery, you would leave those sorts of opinions to the
11 spine surgeons themselves; is that correct?

12 MR. ROGERS: Objection. I'm going to object on
13 the reasonable -- pardon me -- relevance grounds,
14 candidacy versus necessity.

15 But go ahead.

16 MR. CRAFTON: And I'll just state the relevancy
17 of a proper objection. But we're not going to quibble
18 over that.

19 MR. ROGERS: Right. Right.

20 THE WITNESS: In general, yes, I would leave
21 that decision to the surgeon. I certainly have my
22 perceptions of, you know, which patients I think would
23 be better served by surgical intervention and which
24 would not, but ultimately it's going to be up to the
25 surgeon and the patient.

00063

1 BY MR. CRAFTON:

2 Q. And correct me if I'm wrong, I believe you
3 answered the question that Mr. Rogers had -- the
4 question is: But you don't have any opinion of whether
5 or not Mr. Simao should or should not have undergone
6 surgery, do you?

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7 A. No.
8 Q. There was some discussion about certain MRI
9 films and why one MRI film wouldn't necessarily contain
10 the same information that another MRI report -- and I'm
11 talking about the reports would contain?
12 A. Yes.
13 Q. Do you remember that discussion?
14 A. Yes.
15 Q. In your experience, does that have a lot to do
16 with who's actually reading the MRIs and preparing the
17 report?
18 A. Are you referring to the variations in the
19 report --
20 Q. Yes.
21 A. -- from one radiologist to another?
22 Q. Yes.
23 A. Yes.
24 Q. And, for example, in order to confirm or deny
25 whether there are annular fissures in one MRI film
00064
1 versus another, you would have to look at the actual MRI
2 films yourself; correct?
3 A. I'm not sure what the question is. If I felt
4 there was some discrepancy between two readings,
5 certainly a third party, yourself, or whoever is
6 involved, would want to see the films.
7 Q. For example, we spoke -- or we looked at an MRI
8 film from Newport and also one from Steinberg. Do you
9 recall that?
10 A. Yes.
11 Q. Where one referenced annular fissures and the
12 other did not?
13 A. Yes.
14 Q. In order to confirm or deny whether or not there
15 are annular fissures in the Steinberg MRI, you would
16 actually want to see and interpret that MRI on your own;
17 is that fair?
18 A. If I felt there was a significant variation of
19 the two, yeah, I would like to see it myself.
20 Q. And you haven't seen any of the MRI films?
21 You're relying strictly off of the -- you're relying
22 upon the report; is that fair?
23 A. With regard to these particular ones --
24 Q. Yeah.
25 A. -- or in general?
00065
1 I don't know if I saw the films to his initial
2 reports or not. Usually I'll state whether I'm seeing
3 the actual films and/or the report, but I can't recall
4 on the ones that were referenced here, particularly from
5 2008 and 2009 when I wasn't involved with him, so I
6 didn't see the report or the film.
7 Q. Does the presence of annular fissures in the
8 Newport record, did it cause you to change or modify any
9 of your diagnoses?
10 A. No.
11 Q. Does it have any effect on your opinions
12 whatsoever?
13 A. I think it certainly has to be taken into
14 consideration. But again, going back to this, it looks
15 like these are subtle annular tears. It looks like, I
16 think, there's probably limited clinical significance to
17 it, based on this report at least.

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18 Q. With facet hypertrophy and a compression of the
19 C3-C4 disk, what are Mr. Simao's treatment options
20 according to the diagnosis that you've reached?

21 MR. ROGERS: I'm going to object. It misstates
22 the diagnosis and the testimony.

23 But go ahead.

24 BY MR. CRAFTON:

25 Q. Please correct me with the diagnosis, because

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1 I'm not reading it off the record right now.

2 A. I think what he's referring to is the facet
3 hypertrophy causing compression of the C4 nerve root --

4 Q. I apologize.

5 A. -- versus the C3 disk.

6 His options for that are several, depending on
7 the severity of discomfort he's having. He can do
8 nothing. He can take a variety of medications, ranging
9 from anti-inflammatories, opiates, anti-neuropathic
10 medications to try to provide some symptomatic
11 improvement. He can have interventional modalities that
12 we've talked about before, having steroid injections at
13 the C3-4 level, or he can consider surgical
14 intervention.

15 Q. And what sort of surgical intervention could he
16 consider?

17 A. That would have to be left up to the spine
18 surgeon.

19 Q. Is a rhizotomy an appropriate treatment for
20 Mr. Simao's condition?

21 A. A rhizotomy presumably would be referring to a
22 medial-branch rhizotomy.

23 Q. I think it's also called a neuro-ablation?

24 A. Yeah, a medial-branch rhizotomy or a
25 radiofrequency ablation would not have any effect on a

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1 compressed C4 nerve root if that is truly your pain
2 generator.

3 Q. What sort of condition would a -- and I'm just
4 going to refer to it as a rhizotomy -- what sort of
5 condition would a rhizotomy be an appropriate treatment
6 for?

7 A. Rhizotomy is the appropriate treatment for
8 facet-mediated pain.

9 Q. And you ruled out that facet-mediated pain in
10 Mr. Simao?

11 A. I did a diagnostic medial-branch block in
12 sometime of this year, 2010, which he did not have a
13 response to, which would tend to rule out a
14 facet-mediated pain; although, the responses to that are
15 variable in my practice, that rules out a facet-mediated
16 pain.

17 Q. What treatment would you recommend to Mr. Simao
18 at this point in time to more definitively diagnose his
19 condition and also to treat his condition?

20 MR. ROGERS: I'm going to object to the question
21 about "more definitively." I don't think there's been
22 any questions about the definiteness of the diagnosis.

23 But go ahead.

24 THE WITNESS: It seems like there's two
25 questions. One is --

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1 BY MR. CRAFTON:

2 Q. Well, let's break it down to --

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3 A. -- diagnostic and --
 4 Q. -- diagnostic and --
 5 A. -- two is therapeutic.
 6 Q. -- therapeutic. Let's talk about diagnostic
 7 first.
 8 A. From a diagnostic standpoint, based on the last
 9 time I saw him, I would pursue again a selective
 10 nerve-root block at the C4 level.
 11 Q. What would be the purpose of that? Would you
 12 explain?
 13 A. To see if he's having C4 nerve-root mediated
 14 pain caused by the compression of the nerve root.
 15 Q. Is that it? I mean, at this point in time.
 16 A. Yes.
 17 Q. Okay. And what -- assuming that that has a
 18 positive outcome, what would be your treatment options
 19 for -- or your treatment recommendations for him?
 20 A. Again, from my perspective, I'm not the spine
 21 surgeon. But my job is to provide some diagnostics, but
 22 also some therapeutic interventions, which range from
 23 the modalities we mentioned before. Would it be a
 24 medication management or a repeat steroid injection? Or
 25 consider re-referral back to the surgeon to see if he
 00069 felt there was any other surgical interventions that
 1 could help alleviate this based on those diagnostic
 2 results.
 3 Q. And assuming the result was negative, what would
 4 be your next step?
 5 A. If the result was negative, I'd probably
 6 continue to do myofascial treatments for him, medication
 7 management. He may not have any further interventional
 8 or surgical modalities that are available to him.
 9 Q. At that point in time, is it foreseeable to you
 10 that he would be recommended for, say, an implant of an
 11 electronic stimulator or other type of pain-relief
 12 modality, such as the Morphine pump for --
 13 A. I could see where some might consider that an
 14 option. I don't consider a Morphine pump or any
 15 intrathecal device right now a likely option for that.
 16 Q. No, I understand right now. But I'm saying --
 17 and I understand that there still has to be further
 18 workup with Mr. Simao; is that fair?
 19 A. Yes.
 20 Q. But those are two foreseeable options, assuming
 21 that he receives no relief from other types of
 22 therapeutic modalities, such as the ones we've
 23 discussed?
 24 A. I could see where somebody would think that's a
 00070 reasonable option. I don't particularly think that's an
 1 option for him. But, yes, those are treatment
 2 modalities that somebody would feel is appropriate.
 3 MR. CRAFTON: Okay. Thank you.
 4 MR. ROGERS: Let's go off for a second.
 5 (Discussion held off the record.)
 6 EXAMINATION (continued)
 7
 8 BY MR. ROGERS:
 9 Q. To wrap up plaintiff's line of questioning, it
 10 sounds as though you're not in a position right now to
 11 formulate a future treatment plan; but at this point you
 12 are not inclined to recommend any invasive procedures
 13 like intrathecal implantation --

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A. No.

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Q. -- is that correct?

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A. That's correct.

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Q. Something I noticed about your pain clinic was that you provide a psychologist to patients who are referred to you. What's the role of the psychologist in your clinic?

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A. Currently we don't have a psychologist in our clinic, but at the time of our evaluation we did have a pain psychologist in the clinic. And the role can be variable. I think in his -- in his records here, there's a note from her on intake that's just a general

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overview of the patient telling him about the clinic and what maybe he has to look forward to as far as treatment processes.

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But if you speak in terms of general modalities as a pain psychologist in a clinic, you know, we often deal with a larger -- what we call a biopsychosocial model of pain, which can be very complicated and involves variables other than what we find on imaging, meaning compressed nerve roots and disk degeneration. So attempting to provide a patient with a more global pain treatment is what I think the pain psychologist adds to that.

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Q. A pain psychologist can be useful in determining whether there's a nonphysiologic cause of the complaints; is that correct?

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A. A pain psychologist could look to see what type of variables the patient may present with that; can predict how they may do to treatment, or how they may respond to certain physiologic -- or we'll say physiologic findings, as you might state it, such as pain, or radiographic findings such as degenerative changes in the spine. I don't think that they can necessarily sort out, "You have pain that is physiologic or nonphysiologic," but rather a global assessment of the pain of how they feel their pain has affected them

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and how it may correlate with more objective findings such as an MRI of the neck or back.

Q. And, in addition, to help patients who have some psychological overlay deal with their pain?

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A. Correct.

Q. Do you know whether the plaintiff has some sort of psychologic overlay?

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A. No.

Q. You testified earlier that his MRI findings were subtle. You said that in reference particularly to the fissures or tears; but you said that, it seemed, generally about the physical exam and the MRI findings at Steinberg as well. But did I understand you right?

A. I said that the report from the Newport MRI indicated that there were subtle annular tears.

Q. Okay. What I mean by my question is: It goes to your earlier testimony that a person can have the same findings that the plaintiff has on diagnostic studies without having pain?

A. Correct.

Q. Do you know whether there's a nonphysiological component to the plaintiff's complaints?

MR. CRAFTON: Object to form and foundation.

THE WITNESS: I can't confirm that, no.

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MR. CRAFTON: Beyond the scope.

MR. ROGERS: All right, that's it.
(The deposition concluded at 5:09 p.m.)
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CERTIFICATE OF DEPONENT
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* * * * *
I, ROSS SEIBEL, M.D., deponent herein, do hereby
certify and declare that the within and foregoing
transcription to be my deposition in said action; that I
have read, corrected and do hereby affix my signature to
said deposition, under penalty of perjury.

24
25

ROSS SEIBEL, M.D., Deponent Date

00075

CERTIFICATE OF REPORTER
STATE OF NEVADA)

SS:

COUNTY OF CLARK)

I, Jean M. Dahlberg, a duly commissioned and licensed
Court Reporter, Clark County, State of Nevada, do hereby
Page 31

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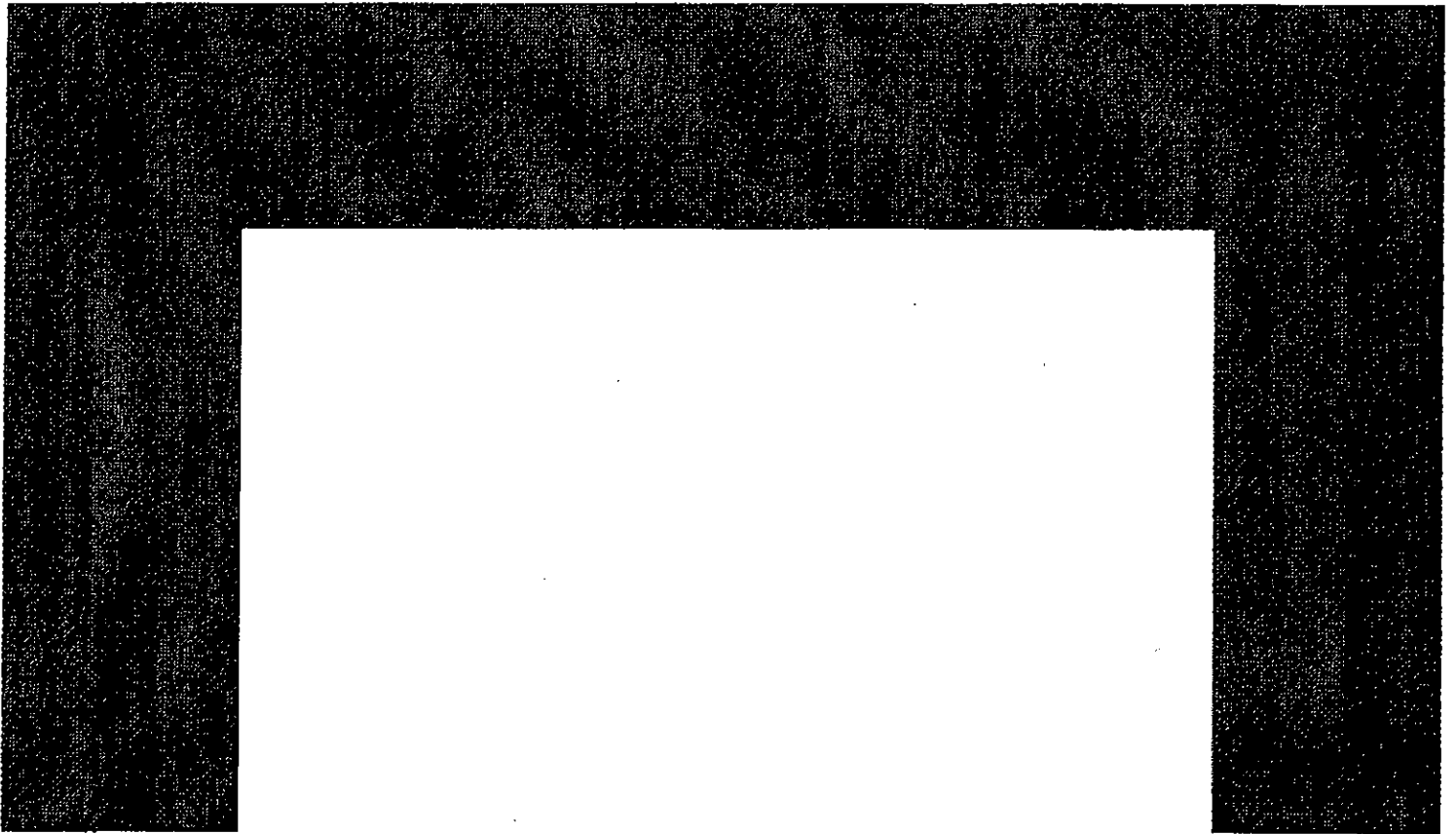
6 certify: That I reported the taking of the deposition
7 of the witness, Ross Seibel, M.D., commencing on Friday,
8 August 20, 2010, at 3:14 p.m.

9 That prior to being examined, the witness was, by me,
10 duly sworn to testify to the truth. That I thereafter
11 transcribed my said shorthand notes into typewriting and
12 that the typewritten transcript of said deposition is a
13 complete, true and accurate transcription of said
14 shorthand notes.

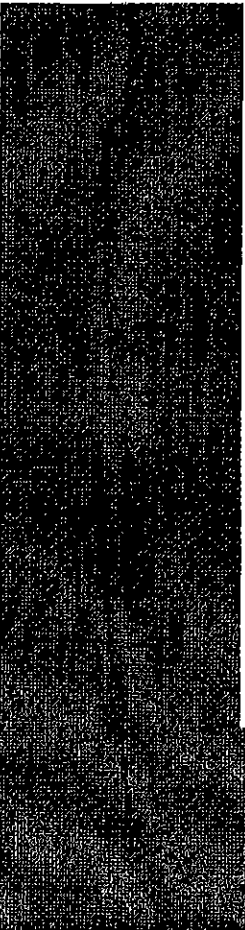
15 I further certify that I am not a relative or
16 employee of an attorney or counsel of any of the
17 parties, nor a relative or employee of an attorney or
18 counsel involved in said action, nor a person
19 financially interested in the action.

20 IN WITNESS HEREOF, I have hereunto set my hand in my
21 office in the County of Clark, State of Nevada, this
22 ____ day of August, 2010.
23
24

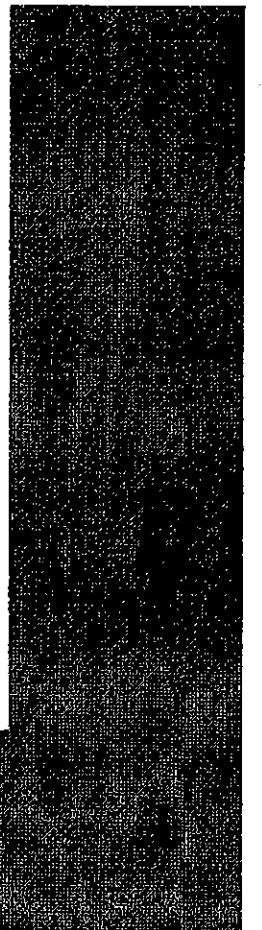
25 JEAN M. DAHLBERG, RPR, CCR NO. 759, CSR 11715



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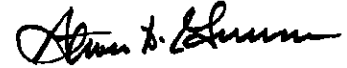


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1 **CSERV**
 2 **STEPHEN H. ROGERS, ESQ.**
 3 Nevada Bar No. 5755
 4 **ROGERS, MASTRANGELO, CARVALHO & MITCHELL**
 5 300 South Fourth Street, Suite 710
 6 Las Vegas, Nevada 89101
 7 Phone (702) 383-3400
 8 Fax (702) 384-1460
 9 *Attorneys for Defendant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

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 CLERK OF THE COURT

6
 7 **DISTRICT COURT**
 8 **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

19 **CERTIFICATE OF SERVICE**

20 Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of
 21 ROGERS, MASTRANGELO, CARVALHO & MITCHELL, and on the 17th day of May, 2011,
 22 a true and correct copy of **DEFENDANT'S MOTION FOR NEW TRIAL** was served via First
 23 Class, U.S. Mail, postage prepaid, addressed as follows, upon the following counsel of record:

24 ///

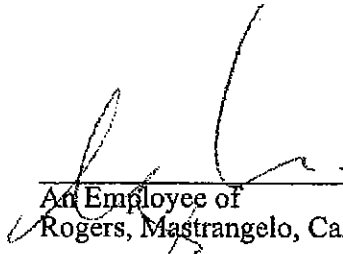
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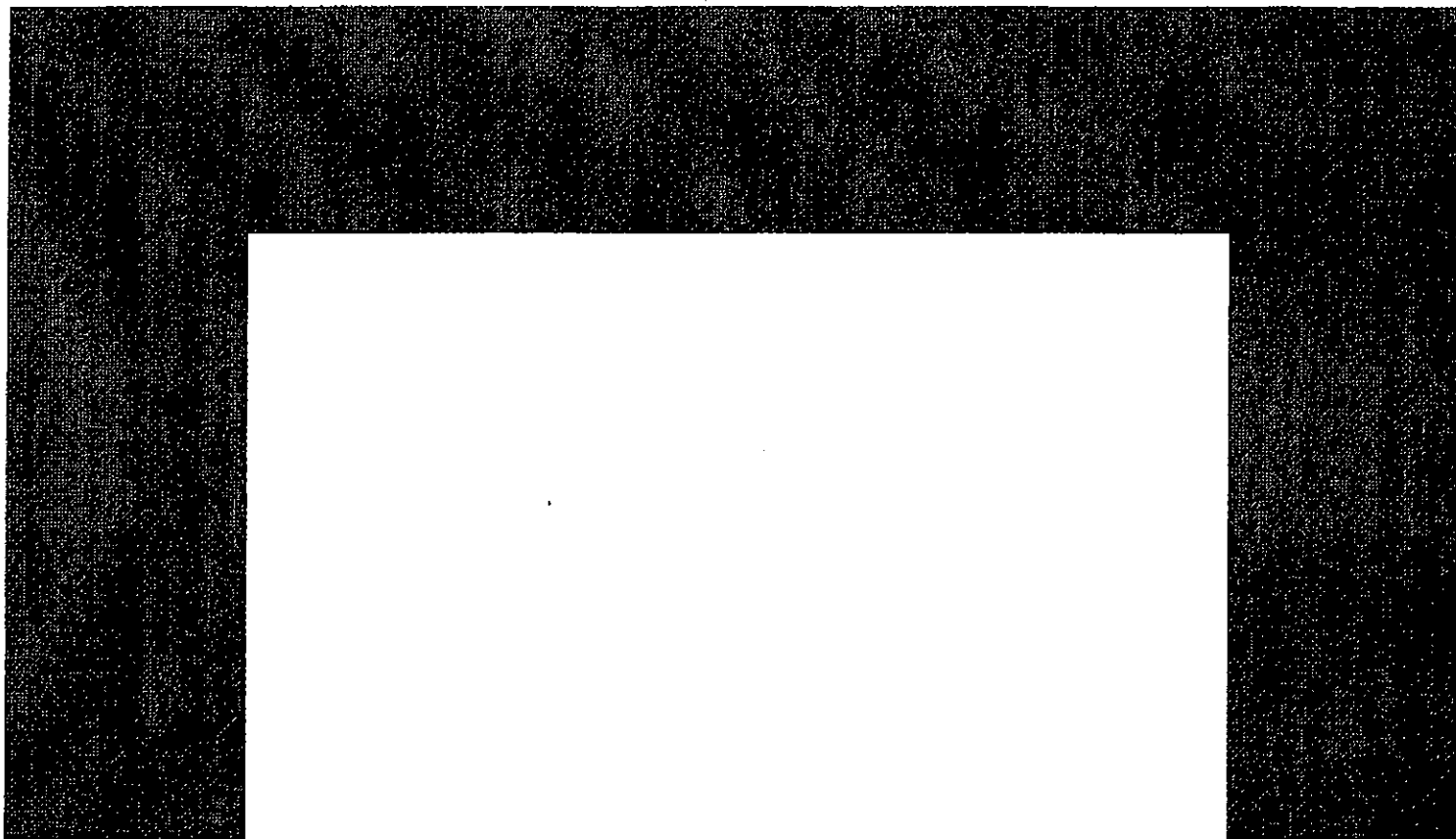
27 ///

28 ///

1 David T. Wall, Esq.
2 MAINOR EGLET
3 400 South Fourth Street, Suite 600
4 Las Vegas, Nevada 89101
5 Telephone: (702) 450-5400
6 Facsimile: (702) 450-5451
7 *Attorneys for Plaintiffs*

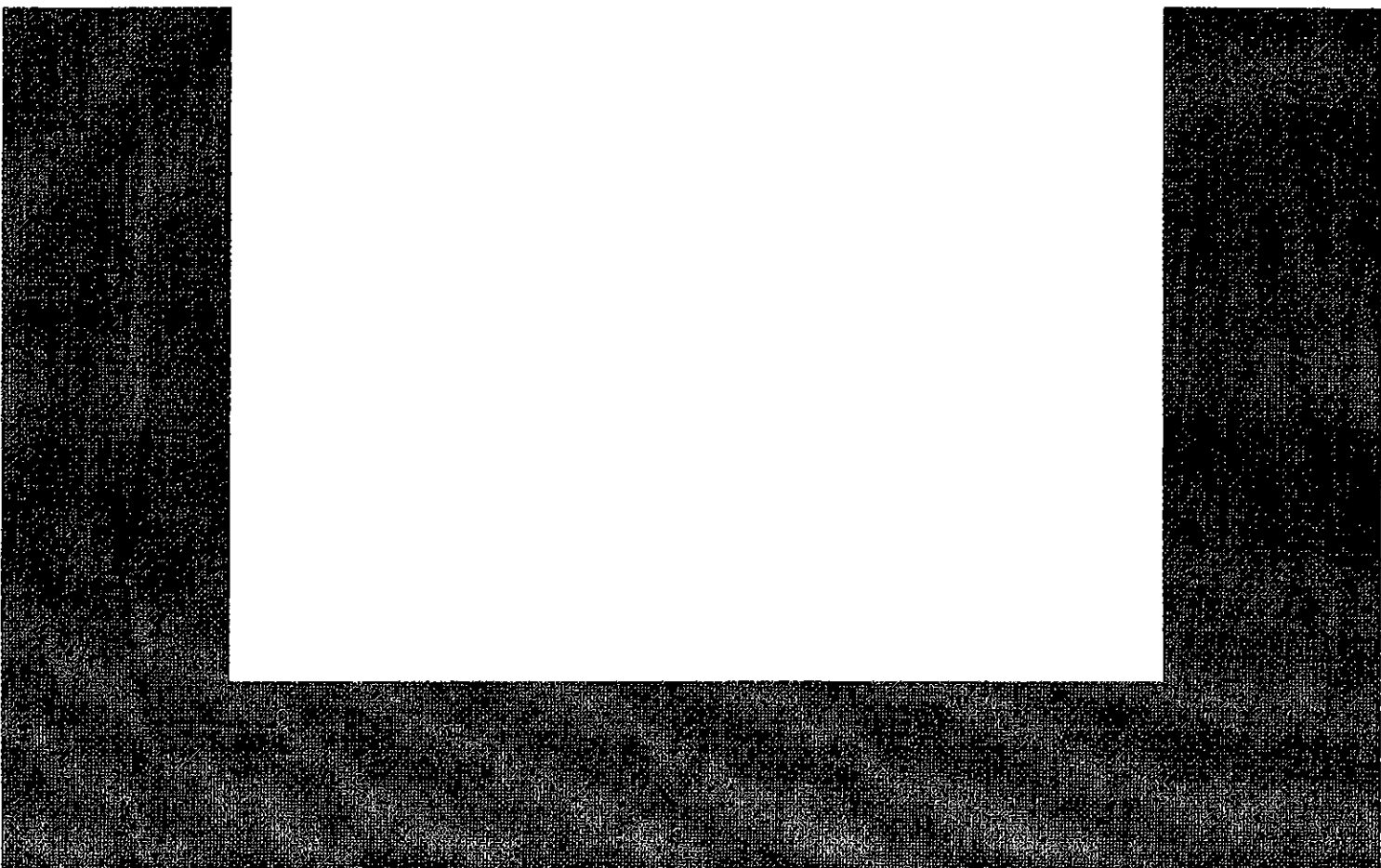

An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell

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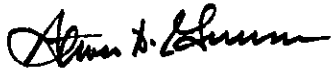


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CLERK OF THE COURT

1 **SUBP**
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*

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

10 WILLIAM JAY SIMAO, individually and)	CASE NO.	A539455
11 CHERYL ANN SIMAO, individually, and as)	DEPT. NO	X
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.)		

17 **SUBPOENA - CIVIL**

18 ☐ REGULAR ☒ DUCES TECUM

19
20 **THE STATE OF NEVADA SENDS GREETINGS TO:**

21 Jans-Jorg Rosler, M.D.
22 Nevada Spine Institute
23 7140 Smoke Ranch Road
24 Las Vegas, Nevada 89128
25 Telephone: 702-320-8111

26 **YOU ARE HEREBY COMMANDED** that all singular, business and excuses set aside,
27 you appear and attend on **May 26, 2011, at 11:00 a.m.** The address where you are required to
28 appear is Rogers, Mastrangelo, Carvalho & Mitchell, 300 South Fourth Street, 710 Bank of
America Plaza, Las Vegas, Nevada 89101. Your attendance is required to give testimony and/or to

1 produce and permit inspection and copying of designated books, documents or tangible things in
2 your possession, custody or control. You are required to bring with you at the time of your
3 appearance any items set forth below. If you fail to attend, you may be deemed guilty of contempt
4 of Court and liable to pay all losses and damages caused by your failure to appear.

5 **ITEMS TO BE PRODUCED**

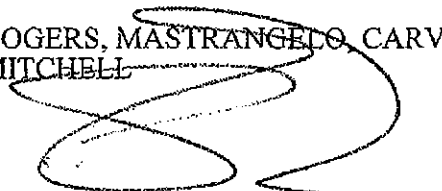
- 6 1. **The flourescopy images taken at the time of the discogram, which you**
7 **published to the jury during the Trial of the above named case pertaining to**
8 **WILLIAM JAY SIMAO DOB 05-08-1963.**

9 **IN LIEU OF APPEARANCE**, you are permitted to provide a copy of the above- referenced
10 documentation together with a signed and notarized Affidavit or Certificate of Custodian of Records,
11 on or before **Thursday, the 26th day of May, 2011 at the hour of 10:00 a.m.**, to Rogers,
12 Mastrangelo, Carvalho & Mitchell, 300 South Fourth Street, 710 Bank of America Plaza, Las Vegas,
13 Nevada 89101.

14 Please see **Exhibit "A"** attached hereto for information regarding the rights of the person
15 subject to this Subpoena.

16 DATED this 17th day of May, 2011.

17 **ROGERS, MASTRANGELO, CARVALHO &**
18 **MITCHELL**

19 
20 **Stephen H. Rogers, Esq.**
21 **Nevada Bar No. 5755**
22 **300 South Fourth Street, Suite 710**
23 **Las Vegas, Nevada 89101**
24 **Telephone: (702) 383-3400**
25 **Facsimile: 702-384-1460**
26 ***Attorneys for Defendant Jenny Rish***

27 **EXHIBIT "A"**

EXHIBIT "A"
NEVADA RULES OF CIVIL PROCEDURE

Rule 45

(c) Protection of Persons Subject to Subpoena.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

AFFIDAVIT OF SERVICE

State of Nevada

County of Clark

District Court

Case Number: A539455 DEPT. X Court Date: 5/26/2011

Plaintiff:

William Jay Simao, et al.

vs.

Defendant:

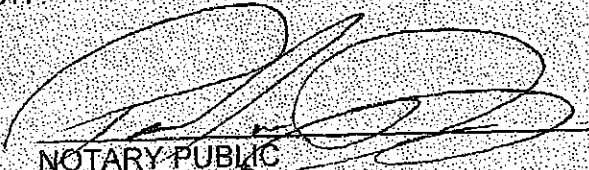
Jenny Rish; James Rish; Linda Rish

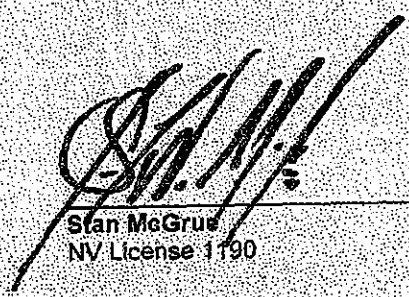
Received by AM:PM Legal Solutions on the 16th day of May, 2011 at 12:49 pm to be served on Hans Jorg Rosler, M.D. - Nevada Spine Clinic, 7140 Smoke Ranch Rd., Ste. 150, Las Vegas, NV 89128.

I, Stan McGrue, being duly sworn, depose and say that on the 16th day of May, 2011 at 2:40 pm, I:

at all times herein, pursuant to NRPC 4(c), was and is a citizen of the United States, over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made and served the within named Witness by delivering a true and correct copy of the Subpoena Duces Tecum on the date and hour of service endorsed thereon by me, at the aforementioned address, to Doris Tiedke (COR) as an individual/agent authorized to accept service for the within named Witness.

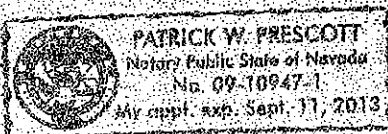
Subscribed and Sworn to me on the 17th day of May, 2011


 NOTARY PUBLIC


 Stan McGrue
 NV License 1190

AM:PM Legal Solutions
 520 S. 7th St., Ste. B
 Las Vegas, NV 89101
 (702) 385-2676

Our Job Serial Number: AMP-2011002951
 Ref: STFA 070168

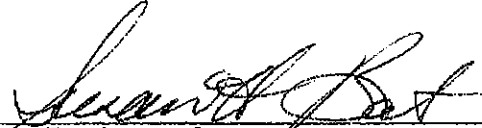


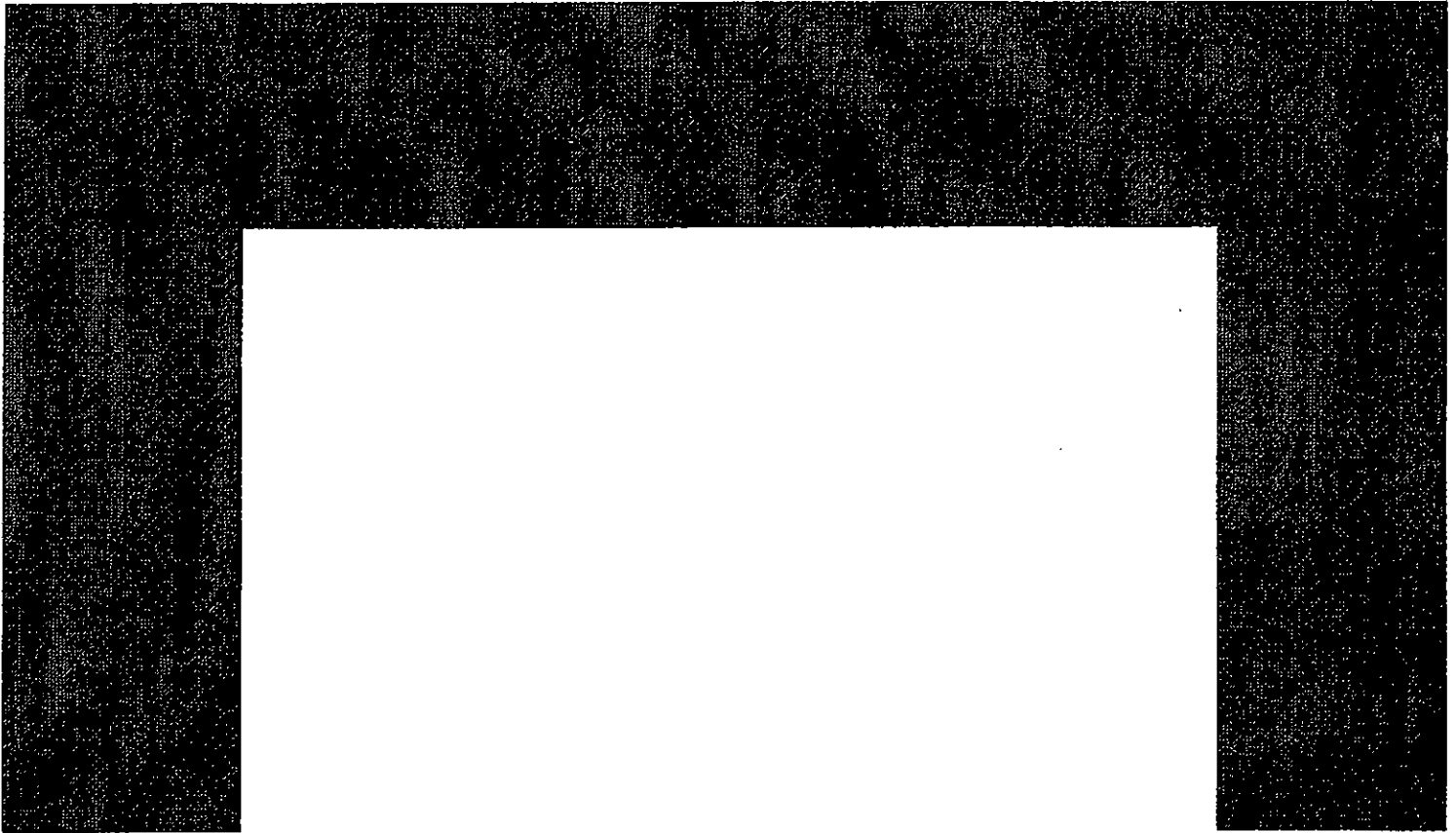
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3 **CERTIFICATE OF SERVICE**

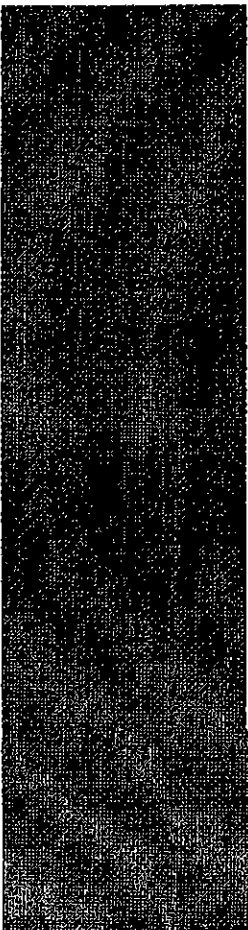
4 Pursuant to NRC 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of Rogers,
5 Mastrangelo, Carvalho & Mitchell, and on the 16th day of May, 2011, a true and correct copy of the
6 foregoing **SUBPOENA DUCES TECUM** was served via First Class, U.S. Mail, postage prepaid,
7 addressed as follows, upon the following counsel of record:

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

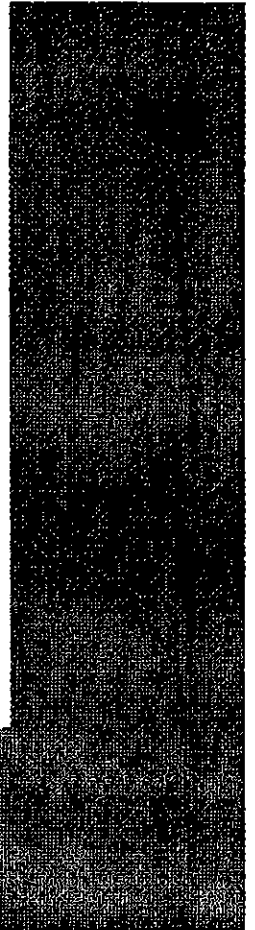
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An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell



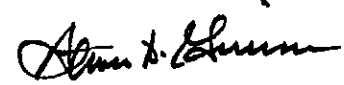
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CLERK OF THE COURT

MATF

ROBERT T. EGLET, ESQ.

Nevada Bar No. 3402

DAVID T. WALL, ESQ.

Nevada Bar No. 2805

ROBERT M. ADAMS, ESQ.

Nevada Bar No. 6551

MAINOR EGLET

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MATTHEW E. AARON, ESQ.

Nevada Bar No. 4900

AARON & PATERNOSTER, LTD.

2300 West Sahara Avenue, Ste. 650

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

**PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES**

MAINOR EGLET

004155

1 COME NOW, Plaintiffs, WILLIAM and CHERYL SIMAO, by and through their
 2 attorneys of record, ROBERT T. EGLET, ESQ., DAVID T. WALL, ESQ. and ROBERT M.
 3 ADAMS, ESQ. of the law firm of MAINOR EGLET, and hereby submits their instant Brief in
 4 Favor of an Award of Attorneys' Fees.

5 This Brief is made and based upon the pleadings and papers on file herein and the
 6 attached Points and Authorities.
 7

8 DATED this 25 day of May, 2011.

9 MAINOR EGLET

10
 11 
 12
 13 DAVID T. WALL, ESQ.
 14 Nevada Bar No. 2805
 15 Attorney for Plaintiffs

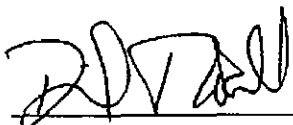
16 **NOTICE OF MOTION**

17 PLEASE TAKE NOTICE that the undersigned will bring the foregoing **PLAINTIFFS'**
 18 **MOTION FOR ATTORNEYS' FEES**, on for hearing on the 30 day of JUNE, 2011, at the
 19 hour of ^{CHAMBERS} , in Department X or as soon thereafter as counsel may be heard.

20 Dated this day of May, 2011.

21
 22 UNSIGNED
 23 _____
 24 DISTRICT COURT JUDGE

25 Respectfully submitted by:

26 
 27
 28 DAVID T. WALL, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES**I.****STATEMENT OF FACTS**

This case involves a motor vehicle accident occurring on April 15, 2005. The Plaintiff, WILLIAM SIMAO, was driving southbound on Interstate 15 when he was rear-ended by a vehicle driven by the Defendant, JENNY RISH. Defendant did not deny causing the accident. Plaintiff WILLIAM SIMAO was injured in the accident and brought the instant action, on April 13, 2007, which included a claim for loss of consortium by WILLIAM SIMAO's wife, Plaintiff CHERYL SIMAO. In an effort to resolve the instant matter, on February 5, 2009, Plaintiffs served upon Defendant an Offer of Judgment in the amount of \$799,999.00. (See Exhibit "1"). Said offer was rejected by Defendant and the matter proceeded forward with discovery in preparation for trial.

As the Court will recall, the jury trial began on March 14, 2011, and had nearly been completed before Plaintiffs were forced to move to strike Defendant's Answer after Defendant's counsel's repeated and willful violations of this Court's pre-trial orders. The Plaintiffs' oral motion to strike the Defendant's Answer was rooted primarily in the Defendant's repeated violations of the Court's Order granting the Plaintiffs' Motion in Limine to Preclude Defendant From Raising a Minor Impact Defense. However, Defendant violated other Orders of this Court during the trial, and the cumulative effect of such violations was material to the Court's analysis. These other violations included violations of this Court's pre-trial orders excluding prior and subsequent accidents and injuries and medical build-up/attorney driven litigation arguments. Due to all of these violations, and only after progressive sanctions had been issued against the Defendant to no avail, this Court struck Defendant's Answer, converting this litigation into a

1 default judgment under NRCP 55. The case proceeded to a prove-up hearing on damages only,
2 which took place on Friday, April 1, 2011.

3 On April 28, 2011, a Judgment by the Court was filed, awarding Plaintiffs \$3,493,983.45,
4 inclusive of past medical expenses, past and future pain and suffering, loss of consortium on
5 behalf of Plaintiff, Cheryl Simao, and litigation costs. (See Judgment at **Exhibit "2"**). The
6 Judgment was subsequently entered on May 3, 2011 (See Entry of Judgment at **Exhibit "3"**).
7 Because the \$3,493,983.45 Judgment unquestionably exceeds the \$799,999.00 amount reflected
8 within the February 5, 2009 Offer of Judgment, Defendant must suffer the consequences set forth
9 by NRCP 68 and NRS 17.115.
10

11 Defendant's attorney in this matter, Stephen H. Rogers Esq., is an experienced attorney
12 who is no doubt familiar with Nevada procedure and trial practice. Certainly, Defendant's
13 counsel understood the additional risks of proceeding to trial after rejecting the Offer if they
14 failed to obtain a more favorable judgment. These additional risks are expressly set forth by our
15 Legislature and all controlling case law. Undoubtedly, counsel understands the purpose of
16 NRCP 68 is to promote settlement. *Matthews v. Collman*, 110 Nev. 940, 878 P.2d 971 (Nev.
17 1994). In fact, the provisions of NRCP 68 were amended demonstrating the Supreme Court's
18 intent to have parties take offers more seriously to promote settlement. Defendant, by and
19 through her counsel, did **NOT** accept the February 5, 2009 Offer of Judgment, proceeded to trial
20 and was unsuccessful. Consequently, Plaintiff is entitled to reasonable attorney's fees and
21 interest.
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23
24

25 II. 26 ARGUMENT

27 A. LEGAL ANALYSIS

28 The law on this topic is clear; both interest and fees are warranted in this matter.

1 Specifically, NRCP 68 states that if the offeree rejects an offer and fails to obtain a more
2 favorable judgment, the offeree shall pay applicable interest on the judgment from the time of the
3 offer to the time of entry of the judgment and reasonable attorney's fees incurred by the offeror
4 from the time of the offer.¹

5 Further, NRS 17.115 states that a party who rejects an Offer of Judgment, and fails to
6 obtain a more favorable judgment, may be ordered to pay interest on the judgment for the period
7 from the date of service of the offer to the date of entry of the judgment and reasonable
8 attorney's fees incurred by the party who made the offer for the period from the date of service
9 of the offer to the date of entry of the judgment.

10 The Nevada Supreme Court set forth four (4) factors of consideration when awarding
11 fees under NRCP 68. *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983). These factors
12 include:

- 13 (1) Whether the claim was brought in good faith;
14 (2) Whether the Offer of Judgment was reasonable and in good faith in both its
15 timing and amount;
16 (3) Whether the decision to reject the offer and proceed to trial was reasonable; and,
17 (4) Whether the fees sought are reasonable and justified in amount.

18 Applying these to the instant case, it is clear that discretion should be exercised in favor
19 of allowing a full award of attorney's fees and interest.

20 **(1) Plaintiff's claim was brought in good faith.**

21 There is no doubt that the Simao's claims were brought in good faith.

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28 ¹ In this matter the Plaintiffs exceeded the Offer of Judgment by more than TWO AND A HALF MILLION
DOLLARS. As such, Plaintiff is entitled to recover the amounts authorized by the provisions of both NRS 17.115
and NRCP 68.

1 The evidence introduced at trial proved that this case involved a rear-end type collision
2 where liability was uncontested and which collision resulted in serious injury.

3 Moreover, at trial it was unequivocally demonstrated that ever since the motor vehicle
4 collision there has been a consistent history of Mr. Simao's neck pain that stems directly from
5 the motor vehicle accident in question. The medical evidence produced throughout this litigation
6 and presented at trial shows without a doubt that Mr. Simao's neck complaints, and the ensuing
7 medical treatment, including surgery, was due to the subject motor vehicle collision.
8 Notwithstanding, Defendant refused to accept responsibility for her negligence, failing to
9 acknowledge that her negligence caused Mr. Simao's need for medial treatment. In fact,
10 Defendant hired two (2) medical witnesses, Jeffrey Wang, M.D., a spine surgeon, and David
11 Fish, M.D., a pain management physician, who both authored medical expert reports and gave
12 deposition testimony and trial testimony, disputing the cause of Mr. Simao's cervical spine
13 injury, claiming that his neck pain was purely degenerative and that his neck surgery was not
14 warranted. It was successfully proven at trial, however, through Mr. Simao's treating physicians,
15 that his claimed injuries and ensuing medical treatment was caused by the motor vehicle
16 collision.
17
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20 Because the Defendant refused to accept responsibility for her negligence, Plaintiffs were
21 forced to hire counsel and file a law suit, which has now been ongoing for over four (4) years.
22 Clearly, this matter was brought in good faith.

23 (2) The Offer of Judgment was reasonable and served in good faith.

24 Each and every piece of evidence in this matter pointed to a probable jury verdict in
25 excess of the \$799,999.00 Offer of Judgment.
26

27 First, almost immediately following the collision, Mr. Simao presented at Southwest
28 Medical Associates Urgent Care Clinic complaining of neck and back pain, left shoulder and left

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1 elbow pain, as well as tenderness to the back of his head. (See Medical Record dated *April 15,*
2 *2005*, attached hereto as **Exhibit "4"**). Thereafter, Mr. Simao began a conservative course of
3 medical treatment for his neck and head which did not result in any significant improvement. A
4 CT scan and MRI of his head/brain were ordered as a result of his headaches, which he described
5 were different than the migraines that he had a history of having. In December 2005, Mr. Simao
6 began receiving medical treatment with a new physician at Southwest Medical, Dr. Dean Tsai,
7 who prescribed physical therapy for Mr. Simao's ongoing neck and shoulder pain. Mr. Simao
8 was later prescribed a four-leads TENS unit by Dr. Tsai. On March 22, 2006, after months of
9 unsuccessful conservative care, Mr. Simao was order to undergo a cervical MRI which indicated
10 a 2-3 mm disc protrusion at the L-4-C-5 level with facet hypertrophy and narrowing with
11 possible C4 nerve root contact within the neural foramen. (See MRI Report at **Exhibit "5"**).
12 Upon this discovery, Mr. Simao was immediately referred to a spine surgeon, Dr. Patrick
13 McNulty. By June 2007, surgery to Mr. Simao's neck was already being discussed as an option
14 for care, although a more conservative regimen was opted for at that time. (See Southwest
15 Medical Associates Record dated June 4, 2007 at **Exhibit "6"**). After approximately three (3)
16 years of conservative care which included physical therapy, multiple series of diagnostic and
17 therapeutic injections, narcotic pain medications, as well as a second opinion with Dr. Jaswinder
18 Grover and more pain management injections with Dr. Jorg Rosler, Mr. Simao was referred for
19 cervical spine surgery, which took place on November 18, 2009 at the hands of Dr. McNulty.

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23 By February 5, 2009, the date of the Offer of Judgment, Mr. Simao had already incurred
24 over \$63,000.00 in medical expenses, was still treating for his neck pain, and had long been
25 recommended for a cervical spine fusion. Mr. Simao's incurred medical expenses after the
26 March 2009 surgery, in the month following the Offer of Judgment, totaled \$170,091.84. Even
27 after undergoing cervical spine surgery in March 2009, Mr. Simao had ongoing pain which
28

1 required continued medical treatment. The total amount of Mr. Simao's medical treatment
2 presented at trial was \$194,390.10. Moreover, due to Mr. Simao's continued pain, his quality of
3 life was greatly affected. Accordingly, Plaintiffs hired Stan Smith, Ph.D., an expert economist,
4 who offered an opinion, testifying to the same at trial, that Mr. Simao's losses with respect to his
5 decreased value of life averaged to approximately \$905,169.00, which is the amount awarded for
6 this item of damages in the Judgment. (See Supplemental Report, dated March 29, 2011, at
7 Exhibit "7,"; see also Exhibit "2"). Importantly, Dr. Smith's opinion regarding Mr. Simao's
8 loss of enjoyment of life was initially produced to Defendant on May 5, 2009, just three (3)
9 months after the Offer of Judgment was served and indicated an average loss for Mr. Simao's
10 reduction quality of life to be \$851,702.00, which alone exceeds the amount of the Offer of
11 Judgment. (See Report at Exhibit "8").

12
13
14 It is clear that well before the trial of this matter that the value of this case was greatly in
15 excess of \$799,999.00.

16 Moreover, the Judgment of \$3,493,983.45 is direct evidence that Plaintiff's \$799,999.00
17 Offer of Judgment was more than reasonable.

18
19 (3) **The decision to reject the offer and proceed to trial was unreasonable.**

20 It is hard to envision why Defendant's carrier refused to acknowledge the reasonable
21 value of Mr. Simao's damages and tender the amount of the Offer of Judgment. Plaintiff's
22 counsel provided every opportunity to the Defendant's carrier to resolve this matter prior to the
23 commencement of trial. The request to tender \$799,999.00, in February, 2009 was an extremely
24 generous offer given Mr. Simao's extensive and severe injuries at that point in time. After Mr.
25 Simao's March 25, 2009, cervical fusion, he continued treating with his medical providers
26 because the surgery did not relieve all of his pain. Defendant has been aware of this through the
27 entire duration of this litigation. In fact, Mr. Simao continues to receive medical treatment to his
28

1 cervical spine and has been recommended for a surgically implanted neurostimulator to assist in
2 the alleviation of his continued pain. Moreover, Defendant's medical expert, Dr. Wang, opines,
3 and agrees that Mr. Simao will require a future cervical spine surgery due to "adjacent segmental
4 breakdown" because of his March 2009, fusion. As of February 5, 2009, the date of the Offer of
5 Judgment, Defendant knew of Mr. Simao's medical condition and of his continued treatment.

6
7 As further evidence of Defendant's unreasonableness, Defendant served a total of three
8 (3) Offers of Judgment upon Plaintiffs. The first was served on July 9, 2008 and offered to settle
9 this matter between the Plaintiffs jointly for \$5,000.00. (See Exhibit "9"). Then, on October 6,
10 2009, several months following Mr. Simao's cervical spine fusion, Defendant served two (2)
11 Offers of Judgment, one to each Plaintiff individually, offering settle Mr. Simao's claims for
12 \$42,500.00 and Mrs. Simao's loss of consortium claim for \$5,000.00. (See Exhibits "10" and
13 "11"). As evidenced by Mr. Simao's medical damages as of October 2009, totaling over
14 \$170,000.00, it is clear from Defendant's own Offers of Judgment that Defendant never seriously
15 evaluated the merits of this litigation and was woefully short-sighted in their handling of this
16 case.
17

18
19 Given the expenses and medical costs that have been incurred up to trial, and the time
20 that has elapsed from the time the Offer of Judgment was served, Plaintiff's \$799,999.00 Offer
21 of Judgment was plainly reasonable and Defendant and/or his carrier was grossly unreasonable
22 to reject it.

23 (4) **The fees sought are reasonable and justified in amount.**

24
25 This matter involves a personal injury case. The State Bar of Nevada has approved
26 contingency fee agreements. In fact, it is industry standard to charge 40% for attorney's fees
27 when a complaint is filed. This fee is nationally recognized as a reasonable fee. Rather than
28 collecting this fee shortly after filing the complaint, this matter proceeded with years of

1 litigation, involving the retention of experts and the presentation of costly medical testimony.
 2 Plaintiffs' counsel expended substantial costs with the risk of never recovering the same at the
 3 end of this litigation. There was substantial work performed throughout the course of litigation,
 4 including a three (3) week jury trial.

5 Personal injury is a specialized area of law. When combining this area of law with the
 6 trial advocacy of Plaintiffs' counsel for the presentation of this case, it is clear that the nationally
 7 recognized standard of a 40% contingency fee is reasonable, fair, and justified. A justifiable
 8 reason is that this is the actual fee that Plaintiffs are required to pay for their counsels' services.
 9 Here, the Defendant will get a benefit if not required to pay the actual fee that the Simao's are
 10 required to pay, which is recognized by attorneys in the industry as fair and reasonable. Failure
 11 to award the full amount of attorney's fees to Plaintiffs only means that they will get less in their
 12 pocket from the recovery in this case.

13 During the course of discovery, substantial time and expenses were spent throughout this
 14 litigation taking depositions, drafting and arguing pre-trial motions, and preparing for trial. This
 15 case was "litigated" pre-trial. This case was "litigated" at trial. Based upon the extensive and
 16 complex legal battle this case is, all the fees requested by the Plaintiff should be granted. See
 17 *infra*.

18 **B. ATTORNEY'S FEES**

19 **a. NRS 17.115 and NRCP 68 Require this Court to Exercise its Discretion and** 20 **Award Plaintiff Attorney's Fees and Costs:**

21 NRS 17.115 states in pertinent part:

22 ...

23 4. Except as otherwise provided in this section, if a party who
 24 rejects an offer of judgment fails to obtain a more favorable judgment, the
 25 court:

26 ...

1 (c) Shall order the party to pay the taxable costs incurred by the
2 party who made the offer; and

3 (d) May order the party to pay the party who made the offer any
4 or all of the following:

5 1. A reasonable sum to cover any costs incurred by
6 the party for each expert witness whose services were
7 reasonably necessary to prepare for and conduct the trial
8 of the case.

9 2. Any applicable interest on the judgment for the
10 period from the date of the service of the offer to the
11 date of entry of the judgment.

12 3. Reasonable attorney's fees incurred by the party
13 who made the offer for the period from the date of
14 service of the offer to the date of entry of judgment. If
15 the attorney of the party who made the offer is collecting
16 a contingent fee, the amount of any attorney's fees
17 awarded to the party pursuant to this subparagraph must
18 be deducted from that contingent fee.

19 NRCP 68 states in pertinent part:

20 (e) Failure to Accept Offer. If the offer is not accepted within
21 10 days after service, it shall be considered rejected by the
22 offeree and deemed withdrawn by the offeror. . . . Any
23 offeree who fails to accept the offer may be subject to the
24 penalties of this rule.

25 (f) Penalties for Rejection of Offer. If the offeree rejects an
26 offer and fails to obtain a more favorable judgment,

27 (2) the offeree shall pay the offeror's post-offer
28 costs, applicable interest on the judgment from
the time of the offer to the time of entry of the
judgment and reasonable attorney's fees, if any
be allowed, actually incurred by the offeror
from the time of the offer. If the offeror's
attorney is collecting a contingent fee, the
amount of any attorney's fees awarded to the
party for whom the offer is made must be
deducted from the contingent fee. [Emphasis
Added].

The Nevada Supreme Court has held that the purpose of this section is to promote settlement of suits by **rewarding** [those] who make reasonable offers and **penalizing** [those] who refuse to accept them. *John W. Muije, Ltd., and Cummings*, 106 Nev. 664; 799 P.2d 559 (1990) (emphasis supplied).

b. **Attorney's fees can be calculated by either the contingency fee or by using a "lodestar" method.**

Attorney fees may be calculated two primary ways: (1) the equivalent of the contingent fee, or (2) an hourly fee, or lodestar, including deviations up or down due to various factors, including the existence of a contingency fee agreement. See *Glendora Comm. Redevelopment Agency v. John P. Deneter, Jr.*, 155 Cal.App.3d 465; 202 Cal.Rptr. 389 (1984) (contingent fee) and *PLCM Group, Inc. v. David Drexler*, 22 Cal. 4th 1084, 997 P.2d 511 (2000) (lodestar analysis).

1) **Contingency Fee**

As stated *supra*, NRS 17.115(4)(d)(3), allows attorney's fees from the time of the Offer of Judgment until the present. NRCP 68 also allows an award of **actual** attorney's fees for the same time period.

JUDGMENT	CONTINGENCY	AMOUNT
\$3,493,983.45	40%	\$1,397,593.38.

In Nevada, "the method upon which a reasonable fee is determined is subject to the discretion of the Court," which is tempered only by reason and fairness. *Shuette v. Beazer Homes Holding Corp.*, 121 Nev. 837, 124 P.3d 530 (2005); *University of Nevada v. Tarkanian*, 110 Nev. 581, 594, 591, 879 P.2d 1180, 1188, 1186 (1994). Accordingly, in determining the

1 amount of fees to award, the court may calculate a reasonable amount to be that of the
2 contingency fee. *Schuelte* at 863.²

3 In considering a contingency fee, the Court must continue its analysis by considering the
4 requested amount in light of the facts enumerated by the Supreme Court in *Schuelte, supra* and
5 *Brunzell v. Golden Gate National Bank*³, namely, the advocate's professional qualities, the
6 nature of the litigation, the work performed, and the result. In this manner, whichever method
7 the Court ultimately uses, the result will prove reasonable as long as the Court provides sufficient
8 reasoning and findings in support of its ultimate determination.⁴ *Schuelte* at 863.

10 The Nevada Supreme Court further enumerated the *Brunzell* factors in *Schouweiler v.*
11 *Yancey Co.*, 101 Nevada 827, 712 P.2d 786 (1985). The four (4) factors which should be
12 considered in determining the reasonableness of attorney's fees are:
13

- 14 (1) Qualities of the advocate, his ability, training, education, experience,
15 professional standing and skill.
16
17
18

19 ² See, *Chun v. Bd. Of Trustees of E.R.S.*, 92, Hawaii 432, 992 P.2d 127, 136, 136-42 (2000) (analyzing different
20 methods used to award attorney fees); accord, *Brundidge v. Glendale Federal Bank. F.S.B.*, 168 Ill.2d 235, 213
21 Ill.Dec. 563, 659 N.E.2d 909 (1995); see also, *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 97
22 Cal.Rptr.2d 797, 821 (2000) (analyzing different methods used to calculate attorney fees in a class action in light of
contingency fee consideration); *Glendora Com. Redevel. Agency v. Demeter*, 155 Cal.App.3d 465, 202 Cal.Rptr.
389 (1984) (affirming, the trial court's attorney fees award equivalent to that called for in a contingency fee
arrangement).

23 ³ *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349 (1969), (recognizing that the factors relevant to
24 determining the reasonableness of an attorney fee award including: "(1) the qualities of the advocate: his ability, his
25 training, education, experience, professional standing and skill; (2) the character of the work to be done: its
difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and
character of the parties where they affect the importance of the litigation; (3) the work actually performed by the
lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what
benefits were derived." (quoting *Schwartz v. Schwerin*, 85 Ariz. 242, 336 P.2d 144, 146 (1959)).

26 ⁴ See, e.g., *Miller v. Wilfong*, 121 Nev. 619, ---, 119 P.3d 727, 730 (2005) (noting that the district court has
27 discretion to determine the reasonableness of statutory attorney fee awards, but in so doing, it must consider the
28 *Brunzell* factors); *Schouweiler v. Yancey Co.*, 101 Nev. 827, 712 P.2d 786 (1985) (reversing the district court's order
awarding attorney fees and remanding the issue to be evaluated under the *Brunzell* factors); see also *Beattie v.*
Thomas, 99 Nev. 579, 589, 668 P.2d 268, 274 (1983) (noting that it is an abuse of discretion to award the full
amount of requested attorney fees without making "findings based on evidence that the attorney's fees sought are
reasonable and justified").

1 (2) The character of the work to be done, its difficulty, intricacy, importance,
2 the time and skill required, the responsibility imposed and the prominence and character
3 of the parties when they effect the importance of the litigation.

4 (3) The work actually performed by the lawyer, the skill, time and attention
5 given to the work.

6 (4) The result, whether the attorney was successful, what benefits were
7 derived.

8
9 (1) Plaintiffs' counsel's trial skills are on par with the top litigators in Clark
10 County.

11 Arguably, the quality and expertise of Plaintiffs' trial counsel is unmatched. Robert T.
12 Eglet, Esq., who has earned and maintained an "AV" Martindale rating, was honored as the
13 "Trial Lawyer of the Year, 2005," by the Nevada Trial Lawyers Association. Most recently, Mr.
14 Eglet was honored as the "National Lawyer of the Year, 2010, by LawyersUSA. Mr. Eglet has
15 tried over one hundred (100) civil jury trials and has won all but three (3). To date, he has
16 successfully litigated the largest products liability verdicts in the Nation's history and has also
17 successfully litigated one of the largest personal injury verdicts in the history of the state. For
18 sometime, has enjoyed membership in the Multi-Million Dollar Advocate's Forum. It is for
19 these reasons and more that a good share of trial lawyers throughout the country have referred
20 him, and his law firm Mainor Eglet, catastrophic injury and wrongful death cases throughout the
21 years. Plaintiffs' counsel humbly suggests he displayed the utmost of skill in this matter.

22
23 Former Judge David T. Wall, Esq., is a Partner of Mr. Eglet's and shares in his expertise.
24 Mr. Wall is a trial lawyer of unmatched skill and expertise whose experience in the court room,
25 both as a lawyer and a former judicial officer, was invaluable to the presentation of the evidence
26 involved in this litigation.
27
28

1 (2) Personal Injury cases are very specialized and difficult by nature.

2 While there may be matters more complex, this case clearly required an attention to detail
3 and an understanding of the presentation of personal injury damages to complex medical
4 evidence in order to establish damages. Having several different medical disciplines testify
5 enabled the Plaintiffs to achieve the best results. Notwithstanding the medical testimony, the
6 expert analysis by Dr. Smith and was vital to achieve the best results. His testimony was crucial
7 to educate the jury regarding the Simao's overall damages. The case presented, and counsel's
8 understanding of these issues, supports the conclusion that the attorney's fees were earned and
9 are fair and reasonable. The cross-examinations of Defendants and her experts, (in particular,
10 Drs. Fish and Wang) demonstrated the degree of advocacy and skill, also warranting an award of
11 full attorney's fees.
12

13 (3) The lawyers' skill, time and attention was unmatched in this proceeding.

14 Plaintiffs' counsels' skill, time and attention for detail during this trial are unprecedented.
15 Throughout the pendency of this litigation, tremendous attention was paid to this case. The
16 preparation was thorough and complete. Counsel for Plaintiffs spent hundreds of hours, retained
17 experts, and were prepared each day at trial despite the long days at Court and the long nights
18 afterwards. Considering the amount of time and effort exerted by Plaintiffs' counsel, the fees are
19 clearly substantiated. Plaintiffs' trial team consisted of three Paralegals, one Associate, and three
20 Partners, all of whom spent literal hundreds of hours pouring over documents, drafting briefs,
21 creating PowerPoint presentations, drafting witness examinations, meeting with clients, experts
22 and witnesses and reviewing literally every shred of evidence within the file. The exhaustive
23 preparation for this trial consumed much of counsel's and associates' time, together with support
24 staff, for no less than one (1) full month. Coordinating witnesses, reviewing and preparing for
25 testimony, many depositions were taken, outlined and memorized for witness examination,
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27
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1 expert reports were reviewed and analyzed. Simply put, extensive preparation went into
2 prosecuting this action.

3 **(4) The result, whether the attorney was successful, what benefits were derived.**

4 The result in this action speaks for itself. Plaintiffs, by virtue of Counsel's education,
5 preparation, skill and advocacy, received a judgment in the sum of \$3,493,983.45. This Court is
6 well aware of the benefits derived by the attorneys to achieve the results in this case. The efforts
7 of the attorneys warrant an award for all actual attorneys' fees incurred by the Plaintiffs in this
8 case.
9

10 Plaintiffs entered into a contingency fee agreement, allowing for an attorney fee in the
11 amount of 40% of the recovery obtained in this case and any award of attorney's fees in this case
12 should be consistent with the fees that Plaintiffs' counsel is contractually entitled to receive. In
13 *Glendora Comm. Redevelopment Agency vs. John P. Deneter, Jr.*, 155 Cal.App. 3d 465; 202
14 Cal.Rptr. 389 (1984), a California court of appeal affirmed the trial court's determination that the
15 attorney fees established by a contingency fee agreement were reasonable. Concluding that the
16 trial court was able to observe and consider the conduct at the trial and related proceedings, the
17 appellate court held that the contingency fee agreement, in light of all other factors, was
18 reasonable. In that case, the appellate court affirmed an award of attorney fees in the amount of
19 \$734,395.76. *Id.* at 480.
20
21

22 In doing so, the reviewing court stated:

23 It follows from the *Vella* decision that while a trial court, in the
24 exercise of its discretion, is not bound by the terms of an attorney fee
25 contract, it should, nevertheless, consider those terms and even award
26 attorney fees in the same amount as would be called for by the terms thereof
27 so long as other factors also bearing on reasonableness are considered as
28 well. . . .

While we conclude that a trial court, in the proper exercise of its
discretion, should consider the terms of an attorney fee agreement, and may
even award attorney fees in the same amount as would be called for by

1 those terms, we rule that the trial court may not do so without considering
2 whether an award in the amount set by the agreement is reasonable in the
3 context of all of the factors which we have set forth. However, we are not
4 equating the contingency fee agreement with reasonable attorney fees. . . .

5 The rule with respect to attorney fees is that the amount to be
6 awarded as attorney's fees is left to the sound discretion of the trial court.
7 The trial judge is in the best position to evaluate the services rendered by an
8 attorney in his courtroom; his judgment will not be disturbed on review
9 unless it is clearly wrong. Citing *Mandel v. Hodges*, (1976) 54 Cal.App. 3d
10 596, 624, 127 Cal.Rptr. 244, 90 A.L.R. 728; *Vella v. Hudgins*, *supra*, 151
11 Cal.App. 3d 515, 522.

12 The *Glendora* Court further reasoned:

13 With respect to 'reasonableness,' the trial court relied, in part, upon
14 California Rules of Professional Conduct, Rule 2-107, which sets forth
15 guidelines for determining reasonableness of attorney fees.

16 Rule 2-107, as quoted in the trial court's statement of decision,
17 provides in part: "B. . . Reasonableness shall be determined on the basis of
18 circumstances existing at the time the agreement is entered into except
19 where the parties contemplate that the fee will be affected by later events.
20 Among the factors to be considered where appropriate, in determining the
21 reasonableness of a fee are the following:

22 (1) The novelty and difficulty of the questions involved and the
23 skill requisite to perform the legal service properly;

24 (2) The likelihood, if apparent to the client, that the acceptance of
25 the particular employment will preclude other employment of the lawyer;

26 (3) The amount involved and the results obtained;

27 (4) The time limitations imposed by the client or by the
28 circumstances;

(5) The nature and length of the professional relationship with the
client;

(6) The experience, reputation, and ability of the lawyer or lawyers
performing the service;

(7) Whether the fee is fixed or contingent;

(8) The time and labor required;

(9) The informed consent of the client to the fee agreement. . . .

1 The Court is aware that the use of contingency fee arrangements is
2 widespread in the general field of civil law. Many such contracts provide
3 for percentage fees greater than 25% of the total recovery. Such contracts
4 do not limit fees to a proportionate share of the excess recovery over the
5 offer. This Court is not called upon to condemn or condone such practice,
6 but it is a fact which cannot escape notice. Occasionally, the result is a
7 considerable fee. Occasionally, there is no fee at all and no recovery by the
8 client. Sharing the benefits to the client produced by the attorney's service
9 is a recognized method of pricing legal fees. It is no less a logical method
10 in the instant case.

11 The trial court here weighed and considered many factors in
12 determining the reasonable value of Hafif's services. The court was able to
13 observe the conduct at the trial and related proceedings and in consideration
14 thereof determined that the contingency fee arrangement, in light of all the
15 other factors, was reasonable. On this record, the trial court did not abuse
16 its discretion.

17 *Id.*, at 473-481.

18 The *Glendora* opinion is precisely on point. The factors enumerated in the opinion are
19 practically identical to those detailed above from *Brunzell*. This Court, having an opportunity to
20 observe the conduct at the trial and other pre-trial proceedings, and upon considering and
21 weighing the many factors set forth above, can reach but one conclusion – an award of attorney's
22 fees in the amount of the contingent fee in this case, is reasonable, and should be awarded.

23 The majority of jurisdictions require trial courts to consider the contingent risk involved
24 in a case when assessing reasonableness of attorney's fees. Indeed, provided that the Court
25 carefully evaluates all factors bearing on reasonableness, a determination equating reasonable
26 fees with the contingency fee will be upheld. See, e.g., *Stimac v. Montana*, 812 P.2d 1246
27 (1991) (attorney fees upheld in full amount of contingency fee.); *Shorewood v. Steinberg*, 174
28 Wis.2d 191, 496 N.W.2d 57 (1992) (upholding trial court's use of contingency fee agreement as
 a guide); *Michigan DOT v. Randolph*, 461 Mich. 757, 610 N.W. 2d 893 (2000) (existence of
 contingency fee contract to be considered); *Allard v. First Interstate Bank*, 112 Wash. 2d 145,

1 768 P.2d 998 (1989) (trial court acted reasonably when it considered the contingency fee before
 2 awarding attorney's fees); *Coulter v. James*, 160 Ore. App. 390, 981 P.2d 395 (1999)
 3 (contingency fee must be considered in assessing reasonableness, and trial court has discretion to
 4 award full amount of contingent fee).

5 Nevada trial courts are vested with much broader discretion to award attorney fees. In
 6 Nevada, a trial court is free to award attorney fees in any amount it deems to be "reasonable and
 7 justified." *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983); *Uniroyal Goodyear*
 8 *Tire Co. v. Mercer*, 111 Nev. 318, 890 P.2d 785 (1995), and *LaForge v. State ex rel. Univ. &*
 9 *Cnty. College Sys.*, 116 Nev. 415 (2000). Therefore, this Court is free to award any amount of
 10 attorney's fees it feels is reasonable and justified, including an amount equivalent to Plaintiffs'
 11 contingency fee agreement. The Plaintiffs will be paying attorney fees equivalent to 40% of all
 12 money received. In the context of this case, and supported by opinions in a multitude of
 13 jurisdictions, Plaintiffs should be awarded attorney fees in the full amount of the fees they will
 14 actually incur, which is 40% of the Judgment, which equals to \$1,397,593.38.

15
 16
 17
 18 **(2) Lodestar.**

19 The lodestar approach involves multiplying the number of hours reasonably spent on the
 20 case by a reasonable hourly rate. *University of Nevada v. Tarkanian*, 110 Nev. 581, 591, 879
 21 P.2d 1180, 1188, 1186 (1989).

22 In this case, Mr. Eglet devoted 267.5 hours since the Offer of Judgment was served; his
 23 reasonable hourly rate is \$750. (See Affidavit at **Exhibit "12"**). Mr. Wall spent 307.5 hours
 24 working on the lawsuit since the offer; his reasonable hourly rate is \$750. (See Affidavit at
 25 **Exhibit "13"**).⁵

26
 27
 28 ⁵ Although several other attorneys from Mr. Eglet and Mr. Wall's law firm devoted substantial time to the
 preparation for, and the actual trial of this case, in the interests of fairness, only the hours expended by Mr. Eglet and

Should this Court decline to award attorney fees in the amount of the contingency fee, it will be required, initially, to determine the reasonable hours expended by counsel and a reasonable hourly rate. This is referred to as the lodestar method. The affidavits of Robert T. Eglet, Esq.,⁶ and David T. Wall, Esq.⁷ establish the reasonable hours expended on this case. The hours of the subject attorneys are the hours worked after the rejection of Plaintiffs' Offer through trial, and reflect the reasonable rates for such practitioners in the community. See, *PLCM Group, Inc. vs. David Drexler*, 22 Cal.4th 1084, 997 P.2d 511 (2000).

The analysis, however, does not end there. In a case governed by a contingency fee agreement, Plaintiffs are entitled to a deviation upward based on the contingent risk involved. Indeed, as discussed in *Glendora* and other cases cited above, and as set forth in SCR 155, this Court must consider the contingent risk in determining what is a reasonable fee.

In *Ketchum v. Moses*, 24 Cal.4th 1122, 17 P.3d 735 (2001), the California Supreme Court affirmed a trial court's determination that the fair market value of a prevailing party's attorney's fees should be increased by a multiple of two, to account for the contingent risk in the case, and the exceptional quality of legal services provided.

The Court stated:

Under *Serrano III*, the lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including, (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award. (*Serrano III*, also known as *Serrano v. Priest*, (1977) 20 Cal. 3d 25 [141 Cal. Rptr. 315, 569 P.2d 1303]). The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the

Mr. Wall are being presented under the lodestar analysis as the primary trial counsel in this matter. Further, it is more than reasonable to consider both Mr. Eglet's and Mr. Wall's time expended in this matter considering that Mr. Rogers, Defendant's counsel, also had at least one other attorney assisting and sitting with him at counsel table during significant portions of the trial.

⁶ Exhibit "12," Affidavit of Robert T. Eglet, Esq.

⁷ Exhibit "13," Affidavit of David T. Wall, Esq.

1 litigation involved a contingent risk or required extraordinary legal skill
2 justifying augmentation of the unadorned lodestar in order to approximate
3 the fair market rate for such services. The experienced trial judge is the best
4 judge of the value of professional services rendered in his court, and while
5 his judgment is of course subject to review, it will not be disturbed unless
6 the appellate court is convinced that it is clearly wrong. (*Id.*)

7 As we explained in *Rader v. Thrasher*, (1962) 57 Cal.2d 244, 253
8 [18 Cal.Rptr. 736, 368 P.2d 360], a contingent fee contract, since it involves
9 a gamble on the result, may properly provide for a larger compensation than
10 would otherwise be reasonable fee. The purpose of fee enhancement, or so-
11 called multiplier, for contingent risk is to bring the financial incentives. . . .
12 into line with incentives they have to undertake claims for which they are
13 paid on a fee-for-services basis.

14 The economic rationale for fee enhancement in contingency cases
15 has been explained as follows: 'A contingent fee must be higher than a fee
16 for the same legal services paid as they are performed. The contingent fee
17 compensates the lawyer not only for the legal services he renders but for the
18 loan of those services. The implicit interest rate on such a loan is higher
19 because the risk of default (the loss of the case, which cancels the debt of
20 the client to the lawyer) is much higher than that of conventional loan.'
21 (*Posner, Economic Analysis of Law*, (4th ed. 1992), pp. 534, 567.) 'A
22 lawyer who both bears the risk of not being paid and provides legal services
23 is not receiving the fair market value of his work if he is paid only for the
24 second of these functions. If he is paid no more, competent counsel will be
25 reluctant to accept fee award cases.' (*Leubsdorf, The Contingency Factor*
26 *in Attorney Fee Award*, (1981) 90 Yale L.J. 473, 480; see also Rules of
27 Professional Conduct, Rule 4-200(B)(9) [recognizing the contingent nature
28 of attorney representation as an appropriate component in considering
whether a fee is reasonable]; ABA Model Code Prof. Responsibility, DR 2-
106(B)(8) [same]; ABA Model Rules of Prof. Conduct, Rule 1.5(a)(8).

Such fee enhancements are intended to compensate for the risk of
loss generally in contingency cases as a class. (*Beasley v. Wells Fargo Bank*
(1991) 235 Cal.App. 3d 1407, 1419 [1Cal.Rptr. 2d 459]. *Id.*, at 741-742.

Application of a multiplier to account for contingent risk,
extraordinary results or other factors is the rule rather than the exception.
See, e.g: *State Farm v. Palma*, 550 So.2d 836 (Fla. 1990) (affirming
contingency fee multiplier of 2.6); *Barker v. Utah PSC*, 970 P.2d 702 (Utah
1998) (upheld multiplier of 2.5 to account for contingent risk and quality of
work); *PLCM v. Drexler*, 997 P.2d 511 (Cal. 2000) (lodestar plus multiplier
formula affirmed).

1 The Affidavits of counsel reflect the time and tasks performed since the Offer was served
2 and reflect the reasonable hours expended on this case through trial. The total number of
3 reasonable hours expended by counsel on this case after Plaintiffs' Offer was rejected is 575
4 hours. (See Exhibits "12" and "13"). The supporting Affidavits of counsel, submitted herewith,
5 reflect the fair market value of attorney services which were calculated to be the sum of
6 \$431,250.00, which it is strongly urged, should be adjusted upward by a minimum multiplier of
7 2.5 to reflect, among other factors, the contingent risk, the exceptional quality of the legal work,
8 and the extraordinary results. Under this scenario the amount of attorneys' fees total
9 \$1,078,125.00.
10

11 As demonstrated during the trial of this matter, Plaintiffs' counsel were required to
12 devote substantial time in order to adequately and properly prepare the absolute very best case
13 for trial. Thus, Plaintiffs seek an order from the Court granting attorneys' fees in a reasonable
14 amount between \$1,078,125.00 and \$1,397,593.38.
15

16 **C. Defendant Must Pay Applicable Interest on the Judgment, in the Amount of**
17 **\$410,338.25**

18 NRCP 68(f) states in pertinent part that "if the [Defendant] offeree rejects an offer and
19 fails to obtain a more favorable judgment, (2) the [Defendant] offeree shall pay the [Plaintiff]
20 offeror's applicable interest on the judgment from the time of the offer to the time of entry of the
21 judgment." NRS 17.115 states in pertinent part that, "if a [Defendant], who rejects an offer of
22 judgment, fails to obtain a more favorable judgment, the court may order the [Defendant] to pay
23 to the [Plaintiff] any applicable interest on the judgment for the period from [February 5,
24 2009] the date of service of the offer to [May 3, 2011] the date of entry of the judgment." In a
25 personal injury matter, "it is appropriate for the District Court to award interest on future
26
27
28

1 damages pursuant to NRS 17.115, which makes no distinction between past and future damages
2 in a judgment.” *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 890 P.2d 785 (1995).

3 As the prevailing party, who obtained a verdict in excess of an offer of judgment made
4 pursuant to Rule 68 and NRS 17.115, Plaintiffs are entitled to the following applicable interest
5 on the Judgment of \$3,493,983.45, bearing interest in accordance with *Lee v. Ball*, 116 P.3d 64
6 (2005) at the rate of 5.25% per annum from February 5, 2009 (time of the offer) through May 3,
7 2011 (time of entry of judgment) as follows:

9 **2/05/09 THROUGH 05/03/11 = \$410,338.25.**
10 **(817 days x \$502.25 per day)**
11

12 The applicable interest requested here is different and distinct from pre-judgment interest.
13 Specifically, applicable interest comes into play when a party [Defendant] rejects an offer of
14 judgment and fails to obtain a more favorable judgment. Rule 68 and NRS 17.115 mandate that
15 “applicable interest” from the date of the offer to the date of the verdict shall be awarded to the
16 prevailing party. Whereas, pre-judgment interest, as previously included in the judgment on the
17 verdict, is from the time of filing a complaint through the time of verdict, as required under *Lee*.
18 Applicable interest, which arguably serves as penalty interest, ensures that “the risk of loss
19 [remain with] the offeree who fail[ed] to accept the offer.” *Matthews v. Collman*, 110 Nev. 940,
20 878 P.2d 971 (1994).
21

22 Accordingly, this Court must also award Plaintiff applicable interest of \$410,338.25.

23
24 ///

25 ///

26 ///

27 ///

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III.

CONCLUSION

For the reasons set forth herein, Plaintiffs pray for an award of attorney's fees in the amount of \$1,397,593.38, which were incurred *via* the Contingency Fee Agreement executed between Plaintiffs and their counsel and for interest in the amount of \$410,338.25 on the verdict amount of future damages from the period of time of the Offer of Judgment to verdict. All these sums and those of the entered Judgment should bear post-judgment interest.

Further, Plaintiffs pray that this Honorable Court order the entry of Judgments against the Defendant to include these amounts.

DATED this 25 day of May, 20011.

MAINOR EGLET

By: 

ROBERT T. EGLET, ESQ.

Nevada Bar No.3402

DAVID T. WALL, ESQ.

Nevada Bar No. 2805

ROBERT M. ADAMS, ESQ.

Nevada Bar No. 6551

400 South Fourth Street, Suite 600

Las Vegas, Nevada 89101

Attorneys for Plaintiffs

EXHIBIT "1"

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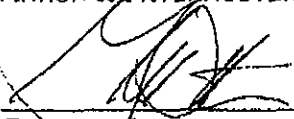
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1 attorney's fees, and Plaintiff's will seek recovery of all allowable costs, attorney's fees and interest as
2 allowed by law.

3 DATED this 5th day of February, 2009.

4 AARON & PATERNOSTER, LTD.

5 

6 GLENN A. PATERNOSTER, ESQ.
7 Nevada Bar No. 5452
8 Attorney for Plaintiffs

9 **CERTIFICATE OF MAILING**

10 Pursuant to NRCP 5(b) and the amendment to the EDCR 7.26, I hereby certify that service of
11 the foregoing **PLAINTIFFS' OFFER OF JUDGMENT TO DEFENDANT, JENNY RISH** was
12 made this date by depositing a true and correct copy of same for mailing, in a sealed envelope, postage
13 fully prepaid, first class mail at Las Vegas, Nevada, addressed to the following:

14
15 Stephen H. Rogers, Esq.
16 ROGERS, MASTRANGELO, CARVALHO & MITCHELL
17 300 S. Fourth Street, Suite 710
18 Las Vegas, NV 89101
19 Facsimile: (702) 384-1460
20 Attorney for Defendant,
21 JENNY RISH

22 at his last known mailing address.

23 DATED this 5 day of February, 2009.

24 
25 An employee of AARON & PATERNOSTER, LTD.

EXHIBIT "2"

Electronically Filed
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DISTRICT COURT
CLARK COUNTY, NEVADA

Alan L. Levine
CLERK OF THE COURT

WILLIAM JAY SIMAO; and
CHERYL ANN SIMAO,

Plaintiffs,

v.

JENNY RISH,

Defendant.

CASE NO.: A539455
DEPT. NO.: X

JUDGMENT

WHEREAS, a hearing for Default Judgment having come before the Court on April 1, 2011. IT IS ORDERED, ADJUDGED AND DECREED, that Judgment is hereby entered in favor of Plaintiffs and against Defendant, Jenny Rish as follows:

William Simao's past medical and related expenses	\$194,390.96
William Simao's pain and suffering:	
- Past pain and suffering	\$473,640.
- Future pain and suffering	\$1,140,552.
- Loss of Enjoyment of Life	\$905,169.
Cheryl Simao's loss of consortium (Society and Relationship)	\$1081,296.
Attorneys' fees	\$TBD
Litigation costs	\$99,555.49
TOTAL	\$3,493,983.45

...

...

1 IT IS FURTHER ORDERED that Judgment against Defendant, Jenny Rish, shall bear interest in
2 accordance with N.R.S. 17.130 and Lee v. Ball, 116 P.3d 64 (2005).
3

4 Dated this 27th day of April, 2011.
5

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7 Jessie Walsh
8 DISTRICT COURT JUDGE
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EXHIBIT "3"

1 NJUD

2 ROBERT T. EGLET, ESQ.

3 Nevada Bar No. 3402

4 DAVID T. WALL, ESQ.

5 Nevada Bar No. 2805

6 ROBERT M. ADAMS, ESQ.

7 Nevada Bar No. 6551

8 MAINOR EGLET

9 400 South Fourth Street, Suite 600

10 Las Vegas, Nevada 89101

11 Ph.: (702) 450-5400

12 Fx.: (702) 450-5451

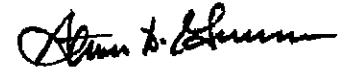
13 reglet@mainorlawyers.com

14 dwall@mainorlawyers.com

15 badams@mainorlawyers.com

16 Attorneys for Plaintiffs

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CLERK OF THE COURT

11 DISTRICT COURT

12 CLARK COUNTY, NEVADA

13
14 WILLIAM JAY SIMAO, individually and
15 CHERYL ANN SIMAO, individually, and
16 as husband and wife,

17 Plaintiffs,

18 v.

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

22 Defendants.

CASE NO.: A539455

DEPT. NO.: X

23 NOTICE OF ENTRY OF JUDGMENT

24 PLEASE TAKE NOTICE that the Judgment, was entered with the above entitled

25 ...

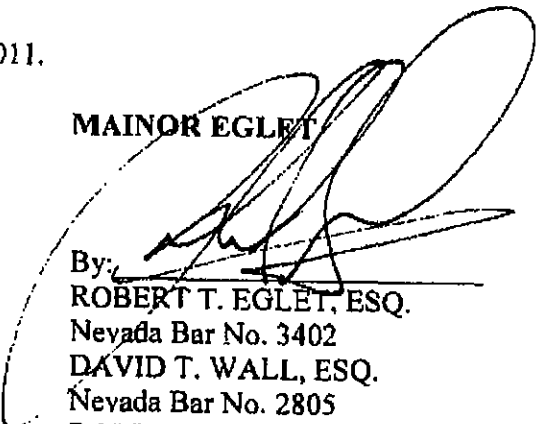
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MAINOR EGLET

004186

1 Court on the 28th day of April, 2011, a copy of which is attached hereto.

2
3 DATED this 2nd day of May, 2011.

4 MAINOR EGLET

5
6
7 By: 

8 ROBERT T. EGLET, ESQ.

9 Nevada Bar No. 3402

10 DAVID T. WALL, ESQ.

11 Nevada Bar No. 2805

12 ROBERT M. ADAMS, ESQ.

13 Nevada Bar No. 6551

14 400 South Fourth Street, Suite 600

15 Las Vegas, Nevada 89101

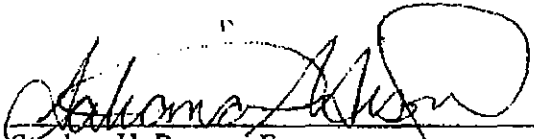
16 Attorneys for Plaintiffs

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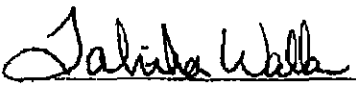
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RECEIPT OF COPY

RECEIPT OF COPY of the foregoing file stamped **NOTICE OF ENTRY OF JUDGMENT** in the matter of **SIMAO v. RISH, et al** is hereby acknowledged:


Stephen H. Rogers, Esq.
**ROGERS, MASTRANGELO,
CARVALHO & MITCHELL, LTD.**
300 S. Fourth Street, #710
Las Vegas, NV 89101
Attorneys for Defendants

Date: 5/2/11 Time: 2:19


Daniel F. Polsenberg, Esq.
Jowl D. Henriod, Esq.
LEWIS AND ROCA, LLP.
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89129
Attorneys for Defendants

Date: 5/2/11 Time: 3:24pm

MAINOR EGLET

004188

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04/28/2011 01:45:32 PM

DISTRICT COURT
CLARK COUNTY, NEVADA

Alvin L. Quinn
CLERK OF THE COURT

WILLIAM JAY SIMAO; and
CHERYL ANN SIMAO,

Plaintiffs,

v.

JENNY RISH,

Defendant.

CASE NO.: A539455
DEPT. NO.: X

JUDGMENT

WHEREAS, a hearing for Default Judgment having come before the Court on April 1, 2011. IT IS ORDERED, ADJUDGED AND DECREED, that Judgment is hereby entered in favor of Plaintiffs and against Defendant, Jenny Rish as follows:

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William Simao's pain and suffering:	
- Past pain and suffering	\$473,640.
- Future pain and suffering	\$1,140,552.
- Loss of Enjoyment of Life	\$ 905,169.
Cheryl Simao's loss of consortium (Society and Relationship)	\$ 1681,296.
Attorneys' fees	\$ TBD
Litigation costs	\$ 99,555.49
TOTAL	\$3,493,983.45

1 IT IS FURTHER ORDERED that Judgment against Defendant, Jenny Rish, shall bear interest in
2 accordance with N.R.S. 17.130 and Lee v. Ball, 116 P.3d 64 (2005).
3

4 Dated this 27th day of April, 2011.
5

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7 Jessie Walsh
8 DISTRICT COURT JUDGE
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EXHIBIT "4"

Urgent Care Note

Southwest Medical Associates, Inc.
Southwest Medical Associates, Inc. P.O. Box 15645
Las Vegas, NV 89114-5645
(702)877-8600

Patient: WILLIAM J. SIMAO
 121 BEAR COAT COURT
 HENDERSON, NV 89002

EMRN: 1641554
Age/DOB: 43/May 08, 1963

Encounter Date: Apr 15 2005 6:45PM

Home: (702)296-9275
Work: (702)458-9999

Reason For Visit

Post mva c/o neck back and left shoulder pain.

The patient is a 41-year-old who is involved in a MVC at 15:30 hours today. His chief complaint is left elbow pain and tenderness in the back of his head. He was the driver of a large van, which was rear-ended at an unknown speed, nearly stopped on the freeway. He states he had a hyperflexion and extension movement of his head, which caused him to strike the back of his head on a cage in the inside of his work van. He denies loss of consciousness. He states after the impact he did begin having left elbow pain, was ambulatory at the scene with these. He was seat-belted with chest and lap. No glass breakage or airbag deployment. EMS was on the scene and he at that time did not feel he needed to have any further medical care. He presently denies any nausea, vomiting, visual disturbances, paresthesias, or numbness.

HISTORY: Noncontributory.

ALLERGIES: PENICILLIN.

O: Examination: BLOOD PRESSURE: 116/70. HEART RATE: 89. RESPIRATORY RATE: 20. TEMPERATURE: 98.5 degrees Fahrenheit. Eyes: PERRL, BOML. Scalp, tender to palpation in the midline occipital area without palpable deformity, midline C-spine is tender at about C6 and no trapezius pain noted. He has full range of motion. Chest and back are without any tenderness on palpation. Left lateral epicondyle of his elbow is tender to palpation without deformity. Pain increases on supination. Radial pulses are 2+ in the bilateral upper and lower extremities. He has no abdominal pain, lower extremity pain, or contusions on examination. Neuro: Alert and oriented x3. Cranial nerves are II to XII are intact. Strength is 5/5 upper and lower extremities. Light touch sensation is intact in the upper and lower extremities. He ambulates with these and steady gait and station.

UC COURSE: X-rays of the C-spine, left elbow, and left forearm obtained noting no fractures or displacements. Radiologist review is pending.

A: 1. Left elbow sprain.
2. Neck sprain.

P: Patient was placed in a left upper extremity sling and instructed to use only sparingly over the next 3 days and continue regular activities without any lifting and do range of motion exercises. Instructed to use ice q.4 h. 20 minutes on with elevation of his left upper extremity over the next several days. Prescriptions written for ibuprofen 800 mg t.i.d. and Flexeril 10 mg t.i.d. p.r.n. Return to clinic or seek primary care followup if not improving in the next week to 10 days. Recorded 04/15/2005 08:44 PM.

Allergies

Penicillins.

Current Meds

Amitriptyline HCl 50 MG TABS; TAKE 1 TABLET DAILY AT BEDTIME. RPT
 Butalbital-APAP-Caffeine-Cod CAPS; TAKE 1 CAPSULE EVERY 4 TO 6 HOURS AS NEEDED. RX
 Enalapril Maleate 20 MG TABS; TAKE 1 TABLET DAILY RX

Urgent Care Note

Patient: WILLIAM J. SIMAO
Encounter: Apr 15 2005 6:45PM

EMRN: 1641554

Clarinx 5 MG TABS;TAKE 1 TABLET DAILY AS DIRECTED. RX
Rhinocort Aqua 32 MCG/ACT SUSP;USE 1 SPRAY IN EACH NOSTRIL ONCE DAILY. RX
Cromolyn Sodium 4 % SOLN;INSTILL 1 DROP INTO BOTH EYES TWICE DAILY AT 6-8 HOUR
INTERVALS. RX.

Vital Signs

Recorded by gonzaana on 15 Apr 2005 07:00 PM

BP:116/70,

HR: 89 b/min,

Resp: 20 r/min,

Temp: 98.5 F,

Weight: 220 lb.

Assessment

- Elbow sprain
- Contusion of the scalp with intact skin surface

Tobacco/ DV Screenings

Are you in a relationship in which you have been hurt or threatened? no

Tobacco Use:

Current.

Orders

Ibuprofen 800 MG TABS;TAKE 1 TABLET EVERY 8 HOURS AS NEEDED.; Qty45; RO Rx.

Cyclobenzaprine HCl 10 MG TABS;TAKE 1 TABLET 3 TIMES DAILY AS NEEDED.; Qty45; RO Rx.

Signature

Signed By: Ana Gonzalez MA I 04/15/2005 7:00 PM PST.

Signed By: NANCY BAHNSEN PA-C 05/10/2005 5:58 PM PST.



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2767 N. Tenaya Way, Las Vegas, Nevada 89128
2850 Sierra Heights, Henderson, Nevada 89052

(702) 732-6000

1

PATIENT: SIMAO, WILLIAM X-RAY NO.: 824436.0 D. O. B.: M/05/08/63

EXAM DATE: 03/22/06 LOCATION: GV

PHYSICIAN: BRITT HILL, PA
4475 S EASTERN
LAS VEGAS, NV 89119

MRI CERVICAL SPINE WITHOUT IV CONTRAST:

CLINICAL HISTORY:

Neck and left shoulder and arm pain.

TECHNIQUE:

Multi-planar imaging performed. 53 images obtained.

FINDINGS:

The craniocervical junction and visualized portions of the cervical and upper thoracic spinal cord have normal signal. Normal cervical lordosis with normal alignment of the vertebral bodies. Normal disk height throughout. Mildly heterogeneous bone marrow signal in the C2, C3 and minimally the C4 vertebral bodies of unknown clinical significance probably related to mixed fatty and red marrow.

Based on sagittal imaging, C2-3 unremarkable.

At C3-4, facet hypertrophy greater on the left mildly narrowing the left neural foramen. There may be contact of the left exiting C4 nerve root. No canal stenosis.

At C4-5, central broad-based 2-3 mm disk protrusion without canal stenosis. No neural foraminal narrowing.

At C5-6, no focal disk protrusion or canal stenosis. No significant neural foraminal narrowing.

At C6-7, no focal disk protrusion or canal stenosis. No significant neural foraminal narrowing.

At C7-T1, no abnormality.



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2767 N. Tenaya Way, Las Vegas, Nevada 89128
2850 Siena Heights, Henderson, Nevada 89052

(702) 732-6000

PATIENT: SIMAO, WILLIAM X-RAY NO.: 824436.0 D.O.B.: M/05/08/63

EXAM DATE: 03/22/06 LOCATION: GV

PHYSICIAN: BRITT HILL, PA
4475 S EASTERN
LAS VEGAS, NV 89119

IMPRESSION:

1. Mild central broad-based disk bulge/2-3 mm protrusion at C4-5 without canal stenosis.
2. Facet hypertrophy narrowing the left neural foramen at the C3-4 level. There may be left C4 nerve root contact within the neural foramen. No canal stenosis.

SAUL RUBEN, M.D.

cc: . SOUTHWEST MEDICAL, QM SUPERVISOR

EXHIBIT "6"

Clinic Follow-Up

Southwest Medical Associates, Inc.
Southwest Medical Associates, Inc. P.O. Box 15645
Las Vegas, NV 89114-5645
(702)877-8600

Patient: WILLIAM J. SIMAO
121 BEAR COAT COURT

EMRN: 1641554
Age/DOB: 44/May 08, 1963

HENDERSON, NV 89002

Encounter Date: Jun 4 2007 8:00AM

Home: (702)296-9275
Work: (702)458-9999

INTERVAL HISTORY

44 year old male with cervical radiculopathy, left C4 and MFPS left trapezius. Patient reports he has stopped morphine and lyrica 2 weeks ago due to lack of effect and side effects. He reports pain 8/10. He prefers to repeat left SNRB C4 with pulsed RF. He has already been through PT. He still has the information on exercises to do at home.

We will schedule pulsed RF left C4 for next week Tuesday at 0740, MDSC. He will return for F/U on 6-18-07 at 0830.

Active Problems

Bulging Disc (C4 - C5) (722.0)

Cervical Radiculopathy (723.4)

Cervical Radiculopathy At C4; Left (723.4); Secondary to facet hypertrophy.

Cervicalgia (723.1); With LUE radiculopathy.

Episodic Tension-type Headache (307.81)

Migraine Headache (346.90)

NICOTINE DEPENDENCE (305.1).

Allergies

Penicillins.

Current Meds

Enalapril Maleate 20 MG Tablet;TAKE 1 TABLET DAILY; Rx

Clarinet 5 MG Tablet;TAKE 1 TABLET DAILY AS DIRECTED.; Rx

Ibuprofen 800 MG Tablet;TAKE 1 TABLET EVERY 8 HOURS AS NEEDED.; Rx

Butalbital-APAP-Caff-Cod 50-325-40-30 MG Capsule;TAKE ONE CAPSULE BY MOUTH EVERY 4 TO 6 HOURS AS NEEDED; Rx

Carisoprodol 350 MG Tablet;TAKE 1 TABLET 3 TIMES DAILY AS NEEDED.; Rx

Lovastatin 20 MG Tablet;TAKE 1 TABLET DAILY.; Rx

Piroxicam 20 MG Capsule;TAKE ONE CAPSULE BY MOUTH EVERY DAY; Rx

Amitriptyline HCl 10 MG Tablet;1 tablet po as directed per dosing schedule.; Rx

Lyrica 75 MG Capsule;1 CAP PO bid; Rx

Morphine Sulfate CR 15 MG Tablet Extended Release 12 Hour;TAKE 1 TABLET 3 TIMES DAILY; Rx.

Assessment

- Cervical radiculopathy at C4 nerve root Left; (723.4); Secondary to facet hypertrophy
- Myalgia and myositis (729.1)

PLAN

1. INTERVENTION: Cervical Selective Nerve Root Block with Pulsed RF
 LEFT C4

2. Patient considering surgical option if this injection does not result in longer relief than 6-8 weeks.

3. RTC 6-18-07, 0830, consider Trigger point injections left trapezius.

Message

Printed By: Shantey Bryant

1 of 2

8/23/07 8:14:49 PM

004197

004197

Clinic Follow-Up

Patient: WILLIAM J. SIMAO
Encounter: Jun 4 2007 8:00AM

EMRN: 1641554

Recorded as Task

Date: 06/04/2007 08:23 AM, Created By: Arita, Adam

Task Name: Appointment Request

Assigned To: Tischler, April

Regarding Patient: SIMAO, WILLIAM J, Status: Active

Comment:

Arita, Adam - 04 Jun 2007 8:23 AM

TASK CREATED

please schedule:

SNRB left C4 with pulsed RF

6-12-07, 0740, S10, MDS

Patient has been to MDS already. He will call to confirm. Thanks.

Signature

Signed By: Adam Arita MD; 06/04/2007 8:23 AM PST.

EXHIBIT "7"